No. 17-2279

In the United States Court of Appeals *for the* Eighth Circuit

Anmarie Calgaro,

Plaintiff - Appellant,
v.

St. Louis County; Linnea Mirsch, individually and in her official capacity as Interim Director of St. Louis County Public Health and Human Services; Fairview Health Services, a Minnesota nonprofit corporation; Park Nicollet Health Services, a nonprofit corporation; St. Louis County School District; Michael Johnson, individually and in his official capacity as Principal of the Cherry School, St. Louis County School District; and E.J.K.,

Defendant – Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THE HON. PAUL A. MAGNUSON

BRIEF OF APPELLEE E.J.K.

Michael A. Ponto, MN# 203944
Martin S. Chester, MN# 031514X
Emily E. Chow, MN# 0388239
Cicely R. Miltich, MN# 0392902
FAEGRE BAKER DANIELS LLP
90 South Seventh Street, Suite 2200
Minneapolis, MN 55402
612.766.7000
Michael.Ponto@faegrebd.com
Martin.Chester@faegrebd.com
Emily.Chow@faegrebd.com
Cicely.Miltich@faegrebd.com

Christopher F. Stoll, CA SBN 179046
Asaf Orr, CA SBN 261650
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
415.392.6257
CStoll@nclrights.org
AOrr@nclrights.org

Attorneys for Appellee E.J.K.

SUMMARY OF THE CASE

Defendant-Appellee E.J.K. is Plaintiff-Appellant Anmarie Calgaro's eighteen-year-old transgender daughter. At fifteen years old, E.J.K. moved out of her mother's home to due to their strained relationship and difficult home environment. Shortly thereafter, E.J.K. began living on her own, going to school, and working to provide for herself. E.J.K. also consented to her own health care, as she was expressly permitted to do under Minnesota law. During this time, Ms. Calgaro sought to obtain E.J.K.'s confidential medical and educational records and to interfere in E.J.K.'s medical care.

Ms. Calgaro filed a complaint alleging that E.J.K.'s health care and educational providers and the County of St. Louis violated her constitutional due process rights, and named E.J.K. as a necessary party. Each party filed dispositive motions. E.J.K. moved to dismiss on the grounds that she is not a state actor and that the Minnesota statutes pursuant to which E.J.K. consented to her own medical care did not violate Ms. Calgaro's parental rights under the Due Process Clause. The District Court granted Defendant-Appellees' dispositive motions, denied Ms. Calgaro's motion for summary judgment, and dismissed the complaint with prejudice.

E.J.K. requests oral argument, and suggests 30 minutes be allotted for all appellees.

TABLE OF CONTENTS

SUMMARY OF THE CASE i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 3

I. STATEMENT OF FACTS 3

II. PROCEDURAL HISTORY 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. THE DISTRICT COURT PROPERLY DISMISSED ANY CLAIMS AGAINST E.J.K. BECAUSE SHE IS NOT A GOVERNMENT ACTOR. 8

II. MINNESOTA'S MATURE MINOR STATUTE IS CONSTITUTIONAL 9

A. A Parent Does Not Have a Constitutional Right to Override the Medical Decision-Making of a Mature Minor. 10

B. Ms. Calgaro Did Not Allege Governmental Constraint or Compulsion as Required to Establish a Due Process Violation. 18

III. MINNESOTA LAW PROVIDES A WELL-ESTABLISHED PROCESS FOR PARENTS SEEKING TO ASSERT PARENTAL AUTHORITY OVER A MINOR CHILD LIVING OUTSIDE THE PARENT'S HOME 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

A.H. ex rel. Hubbard v. Midwest Bus Sales, Inc.,
823 F.3d 448 (8th Cir. 2016) 9

Anspach v. City of Phila.,
No. CIV.A.05-810, 2005 WL 1519014 (E.D. Pa. June 27, 2005), *aff'd*, 503 F.3d 256 (3d Cir. 2007).....14

Anspach v. City of Philadelphia,
503 F.3d 256 (3d Cir. 2007)..... passim

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....7, 8

Atherton Mills v. Johnston,
259 U.S. 13 (1922).....9

Beck by Beck v. Mo. State High Sch. Activities Ass'n,
18 F.3d 604 (8th Cir. 1994) 9

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....7, 8

Bellotti v. Baird,
443 U.S. 622 (1979).....1, 12

Carey v. Population Servs. Int'l,
431 U.S. 678 (1977).....1, 11

Cnty. of St. Charles v. Mo. Family Health Council,
107 F.3d 682 (8th Cir.1997) 16

Crumpley-Patterson v. Trinity Lutheran Hosp.,
388 F.3d 588 (8th Cir. 2004) 1, 8

Doe v. Irwin,
615 F.2d 1162 (6th Cir. 1980) ..... passim

Gordon v. Hansen,
168 F.3d 1109 (8th Cir. 1999) 10

Hall v. Ramsey Cnty.,
801 F.3d 912 (8th Cir. 2015) 9

Harpole v. Ark. Dep't of Human Servs.,
820 F.2d 923 (8th Cir. 1987) 22, 23

Harris v. McRae,
448 U.S. 297 (1980).....26

Helleloid v. Indep. Sch. Dist. No. 361,
149 F. Supp. 2d 863 (D. Minn. 2001).....22

Hempstead Cnty. Hunting Club, Inc. v. Sw. Elec. Power Co.,
558 F.3d 763 (8th Cir. 2009) 9

Hodgson v. Minnesota,
853 F.2d 1452 (8th Cir. 1988), *aff'd*, 497 U.S. 417 (1990) 13

J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.,
650 F.3d 915 (3d Cir. 2011).....24

Keating v. Neb. Pub. Power Dist.,
562 F.3d 923 (8th Cir. 2009) 7

Lee v. Pine Bluff Sch. Dist.,
472 F.3d 1026 (8th Cir. 2007) 2, 20

Manzano v. S.D. Dep't of Soc. Servs.,
60 F.3d 505 (8th Cir.1995) 11

Myers v. Morris,
810 F.2d 1437 (8th Cir. 1987), *abrogated on other grounds by Burns v. Reed*,
500 U.S. 478 (1991).....22

