

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ADAM LOWTHER and JESSICA)
LOWTHER on behalf of themselves and)
as next friends to their minor children,)
W.L. and A.L.,)

Plaintiffs,)

v.)

No. _____

CHILDREN YOUTH AND FAMILIES)
DEPARTMENT, BERNALILLO)
COUNTY SHERIFF’S DEPARTMENT,)
MARIA MORALES, in her personal)
capacity acting under color of state law,)
JACOB WOOTTON, in his personal)
capacity acting under color of state law,)
CATHERINE SMALLS, in her personal)
capacity acting under color of state law,)
BRIAN THORNTON, in his personal)
capacity acting under color of state law,)
and MARTIN LOZANO, in his personal)
capacity acting under color of state law,)

Defendants.)

_____)

**COMPLAINT FOR CIVIL RIGHTS VIOLATIONS
AND VIOLATIONS OF THE NEW MEXICO TORT CLAIMS ACT**

1. Plaintiffs Adam and Jessica Lowther on behalf of themselves and as next friends to their minor children A.L. and W.L. bring this complaint against Defendants the Children Youth and Families Department (CYFD), Bernalillo County, the Bernalillo County Sheriff’s Office (BCSO), CYFD Investigator Maria Morales, BCSO Detective Jacob Wootton, and BCSO Deputies Catherine Smalls, Brian Thornton, and Martin Lozano for damages arising from violations of the First, Fourth, and Fourteenth Amendments to the United States Constitution

pursuant to 42 U.S.C. § 1983 and the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 *et seq.* In support, the Lowthers state as follows:

The Parties

2. Plaintiff Adam Lowther is a resident of Katy, Harris County, Texas.
3. Plaintiff Jessica Lowther is a resident of Katy, Harris County, Texas.
4. Plaintiff A.L. is a minor. She is represented by her parents Adam and Jessica Lowther as next friends. A.L. resides in Katy, Harris County, Texas, with her parents.
5. Plaintiff W.L. is a minor. He is represented by his parents Adam and Jessica Lowther as next friends. W.L. resides in Katy, Harris County, Texas, with his parents.
6. Defendant Children Youth and Families Department is a department of New Mexico state government.
7. Defendant Bernalillo County Sheriff's Office is a Department of Bernalillo County, a political subdivision of the State of New Mexico.
8. At all times material to this lawsuit, Defendant Maria Morales was a resident of New Mexico (county unknown) and was employed as a senior investigator by CYFD. Defendant Morales was responsible, in whole or in part, for the constitutional and other violations of law alleged by Plaintiffs.
9. At all times material to this lawsuit, Defendant Jacob Wootton was a resident of New Mexico (county unknown) and was employed as a detective by BCSO. Defendant Wootton was responsible, in whole or in part, for the constitutional and other violations of law alleged by Plaintiffs.
10. At all times material to this lawsuit, Defendant Catherine Smalls was a resident of New Mexico (county unknown) and was employed as a deputy sheriff by BCSO. Defendant

Smalls was responsible, in whole or in part, for the constitutional and other violations of law alleged by Plaintiffs.

11. At all times material to this lawsuit, Defendant Brian Thornton was a resident of New Mexico (county unknown) and was employed as a deputy sheriff by BCSO. Defendant Thornton was responsible, in whole or in part, for the constitutional and other violations of law alleged by Plaintiffs.

12. At all times material to this lawsuit, Defendant Martin Lozano was a resident of New Mexico (county unknown) and was employed as a deputy sheriff by BCSO. Defendant Lozano was responsible, in whole or in part, for the constitutional and other violations of law alleged by Plaintiffs.

Jurisdiction and Venue

13. Jurisdiction and venue are proper pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 28 U.S.C. § 1367.

14. At all times material to this lawsuit, Defendants Morales, Wootton, Smalls, Thornton, and Lozano acted within the course and scope of their duties as public employees, were state actors, and acted under color of state law.

15. All of the acts relevant to this complaint occurred in New Mexico.

Summary of Allegations

16. The Lowther family brings this lawsuit to recover substantial monetary damages for unlawfully removing A.L. and W.L. (children or Lowther children) from the Lowther home and taking them into state custody without a warrant or reasonable grounds to believe they were in imminent danger, arresting Dr. Lowther without a warrant or probable cause, entering the Lowther home without a warrant or exigent circumstances, and defamation.

17. Because this lawsuit concerns the topic of whether Dr. Lowther sexually abused his daughter, Dr. Lowther wishes to make clear from the outset that he has never abused his daughter, sexually or otherwise. The allegation is not only sick and disgusting, it is absurd. Dr. Lowther has done everything in his power to prove his innocence, including taking and passing a polygraph that was validated by the District Attorney's own polygraph expert ("My grand total scores for the Lucero [the polygrapher] test after three charts was a +9, indicative of a 97% probability of truthfulness."). Dr. Lowther has also consented to independent psychological evaluations by court-appointed therapists and participated in the children's court's family reunification process. In May 2018, CYFD voluntarily and with the children's court's approval restored Dr. Lowther's custodial rights. Finally, prosecutors have abandoned the case.

18. Turning back to the allegations raised in this complaint, the facts are straightforward: On August 30, 2017, Betty DuBoise, a kindergarten teacher at Calvary Christian Academy in Albuquerque, called CYFD to report that the Lowthers' four-year-old daughter, A.L., had allegedly revealed sexual abuse by Dr. Lowther and her then seven-year-old brother, W.L. The alleged disclosures occurred in response to aggressive and inappropriate questioning by DuBoise while she was alone with A.L.

19. CYFD immediately referred the case to BCSO. Less than one hour after receiving the call from CYFD, the individual Defendants were at the Lowther home to conduct a child welfare check. When they arrived, Mrs. Lowther was inside the house with her children. Dr. Lowther was at work. The individual Defendants, who did not have a warrant, demanded that Mrs. Lowther let them into the house to see the children but did not say why. Mrs. Lowther, unaware of why the individual Defendants wanted to enter the home, refused. The individual Defendants repeatedly threatened to arrest Mrs. Lowther for not allowing them inside the house.

20. When Dr. Lowther arrived home they immediately detained and arrested him. BCSO did not have a warrant for the arrest. The individual Defendants forced entry into the house to examine the children. BCSO did not have a warrant to enter the house.

21. Shortly after the individual Defendants entered the house Mrs. Lowther requested to speak with an attorney. Because of Mrs. Lowther's request for an attorney, BCSO and CYFD took the children into temporary protective custody (also known as a 48-hour hold) and removed them from the home.

22. At the time of the removal, BCSO and CYFD had not yet investigated the allegations or obtained a warrant for the entry and removal.

23. For the warrantless removal to be lawful Defendants must have had "a reasonable suspicion of an *immediate threat* to the safety of the child if he or she [was] allowed to remain [in the home]." *Gomes v. Wood*, 451 F.3d 1122, 1130 (10th Cir. 2006) (emphasis added). To arrest Dr. Lowther, Defendants must have had a warrant or probable cause. *See Cortez v. McCauley*, 478 F.3d 1108, 1118 (10th Cir. 2007). Finally, to enter the home Defendants must have had a warrant or reasonable proof of an exigency. *See Id.* at 1124-25. None of these requirements were met.

24. **First**, DuBoise's double-hearsay allegation of abuse, given under anonymous conditions, was not itself sufficiently reliable to justify the warrantless arrest and seizures. DuBoise's anonymous call was based on hearsay. No one witnessed the alleged conversation between DuBoise and A.L., nor was it recorded.

25. **Second**, CYFD and BCSO did not investigate the allegation or obtain a warrant before arresting Dr. Lowther, entering the home, or removing and taking custody of the children. No one from CYFD or BCSO even bothered to meet with or take a formal statement from

DuBoise before the arrest and removal, and CYFD and BCSO did not identify any physical, medical, or other corroborating evidence to support DuBoise's hearsay allegation before the arrest and removal.

26. **Third**, an investigation would have revealed DuBoise was not trustworthy. DuBoise had only known A.L. for eight days. She had not observed behavioral changes or abnormal behavior. DuBoise also has a history of legal troubles, including convictions for shoplifting and several lawsuits for failure to pay bad debts, which bear on her credibility.

27. **Fourth**, Defendants Morales and Wootton have admitted in sworn statements given in previous criminal and civil proceedings that the children were not in imminent danger at the time of the children's removal. They have also admitted CYFD and BCSO took custody of the children because Mrs. Lowther requested to speak to an attorney after her home was raided. No one from CYFD or BCSO told Mrs. Lowther of the specific abuse allegations before she asked for an attorney.

28. **Fifth**, the children were not in imminent danger when they were taken into state custody. Dr. Lowther had already been arrested and was therefore prevented from having any contact with the children. Mrs. Lowther had not been accused of abusing the children and was not even aware of the specific nature of the allegations.

29. **Sixth**, CYFD and BCSO had ample time to investigate the allegations and seek a warrant before taking custody of the children.

30. **Seventh**, the individual BCSO defendants (Wootton, Smalls, Thornton, and Lozano) were trained to believe they could enter private homes to conduct welfare checks without a warrant, that a parent's refusal to allow entry constituted an arrestable offense, and that the parent's arrest was a legally sufficient reason to take custody of the children. This practice

deprives families like the Lowthers of their constitutional rights where child abuse is alleged, and virtually ensures BCSO can and will take children into custody wherever and whenever they want.

