UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Michael Bounds, et al.,

Plaintiffs,

v.

The State of Minnesota, et al.,

Defendants.

Court File No. 13-CV-266 (JRT/FLN)

RAMSEY COUNTY DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs bring claims against Defendants under 42 U.S.C. § 1983 and the Minnesota Tort Claims Act. Plaintiffs' claims arise out of their alleged participation in a Drug Recognition Experts (DRE) Program on or about April 26-27, 2012.[1] Plaintiffs allege that Defendants targeted them because they were Occupy Minneapolis protesters, provided them with marijuana, observed its effects on them, and returned them to downtown Minneapolis. No Plaintiff claims that he or she was forced to use marijuana, forced to participate, or threatened with arrest for failure to participate.

Defendants Ramsey County Sheriff's Office and Ramsey County Deputy Sheriff Mark Suchy (hereinafter "Ramsey County Defendants" or "Defendants") move this Court, pursuant to Fed. R. Civ. P. 12(b)(6), for an Order dismissing the claims against them. Ramsey County Defendants submit this motion in lieu of an Answer. The claims

[1] The State Patrol refers its program as a "Drug Recognition Experts" (DRE) program (Docket "Doc." 28, ¶ 2). Plaintiffs refer to the program as a "Drug Recognition Evaluators" (DRE) program (Doc. 1, ¶ 9).

against the Ramsey County Defendants should be dismissed for two reasons: (1) Plaintiffs fail to state claims for which relief can be granted by failing to level any specific allegations against the Ramsey County Defendants and by failing to allege facts that rise to the level of a constitutional, tort, or federal law violation; and (2) Ramsey County Defendants are entitled to qualified immunity.

FACTS AS ALLEGED IN THE COMPLAINT

On or around April 26, 2012, two unknown officers, who were participating in the DRE program, approached Plaintiff Michael Bounds and supplied him with marijuana (Doc. 1, ¶¶27-30). Bounds is a member of the Occupy Minneapolis movement (*Id.* at ¶ 27). The officers did not evaluate Bounds (Id. at ¶ 31). The officers then released Bounds downtown Minneapolis while still high (*Id.*). The officers then gave Bounds a quarter of a baggie of marijuana in exchange for information on the Occupy Minneapolis Movement (*Id.* at ¶31-32).

On or around April 27, 2012, Officers Jacobson and Willers approached Plaintiff Olivier three separate times, offered him drugs, and took him to a testing facility to observe him (*Id.* at ¶¶33-35). On one of those occasions, Plaintiff Olivier was taken to a testing facility but was refused admittance due to his affiliation with the Occupy Minneapolis protest (*Id.* at ¶40). Following their observations, the officers twice returned Olivier to Peavey Plaza where the Occupy protesters were gathered (*Id.* at ¶¶34-35). The third time, officers dropped Olivier off "downtown" (*Id.* at ¶41).

The remaining Plaintiffs only allege that they "had similar experiences" (*Id.* at ¶42). Plaintiffs do not allege that any Ramsey County Defendant offered drugs or even had any contact with them (*Id.* at ¶¶ 28-50).

Plaintiffs claim that the Defendants' conduct violated their rights under 42 U.S.C. § 1983 and the First, Fourth, Eighth and Fourteenth Amendments of the U.S. Constitution (Id. at ¶¶52-54, 57). Plaintiffs also assert that the Defendants are liable under the Minnesota Tort Claims Act (Doc. 1, ¶¶63, 65).

STANDARD OF REVIEW

Federal Rule of Civil Procedure 8 requires that a complaint present "a short and plain statement of the claim showing that the pleader is entitled to relief." To meet this standard, and survive a motion to dismiss under Rule 12(b)(6), "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) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a "sheer possibility." *Id.*

A complaint states a plausible claim for relief if its "factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. Several principles guide courts in determining whether a complaint meets this standard. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). First, the court must take the plaintiff's factual allegations as true. *Iqbal*, 556 U.S. at 678-79. This tenet does not apply, however, to legal conclusions or "formulaic

recitation of the elements of a cause of action." *Id.* (quoting *Twombly,* 550 U.S. at 555). Such allegations may properly be set aside. *Id*.