Neighborhood Transp. Network, Inc. v. Pena,
42 F.3d 1169 (8th Cir. 1994) 9

New York v. Heckler,
719 F.2d 1191 (2d Cir.1983).....16

Parham v. J.R.,
442 U.S. 584 (1979).....21

Pierce v. Soc'y of Sisters,
268 U.S. 510 (1925).....18, 21

Planned Parenthood of Cent. Mo. v. Danforth,
428 U.S. 52 (1976).....1, 11, 12, 18

Planned Parenthood Fed. of Am. v. Heckler,
712 F.2d 650 (D.C. Cir.1983) 16

Planned Parenthood v. Miller,
63 F.3d 1452 (8th Cir. 1995) 1, 12, 13, 17

Planned Parenthood v. Miller,
860 F. Supp. 1409 (D.S.D. 1994) 12

Poorman on Behalf of Elk v. Bowen,
686 F. Supp. 251 (D.S.D. 1988) 9

Prince v. Massachusetts,
321 U.S. 158 (1944).....10

Reardon v. Midland Cmty. Schs.,
814 F. Supp. 2d 754 (E.D. Mich. 2011).....24

Santosky v. Kramer,
455 U.S. 745 (1982).....21

Troxel v. Granville,
530 U.S. 57 (2000).....21

United States v. 24.30 Acres of Land,
105 F. App'x 134 (8th Cir. 2004) 8

Wisconsin v. Yoder,
406 U.S. 205 (1972).....18

STATE CASES

Cardwell v. Bechtol,
739 S.W.2d 739 (Tenn. 1987).....16

Curtis v. Sch. Comm. of Falmouth,
652 N.E.2d 580 (Mass. 1995) 2, 19, 25

Decker v. Carroll Academy,
No. 02A01-9709-CV-00242, 1999 WL 332705 (Tenn. Ct. App. May 26,
1999) 25

Nash v. Nash,
307 P.3d 40 (Ariz. Ct. App. 2013).....11

Younts v. St. Francis Hosp. & Sch. of Nursing, Inc.,
469 P.2d 330 (Kan. 1970).....16

FEDERAL STATUTES

42 U.S.C. § 1983.....1, 5, 6, 8

STATE STATUTES

Ala. Code § 22-8-6 16

Alaska Stat. Ann. § 25.20.025(a)(1) 15

Ark. Code Ann. § 20-9-602(7) 15

Colo. Rev. Stat. § 13-22-103(1) 15

Ill. Comp. Stat. Chapter 410 § 210/4 16

Iowa Code § 139A.35 15

Kan. Stat. Ann. § 65-2892a 16

Minn. Stat. § 256D.05 24

Minn. Stat. § 260C.007, subd. 6 27

Minn. Stat. § 260C.201, subd. 1 27

Minn. Stat. § 260C.317, subd. 1 24

Minnesota Statutes Chapter 260C 27

Minnesota Statutes § 144.341 ..... passim

Minnesota Statutes § 260C.141 ..... 4, 27

Miss. Code Ann. § 41-41-13 15

Mont. Code Ann. § 41-1-402(2)(b) 15

N.D. Cent. Code § 14-10-17 15

N.H. Rev. Stat. Ann. § 318-B:12-a 16

Okla. Stat. Title 63, § 2602(A)(2) 15

S.D. Codified Laws §§ 34-23-16, -17 15

State Minor Consent Laws 15

Tenn. Code Ann. § 68-10-104(c) 15

Tex. Fam. Code Ann. § 32.003(a)(2) 15

Utah Code Ann. § 26-6-18(1) 15

Wyo. Stat. Ann. § 14-1-101(b)(iv).....15

RULES

Fed. R. Civ. P. 19(a)(1)(B)(i).....5

Rule 19.....5

REGULATIONS

42 C.F.R. § 59.11.....16

CONSTITUTIONAL PROVISIONS

First Amendment.....11

Fourteenth Amendment.....1, 2, 11

Bill of Rights.....11

OTHER AUTHORITIES

Application of Gault, 387 U.S. 1 (1967).....11

available at https://www.freelists.org/archives/hilac/02-2014/pdftRo8tw89mb.pdf (last visited Sept. 25, 2017).....15

Restatement (Second) of Torts § 892A cmt.....17

STATEMENT OF THE ISSUES

1. Whether Ms. Calgaro's complaint failed to state a claim because E.J.K. is not a state actor under 42 U.S.C. § 1983.

   Apposite Authorities

   Crumpley-Patterson v. Trinity Lutheran Hosp., 388 F.3d 588 (8th Cir. 2004)

2. Whether Ms. Calgaro's complaint failed to state a claim because Minnesota Statutes section 144.341, which permits minors who are living outside their parents' home and managing their own finances to consent to their own medical care, does not deprive parents of any liberty or property interest protected by the Due Process Clause of the Fourteenth Amendment.

   Apposite Authorities

   Anspach v. City of Philadelphia, 503 F.3d 256 (3d Cir. 2007)

   Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)

   Doe v. Irwin, 615 F.2d 1162 (6th Cir. 1980)

   Bellotti v. Baird, 443 U.S. 622 (1979)

   Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995)

   Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976)

3. Whether Ms. Calgaro's complaint failed to state a claim because neither Minnesota Statutes section 144.341 nor any alleged actions of Defendant-

Appellees imposed any governmental constraint or compulsion on Ms. Calgaro's or E.J.K.'s conduct, and therefore no conduct of Defendant-Appellees deprived Ms. Calgaro of any parental rights protected by the Due Process Clause of the Fourteenth Amendment.