31. Immediately after the removal and late into the night, the children were subjected to hours of forensic interviews. A.L. was also required to undergo two different intrusive physical examinations where her genitals were probed for evidence of sexual abuse. The forensic interviews and physical examinations were conducted without a warrant or court oversight. CYFD, who was the guardian of the children, acted with indifference to the trauma caused by the forensic interviews and examinations.

32. Indeed, the removal decision was made in furtherance of the criminal investigation—not to keep the children safe from harm. This itself was contrary to the children’s interests and violative of their constitutional rights.

33. The forensic interviews and physical examinations did not reveal any evidence of abuse. Although Defendants Morales and Wootton—the lead investigators on the case—have portrayed the forensic interviews and physical examinations as corroborating DuBoise’s allegations, this is untrue. In her forensic interview, which was conducted late at night and immediately after the removal, A.L. described her father touching her genitals while wiping her after she used the restroom, something every parent does. The sexual assault examiners—a SANE Nurse and a medical doctor—found no physical evidence of abuse.

34. Therefore, Defendants Morales and Wootton are either unencumbered by the truth or recklessly incompetent. Either way, their mishandling of the case is inexcusable.

35. Because of the sensational nature of the allegations and the false perception BCSO, CYFD, and the individual Defendants created regarding Dr. Lowther’s guilt, the arrest

received significant press attention, including outside New Mexico. In various press statements BCSO knowingly reported false information, including that physical evidence supported the arrest and that Dr. Lowther had failed a polygraph, neither of which was true. BCSO's statements to the press were malicious and in bad faith. Dr. Lowther received death threats as a result of the press reports. Maj. Gen. Todd Stewart (Ret.), Dr. Lowther's superior, cited the statements in the press report when Dr. Lowther was removed from his senior-level position with the US Air Force and punished.

36. In short, the Defendants collectively and individually bungled the investigation by immediately arresting Dr. Lowther and removing the children without a warrant or reasonable grounds to believe the children were in imminent danger, and prior to conducting any investigation. After the unlawful removal Defendants compounded the problem by subjecting A.L. and W.L. to warrantless forensic interviews and physical examinations. The subsequent criminal and custody proceedings, which resulted from Defendant Morales' and Wootton's false and misleading statements about the forensic interviews and physical examinations, were therefore unwarranted and improper.

37. The Lowthers deserve justice for what has happened to them. The children will need life-long therapy to overcome the consequences of prolonged separation from their parents and inquiry into sexual and physical abuse by their parents. They are now distrustful of authority figures and afraid to be separated from their parents. Dr. Lowther lost a high-level executive position with the US Air Force studying nuclear policy, and his top secret/SCI security clearance was suspended. Because of the publicity surrounding his arrest, Dr. Lowther will never be able to work in his field again. His Air Force career has been destroyed.

38. Finally, Defendants Morales and Wootton have repeatedly lied in court proceedings to cover up their mistakes. They, along with the government agencies involved, must be held accountable for their wrongdoing.

GENERAL ALLEGATIONS

39. Dr. and Mrs. Lowther have dedicated their lives to public service. Prior to his arrest, Dr. Lowther founded and led the School of Advanced Nuclear Deterrence Studies (SANDS) at Kirtland Air Force Base in Albuquerque. Prior to standing up SANDS in 2015 and serving as its Director, Dr. Lowther was a Research Professor and Director of Academic and Professional Journals at the Air Force Research Institute at Maxwell Air Force Base in Alabama.

40. As a condition of employment Dr. Lowther was required to possess and maintain a Top Secret/SCI (TS/SCI) security clearance. Dr. Lowther, who holds a doctorate in international relations from the University of Alabama, has written extensively on nuclear deterrence and has represented the US Air Force at domestic and international events and briefed senior leaders in the Air Force and US government. He is one of the country's leading experts on nuclear policy. The constitutional violations have caused irreparable damage to Dr. Lowther reputationally, professionally, and financially. His security clearance, which is necessary for his line of work, has been suspended.

41. Mrs. Lowther works as an editor for The Heritage Foundation, a well-known Washington think tank, whose mission is "to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense." She holds a master's degree from Arkansas Tech University. The constitutional violations have caused irreparable damage to Mrs. Lowther reputationally, professionally, and financially.

42. The Lowthers have two elementary-age children, A.L. and W.L. During the events in question W.L. attended second grade at a public elementary school in Albuquerque. A.L., on the other hand, attended Calvary Christian Academy (CCA), a small private Christian school in Albuquerque. The Lowthers sent A.L. to CCA because the school allowed her to begin kindergarten early.

43. Betty DuBoise was A.L.'s kindergarten teacher. She had worked at the school for approximately two years and has since had her employment terminated. DuBoise did not know the Lowthers prior to teaching A.L. She had only taught A.L. for approximately a week before reporting the alleged abuse to CYFD.

44. DuBoise's personal background suggests she is unreliable. She was convicted of shoplifting around twenty years ago and has in recent years been sued several times for failure to pay debts. Based on statements made before and after Dr. Lowther's arrest, DuBoise was allegedly unhappy with the Lowthers because A.L. put her hands in her pants at school and the Lowthers did not address her concerns as she thought they should. DuBoise spoke to the Lowthers about A.L.'s behavior. While this behavior is normal for a child A.L.'s age, the Lowthers acknowledged DuBoise's concerns and said they would talk to A.L., which they did.

DuBoise's double-hearsay report of sexual abuse against Dr. Lowther

45. Apparently dissatisfied with the Lowthers' response, according to CYFD's records, on August 30, 2017, DuBoise called CYFD to report an allegation of sexual abuse against Dr. Lowther and her brother, W.L.

46. DuBoise called after claiming she overheard A.L. tell a boy on the playground he had a "penis"—a word which A.L. has never used and did not use hours later in her forensic interview.

47. DuBoise allegedly took A.L. aside and began questioning her as to how she knew the word “penis.” According to DuBoise’s hearsay account of the conversation, A.L. said Dr. Lowther put her on his lap when he went to the restroom and moved her up and down like a horsey, kissed her on the lips with tongue, and touched her on the bottom and put his finger inside of her. A.L. also allegedly said her brother, W.L., kissed her with tongue and touched her. Additionally, A.L. allegedly said Dr. Lowther touched her brother. Finally, DuBoise alleged that A.L. said this was a secret and that her mother, Jessica, would get mad.

48. DuBoise did not record or take notes related to the alleged conversation, nor was it witnessed by anyone else.

49. DuBoise called CYFD after the alleged conversation with A.L.

50. The school permitted Mrs. Lowther to pick up A.L. that afternoon.

51. A.L. has subsequently denied having the alleged conversation with DuBoise.

CYFD’s referral to BCSO and their joint child welfare check

52. At approximately 2:46 pm CYFD assigned Defendant Morales, a senior investigator at CYFD, to investigate the allegation. Defendant Morales had worked for CYFD for approximately three years but had no specialized education or training in investigative or interviewing techniques, child psychology, or identifying the characteristics of child abuse.

53. At approximately 3:10 pm, Morales called Defendant BCSO to accompany her to the Lowther house to conduct a welfare check.

54. No one from CYFD met with DuBoise or investigated the allegation before calling for the welfare check.

55. BCSO dispatched Defendants Smalls, Thornton, and Lozano to the Lowther house. Defendant Smalls served as lead deputy.

State law relevant to child welfare checks and removal decisions

56. New Mexico has enacted various statutes that govern the conduct of child abuse investigations. For example, pursuant to NMSA 1978, § 32A-4-6,

A. A child may be held or taken into custody:

(1) by a law enforcement officer when the officer has evidence giving rise to reasonable grounds to believe that the child is abused or neglected *and that there is an immediate threat to the child's safety*; provided that the law enforcement officer contacts the department to enable the department to conduct an on-site safety assessment to determine whether it is appropriate to take the child into immediate custody, except that a child may be taken into custody by a law enforcement officer without a protective services assessment being conducted if:

(a) the child's parent, guardian or custodian has attempted, conspired to cause or caused great bodily harm to the child or great bodily harm or death to the child's sibling;

(b) the child's parent, guardian or custodian has attempted, conspired to cause or caused great bodily harm or death to another parent, guardian or custodian of the child;

(c) the child has been abandoned;

(d) the child is in need of emergency medical care;

(e) the department is not available to conduct a safety assessment in a timely manner; or

(f) the child is in imminent risk of abuse; or

(2) by medical personnel when there are reasonable grounds to believe that the child has been injured as a result of abuse or neglect and that the child may be at risk of further injury if returned to the child's parent, guardian or custodian. The medical personnel shall hold the child until a law enforcement officer is available to take custody of the child pursuant to Paragraph (1) of this subsection.

(emphasis added).

57. The post-removal statutory requirements are reflected in NMSA 1978, § 32A-4-7(A), which provide:

A. A person taking a child into custody shall, with all reasonable speed:

(1) release the child to the child's parent, guardian or custodian and issue verbal counsel or warning as may be appropriate; or

(2) deliver the child to the department or, in the case of a child who is believed to be suffering from a serious physical or mental condition or illness that requires prompt treatment or diagnosis, deliver the child to a medical facility. If a law enforcement officer delivers a child to a medical facility, the officer shall immediately notify the department that the child has been placed in the department's legal custody.