In addition, some factual allegations may be so indeterminate that they require "further factual enhancement" in order to state a claim. *Id.* (quoting *Twombly*, 550 U.S. at 557) *see also Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). As this Court has ruled, "a naked assertion devoid of further factual enhancements . . . does not state a viable claim for relief." *Minn. Majority v. Mansky*, 789 F.Supp.2d 1112, 1119, fn. 5 (D. Minn. 2011) (quoting *Iqbal*, 556 U.S. at 678)).

Finally, the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible. *See Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 285 (D.C.Cir.2009) (factual allegations should be "viewed in their totality"); *cf. Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007) ("The inquiry [under the Private Securities Litigation Reform Act] is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard."). Ultimately, evaluation of a complaint upon a motion to dismiss is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

ARGUMENT

I. PLAINTIFFS' CLAIMS AGAINST THE RAMSEY COUNTY DEFENDANTS SHOULD BE DISMISSED IN THEIR ENTIRETY BECAUSE PLAINTIFFS DID NOT PLEAD FACTS SHOWING PERSONAL INVOLVEMENT.

Plaintiffs have failed to plead any facts alleging that Deputy Mark Suchy or any other Ramsey County official was personally involved with the alleged misconduct.

The only allegation in the Complaint that relates directly to Deputy Suchy or Ramsey County follows:

> 4. At all relevant times, Defendants . . . Marc [sic] Suchy of the Ramsey County Sheriff's Department . . .[was a] duly authorized police officer[ ] deputized to perform official functions and acting under color of state law. These Defendants are being sued in their official and individual capacities (Docket 1, ¶ 4).

The remaining allegations in the Complaint fall into two categories: (1) they address the actions of named individual defendants—which do not include the Ramsey County Defendants; or (2) they cast a wide net, alleging in a conclusory fashion that all 100+ defendants "individually and collectively designed, developed, and/or ran a program called the "Drug Recognition Evaluators" program and that therefore they must be liable to Plaintiffs (Doc. 1, ¶ 9). Plaintiffs allege guilt by association, claiming that any unspecified officers who did not actually participate in the alleged unlawful conduct "knew about, and failed to stop it, in reckless disregard of the Plaintiffs rights" (Doc. 1, ¶¶ 15-16). These types of conclusory and non-specific allegations are insufficient to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

A complaint that only lists a defendant's name in the caption or elsewhere in the complaint, without alleging that the defendant was personally involved in the alleged

misconduct, fails to state a claim against a defendant. *Krych v. Hvass*, 83 F. App'x 854, 855 (8th Cir. 2003) (citing *Potter v. Clark*, 497 F.2d 1206, 1207 (7th Cir. 1974) (per curiam) (holding that court properly dismissed complaint that was silent as to defendant except for his name appearing in the caption)).

A § 1983 claim against a police officer must allege a set of facts which, if proven true, demonstrate that the officer violated the plaintiff's constitutional rights while acting under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988). In a civil rights action brought pursuant to 42 U.S.C. § 1983, the complaint must contain allegations setting out a defendant's direct involvement in the alleged unconstitutional actions. *Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985). Mere knowledge is not sufficient to establish personal participation. *Ashcroft v. Iqbal*, 550 U.S. 662, 677 (2009). "Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 550 U.S. at 676. Plaintiffs have not alleged any direct or personal involvement of Deputy Suchy or any other Ramsey County official in the claimed unconstitutional actions.

Additionally, courts have held that "a well-pleaded complaint must contain something more than mere conclusory statements that are unsupported by specific facts." *Kaylor v. Fields*, 661 F.2d 1177, 1183 (8th Cir. 1981). The United States Supreme Court held that a similarly conclusory pleading was insufficient to state a claim in *Iqbal*, 550 U.S. at 679-80 (2009). In that case, plaintiff pleaded that defendant Ashcroft and others "knew of, condoned, and willfully and maliciously agreed to subject him to 'harsh

conditions of confinement as a matter of policy solely on account of religion, race, and national origin.'" The complaint also identified Ashcroft as the "principal architect." *Id.* at 680. The Supreme Court held that those assertions were conclusory and formulary allegations "not entitled to the assumption of truth." *Id.* The Court concluded that plaintiff would have to provide more factual content that would "nudge" his claim of purposeful discrimination "across the lines from conceivable to plausible." *Id.* (citing *Twombly*, 550 U.S. at 570 (clarifying the necessity of sufficient allegation of fact rather than formulas)). Similarly, Plaintiffs in this case have failed to make any allegations of fact showing that it is plausible that Deputy Suchy took any action or failed to take any action with the intent of violating their federal civil rights. Plaintiffs do not even allege that they ever had contact with Deputy Suchy or anyone else from the Ramsey County Sheriff's Office.