Apposite Authorities

Anspach v. City of Philadelphia, 503 F.3d 256 (3d Cir. 2007)

Curtis v. Sch. Comm. of Falmouth, 652 N.E.2d 580 (Mass. 1995)

Doe v. Irwin, 615 F.2d 1162 (6th Cir. 1980)

Lee v. Pine Bluff Sch. Dist., 472 F.3d 1026 (8th Cir. 2007)

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

E.J.K. is a young transgender woman and the biological child of Ms. Calgaro. (App. at 14 ¶ 3, 19 ¶ 19.) Pursuant to a paternity order dated April 14, 2008—when E.J.K. was eight years old—Ms. Calgaro had sole physical custody over E.J.K. (*Id.* at 23 ¶ 44.) E.J.K. turned 18 on July 6, 2017. (*Id.* at 20 ¶ 23.)

In 2015, due to a difficult home environment and strained relationship between E.J.K. and her mother, E.J.K. moved out of Ms. Calgaro's home and moved in with her father. (App. at 25 ¶ 53.) E.J.K did not return to live with Ms. Calgaro after leaving her father's home and continued to live on her own. (*Id.* at 25 ¶ 53-54.) To date, E.J.K. has lived outside of her mother's home for nearly three years. Calgaro was aware of E.J.K.'s situation, but did not attempt to require E.J.K. to return to her home. (*Id.* at 24-25 ¶¶ 50, 55.)

While living on her own and managing her own finances, E.J.K. consented to her own medical care, which included treatment for her gender dysphoria. (App. at 34 ¶¶ 100-101, 35 ¶ 108.) The Defendant-Appellee health care providers assisted E.J.K. with her medical care pursuant to Minnesota Statutes section 144.341, which provides:

> Notwithstanding any other provision of law, any minor who is living separate and apart from parents or legal guardian, whether with or without the consent of a parent or guardian and regardless of the duration of such separate residence, and who is managing personal

> financial affairs, regardless of the source or extent of the minor's income, may give effective consent to personal medical, dental, mental and other health services, and the consent of no other person is required.

Several months after E.J.K. started living on her own, without contacting E.J.K. directly or letting E.J.K. know of her actions, Ms. Calgaro allegedly requested E.J.K.'s school records and tried to obtain medical information from E.J.K.'s health care providers. (App. at 28-29 ¶ 76-79; App. at 36-38 ¶¶ 113, 118.) Ms. Calgaro also allegedly asked to be consulted regarding E.J.K.'s medical care and educational decisions. (App. at 28-29 ¶¶ 76-79; App. at 36-39 ¶¶ 113, 118, 129, 134, 136; App. at 52 ¶ 210.) Ms. Calgaro did not receive E.J.K.'s educational or medical records and was not permitted to intervene in E.J.K.'s decision-making. (*Id.*).

Parents in Minnesota who wish to have a court take jurisdiction over a child who has left their home can seek protective services and assistance from their county child welfare agency and/or file a private Child In Need of Protection or Services ("CHIPS") petition pursuant to Minnesota Statutes Section 260C.141. Ms. Calgaro never took such actions, (App. at 22 ¶ 39). In fact, she never took any steps to compel E.J.K. to return to her home.

II. PROCEDURAL HISTORY

In November 2016, Ms. Calgaro filed a complaint against E.J.K., St. Louis County, St. Louis County School District, Fairview Health Services, Park Nicollet

Health Services, and a variety of individuals associated with those entities, claiming that Defendant-Appellees violated her constitutional rights as a parent. (App. at 11-57.) The complaint alleged that Defendant-Appellees treated E.J.K. as an emancipated minor by providing E.J.K. with medical services, education, and general assistance without seeking Ms. Calgaro's involvement or consent.

The parties immediately filed dispositive motions. On May 23, 2017, the District Court ruled that Ms. Calgaro's claims were "meritless" and dismissed Ms. Calgaro's complaint in its entirety and with prejudice. Specifically, the District Court concluded that Ms. Calgaro could not establish sufficient facts to satisfy the elements of her Section 1983 claims because the medical providers are not state actors and the school district and county government did not act pursuant to a policy or custom.

With respect to E.J.K., the District Court also concluded that dismissal was appropriate, explaining:

> Calgaro stops short of making the absurd argument that E.J.K. deprived Calgaro of her parental rights without due process while acting under color of state law. Calgaro merely argues that E.J.K. is a required party who must be joined in the action because E.J.K. 'claims an interest relating to the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). Although E.J.K. likely is a required party under Rule 19, because Calgaro's claims against all other Defendants fail, any claims she might raise against E.J.K. are likewise dismissed.

(App. at 69.)

Following the District Court's ruling, E.J.K. earned her high school degree and recently started nursing school. She no longer resides in St. Louis County. Because she is now eighteen, (App. at 14 ¶ 3, 20 ¶ 23), E.J.K. no longer relies on Minnesota's statues related to the consent of minors in order to obtain medical care.

SUMMARY OF THE ARGUMENT

The District Court correctly characterized Calgaro's claims as "meritless" in its decision to dismiss the complaint without leave to amend. Ms. Calgaro filed her complaint to prevent E.J.K. from obtaining appropriate medical care, to deny her public benefits that covered some of her basic necessities, and to access E.J.K.'s confidential educational records. Even if these remedies were ever available, which Defendant-Appellees strongly dispute, those remedies are now moot since E.J.K. is eighteen years old and no longer a minor under Minnesota law.

Ms. Calgaro cannot allege a viable claim for relief. Calgaro does not allege, nor could she, that E.J.K. is a state actor subject to suit under 42 U.S.C. § 1983. More fundamentally, however, Ms. Calgaro's claims fail as a matter of law.

Consistent with well-established precedent, Minnesota's minor medical care consent law, Minn. Stat. § 144.341, does not infringe on Calgaro's due process right to parent because that right does not permit parents to override the valid consent of a mature minor. Nor can Calgaro demonstrate that any government

actor compelled her or E.J.K. to take any action, or prevented them from taking any action, in a manner that impermissibly interfered in the parent-child relationship. Courts have repeatedly held that the provision of health services to a minor on a voluntary basis, at the minor's request and without parental notification or consent, does not deprive parents of due process. *Anspach v. City of Philadelphia*, 503 F.3d 256, 262 (3d Cir. 2007); *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980).