58. Pursuant to paragraphs B, C, and D of Section 32A-4-7, CYFD must be involved in the custody determination, act promptly in making a custody determination, and endeavor to return custody to the parents unless the factual circumstances require otherwise.

B. When an alleged neglected or abused child is delivered to the department, a department caseworker shall review the need for placing the child in custody and shall release the child from custody unless custody is appropriate or has been ordered by the court. When a child is delivered to a medical facility, a department caseworker shall review the need for retention of custody within a reasonable time after delivery of the child to the facility and shall release the child from custody unless custody is appropriate or has been ordered by the court.

C. If a child is placed in the legal custody of the department and is not released to the child's parent, guardian or custodian, the department shall give written notice thereof as soon as possible, and in no case later than twenty-four hours, to the child's parent, guardian or custodian together with a statement of the reason for taking the child into custody.

D. Reasonable efforts shall be made to prevent or eliminate the need for removing the child from the child's home, with the paramount concern being the child's health and safety. In all cases when a child is taken into custody, the child shall be released to the child's parent, guardian or custodian, unless the department files a petition within two days from the date that the child was taken into custody.

E. The department may release the child at any time within the two-day period after the child was taken into custody if it is determined by the department that release is appropriate or if release has been ordered by the court.

59. These are the state laws that were generally in effect and that Defendants were required to follow, along with applicable federal constitutional law, when they conducted the welfare check at the Lowther house on August 30, 2017.

The facts regarding the individual CYFD and BCSO defendants' attempts to enter the home to conduct a welfare check of the children before Dr. Lowther was detained and arrested

60. Defendants Smalls, Thornton, and Lozano (the field deputies) arrived at the Lowther home at approximately 3:50 pm on August 30, 2017—forty minutes after receiving Defendant Morales' call.

61. Mrs. Lowther was inside the house with the children. Dr. Lowther was at work.

62. Mrs. Lowther worked from home and served as the children's primary caretaker. She was on the phone with Dr. Lowther when the field deputies knocked on her door.

63. After Mrs. Lowther answered the door, Defendant Smalls asked if Dr. Lowther was home. When Mrs. Lowther explained he was at work, Detective Smalls stated, "Okay. So, we just got called out here. We're just going to do a welfare check on the kids with CYFD." She then said, "So we're just going to come in and talk to you guys a little bit." Mrs. Lowther responded, "I'm sorry, a welfare check? I don't understand."

64. None of the field deputies on scene explained to Mrs. Lowther what the allegation was, who reported the allegation, or why they wanted to conduct a welfare check.

65. Defendants Small, Thornton, and Lozano then attempted to enter the house.

66. Mrs. Lowther stopped them and explained, "I won't be able to let you in until my husband gets here. He's on his way home right now."

67. One of the male officers—either Defendant Thornton or Defendant Lozano—responded, “So in the state of New Mexico when we’re conducting a check on children, if you deny us access, you can be arrested.”

68. For approximately thirty to forty-five minutes Mrs. Lowther engaged in a conversation with Defendants Smalls, Thornton, and Lozano that she found threatening, intimidating, and hostile.

69. During this time Mrs. Lowther left the door open so the field deputies could see inside the house. The children came to the door several times allowing Defendants Smalls, Thornton, and Lozano to see them. On Defendant Smalls’ belt tape the children can be heard in the background. The children were acting normally and did not exhibit any signs of abuse or neglect. Defendants Smalls, Thornton, and Lozano did not observe anything that would have suggested to a reasonable officer that the children were in imminent danger.

70. When Mrs. Lowther tried to explain to the deputies that A.L. was “not unsafe,” one of the male Defendants—either Thornton or Lozano—stated, “Hold on, hold on. I’m going to stop you right there. When it comes to the safety of a child, people generally are a little more cooperative if there’s nothing going on.” Mrs. Lowther replied, “There’s nothing going on.” The officer stated, “I’m just saying, like, typically, you hear on the news the stories that happen to kids. It all starts with accusations like this. So, we take every single one of them seriously until proven otherwise. I hope as a parent you would appreciate that. If you can’t, then there’s [sic] bigger problems going on here. Does that make any sense whatsoever to you?” He continued, “And if this was my investigation, you would be in the back of a cop car right now, too, because you’re obstructing our duty to check on the well-being of a child.” Mrs. Lowther responded to the deputy’s verbal threat, “My duty is to my husband and my kids.” He then became more

aggressive and agitated, stating, “I don’t care right now. I’m just—I don’t care. I’m just letting you know if this was my investigation, you would be in handcuffs in the back of a car. So, you might want to consider your actions. As a parent, I figured you’d appreciate that—this kind of response when it comes to the safety of a child.”

71. Defendant Smalls, the lead deputy, then threatened Mrs. Lowther by stating, “All right. So, we’re going to have medical come out. You can either let us into the residence or you will be detained in the back of a car. That is your choice.”

The facts surrounding Dr. Lowther’s unlawful, warrantless arrest

72. Dr. Lowther arrived home at approximately 4:50 pm. Before he could enter the house Defendants Smalls, Thornton, and Lozano detained him in the back of a police car, where he sat for approximately thirty to forty-five minutes.

73. While Dr. Lowther was detained, Defendant Wootton, who was the lead detective, arrived at the Lowther house. He went inside the home to talk to Defendants Smalls, Thornton, and Lozano.

74. Shortly afterward, Defendant Smalls, with her sergeant present, took Dr. Lowther out of the car, patted him down, removed his personal items, including his cell phone, handcuffed him, and placed him back in the police car. He remained handcuffed and in the police car until approximately 8:00 pm.

75. Dr. Lowther was handcuffed inside the locked police car for nearly three hours.

76. At around 8:00 pm, Dr. Lowther was taken out of handcuffs, so he could use the restroom. He was placed back in the car, but not handcuffed, for several more hours. For the duration of the arrest the individual BCSO defendants (Wootton, Smalls, Thornton, and Lozano) prohibited Dr. Lowther from leaving the property or speaking to Mrs. Lowther.

77. The individual BCSO defendants did not obtain a warrant before arresting Dr. Lowther outside his personal residence.

78. The individual BCSO defendants did not have probable cause to arrest Dr. Lowther. To begin with, at the time of the warrantless arrest, the individual BCSO defendants had not investigated DuBoise's allegations. The individual BCSO defendants did not bother to meet with or even speak to DuBoise before arresting Dr. Lowther. Nor did they speak with anyone at A.L.'s school. The individual BCSO defendants relied solely on Defendant Morales's double-hearsay account of DuBoise's call to CYFD. A.L.'s alleged statements to DuBoise were not sufficiently reliable to justify Dr. Lowther's warrantless arrest, given her very young age. An investigation was required to corroborate the allegations. Moreover, had the individual BCSO defendants actually spoken to DuBoise they would have determined the report was not reliable. Specific details in DuBoise's allegations are inconsistent with the physical layout of the Lowther home. DuBoise admitted to soliciting the alleged comments from A.L. after confronting her on the playground for allegedly saying the word "penis." No one witnessed the alleged conversation between DuBoise and A.L., and the conversation was not recorded.

79. The individual BCSO Defendants' interrogation of Mrs. Lowther at the Lowther residence did not illicit any new or corroborating evidence to justify Dr. Lowther's warrantless arrest. Defendants Smalls, Thornton, and Lozano did not disclose any details about the abuse allegations to Mrs. Lowther. While speaking to the field deputies, Mrs. Lowther left the front door open, so the children could be seen inside the home. The children did not exhibit any signs of abuse or neglect. Mrs. Lowther did not say anything to the field deputies to suggest Dr. Lowther had abused the children, or that he was a danger to them. To the extent Mrs. Lowther wished to talk to Dr. Lowther, it was because she was in shock and frightened by the aggressive

behavior of the field deputies' demands to enter her home without a warrant and because of their threats to arrest her. Mrs. Lowther's decision to speak to her husband, Dr. Lowther, before allowing Defendants Smalls, Thornton, and Lozano into her home was reasonable and lawful.

80. Defendants Smalls, Thornton, and Lozano did not speak with DuBoise or have reason to believe DuBoise's double-hearsay report was credible enough to establish probable cause for an arrest, or alternatively, reasonable suspicion for a prolonged detention.

81. Defendants Wootton, Smalls, Thornton, and Lozano personally participated in Dr. Lowther's arrest. Defendant Smalls frisked, handcuffed, and placed Dr. Lowther in the police car, where he remained for nearly all of the time the CYFD and BCSO Defendants were inside the house, and before Dr. Lowther was eventually transported to the police station, albeit several hours after he was first handcuffed. Defendants Wootton, Smalls, Thornton, and Lozano knew that Dr. Lowther was handcuffed and inside the patrol car, and they collectively left him in the patrol car for over six hours while they were on scene.

The facts surrounding Defendants' unlawful, warrantless entry into the Lowthers' home

82. At approximately 5:00 pm, Defendants Smalls, Thornton, and Lozano forced their way into the Lowther home by physically intimidating Mrs. Lowther into backing inside her home as they aggressively moved inside the house toward her. This followed repeated threats to arrest her, which itself was coercive.

83. Defendants Smalls, Thornton, and Lozano did not have a warrant and Mrs. Lowther did not consent to their entry.

84. Defendant Morales, who was on scene and witnessed the interaction between Mrs. Lowther and the field deputies, entered the house as well. She did not have consent to enter the house and did know or should have known Mrs. Lowther had not consented to her entry.