In sum, Plaintiffs' Complaint fails to state any facts upon which a plausible conclusion can be drawn that Deputy Suchy or the Ramsey County Sheriff's Department engaged in any misconduct. Additionally, the facts as alleged by Plaintiffs do not provide the Court with sufficient information to allow the Court to draw the reasonable inference that Ramsey County Defendants are liable for the misconduct alleged. For the foregoing reasons, the claims against the Ramsey County Defendants should be dismissed in their entirety and with prejudice.

II. RAMSEY COUNTY DEPUTY MARK SUCHY IS ENTITLED TO QUALIFIED IMMUNITY.

Plaintiffs' § 1983 claims should be dismissed because Deputy Suchy is entitled to qualified immunity. "Under the doctrine of qualified immunity, a county employee may be held personally liable for a constitutional violation only if his own conduct violated a clearly established constitutional right" of which a reasonable person would have known. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 482 (8th Cir. 2010); *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Qualified immunity is decided by the district court, and it is "immunity from suit rather than a mere defense to liability." *Pearson*, 555 U.S. at 237 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). "Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation." *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Like absolute immunity, qualified immunity is effectively lost if a case is erroneously permitted to go to trial. *Id.* The intent behind a qualified immunity analysis is to balance the need to hold officers accountable when they exercise power irresponsibly and the "need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231.

A. Deputy Suchy Is Entitled To Qualified Immunity Because His Conduct Did Not Violate The Plaintiffs' Constitutional Rights.

As argued above**,** Plaintiffs have not pleaded any facts upon which a plausible conclusion or even an inference can be drawn that Deputy Suchy or the Ramsey County Sheriff's Department engaged in any misconduct. Plaintiffs cannot even establish by inference that Deputy Suchy ever had contact with them. For this reason alone, the

claims should be dismissed and Deputy Suchy would be entitled to qualified immunity. But even if this Court concludes that it plausible or inferable that Deputy Suchy and Ramsey County engaged in the conduct alleged in the Complaint, Plaintiffs do not establish that their federal rights were violated.[2]

1. Plaintiffs' First Amendment claim fails.

Plaintiffs claim that all Defendants violated their constitutional right to free speech and peaceable assembly because Defendants "specifically target[ed] Occupy Minneapolis protesters" while they were exercising their First Amendment rights (Doc. 1, ¶ 13). Plaintiffs' claim fails, however, because Plaintiffs do not show that Deputy Suchy or that any other officer engaged in any adverse action that was motivated by their exercise of free speech.

It is a well-settled principle that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions .... on the basis of his constitutionally protected speech." *Osborne v. Grussing*, 477 F.3d. 1002, 1005 (8th Cir. 2007) (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). To prevail on a § 1983 claim for retaliation in violation of the First Amendment, Plaintiffs must demonstrate (1) that they were engaged in a protected activity; (2) that the government official took adverse action against them that would chill a person of ordinary firmness from continuing in the activity; and (3) that the adverse action was motivated at least in part by

[2] Ramsey County Defendants deny that Deputy Suchy ever had any contact with any of the Plaintiffs. The analysis below, is for the sake of argument only, and demonstrates that even if Deputy Suchy had contact with Plaintiffs, he is entitled to qualified immunity.

the exercise of the protected activity. *Santiago v. Blair*, 707 F.3d. 984, 991 (8th Cir. 2013) (quoting *Revels v. Vincenz,* 382 F.3d 870, 876 (8th Cir. 2004)). To show that an adverse action is causally connected to the protected activity, plaintiffs must prove that they were "singled out" because of the exercise of their constitutional rights. *Kilpatrick v. King*, 499 F.3d. 759, 767 (8th Cir. 2007).