In any event, Minnesota law provided Calgaro with several avenues through which she could have asserted her parental rights had she chosen to do so. Having failed to avail herself of those processes, Calgaro cannot demonstrate that her due process rights were violated.

ARGUMENT

The trial court properly dismissed Ms. Calgaro's complaint. This Court reviews de novo a district court's grant of a motion to dismiss. *Keating v. Neb. Pub. Power Dist.*, 562 F.3d 923, 927 (8th Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do." *Id.* at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Nor does a complaint suffice if

it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Ms. Calgaro's complaint repeatedly recites the elements of a Section 1983 claim in a rote fashion, but does not allege any facts demonstrating that she can satisfy those basic elements.

I. THE DISTRICT COURT PROPERLY DISMISSED ANY CLAIMS AGAINST E.J.K. BECAUSE SHE IS NOT A GOVERNMENT ACTOR.

Ms. Calgaro does not dispute the District Court's conclusion that she cannot plead constitutional claims against her daughter, who is plainly not a state actor. In the absence of any allegation that E.J.K. is a state actor, any claims for relief against E.J.K. were properly dismissed. *See, e.g., Crumpley-Patterson v. Trinity Lutheran Hosp.*, 388 F.3d 588, 590 (8th Cir. 2004) (dismissing Section 1983 claim against private parties). Because Ms. Calgaro did not address this conclusion in her opening brief, she has waived any right to challenge the District Court's determination of this issue. *See, e.g., United States v. 24.30 Acres of Land*, 105 F. App'x 134, 135 (8th Cir. 2004) (by failing to raise issue on appeal, party waived challenge to court's determination on issue). Accordingly, this Court should affirm the District Court's dismissal of the Complaint and any claims for relief against E.J.K.[1]

[1] Ms. Calgaro's claims for injunctive relief against E.J.K. and the other Defendant-Appellees are also now subject to dismissal, because they are moot. "[A]n actual controversy must exist at all stages of appellate review, not merely at the time the

(footnote continued)

II. MINNESOTA'S MATURE MINOR STATUTE IS CONSTITUTIONAL.

The District Court properly granted Defendant-Appellees' dispositive motions on Ms. Calgaro's due process claim.[2] "To set forth a procedural due process violation, a plaintiff first, must establish that [her] protected liberty or property interest is at stake. Second, the plaintiff must prove that the defendant deprived [her] of such an interest without due process of law." *Hall v. Ramsey*

(footnote continued from previous page)

complaint is filed." *Beck by Beck v. Mo. State High Sch. Activities Ass'n*, 18 F.3d 604, 605 (8th Cir. 1994). "A claim for injunctive relief may become moot if challenged conduct permanently ceases." *Hempstead Cnty. Hunting Club, Inc. v. Sw. Elec. Power Co.*, 558 F.3d 763, 767 (8th Cir. 2009). Furthermore, a claim for injunctive relief becomes moot where a decision in plaintiff's favor would not be capable of providing the relief sought due to changed circumstances. *See Atherton Mills v. Johnston*, 259 U.S. 13, 14-16 (1922) (dismissing appeal challenging the constitutionality of law prohibiting employment of children between the ages of fourteen and sixteen, because the child whose employment gave rise to the action was no longer within the ages covered by the act); *Poorman on Behalf of Elk v. Bowen*, 686 F. Supp. 251, 254 (D.S.D. 1988) (dismissing claim as moot because the challenged law was applicable only to minors and plaintiff had turned eighteen while the litigation was pending); *see also Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1172 (8th Cir. 1994). Here, Ms. Calgaro sought an injunction enjoining Defendant-Appellees from providing "any additional medical, educational or other services to any of the minor children of Ms. Calgaro deemed emancipated by Defendant[-Appellees] without Ms. Calgaro's consent." (App. at 56.) But E.J.K. turned eighteen in July 2017. Thus, an injunction would have no effect at this time because Defendant-Appellees are no longer providing services to a minor child of Ms. Calgaro.

[2] Although the District Court did not base its dismissal order on Ms. Calgaro's failure to plead infringement of a protected interest, this Court may "affirm the judgment below on any ground supported by the record." *A.H. ex rel. Hubbard v. Midwest Bus Sales, Inc.*, 823 F.3d 448, 453 (8th Cir. 2016).

Cnty., 801 F.3d 912, 919 (8th Cir. 2015) (citations omitted); *see also Gordon v. Hansen*, 168 F.3d 1109, 1114 (8th Cir. 1999). Ms. Calgaro's allegations fail to satisfy either required element.

First, Minnesota Statutes section 144.341 (the "mature minor statute") does not deprive Ms. Calgaro of any constitutionally-protected liberty or property interest. The Due Process Clause does not give parents a right to override the medical decision-making of a mature minor, especially one living independently of her parents. Instead, the Supreme Court and this Court have recognized that the Constitution protects a mature minor's right to make her own medical decisions. Second, Defendant-Appellees have done nothing to compel or coerce any conduct by Ms. Calgaro or by E.J.K., or to inhibit Ms. Calgaro's exercise of her parental rights in any way. For these reasons, courts have repeatedly rejected due process challenges brought by parents to governmental programs that provide health services at the request of a minor, as occurred here. Ms. Calgaro's complaint failed to state a viable legal claim challenging the constitutionality of Minnesota's mature minor law, and the District Court correctly dismissed it.

A. A Parent Does Not Have a Constitutional Right to Override the Medical Decision-Making of a Mature Minor.

A parent's right to direct a child's upbringing and education is not absolute. For example, the state may limit parental freedom to protect children's health and welfare. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (holding that

state may prohibit child labor over parents' objections); *Manzano v. S.D. Dep't of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir.1995) ("The right to family integrity clearly does not include a constitutional right to be free from child abuse investigations."); *Nash v. Nash*, 307 P.3d 40, 49-50 (Ariz. Ct. App. 2013) (holding restrictions on speech in the context of child custody disputes did not violate the First Amendment).