85. The facts and circumstances support that Mrs. Lowther did not consent to the entry. First, Defendants Smalls, Thornton, and Lozano threatened to arrest Mrs. Lowther for not letting them into the house. Second, Defendants Smalls, Thornton, and Lozano detained Dr. Lowther in the back of a police car immediately before entering the home, which frightened and intimidated Mrs. Lowther. Third, Defendants Smalls, Thornton, and Lozano forcibly pushed past Mrs. Lowther when they entered the home. As Defendant Smalls' belt tape verifies, the field deputies ignored Mrs. Lowther's repeated denials—using brute force to enter the Lowther home. The field deputies' firearms were visible when they entered the home.

86. The children were not in imminent danger when Defendants Smalls, Thornton, and Lozano entered the house without a warrant, therefore no exigency existed. The children were inside the house with their mother, Mrs. Lowther, who was not accused of abuse. Dr. Lowther had already been detained and arrested, placed in the back of a police car, and was not inside the house. As Deputy Smalls' belt tape clearly recorded, Mrs. Lowther kept the door open, so Defendants Smalls, Thornton, Lozano, and Morales could see the children. The children did not exhibit any signs of abuse or neglect. And, as Defendant Smalls' belt tape verifies, Mrs. Lowther repeatedly resisted the field deputies' efforts to coerce entry into the home because she did not know why they were conducting a child welfare check.

87. Dr. Lowther also repeatedly informed the field deputies he did not consent to their entry inside the house. None of the individual Defendants had advised Dr. Lowther of why they wanted to enter the house to check on the welfare of the children. Therefore, when Dr. Lowther refused entry he was unaware of the specific nature of the allegations. This alone was sufficient to constitute a lack of consent to enter the Lowther house.

88. Defendant Wootton, who was assigned as lead detective by Sgt. Amy Dudowicz, entered the Lowther home shortly after 5:00 pm. He did not have a warrant or the Lowthers' consent.

89. Defendant Wootton was a very inexperienced detective. He was a detective for about a week, had no relevant training or education beyond the basic law enforcement academy, and had served as a patrol deputy for approximately three-and-a-half years prior to his promotion.

90. When Defendant Wootton entered the house Defendants Morales, Smalls, Thornton, and Lozano briefed him. As lead detective Defendant Wootton knew or should have known that the Lowthers had not consented to the warrantless entry, and that the warrantless arrest was improper.

The facts surrounding the individual Defendants' unlawful detention of Mrs. Lowther, and the unlawful removal and seizure of the Lowthers' children

91. Once Defendants Morales, Wootton, Smalls, Thornton, and Lozano entered the home, they searched it, took pictures of the children, and had paramedics examine the children. The paramedics did not identify any signs of abuse or neglect. Defendant Smalls can be heard on belt tapes speaking to the children, but the questions are not of a substantive nature and neither child complained of abuse or feeling unsafe. None of the other individual CYFD or BCSO defendants spoke to the children. The individual Defendants did not therefore discover or identify any evidence to support a finding that the children were in imminent danger.

92. The individual BCSO defendants (Wootton, Smalls, Thornton, and Lozano) detained Mrs. Lowther inside the house. They did not have legal justification to detain her. And Mrs. Lowther's liberty was restricted—she was confined to the home, not allowed to leave, and was detained for several hours that evening.

93. While Mrs. Lowther was detained she asked to speak to an attorney.

94. Immediately after she asked for an attorney, Defendants Morales and Wootton took the children into state custody.

95. The seizure occurred at 5:33 pm, fewer than three hours after DuBoise's false complaint to CYFD, and before any investigation had been conducted.

96. At the time of the seizure, the children were not in imminent danger. Dr. Lowther had been detained and then arrested and was not inside the house. Mrs. Lowther was not alleged to be a danger to the children, and nothing happened while the individual CYFD and BCSO defendants were on scene that suggested she was a danger to the children. Mrs. Lowther kept the door open, so Defendants Morales, Smalls, Thornton, and Lozano could see the children inside the house. The children came to the door several times while the field deputies spoke to Mrs. Lowther. The individual CYFD and BCSO defendants were able to see and interact with the children inside the home after the unlawful, warrantless entry. The onsite paramedics did not find any signs of abuse or neglect.

97. Moreover, the individual CYFD and BCSO defendants had ample time to investigate and seek a warrant before the illegal entry and removal of the children. Dr. Lowther had been arrested and could not, even if he wanted to, enter the house to have contact with his children or Mrs. Lowther.

98. The custody decision is memorialized in a document called, "CYFD Protective Services Division (PSD), Statement of Reasonable Grounds for Temporary PSD Custody" (hereinafter referred to as the "Temporary Custody Form" or "Form"), which Defendant Wootton signed at 5:33 pm. According to the Form the children were taken into state custody pursuant to NMSA 1978, § 32A-4-6 because Dr. and Mrs. Lowther had been detained and

arrested, there were no caretakers to ensure the children's safety, and the children were in danger from their surroundings.

99. Defendant Morales personally participated in the decision to take the children into state custody. She was at and inside the Lowther house throughout the day and evening, spoke to the Lowthers, consulted with the individual BCSO Defendants on scene, including Defendant Wootton, and served as CYFD's representative for purposes of checking on the welfare of the children. State law requires CYFD to be involved in the removal process, including by conducting a safety assessment.

100. The Temporary Custody Form, which is a CYFD form, confirms that by 5:33 pm Dr. Lowther and Mrs. Lowther had been arrested and detained, and that the arrest and detention were relevant to the decision to take the children into protective custody.

101. Importantly, when the children were seized and removed from the Lowther house, the only "evidence" law enforcement had identified regarding the abuse allegation was: (1) the double-hearsay report from DuBoise made to CYFD (which was quadruple hearsay by the time Defendant Morales reported to the individual BCSO Defendants), (2) Mrs. Lowther's refusal to allow Defendants into the home, despite the fact that she was never informed why the individual CYFD and BCSO Defendants were at her home, and (3) Mrs. Lowther's request for an attorney.

Defendants Wootton and Morales's admissions that the children were not in imminent danger at the time of the removal and seizures

102. On October 23, 2017, the Lowthers' defense attorney, Mr. Marc Lowry, interviewed Defendant Wootton as part of the discovery process in the CYFD custody case. The interview was recorded.

103. Mr. Lowry asked Defendant Wootton why the children were taken into custody. Defendant Wootton stated that a law-abiding citizen would cooperate with the investigation.

104. Mr. Lowry asked Defendant Wootton whether he believed the children were in imminent danger. Detective Wootton stated the children were not in immediate danger, but he did not believe Mrs. Lowther was fully cooperating in the investigation.

105. Mr. Lowry asked Defendant Wootton was asked whether he was familiar with the legal requirements for entering a home to conduct a welfare check. Defendant Wootton stated that BCSO has authority to enter homes to conduct child welfare checks but could not recall the law that granted this authority.

106. On September 8, 2017, Defendant Morales signed a sworn affidavit in support of CYFD's custody action against the Lowthers.

107. In the sworn affidavit, Defendant Morales admitted paramedics examined the children, the children did not exhibit signs of abuse or need any immediate medical attention, and that the children were taken into custody immediately after Mrs. Lowther requested an attorney.

108. Together Defendants Morales and Wooten, the two lead investigators on scene, admitted (1) the Lowther children were not in immediate danger and (2) the removal decision was motivated by Mrs. Lowther's request to speak to an attorney.

A.L. and W.L. were forensically interviewed while in CYFD custody without a warrant or other judicial authorization, and the forensic interviews did not reveal any evidence of sexual abuse

109. After placing W.L. and A.L. in state custody but before obtaining a warrant or judicial authorization, Defendants Morales and Wootton immediately arranged for the children to be forensically interviewed at All Faiths (the Safehouse)—a private organization that contracts with law enforcement agencies in Albuquerque.

110. The forensic interviews occurred on the night of August 30, 2017, after the children had already been seized.

111. The Lowthers did not consent to the interviews.

112. According to its website, “the Safehouse provides child-sensitive interviews and interagency coordination for the effective investigation of child abuse cases and crimes witnessed by children, ages 2-18 years of age.” The forensic services are provided for “open criminal investigations” based on referrals from CYFD, BCSO, and other law enforcement agencies.

113. A.L. was interviewed for approximately one-and-a-half hours.

114. W.L. was interviewed for approximately forty-five minutes.

115. The purpose of the forensic interviews was to facilitate the criminal investigation, not to treat or provide psychological or other medical services to the Lowther children.

116. Defendants knew or should have known that by subjecting the children to a warrantless forensic interview based solely on the double-hearsay allegations of DuBoise, and without judicial authorization, such conduct would adversely affect the relationship between the Lowthers and their children.

117. Defendants Morales and Wootton assumed without any investigation that the abuse allegations were true. As is heard in Defendant Wootton’s interrogation of Mrs. Lowther after she was taken to the main police station in downtown Albuquerque, “And so my job is not to prove a little child wrong, it is my job to prove them right, and so I’m trying to get the facts to support her statement.”

118. Defendant Wootton's comment indicates that he and Defendant Morales acted maliciously and in willful disregard of the truth in an attempt to obtain substantiating evidence against Dr. Lowther.

119. Defendants Morales and Wootton knew or should have known that to the extent the law allowed them to seize and take the Lowther children into state custody without a warrant or other court order it was for the limited purpose of keeping them safe from immediate harm, not to further a criminal investigation.