In this case, Defendants do not dispute that protesting in a peaceable manner is a protected activity within the meaning of the First Amendment. *Cross v. Mokwa,* 547 F.3d. 890, 896 (8th Cir. 2008); *Fischer v. City of St. Paul*, 894 F.Supp.1318, 1325 (D. Minn. 1995). Plaintiffs, however, have asserted no other facts to support their First Amendment retaliation claim. By Plaintiffs' own admissions, they were not "chilled" from continuing in the Occupy Minneapolis protests because police dropped off Plaintiffs downtown Minneapolis where they could continue to protest, if they wished, after their encounters with the DRE officers. (Doc. 1, ¶ 31, 34-35, 41-42). In fact, after at least two DRE encounters, police went out of their way to return the protesters to the site of the protest. Plaintiff's own Complaint admits that police twice "returned [Plaintiff Olivier] to Peavey Plaza, where the Occupy protesters were gathered" (Doc. 1, ¶ 34-35, 42).

Lastly, Plaintiffs suffered no "adverse action" due to their exercise of free speech. The DRE program is designed to educate law enforcement about how to detect when an individual is under the influence of illegal narcotics (Doc. 1, ¶ 11). Participation in the program is voluntary, and Plaintiffs could have refused to participate. Plaintiffs, however, agreed to be observed under the influence of marijuana, and Plaintiff Olivier even admits to participating in the DRE observation on three separate occasions (Doc. 1, ¶ 34-36).

Plaintiffs' First Amendment retaliation claim should be dismissed because Plaintiffs have failed to allege facts that would rise to the level of a constitutional violation. While Plaintiffs were engaged in constitutionally protected activity, Plaintiffs suffered no adverse action that would chill a person of ordinary firmness from engaging in that activity.

2. Plaintiffs' Fourth Amendment claim fails.

Plaintiffs allege that their Fourth Amendment right to be free from unreasonable searches and seizures was violated by Defendants (Doc. 1, ¶ 57). But Plaintiffs' encounters with law enforcement, as alleged, do not rise to the level of a seizure.

The Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; *see United States v. Ameling*, 328 F.3d 443, 447 (8th Cir. 2003) (explaining that Fourth Amendment applies to the states through the Fourteenth Amendment). Not every encounter between a police officer and a citizen constitutes an unreasonable seizure under the Fourth Amendment: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968).

A seizure, within the meaning of the Fourth Amendment, takes place "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *United States v. Mendenhall*, 446 U.S. 554, 552 (1980) (quotation omitted). "A person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a

reasonable person would have believed he was not free to leave." *Id.* at 554. The Supreme Court has made it abundantly clear "that mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). "So long as a reasonable person would feel free to disregard the police and go about his business," the encounter is consensual. *Id.* (quoting *California v. Hodari D.*¸499 U.S. 621, 628 (1991)). Simply accompanying officers to another location, as Plaintiffs did, does not rise to the level of a Fourth Amendment violation. *See United States v. Hendrix*, 726 F.2d 433, 433-34 (8th Cir. 1984) (holding that defendant was not seized when he agreed to speak with DEA agents, accompanied them indoors to a small room, and spoke with them for approximately forty-five minutes).

Here, Plaintiffs' Complaint alleges no facts to support that Plaintiffs were seized within the meaning of the Fourth Amendment. No Plaintiff states that he or she was arrested or even threatened with arrest. While the Complaint makes the conclusory allegation that the DRE program authorized officers to intimate to volunteers "that they would be arrested if they did not participate," there is no allegation in the Complaint that Plaintiffs actually believed they would be arrested if they did not participate (Doc. 1, ¶ 17). Moreover, Plaintiffs own allegations establish that they were engaging in activities that would not have even put them at risk of arrest. Plaintiffs were exercising their constitutional right to peaceably protest and as such, were not under risk of arrest for that activity (Doc. 1, ¶ 20). Additionally, Plaintiffs Bounds and Olivier were specifically asked by Defendants if they were in the possession of illegal drugs; both answered no (Doc. 1, ¶ 29, 37). Plaintiffs have pleaded no facts establishing that they were arrested,

were threatened with arrest, or were even engaging in activity that could have resulted in an arrest.

A Fourth Amendment analysis requires the Court to consider "all of the circumstances surrounding the incident" in determining whether there has been a seizure. *Merdenhall,* 446 U.S. at 544. Plaintiffs merely allege, in conclusory fashion, that they "were taken into police custody" and that Olivier was "placed in the back of a squad car" (Doc. 1, ¶ ¶ 15, 38). Other than conclusory allegations, Plaintiffs allege no additional facts concerning the surrounding circumstances that would bear upon a determination of whether they were actually seized within the meaning of the Fourth Amendment.