A parent's interest with respect to a child is also limited by a minor's own constitutionally protected interest in autonomy—an interest that emerges as a minor develops and matures. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74–75 (1976) (invalidating statute prohibiting minors from consenting to abortion care). "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Application of Gault*, 387 U.S. 1, 13 (1967). Of particular relevance here, minors, like adults, have a fundamental right to privacy with respect to medical care, especially in areas that implicate intimate matters such as reproduction. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977) (holding that a statute prohibiting the distribution of contraceptives to persons under 16 years of age violated minors' due process right to privacy); *Danforth*, 428 U.S. at 74-75. *See*

also Bellotti v. Baird, 443 U.S. 622, 647 (1979) (noting that mature minors have a constitutionally protected right to reproductive autonomy independent of the parent's wishes).

In such cases, when a mature minor seeks constitutional protection against parental attempts to usurp her right to make such intimate medical decisions, "the child's right is virtually coextensive with that of an adult." *Bellotti*, 443 U.S. at 634. For this reason, "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto," *Danforth*, 428 U.S. at 74, over a minor's exercise of such constitutionally-protected intimate decisions. In recognition of these principles, this Court has affirmed that "'[s]tate and parental interests must yield to the constitutional right of a mature minor, or of an immature minor whose best interests are contrary to parental involvement, to obtain an abortion without consulting or notifying the parent or parents.'" *Planned Parenthood v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995) (quoting *Planned Parenthood v. Miller*, 860 F. Supp. 1409, 1415 (D.S.D. 1994)) (holding that statute requiring notice and consent of one parent to obtain abortion services and providing no judicial bypass of notice and consent requirement for mature minors violated due process rights of minors).

In *Planned Parenthood*, this Court held that the Constitution forbids the state to grant veto power over such constitutionally-protected healthcare decisions

"to parents of mature daughters capable of making their own informed choices." *Id.* at 1460. With respect to mature minors, "the State has no legitimate reason for imposing a restriction on their liberty interests that it could not impose on adult women." *Id. See also Hodgson v. Minnesota*, 853 F.2d 1452, 1455-56 (8th Cir. 1988) (noting "state and parental interests [in restricting access to abortions] must give way to the constitutional right of a mature minor . . . to obtain an abortion without consulting or notifying her parents."), *aff'd*, 497 U.S. 417 (1990).

Ms. Calgaro's argument disregards this settled law. Ms. Calgaro claims that Defendant-Appellees interfered with her parental rights by providing medical care to E.J.K. at E.J.K.'s request without first contacting Ms. Calgaro and obtaining parental consent to treatment, as Minnesota Statutes section 144.341 expressly authorized them to do. That argument disregards E.J.K.'s own constitutionally protected privacy and autonomy as a mature minor. Courts have repeatedly rejected similar parental challenges to health care services provided by the government at the request of mature minors. In *Anspach v. City of Philadelphia*, 503 F.3d 256 (3d Cir. 2007), for example, the Third Circuit held that a public health clinic did not violate a parent's due process right by providing emergency contraception at the request of a 16-year-old girl without notifying her parents or suggesting that she consult with them before receiving treatment. The court held that "[t]he type of 'interference' that the Anspachs assert would impose a

constitutional obligation on state actors to contact parents of a minor or to encourage minors to contact their parents. *Either requirement would undermine the minor's right to privacy and exceed the scope of the familial liberty interest protected under the Constitution*." *Id.* at 262 (emphasis added). *See also Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980) (holding that there was "no deprivation of the liberty interest of parents" in public clinic's practice of distributing contraceptives to unemancipated minors without notifying parents or obtaining consent).

As this authority makes clear, "[w]hile the Supreme Court has upheld the constitutionality of parental notice requirements under some circumstances, the Court has never held that parents have a *constitutional right* to such notification, either with respect to contraception or abortion." *Anspach v. City of Phila.*, No. CIV.A.05-810, 2005 WL 1519014, at *5 (E.D. Pa. June 27, 2005), *aff'd*, 503 F.3d 256 (3d Cir. 2007) (emphasis added). To the contrary, it is parental notification requirements that often are constitutionally suspect. *See id.*; *see also Anspach*, 503 F.3d at 271 ("While parental notification has been permitted in limited circumstances in the context of abortion, . . . it has never been affirmatively required, nor extended to include other reproductive health services such as access to contraception."). That legal framework applies with equal force here, where Ms. Calgaro is challenging a state law that allows minors who are living independently

from their parents and managing their own finances to consent to their own medical care.

Section 144.341 appropriately addresses the reality that there are youth in Minnesota who, although not formally emancipated by court order, are living apart from their parents and managing their own affairs without parental assistance. The statute recognizes that these young people must be able to consent to medical care. At least twenty-five other states have enacted similar statutes that permit minors to receive medical care without parental notification or consent in similar circumstances. Abigail English et al., *State Minor Consent Laws: A Summary* 4 (3d ed., 2010), *available at* https://www.freelists.org/archives/hilac/02-2014/pdftRo8tw89mb.pdf (last visited Sept. 25, 2017); *see, e.g.*, Alaska Stat. Ann. § 25.20.025(a)(1); Ark. Code Ann. § 20-9-602(7); Colo. Rev. Stat. § 13-22-103(1); Mont. Code Ann. § 41-1-402(2)(b); Okla. Stat. tit. 63, § 2602(A)(2); Tex. Fam. Code Ann. § 32.003(a)(2); Wyo. Stat. Ann. § 14-1-101(b)(iv). Many states also expressly permit minors to obtain treatment, without parental notification or consent, for certain types of particularly sensitive and intimate medical care. For example, all states permit minors to consent to testing and treatment for sexually transmitted infections and venereal diseases. English, *supra,* at 6; *see, e.g.*, Iowa Code § 139A.35; Miss. Code Ann. § 41-41-13; N.D. Cent. Code § 14-10-17; S.D. Codified Laws §§ 34-23-16, -17; Tenn. Code Ann. § 68-10-104(c); Utah Code

Ann. § 26-6-18(1). And minors can consent to drug and alcohol treatment in nearly every state. English, *supra*, at 6; *see, e.g.*, Ala. Code § 22-8-6; Ill. Comp. Stat. ch. 410 § 210/4; Kan. Stat. Ann. § 65-2892a; N.H. Rev. Stat. Ann. § 318-B:12-a; 71 Pa. Stat. and Cons. Stat. Ann. § 1690.112.[3] Ms. Calgaro has not cited, and E.J.K. is unaware of, any case in which such statutes have been held to violate the due process rights of parents.