120. Defendants Morales and Wootton had ample time to obtain a warrant or other judicial authorization prior to the forensic interviews of A.L. and W.L.

121. Obtaining a warrant or judicial authorization would not have harmed or otherwise prejudiced the investigation.

122. By placing the children into state custody without a warrant and immediately subjecting the children to forensic interviews, Defendants Morales and Wootton were able to bypass judicial scrutiny of the removal and custody decision.

123. The forensic interviews did not reveal any information that constituted credible evidence of physical abuse.

124. In any event, by conducting the forensic interviews late at night and after the lengthy removal process at the Lowther house, the interviews themselves were inherently unreliable.

125. Defendants Morales and Wootton were present for the forensic interviews.

126. Defendants Morales and Wootton later intentionally and/or recklessly mischaracterized the children's answers to support criminal and civil custody proceedings.

127. The Lowthers were unable to have custody of their children while the criminal and civil custody proceedings were pending.

A.L.'s physical examinations were conducted without a warrant or other judicial authorization; the physical examinations do not reveal evidence of abuse

128. After placing A.L. in state custody but before obtaining a warrant or judicial authorization, Defendants Wootton and Morales arranged for her to undergo a sexual assault examination at the Albuquerque SANE Collaborative (SANE). SANE provides forensic medical examinations at the request of law enforcement.

129. SANE Nurse Gail Starr examined A.L. on the evening of August 31, 2017, at approximately 5:30 pm. Starr's examination did not reveal any physical evidence of abuse.

130. Abigail was taken for a second medical Exam on September 1 at approximately 11:00 am at Para Los Ninos (PLN). The University of New Mexico's School of Medicine controls and operates PLN. PLN is therefore a governmental entity and upon information and belief, its employees, including Dr. Shalon Nienow, are government employees.

131. According to its website, "PLN provides medical evaluations for children and adolescents who have been sexually abused and sexually assaulted." Of course, this mission statement presupposes an outcome and makes their findings of no physical evidence even more powerful. It conducts "forensic medical examinations for evidence collection, rape kits and photo documentation."

132. The Lowthers did not consent to either of the physical examinations.

133. Defendants Morales and Wootton did not obtain a warrant or other judicial authorization to conduct the physical examinations.

134. The purpose of the physical examinations was to substantiate the allegations, not to treat or provide psychological or other medical services to A.L.

135. The results of the physical examinations were made available to Defendants Morales and Wootton.

136. Defendants Morales and Wootton knew or should have known that the results of the physical examination did not support a finding of physical abuse.

137. Defendants Morales and Wootton knew or should have known that by subjecting A.L. to a physical examination for evidence collection purposes based solely on the double-hearsay allegations of DuBoise, and without judicial authorization, such conduct would adversely affect the relationship between the Lowthers and A.L.

138. Defendants Wootton and Morales assumed without any investigation that the abuse allegations were true. As Defendant Wootton explained to Mrs. Lowther during her late-night interrogation on August 30, 2017, “And so my job is not to prove a little child wrong, it is my job to prove them right, and so I’m trying to get the facts to support her statement.”

139. Defendant Wootton’s comment indicates that he and Defendant Morales acted maliciously and in willful disregard of the truth in an attempt to obtain substantiating evidence against Dr. Lowther.

140. Defendants Morales and Wootton knew or should have known that to the extent the law allowed them to seize and take the Lowther children into state custody without a warrant or other court order, it was for the limited purpose of keeping them safe from immediate harm, not to further a criminal investigation.

141. Defendants Morales and Wootton had ample time to obtain a warrant or other judicial authorization prior to A.L.’s physical examinations.

142. Obtaining a warrant or judicial authorization would not have harmed or otherwise prejudiced the investigation.

143. Defendants Morales and Wootton were able to bypass judicial scrutiny of the appropriateness of removal and custody decision.

BCSO's unlawful practices related to child welfare checks

144. Defendant BCSO has a policy and practice of conducting child welfare checks in a manner that is contrary to well-established federal constitutional law. BCSO's unlawful practice consists of three parts. First, BCSO deputies are trained to believe they may enter a home to check on the welfare of a child without a warrant or reasonable grounds to believe a child is in imminent danger. Second, BCSO deputies are trained to believe they may arrest a parent who refuses to allow them into the home to check on the welfare of a child. Third, BCSO deputies are trained to believe they may seize a child and place them into state custody based on the arrest or detention of the parent.

145. The BCSO policy eviscerates the protections of the First, Fourth, and Fourteenth Amendments.

146. The BCSO practice described above is contrary to well-established federal law, which in the context of the investigation of child abuse requires the following:

- To enter a house without a warrant requires consent or the existence of an exigent circumstance, such as an immediate need to protect life. *See Cortez* at 1124-25 (“Exigent circumstances in an emergency situation exist when . . . the law enforcement officers have objectively reasonable grounds to believe that there is an immediate need to protect their lives or others[.]”).
- To remove a child from the home requires reasonable suspicion that the child is in imminent danger. *See Gomes*, 451 at 1130 (10th Cir. 2006)

("[W]e conclude that state officials may remove a child from the home without prior notice and a hearing when they have a reasonable suspicion of an immediate threat to the safety of the child if he or she is allowed to remain there.").

- And finally, to conduct a warrantless arrest of a parent for child abuse requires probable cause. *See Cortez v. McCauley*, 478 F.3d 1108, 1118 (10th Cir. 2007) ("That unsubstantiated double-hearsay originating from a two-year-old, standing alone, does not give rise to probable cause should have been patently obvious to any reasonable law enforcement official.").

147. The individual BCSO defendants conducted the child welfare check in question in conformity with BCSO's practices.

148. By permitting its officers to engage in this constitutional practice, BCSO acted with deliberate indifference to the unconstitutional rights of the Lowthers.

149. As a direct result of BCSO's unlawful practices, the Lowther children were seized from the home and placed into state custody on August 30, 2017.

150. As a direct result of BCSO's unlawful practices, A.L. was subjected to two different invasive and humiliating physical examinations.

151. As a direct result of BCSO's unlawful practices, A.L. and W.L. were subjected to lengthy and emotionally distressing forensic examinations.

CYFD's collusive and illegal practices permit law enforcement to violate the constitutional rights of children under its custody

152. Upon information and belief, CYFD customarily and as a matter of practice consents to the forensic interview and physical examination of children who have been taken into temporary custody prior to the issuance of a warrant or other court order.

153. This practice undermines the protections afforded by the Fourth, Fifth, and Fourteenth Amendments because it allows law enforcement to interrogate and examine children without judicial review, approval, or oversight.

154. To the extent the law allows law enforcement to take temporary custody of a child without a warrant or other judicial authorization, it is for the limited purpose of keeping them safe from imminent harm, not to obtain evidence for a criminal investigation or state custody proceeding.

155. As the temporary custodian of the children, CYFD had a legal duty to protect and safeguard their well-being, which includes their constitutional and other statutory rights.

156. CYFD violated its legal duty to A.L. and W.L. by requiring them to be forensically interviewed without a warrant or court authorization.

157. CYFD also violated its legal duty to A.L. by requiring her to undergo a sexual assault examination without a warrant or court authorization.

158. Upon information and belief, CYFD consented to the forensic and physical examinations of the Lowther children before Defendant Morales had conducted a safety assessment.

159. Forensic interviews and/or physical examinations that are designed to illicit evidence of sexual abuse, including abuse by a family member, can cause long-term trauma to a child. The examination can also create distrust between a child and parent.

160. CYFD's practices are collusive and contrary to the best interests of the children who are temporarily under their custody and control.

161. CYFD acted with deliberate indifference to the constitutional rights of the Lowthers.

162. As a direct result of CYFD's unlawful practices, the Lowther children were seized from the home and placed into state custody on August 30, 2017, and then again on September 6, 2017.

163. As a direct result of CYFD's unlawful practices, A.L. was subjected to two different invasive and humiliating physical examinations.

164. As a direct result of CYFD's unlawful practices, A.L. and W.L. were subjected to lengthy and emotionally distressing forensic examinations.

Facts surrounding the polygraphs

165. At approximately 11:00 pm on August 30, 2017, Dr. Lowther was transported to the main BCSO station for interrogation and booking. By this time, Dr. Lowther had been under arrest for approximately six hours.

166. At the main station Dr. Lowther requested the opportunity to take a polygraph to prove his innocence.

167. Sgt. Dudewicz, Defendant Wootton's supervisor, represented to Dr. Lowther that she was qualified to administer the polygraph.

168. At approximately 2:00 am on August 31, 2017, after approximately ten hours under arrest, Dr. Lowther took the polygraph. He had been awake for nearly 24 hours.

169. Sgt. Dudewicz did not reveal the results of the polygraph to Dr. Lowther.

170. At approximately 4:53 am, Dr. Lowther was booked into the Bernalillo County Metropolitan Detention Center.

171. At approximately 4:55 am on August 31, 2017, Defendant Wootton filed a criminal complaint in Bernalillo County Metropolitan Court accusing Dr. Lowther of criminal sexual contact of a minor and first degree criminal sexual penetration.

172. During the subsequent criminal proceeding Dr. Lowther's attorney requested the charts related to Sgt. Dudewicz's polygraph.

173. The results of Sgt. Dudewicz's polygraph were provided to the District Attorney's Office's independent polygraph examiner. He determined Sgt. Dudewicz's testing technique was "inherently biased against a truthful subject" and that the result was "inconclusive."

174. On September 17, 2017, Dr. Lowther took a polygraph conducted by retired State Police Detective and polygraph examiner Eric Lucero. The polygraph tested whether Dr. Lowther had ever sexually assaulted A.L. According to the District Attorney's independent polygraph expert, Dr. Lowther's "grand total scores for the Lucero test after three charts was a +9, indicative of a 97% probability of truthfulness." He also evaluated the data using "computer scoring algorithm OSS 3," which found a "98% probability of non-deception."

Facts surrounding the criminal process against Dr. Lowther

175. In New Mexico a criminal complaint initiates a criminal case and is required when pretrial detention is sought, and the underlying arrest was made without a warrant.

176. Bernalillo County Metropolitan Court Judge Kenny Montoya reviewed the criminal complaint drafted and sworn to by Defendant Wootton.

177. In reliance on Defendant Wootton's false and misleading affidavit Judge Montoya ordered Dr. Lowther to be kept in pretrial detention.

178. On September 6, 2017, Judge Brett Lovelace of the Second Judicial District Court, Bernalillo County, released Dr. Lowther from pretrial detention and issued an order setting conditions of release. In addition to standard conditions of release, Dr. Lowther was precluded from having any contact with Mrs. Lowther or the children. He was also prohibited from using a computer.

179. On September 15, 2017, Judge Lovelace modified the conditions of release to allow limited contact with Mrs. Lowther, so they could defend themselves in the state custody proceeding.

180. Defendant Wootton's affidavit in support of the criminal complaint served as the basis for the pretrial detention and no-contact orders.

181. Defendant Wootton's affidavit contained many material misstatements and omissions that misled the reviewing judges.

182. Defendant Wootton's false and misleading statements and material omissions were willful and/or reckless.

183. Detective Wootton's affidavit is derived from CYFD's intake record of the call from DuBoise and from observing A.L.'s interview at the Safehouse.

184. Defendant Wootton did not interview DuBoise prior to signing the criminal complaint under penalty of perjury.

BCSO's false and defamatory statements to the media about Dr. Lowther

185. On September 1, 2017, the media began writing stories about Dr. Lowther's arrest for the alleged sexual abuse of A.L.

186. At 10:21 pm, KOB 4 posted a story titled, "Nuclear Deterrence Studies Director Arrested for Child Rape." The story referenced that Defendant Wootton's criminal complaint described "a safe house interview with the young child in which she goes into graphic detail about multiple alleged sexual abuses committed by [Dr.] Lowther." The article identified Dr. Lowther as a "nationally known nuclear weapons expert and the author of five books on the subject of deterrence." A Kirtland Air Force Base public affairs officer was quoted as saying,

“Air Force law enforcement and investigative agencies will assist civil authorities if called upon to do so.”

187. On September 1, 2017, the *Albuquerque Journal* ran a similar news story entitled, “Nuke Expert at Kirtland Accused of Raping 4-Year-Old Girl.” According to the article, BCSO had issued a news release saying among other things that “a forensic interview and physical examination revealed evidence of physical abuse.”

188. As previously established, neither the forensic interview nor the physical examination revealed any evidence of sexual abuse.

189. The BCSO news release was false and caused direct damage to Dr. Lowther’s reputation because it created the inaccurate perception that the allegations were supported by actual evidence, including medical evidence. For example, the physical examination that had been conducted did not reveal any physical injuries or trauma that were suggestive of sexual abuse.

190. BCSO acted maliciously and in bad faith by conveying false information to the news media related to the forensic interviews and physical examination.

191. The KOB 4 and *Albuquerque Journal* articles are available on the internet and can be found by typing Dr. Lowther’s name in an internet search engine site like Google or Yahoo.

192. On September 6, 2017, an organization called New Mexicans Against Child Abuse posted on its Facebook page a story about Dr. Lowther’s release from jail. The Facebook post can be found through an internet search. Several Facebook users posted disparaging comments to the linked article, including death threats. Some examples include:

- “This man should be put to death.”
- “I hope his face gets out there so every person he comes across knows what kind of scum he is.”
- “He should get a bullet in the back of his head.”

- “He better move away from this state! Monster!”
- “Dead man walking.”
- “Hunt a pedophile.”
- “Don’t let me see him (sic) if do he won’t get a minute older.”

193. The disparaging comments are directly related to BCSO’s inclusion of false information in press releases and comments made available to the news media.

194. In a letter dated October 16, 2017, Dr. Lowther’s superior, Maj. Gen. Todd Stewart (Ret.) wrote, “It is known that local radio stations, television and newspaper reports have noted that you are a federal employee with the Department of the Air Force, AFIT, Kirtland Air Force Base, Albuquerque, New Mexico. Adverse publicity created by the local news media coverage concerning your charges and allegations has had an adverse effect upon the Department of the Air Force.” He went on to write, “Your alleged off-duty criminal misconduct and subsequent publicity cannot be tolerated in your position which requires utmost trust and integrity during the development of Nuclear Deterrence Studies.”

195. In an October 26, 2017, *Wetumpka Herald* article, Deputy Felicia Maggert and other unnamed deputies from BCSO provided false information to the newspaper as reflected in the following statement: “One of the officials on the conference call said about the claims of Lowther allegedly passing a polygraph, that the BCSD [sic] had no knowledge if Lowther had obtained a private test, but that he did fail a polygraph administered earlier by their department.”

196. The BCSO press statement was false and caused direct damage to Dr. Lowther’s reputation because it created the inaccurate perception that the allegations were supported by a failed polygraph. As discussed previously, Dr. Lowther did not fail the polygraph administered by Sgt. Dudewicz.

197. BCSO acted maliciously and in bad faith by conveying false information to the news media related to the forensic interviews and physical examination.

198. The false and misleading statements made by Defendant BCSO and its employees have had a direct and negative effect on Dr. Lowther's career, including the termination of his Air Force career and the suspension of his security clearance.

199. Dr. Lowther has been turned down for jobs because of the inaccurately reported information contained in the BCSO news release, and in particular, the allegation that actual physical evidence supported the allegation of abuse.

CYFD rightly restores Mrs. Lowther's custody rights, and then inexplicably takes custody away a second time

200. On September 1, 2017, CYFD held a Family Centered Meeting (FCM) with Mrs. Lowther and her parents, Terry and John Borg. Dr. Lowther was unable to attend because he was in jail.

201. The purpose of the FCM was to develop a safety plan so the children could be returned to Mrs. Lowther.

202. CYFD and Mrs. Lowther agreed to a safety plan, which included in-home services. The safety plan also provided that Mr. and Mrs. Borg would live with Mrs. Lowther and serve as safety monitors.

203. The safety plan prevented Mrs. Lowther from being alone with the children.

204. On September 1, 2017, CYFD returned custody of A.L. and W.L. to Mrs. Lowther.

205. Mr. and Mrs. Borg were appointed as safety monitors.

206. On September 5, 2017, a detention hearing was held in Dr. Lowther's criminal case.

207. At the detention hearing, Mr. Borg expressed to CYFD social worker Andrea Miles his opinion that the allegations against Dr. Lowther were untrue, and that the family

needed therapy. Miles erroneously believed Mr. Borg's comments were inappropriate and called into question whether the Borgs were suitable safety monitors.

208. Sometime before September 6, 2017, Social Worker Andrea Miles notified Robin Yoder, her supervisor, and Defendant Morales of Mr. Borg's comments. Morales subsequently notified Defendant Wootton and the decision was made to take the Lowther children a second time. Specifically, Defendant Morales expressed concern that (1) the Borgs would not protect the children and (2) might allow Dr. Lowther to have contact with the children in violation of the no-contact order.

209. Based on Defendant Morales' concerns, CYFD again took temporary protective custody of the children and placed them into foster care.

210. CYFD did not obtain a warrant or other judicial authorization before taking the children into temporary protective custody on September 7, 2017.

211. CYFD did not have reasonable grounds to believe the children were in imminent danger when the children were taken into temporary custody on September 7, 2017. Mr. Borg had merely expressed his opinion that the allegations were untrue and that CYFD had an obligation to provide services to the family for the trauma the separation had caused. Nor did Defendant Morales have any reason to believe Dr. or Mrs. Lowther would defy the court's no-contact order.

212. Defendant Morales' concern was unreasonable and speculative.

213. The temporary protective custody decision was therefore unlawful.

The facts surrounding the state custody proceedings

214. As previously established, under New Mexico's child protection laws CYFD may hold a child in temporary protective custody for up to two days where reasonable grounds exist

to believe the child is in imminent danger. *See* NMSA 1978, § 32A-4-7(D). This comports with the federal constitutional standard.

215. To hold a child beyond two days CYFD must file an abuse and neglect petition (petition) and if CYFD wishes to retain custody of the child, an *ex parte* custody order, along with an affidavit showing probable cause that custody is necessary and that the child has been abused or neglected. § 32A-4-16(A) and (B). If the state court finds probable cause, it may grant interim legal custody of the child until an initial custody hearing is held. §§ 32A-4-16(A) and 32A-4-18(A).

216. The state court must hold a custody hearing within ten days of the filing of the petition to determine if the child should remain in CYFD custody. § 32A-4-18(A). The petition must contain the allegations and potential consequences of the action. § 32A-4-10(G). If the court finds probable cause, the court then makes a custody determination pending an adjudicatory hearing on the merits of the petition. § 32A-4-18(A) and (D). The adjudicatory hearing must occur within sixty days of the filing of the petition. § 32A-4-19(A).