Even in states that have not enacted statutes specifically permitting minors to consent to medical treatment, well-established common law principles allow "mature minors"—those who have the ability to understand and appreciate the consequences of their consent—to consent to treatment. *See, e.g.*, *Cardwell v. Bechtol*, 739 S.W.2d 739, 748-749 (Tenn. 1987) (holding that a minor was able to consent to chiropractic services performed by an osteopath); *Younts v. St. Francis Hosp. & Sch. of Nursing, Inc.*, 469 P.2d 330, 338 (Kan. 1970) (holding that a minor was able to consent to skin graft procedure without consent of parent); *In re E.G.*, 549 N.E.2d 322, 327-28 (Ill. 1989) (holding that a parent did not commit

[3] In addition, both this Court and other courts of appeals have held that providers of federally-funded contraception and family planning services may not require parental notification when providing such services to minors, because federal law imposes a burden of confidentiality on providers. 42 C.F.R. § 59.11. *See Cnty. of St. Charles v. Mo. Family Health Council*, 107 F.3d 682, 684-85 (8th Cir.1997); *New York v. Heckler*, 719 F.2d 1191, 1196-97 (2d Cir.1983); *Planned Parenthood Fed. of Am. v. Heckler*, 712 F.2d 650, 656-61 (D.C. Cir.1983).

medical neglect by allowing a mature minor to refuse medical care). *See also* Restatement (Second) of Torts § 892A cmt. b (1979) ("If the person consenting is a child or one of deficient mental capacity, the consent may still be effective if he is capable of appreciating the nature, extent and probable consequences of the conduct consented to, although the consent of a parent, guardian or other person responsible is not obtained or is expressly refused.").

Under these established principles, E.J.K. had a statutory and constitutional right to make her own medical decisions without parental notification or consent. At all relevant times, E.J.K. had been living independently from Ms. Calgaro, supporting herself financially, and going to school. Under section 144.341, E.J.K. had the statutory right to consent to her own medical care.

In addition, as a constitutional matter, Minnesota law reasonably regarded E.J.K. as a mature minor "capable of making [her] own informed choices," and therefore "the State has no legitimate reason for imposing a restriction on [her] liberty interests that it could not impose on adult women." *Planned Parenthood*, 63 F.3d at 1460. In these circumstances, "parental interests must yield to the constitutional right of a mature minor." *Id.* at 1458 (citation omitted). Because the right to make the medical decisions at issue here rested with E.J.K., Ms. Calgaro cannot plausibly allege deprivation of any protected liberty interest, and her due process claim was properly dismissed.

B. Ms. Calgaro Did Not Allege Governmental Constraint or Compulsion as Required to Establish a Due Process Violation.

The District Court was also correct to dismiss Ms. Calgaro's due process claim for the additional reason that she failed to allege any conduct by Defendant-Appellees that infringed a protected interest. Even accepting the facts alleged in the complaint as true, Ms. Calgaro cannot establish a due process claim because those facts do not establish interference by a state actor that "either require[d] or prohibit[ed] some activity." *See Doe*, 615 F.2d at 1168. *See also Danforth*, 428 U.S. at 74-75 (holding that parental rights are accorded constitutional protection only against unwarranted or unreasonable interference by the state).

The United States Supreme Court has consistently held that a parent must demonstrate that the government affirmatively compelled the parent to take action in violation of the constitutional right to parent, or prohibited them from exercising that right. *See, e.g.*, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 533-35 (1925) (holding that a law prohibiting parents from sending their children to private schools unconstitutionally interfered with the liberty interest of parents to direct the upbringing and education of their children); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (finding parents' constitutional rights infringed by law mandating school attendance). These cases demonstrate that "[c]ourts have recognized the parental liberty interest only where the behavior of the state actor *compelled interference* in the parent-child relationship." *Anspach*, 503 F.3d at 262 (emphasis added), *see also*

Curtis v. Sch. Comm. of Falmouth, 652 N.E.2d 580, 586 (Mass. 1995) (holding that a school district's condom-availability program was constitutional because it was voluntary and did not circumscribe the conduct of parents).

Allowing minors to make choices about their personal health decisions, education, and receipt of government assistance does not impose any requirements or prohibitions upon parents or their children, and therefore does not deprive parents of any constitutional right. In *Doe v. Irwin*, for example, the Sixth Circuit held that Michigan's establishment of a voluntary birth control clinic, where minors could go with or without parental consent, and which prescribed and distributed contraceptives to minors without parental knowledge or consent, did not violate any constitutional rights of the parents. *See Doe*, 615 F.3d at 1169. The Sixth Circuit concluded that nothing about the establishment of the clinic prevented parents from exercising any constitutional right they had to the care, custody, and control of their minor children. The court explained that no constitutional violation occurred because "[t]here is no requirement that the children of the plaintiffs avail themselves of the services offered by the Center and no prohibition against the plaintiffs participating in decisions of their minor children on issues of sexual activity and birth control. The plaintiffs remain free to exercise their traditional care, custody and control over their . . . children." *Id.* at 1168.

Similarly, in *Anspach*, the court noted that "the Complaint is completely devoid of any allegations that [clinic] personnel told [the minor] not to consult her parents before taking the medication, or that [the minor] told [clinic] personnel that she was reluctant to take the medication before speaking with her parents and was prevented from doing so, or even that any mention was made of her parents at all. . . . These facts in no way suggest that the state injected itself into the Anspachs' private familial sphere as required for a constitutional violation." *Anspach*, 503 F.3d at 267.