217. In this case, CYFD filed an abuse and neglect petition and an affidavit for *ex parte* custody order (affidavit) in children's court on September 8, 2017. CYFD amended the petition and affidavit for *ex parte* order on September 12, 2017. Defendant Morales swore to the affidavits.

218. The children's court held a temporary custody hearing on September 18, 27, and 28, 2017.

219. The children's court issued a temporary custody order (custody order) on October 6, 2017.

220. Pursuant to that order A.L. and W.L. remained in state custody.

221. The custody order relied on Defendant Morales' affidavit and testimony, particularly as to the allegation that Mrs. Lowther was an unfit parent for not protecting the children from the alleged abuse.

222. Defendant Morales' affidavit contained several material misstatements and omissions that misled the children's court, particularly as to the allegation that Mrs. Lowther was an unfit parent.

223. Defendant Morales' false and misleading statements and material omissions were willful and/or reckless.

224. Mr. and Mrs. Lowther were not able to participate in several family and school-related activities with their children while they were in state custody, including an extended fall break.

225. Mr. and Mrs. Lowther were not kept informed of important personal, medical, and school-related issues involving their children while the children were in state custody.

226. On October 13, 2017, Judge Parnall wrote an e-mail to counsel in the custody case requesting that Mrs. Lowther provide a statement addressing whether she would follow a safety plan and protect the children from contact with Dr. Lowther. This was the first time anyone had directly asked Mrs. Lowther whether she would ensure the terms of the no-contact and temporary custody orders were complied with.

227. On October 19, 2017, the children's court held a mediation.

228. On October 19, 2017, immediately after the mediation, Judge Parnall advised counsel that he was considering restoring custody of the children to Mrs. Lowther. The Guardian ad Litem (GAL) for the children, who was present for the mediation and the meeting with Judge Parnall, requested to meet with Mrs. Lowther beforehand.

229. On October 23, 2017, the Lowther family's dog passed away. Mrs. Lowther was home alone when this happened. The no-contact and temporary protective custody orders prevented Dr. Lowther from living in the house, and her children were in foster care. This was an emotionally devastating event that was compounded by the family separation.

230. On October 24, 2017, Mrs. Lowther participated in a court-ordered, hour-long psychosocial assessment with the CYFD permanency/reunification worker.

231. That same day Mrs. Lowther met with the GAL. During the meeting Mrs. Lowther offered to change the locks on the house and not allow family members, including Dr. Lowther, access to the children if her custody rights were restored. After the meeting the GAL agreed to recommend that the children be returned to Mrs. Lowther. The agreement was signed by the GAL and counsel for the Lowthers. CYFD refused to sign the agreement.

232. On November 7, 2017, Judge Parnall returned custody of the children to Mrs. Lowther.

Defendant Wootton's unlawful arrest of Mrs. Lowther in retaliation for Judge Parnall's decision to restore her custody rights

233. On November 6, 2017, A.L. notified Betty Duboise that she would be returning home to her mother (Judge Parnall had notified attorneys of his intent to restore custody to Mrs. Lowther) and that she would no longer attend CCA. Upon this notification, Duboise called Defendant Wootton to notify him of this information in order to prevent Mrs. Lowther from having custody returned.

234. On November 7, 2017, Defendant Wootton attended the children's court proceeding in which Judge Parnall restored Mrs. Lowther's custody rights.

235. Before the hearing Defendant Wootton met in chambers with Judge Parnall. The Lowthers' legal counsel was present for part of the meeting. Defendant Wootton was visibly

upset at Judge Parnall for returning custody of the children to Mrs. Lowther. He stated in a loud voice that restoring Mrs. Lowther's custody rights would "ruin his criminal case." Defendant Wootton's comments could be heard outside chambers.

236. Immediately after the hearing Defendant Wootton arrested Mrs. Lowther, at the courthouse, for bribery or intimidation of a witness.

237. In a criminal complaint filed later that afternoon, Defendant Wootton alleged that on October 19, 2017, he was "contacted by DuBoise, A.L.'s teacher, who informed him [A.L.] disclosed that [Mrs. Lowther] had told her not to say anything to anyone regarding the sexual abuse perpetrated by [Dr. Lowther]."

238. The allegation was made approximately three weeks before the arrest occurred.

239. The arrest was based on the hearsay statement of A.L.

240. Defendant Wootton did not obtain sufficiently reliable corroborating evidence to substantiate the allegation. In a forensic interview A.L. denied telling DuBoise that her mother told her not to talk to anyone about the alleged abuse.

241. Defendant Wootton did not make the arrest until after the children's court officially returned custody of A.L. and W.L. to Mrs. Lowther.

242. The arrest was made in retaliation for the children's court's custody determination, which Defendant Wootton adamantly disagreed with.

243. The arrest was conducted in bad faith and with malicious intent to interfere with Mrs. Lowther's custody rights.

244. Mrs. Lowther was arrested, booked into jail, placed in a jumpsuit, strip and body cavity searched, forced to take an unsanitary pregnancy test, and then released on personal recognizance.

245. A first appearance was held in Bernalillo County Metropolitan Court on November 9, 2017.

246. At the first appearance the district attorney's office informed the judge that Mrs. Lowther would not be prosecuted.

247. No charges were ever brought against Mrs. Lowther.

Dr. Lowther's custodial rights are finally restored in May 2018 and the district attorney's office abandons the criminal prosecution

248. From August 30, 2017, until May 2, 2018, Dr. Lowther was prevented from having unsupervised contact with his children. Not only was this humiliating, it personally affected his relationship with his family.

249. To expedite the process of regaining custody of his children, in early 2018 Dr. Lowther agreed to participate in a court-mandated therapy/reunification process.

250. Dr. Lowther regularly met with the family reunification therapist who evaluated whether he presented a safety risk to his children.

251. Dr. Lowther and his children successfully completed therapy in April 2018. Both the family reunification therapist and the children's individual therapist determined that Dr. Lowther did not present a safety risk to the children. The therapists notified the children's court of their opinion in the form of letters to the court.

252. Defendant CYFD voluntarily agreed to dismiss the abuse and neglect petition against Dr. Lowther. The children's court approved the dismissal.

253. Between September 2017 and March 2018, on five occasions prosecutors threatened to take Dr. Lowther's case to a grand jury. In March 2018 prosecutors abandoned the criminal case.

254. Despite favorable outcomes in the criminal and custody cases, the US Air Force terminated Dr. Lowther's employment after a long and successful military career.

The children experienced emotional and physical trauma while in foster care

255. On August 30, 2017, CYFD placed A.L. and W.L. together in a licensed foster care facility. The children were not separated even though DuBoise's report to CYFD included an allegation of abuse against W.L.

256. According to CYFD's records, on August 30, 2017, W.L. physically attacked A.L. because he blamed her for their placement in foster care.

257. Additionally, after the children were placed back in foster care W.L. threatened to kill himself while at school. He also visited the school counselor fifty-five times because he was emotionally distressed by the separation.

258. CYFD did not place the children into therapy until November 2017, months after they had been in foster care.

259. Both children expressed that they were sad, depressed, and angered by the removal and separation from their parents.

260. A.L. repeatedly told CYFD and other authority figures while she was in state custody that Dr. Lowther did not sexually assault her.

261. The emotional trauma has persisted since the children were returned to the Lowthers as they are fearful of being taken again.

Count I

Fourth Amendment – Unlawful Seizure and Arrest of Dr. Lowther (Against Defendants BCSO, Wootton, Smalls, Thornton, and Lozano)

262. Plaintiffs incorporate by reference the proceeding paragraphs as though set forth fully herein.

263. On or about August 30, 2017, Defendants BCSO, Wootton, Smalls, Thornton, and Lozano, unlawfully seized and arrested Dr. Lowther without a warrant.

264. The warrantless arrest lacked probable cause.

265. Defendants BCSO, Wootton, Smalls, Thornton, and Lozano were government officials, acting under color of law, when the warrantless arrest was made.

266. No exigency existed to justify the warrantless seizure and arrest.

267. Dr. Lowther has suffered actual, tangible injuries as a result of the illegal, warrantless seizure and arrest for which he is entitled to recover damages at trial.

Count II (in the alternative to Count I)
Fourth Amendment – Unlawful Detention of Dr. Lowther (Against Defendants Wootton, Smalls, Thornton, and Lozano)

274. Plaintiffs incorporate by reference the proceeding paragraphs as though set forth fully herein.

275. On or about August 30, 2017, Defendants BCSO, Wootton, Smalls, Thornton, and Lozano unlawfully seized and detained Dr. Lowther without a warrant.

276. The detention lacked reasonable suspicion.

277. Defendants Wootton, Smalls, Thornton, and Lozano were government officials, acting under color of law, when the detention was made.

278. Dr. Lowther has suffered actual, tangible injuries as a result of the illegal arrest for which he is entitled to recover damages at trial.

Count III
Fourth Amendment – Unlawful Detention of Mrs. Lowther (Against Defendants Wootton, Smalls, Thornton, and Lozano)

279. Plaintiffs incorporate by reference the proceeding paragraphs as though set forth fully herein.

280. On or about August 30, 2017, Defendants BCSO, Wootton, Smalls, Thornton, and Lozano unlawfully seized and detained Mrs. Lowther without a warrant.