This Court has recognized similar principles in rejecting the claim that due process creates an affirmative duty for public schools to protect students from injury in the context of voluntary school extracurricular activities. *See Lee v. Pine Bluff Sch. Dist*., 472 F.3d 1026, 1030 (8th Cir. 2007) ("[I]f a citizen voluntarily exercises his liberty to enter into the custody of a state official or to participate in a state-sponsored activity, it is difficult to conclude that *the State* has deprived the citizen of liberty.") Just as a student's participation in optional school activities does not deprive either the student or the parent of a constitutionally-protected interest, so too a minor's decision to obtain medical care pursuant to Section 144.341, or to obtain general assistance or other public services, does not deprive her parent of a protected interest.

Ms. Calgaro's reliance on *Troxel* and other Supreme Court cases to support her argument that any conduct of Defendant-Appellees violated her constitutional rights is misplaced. Each of those cases involved a state using its authority to compel or prohibit some action by parents. Specifically, in *Troxel*, a state court ordered visitation rights for a child's grandparents over the parent's objections, thus compelling the parent to turn her child over to the custody of the child's grandparents for visitation. *Troxel v. Granville*, 530 U.S. 57, 61 (2000). *See also Pierce*, 268 U.S. at 530-31; *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (finding "preponderance of the evidence" standard unable to safeguard parental rights in termination proceedings).

Ms. Calgaro's reliance on *Parham v. J.R.*, 442 U.S. 584 (1979), is equally inapposite. The central question in that case was whether the state's procedural safeguards sufficiently protected the due process rights of the *children* whose parents consented to placing them in state-run, in-patient psychiatric care. It did not involve a claim that the state had compelled any conduct by parents or deprived parents of their rights in violation of due process. The cases from this Circuit that Ms. Calgaro relies upon to support her argument that Defendant-Appellees' conduct in providing E.J.K. with general assistance, education, and medical treatment violated Ms. Calgaro's due process rights also do not aid her position. In each of the cases cited by Ms. Calgaro, the court actually found *no* due

process violation. *See Harpole v. Ark. Dep't of Human Servs.*, 820 F.2d 923, 927-28 (8th Cir. 1987) (dismissing due process claim for failure to allege "governmental attempts to directly affect the parent-child relationship by means such as determining paternity or terminating parental rights"); *Myers v. Morris*, 810 F.2d 1437, 1462-63 (8th Cir. 1987) (recognizing that the liberty interest that parents and children have in the care and companionship of each other "is not absolute" and holding there was no clearly established due process right violated by the hasty removal of minor children from plaintiffs' custody upon the arrest of one or both parents for sexually abusing other children), *abrogated on other grounds by Burns v. Reed*, 500 U.S. 478 (1991); *Helleloid v. Indep. Sch. Dist. No. 361*, 149 F. Supp. 2d 863, 876-77 (D. Minn. 2001) (dismissing substantive due process claim based on allegation that school district "interfered with [plaintiffs'] right to parent" because plaintiffs failed to allege that "they suffered any direct physical injury to their person" or that "the District acted with an intent to legally sever their parent-child relationship with their son"). None of these cases supports the claim that any of Defendant-Appellees' conduct, as alleged by Ms. Calgaro, violated Ms. Calgaro's constitutional rights.

Ms. Calgaro has alleged facts showing, at most, that some actions by the school district, the County, and E.J.K.'s medical providers may have "indirectly affect[ed] the relationship" between her and E.J.K. This is insufficient to state a

claim for a due process violation. *See Harpole*, 820 F.2d at 928 (dismissing due process claim and explaining there is a "significant difference between government actions which directly affect the relationship between a parent and a minor child and actions which indirectly affect the relationship between parent and adult child").

The language of Minnesota's minor consent statute further demonstrates that Ms. Calgaro cannot establish that any government actor compelled Ms. Calgaro's or E.J.K.'s conduct, and therefore her due process claim must fail. Section 144.341 provides that minors who are "living separate and apart from parents" and who are "managing [their own] personal financial affairs" may consent to their own health-related services. *See* Minn. Stat. § 144.341. As with the health programs at issue in *Doe* and *Anspach*, there is no requirement that all minors who live independently must avail themselves of the statute's grant of authority to consent. Nor does the statue prohibit minors from informing or obtaining input from their parents about health-related services, or prohibit parents from participating in the decisions of their minor children to seek such services. Moreover, section 144.341 does nothing to prohibit parents from avoiding a situation in which their minor children are living separate and apart and therefore in a position to fall within the purview of that statute.

Contrary to Ms. Calgaro's arguments, Minn. Stat. § 144.341, Minn. Stat. § 256D.05, and the School District's decisions regarding release of school records did not and cannot terminate her parental rights. An order terminating parental rights can only be issued by a court, and such an order permanently and completely severs the legal parent-child relationship. *See* Minn. Stat. § 260C.317, subd. 1. The statutes and conduct Ms. Calgaro complains of merely recognize that when a minor is living separately from her parents and is managing her own affairs, she has the authority to make certain decisions, including those related to medical care, education, or the receipt of general assistance. As the District Court correctly found, the conduct of Defendant-Appellees did not deprive Ms. Calgaro of her legal status as a parent.

Because the statutes and policies about which Ms. Calgaro complains do not compel or constrain her conduct or the conduct of E.J.K., she cannot plausibly allege a violation of her constitutional rights. *See Irwin*, 615 F.2d at 1168; *see also J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 934 (3d Cir. 2011) (holding parents' liberty interests were not implicated where school district's disciplinary actions "in no way forced or prevented J.S.'s parents from reaching their own disciplinary decision, nor did its actions force her parents to approve or disapprove of her conduct"); *Reardon v. Midland Cmty. Schs.*, 814 F. Supp. 2d 754, 771-72 (E.D. Mich. 2011) (finding no violation of parents' constitutional

rights where two school officials suggested alternatives and offered to support a minor student's decision if she chose to leave her parents' home without informing her parents because "neither was constitutionally obligated to meet [the child's] request for assistance with silence or a cold shoulder" and were not required to "obtain parental consent" to provide the child with counseling); *Curtis*, 652 N.E.2d at 585-86 (holding that condom-availability program did not violate parents' constitutional rights because the program was voluntary and "parents are free to instruct their children not to participate"); *Decker v. Carroll Academy*, No. 02A01-9709-CV-00242, 1999 WL 332705 (Tenn. Ct. App. May 26, 1999) (finding statute allowing physicians to provide birth control to minors without notifying parents was constitutional because it does not impose any requirements or limitations on the conduct of physician or parents).