281. The detention lacked reasonable suspicion.

282. Defendants Wootton, Smalls, Thornton, and Lozano were government officials, acting under color of law, when the detention was made.

283. Mrs. Lowther has suffered actual, tangible injuries as a result of the illegal detention for which she is entitled to recover damages at trial.

Count IV

Fourth Amendment – Unlawful Entry into the Lowther Home (Against Defendants Morales, Wootton, Smalls, Thornton, and Lozano)

284. Plaintiffs incorporate by reference the preceding paragraphs as though set forth fully herein.

285. On or about August 30, 2017, Defendants Morales, Wootton, Smalls, Thornton, and Lozano unlawfully entered the Lowther home without consent, a warrant, or exigent circumstances.

286. Defendants Morales Wootton, Smalls, Thornton, and Lozano were government officials, acting under color of law, when the warrantless entry occurred.

287. Dr. and Mrs. Lowther have suffered actual, tangible injuries as a result of the illegal entry for which they are entitled to recover damages at trial.

Count V

Fourth and Fourteenth Amendments – Illegal Seizure of the Lowther Children (Defendants Morales and Wootton)

288. Plaintiffs incorporate by reference the preceding paragraphs as though set forth fully herein.

289. On or about August 30, 2017, Defendants Morales and Wootton unlawfully seized the Lowther children without a warrant or reasonable suspicion the children were in imminent danger.

290. Defendant Morales, who participated in and conducted the illegal seizures, was a government official, acting under color of law, when the warrantless seizures occurred.

291. The Lowthers have suffered actual, tangible injuries as a result of the illegal seizures for which they are entitled to recover damages at trial.

Count VI
Fourth and Fourteenth Amendments – Illegal Seizure of the Lowther Children
(Defendant Morales)

292. Plaintiffs incorporate by reference the preceding paragraphs as though set forth fully herein.

293. On or about September 7, 2017, Defendant Morales unlawfully seized the Lowther children without a warrant or reasonable suspicion the children were in imminent danger.

294. Defendant Morales, who participated in and conducted the illegal seizures, was a government official, acting under color of law, when the warrantless seizures occurred.

295. The Lowthers have suffered actual, tangible injuries as a result of the illegal seizures for which they are entitled to recover damages at trial.

Count VII
Fourth and Fourteenth Amendments – Illegal Arrest, Entry, and Seizures (Defendant
BCSO)

296. Plaintiffs incorporate the preceding paragraphs as though set forth fully herein.

297. Defendant BCSO is required to establish and maintain standard operating procedures, training, monitoring, discipline, and supervision intended to prevent violations of citizens' civil rights, rather than to encourage such violations.

298. Before the Lowther children were seized, Defendant BCSO was aware of a widespread practice within the department of disregarding the constitutional and statutory rights of citizens in child abuse investigations, including ignoring warrant and exigency requirements for arrests, entries into private residences, and seizures and removals of children.

299. Defendant BCSO was aware of the substantial risks associated with disregarding citizens' constitutional rights during child abuse investigations but chose not to take appropriate action to protect citizens.

300. Defendant BCSO's deliberate indifference and failure to correct the custom and practice of officers who disregard constitutional protections in order to seize and remove children from the home where child abuse is alleged caused the Lowthers' constitutional deprivations.

301. Defendant BCSO acted intentionally, maliciously or with reckless indifference in continuing in effect and failing to correct the practice of disregarding the constitutional rights of citizens during child abuse investigations, thus punitive damages should be awarded to prevent and punish this type of misconduct from occurring in the future.

Count VIII
Fourth and Fourteenth Amendments – Illegal Seizure of the Lowther Children (Defendant CYFD)

302. Plaintiffs incorporate the preceding paragraphs as though set forth fully herein.

303. Defendant CYFD is required to establish and maintain standard operating procedures, training, monitoring, discipline, and supervision intended to prevent violations of the civil rights of children under its custody and control, rather than to encourage such violations.

304. Before the Lowther children were seized, Defendant CYFD was aware of a widespread practice within the department of disregarding the constitutional and statutory rights of the children under its custody and control, including but not limited to, by permitting warrantless forensic interviews and sexual assault examinations.

305. Defendant CYFD was aware of the substantial risks associated disregarding the constitutional and statutory rights of children under its custody and control but chose not to take appropriate action to protect them.

306. Defendant CYFD acted with deliberate indifference by failing to correct the custom and practice of its employees of disregarding the constitutional requirements for law enforcement to compel forensic interviews and sexual assault examinations of children under the department's custody and control.

307. Defendant CYFD acted intentionally, maliciously or with reckless indifference in continuing in effect and failing to correct the practice of its employees of disregarding the constitutional rights of children under its custody and control, thus punitive damages should be awarded to prevent and punish this type of misconduct from occurring in the future.

Count IX

First Amendment – Retaliation against Mrs. Lowther (against Defendant Wootton)

308. Plaintiffs incorporate by reference the proceeding paragraphs as though set forth fully herein.

309. The right to retain and consult with an attorney implicates clearly established First Amendment rights of association and speech.

310. These rights are violated when a police officer retaliates against an individual for seeking legal advice.

311. On or about August 30, 2017, Mrs. Lowther was engaged in constitutionally protected activity when she requested the right to speak to an attorney.

312. Defendant Wootton's actions would have chilled a person of ordinary firmness from continuing to engage in that protected activity.

313. Defendant Wootton's actions were substantially motivated by a response to her protected conduct.

314. Defendant Wootton's retaliatory motive caused the children to be seized.

Count X

NMTCA – False arrest and imprisonment of Dr. Lowther (against Defendant BCSO)

315. Plaintiffs incorporate by reference the proceeding paragraphs as though set forth fully herein.

316. Defendants Wootton, Smalls, Thornton, and Lozano arrested, restrained and/or confined Dr. Lowther against his will.

317. Defendants Wootton, Smalls, Thornton, and Lozano knew that they did not have authority to restrain and/or confine Dr. Lowther.

318. This happened in New Mexico on or about August 30, 2017.

319. Defendants Wootton, Smalls, Thornton, and Lozano were acting within the scope and course of their employment as BCSO detectives and/or deputies when they wrongly arrested, detained and/or confined Dr. Lowther and therefore BCSO is liable under the doctrine of respondeat superior.

Count XI

NMTCA – False arrest and imprisonment of Mrs. Lowther (against Defendant BCSO)

320. Plaintiffs incorporate by reference the proceeding paragraphs as though set forth fully herein.

321. Defendants Wootton, Smalls, Thornton, and Lozano arrested, restrained and/or confined Mrs. Dr. Lowther against her will.

322. Defendants Wootton, Smalls, Thornton, and Lozano knew that they did not have authority to arrest, restrain and/or confine Mrs. Lowther.

323. This happened in New Mexico on or about August 30, 2017.

324. Defendants Wootton, Smalls, Thornton, and Lozano were acting within the scope and course of their employment as BCSO detectives and/or deputies when they wrongly arrested, detained and/or confined Mrs. Lowther and therefore BCSO is liable under the doctrine of respondeat superior.

Count XII

NMTCA – False arrest and imprisonment of the Lowther children (against Defendants CYFD and BCSO)

325. Plaintiffs incorporate by reference the proceeding paragraphs as though set forth fully herein.

326. Defendants Morales, Wootton, Smalls, Thornton, and Lozano arrested, restrained, seized, and/or confined A.L. and W.L. against their will.

327. Defendants Morales, Wootton, Smalls, Thornton, and Lozano knew that they did not have authority to arrest, restrain and/or confine Mrs. Lowther.

328. This happened in New Mexico on or about August 30 and September 7, 2017.

329. Defendants Morales was acting within the scope and course of her employment as a CYFD investigator when she wrongly arrested, detained, seized and/or confined A.L. and W.L. and therefore CYFD is liable under the doctrine of respondeat superior.

330. Defendants Wootton, Smalls, Thornton, and Lozano were acting within the scope and course of their employment as BCSO detectives and/or deputies when they wrongly arrested, detained, seized, and/or confined Mrs. Lowther and therefore BCSO is liable under the doctrine of respondeat superior.

Count XIII
NMTCA – Defamation of Dr. Lowther (against BCSO)

331. Plaintiffs incorporate by reference the proceeding paragraphs as though set forth fully herein.

332. Defendant published defaming communications in the press between September and October 2017. The defamatory communications included the following false information: (1) Dr. Lowther failed a polygraph examination; (2) physical evidence supported the allegation of sexual abuse; and (3) forensic examinations of the children supported the allegation of sexual abuse.

333. The communications contain statements of fact.

334. The communications were concerning Dr. Lowther, a plaintiff in this action.

335. The statements were in fact false.

336. The persons receiving the communications understood them to be defamatory.

337. Defendant BCSO knew the statements were false and acted with malice and bad faith in publishing the statements.

338. The false communications caused actual injury to Dr. Lowther, including to his reputation.

Request for Relief

WHEREFORE, Plaintiffs respectfully request this Court award compensatory and punitive damages against all defendants in an amount to be proven at trial along with attorneys' fees, costs, and any other relief the Court deems just and proper.

Demand for Jury Relief

Plaintiffs demand a trial pursuant to F. R. Civ. 38(a).

Respectfully submitted,

/s/Vincent J. Ward

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