In this case, Ms. Calgaro has shown only that she, "as a mother objects to" how E.J.K. has exercised her right to make medical, educational, and financial decisions on her own behalf under Minnesota law. (App. at 21 ¶ 32.) That allegation does not demonstrate that the State compelled E.J.K. or Ms. Calgaro into any course of action. *See Anspach*, 503 F.3d at 264. Ultimately,

> [t]he real problem alleged by [the parents] is not that the state actors *interfered* with [them] as parents; rather it is that the state actors did not *assist* [the parents] as parents or affirmatively *foster* the parent/child relationship. However, the [parents] are not entitled to that assistance under the Due Process Clause.

Anspach, 503 F.3d at 266; *see also Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (finding that the Due Process Clause "does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom").

Ms. Calgaro cannot plausibly allege a violation of due process for those same reasons. The State has not imposed any constraints or requirements on her action as a parent. It has merely enacted a statute that recognizes the rights of mature minors to obtain medical treatment. Accordingly, this Court should affirm the ruling of the District Court.

III. MINNESOTA LAW PROVIDES A WELL-ESTABLISHED PROCESS FOR PARENTS SEEKING TO ASSERT PARENTAL AUTHORITY OVER A MINOR CHILD LIVING OUTSIDE THE PARENT'S HOME.

Ms. Calgaro repeatedly asserts that her constitutional rights were violated because the Minnesota laws related to provision of general assistance, medical services, and education "fail[] to provide a corresponding parental private cause of action." (Brief at 26; *see also id.* at 30, 35.) Ms. Calgaro cites no authority to support the proposition that the absence of a "parental private cause of action" creates a due process violation. Moreover, tellingly absent from Ms. Calgaro's brief is any mention of the numerous procedures that were available to her if she wished to exercise parental authority over E.J.K. Ms. Calgaro chose not to avail

herself of the processes and procedures available under Minnesota law, instead leaving E.J.K. to provide for herself for nearly two years.

Minnesota Statutes Chapter 260C contains Minnesota's comprehensive statutory scheme to protect the health, safety, and best interests of minor children. Under this Chapter, Ms. Calgaro could have sought judicial review of E.J.K.'s decision to live independently of her parents. Specifically, if Ms. Calgaro believed that E.J.K. was "absent from the home of a parent . . . without the consent of the parent" or was a child "whose behavior, condition or environment is such as to be injurious or dangerous to the child," she could have sought protective services and assistance from the county child welfare agency. *See* Minn. Stat. § 260C.007, subd. 6; *id.*, subd. 28. Ms. Calgaro also could have filed and prosecuted a private Child In Need of Protection or Services (CHIPS) petition in juvenile court. *See* Minn. Stat. § 260C.141. If Ms. Calgaro had initiated a successful CHIPS petition, a juvenile court would have had the discretion to issue, among other things, an order placing E.J.K. in Ms. Calgaro's home, an order placing E.J.K. in foster care, an order placing E.J.K. in the custody of a relative or other suitable adult custodian, an order for counseling and other supportive services for E.J.K. and Ms. Calgaro, or an order directing E.J.K. to live independently under such supervision the juvenile court considered appropriate. *See* Minn. Stat. § 260C.201, subd. 1.

Had Ms. Calgaro at any time sought the intervention and assistance of the child welfare agency and/or the juvenile court, she would have had a full opportunity to address the concerns she now voices. For almost two years, Ms. Calgaro chose not to take the legal steps available to her under Minnesota law to object to the arrangement whereby E.J.K. lived apart from her parents and managed her own affairs. Rather, Ms. Calgaro now chooses to castigate Defendant-Appellees for treating E.J.K. as someone entitled to make her own healthcare decisions, manage her education, and receive general assistance. Minnesota law allows Defendant-Appellees to do so, however, precisely to address situations such as the present case. Ms. Calgaro cannot maintain a claim against Defendant-Appellees for a constitutional violation when she alone is responsible for abdicating her rights and responsibilities as E.J.K.'s parent. For these additional reasons, Ms. Calgaro cannot state a claim for deprivation of due process, and the District Court properly dismissed her claims.

CONCLUSION

For the foregoing reasons, E.J.K. respectfully requests that this Court affirm the District Court's dismissal of Ms. Calgaro's complaint.

Dated: October 2, 2017

FAEGRE BAKER DANIELS LLP

s/ Michael A. Ponto

Michael A. Ponto, MN# 203944
Martin S. Chester, MN# 031514X
Emily E. Chow, MN# 0388239
Cicely R. Miltich, MN# 0392902
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
612.766.7000
Michael.Ponto@faegreBD.com
Martin.Chester@faegreBD.com
Emily.Chow@faegreBD.com

NATIONAL CENTER FOR LESBIAN RIGHTS

s/ Asaf Orr

Christopher F. Stoll, CA SBN 179046
Asaf Orr, CA SBN 261650
870 Market Street, Suite 370
San Francisco, CA 94102
415.392.6257
CStoll@nclrights.org
AOrr@nclrights.org

Attorneys for Appellee E.J.K.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

☒ this document contains 7,684 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

☒ this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman, Font Size 14.

The undersigned also certifies that this brief has been scanned for viruses and is virus-free.

Dated: October 2, 2017

s/ Michael A. Ponto
Attorney for Appellee E.J.K.

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Michael A. Ponto
Attorney for Appellee E.J.K.

US.114419336.01