Plaintiffs have not pleaded sufficient facts to establish a Fourth Amendment violation. As such, Plaintiffs Fourth Amendment claim must be dismissed.

3. Plaintiffs' Eighth Amendment claim fails.

Plaintiffs allege that Defendants deprived them of their rights under the Eighth Amendment. But the Eighth Amendment is applicable only to prisoners, and Plaintiffs do not claim to be convicted prisoners. This claim fails.

The Eighth Amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. In *Ingraham v. Wright,* the Supreme Court limited the reach of the Eight Amendment by stating "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." 430 U.S. 651, 671 n. 40 (1977).

Here, Plaintiffs' Eighth Amendment claim fails because Plaintiffs do not allege that they were convicted prisoners at the time of their DRE encounter.

4. Plaintiffs' Fourteenth Amendment claim fails.

Plaintiffs allege that the Defendants' conduct deprived them of their Fourteenth Amendment rights, but they fail to identify a basis for the deprivation (Doc. 1, ¶ 57).

The due process clause of the Fourteenth Amendment provides that "no state shall deprive a person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. The due process clause bars "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). If a right is "so rooted in the tradition and conscience of our people as to be ranked fundamental," then the right is protected by the due process clause. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Fundamental rights are only those clearly enumerated in the Bill of Rights or other rights recognized by the Supreme Court as requiring constitutional protection. *Brown v. Nix*, 33 F.3d 951, 953 (8th Cir.1994); *Friedman v. City of Overland*, 935 F.Supp. 1015, 1019 (E.D.Mo. 1996).

The right to be free of state-sponsored invasion of a person's bodily integrity is protected by the [constitutional] guarantee of due process." *In re Cincinnati Radiation Litig.*, 874 F.Supp.796, 810–11 (S.D. Ohio 1995). As the Supreme Court has noted, "[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272, (1994) (*citing Planned Parenthood v. Casey*, 505 U.S. 833, 847–49 (1992)). To prevail on a claim for violation of bodily integrity through

substantive due process, a plaintiff must show that "the defendant acted with deliberate indifference to a constitutional right in a manner that shocks the conscience." *Revels v. Vincenz*, 382 F.3d 870, 875 (8th Cir. 2004) (quoting *Putnam v. Keller*, 332 F.3d 541, 548 (8th Cir. 2003)).

Courts have consistently held that substantive due process is not violated when an individual knowingly or voluntarily participates in an investigational experiment. *See e.g. Wright* at 1296 (holding that "failure to make disclosures necessary to the informed consent process in a therapeutic, experimental setting, does not implicate rights that are so rooted in the tradition and conscience of our people as to be ranked as fundamental." *Id.*); *Heinrich v. Sweet,* 62 F.Supp.2d 282, 315 (D. Mass. 1999) (holding that plaintiffs could sustain a substantive due process claim against government when plaintiffs were deceived about the true nature of the radiation experiments); *Stadt v. University of Rochester*, 921 F.Supp. 1023 (W.D.N.Y. 1996) (holding that plaintiff could sustain § 1983 claim against government physician where physician told plaintiff she would receive treatment for a skin disease, but physician actually injected plaintiff with plutonium without her knowledge or consent); *In Re Cinnanati* at 894 (allowing plaintiffs to maintain substantive due process claim when plaintiffs were not informed that they were involved in military experiment to undergo radiation treatment in lieu of cancer treatment).

"Knowledge that one is participating in a human subjects experiment, whether therapeutic or not, is a crucial fact in determining whether a constitutional right is at stake." *Wright* at 1296 (internal quotations omitted). Here, Plaintiffs allege no facts to

support a substantive due process claim. Even assuming that the DRE program is a human subjects experiment, Plaintiffs were aware that they were participating in a drug identification program and do not allege that they were deceived by Defendants. Plaintiff Olivier even participated in the program on multiple occasions (Doc. 1, ¶ 34-9).

Plaintiffs allege they were given marijuana by Defendants, which they then ingested and became high (Doc. 1, ¶ 30, 34-39, 42). Plaintiffs, however, do not allege that they received unknown substances or that they were forced to use drugs.

Plaintiffs' substantive due process rights were not violated. This claim should be dismissed.

5. Plaintiffs' 45 C.F.R. § 46 claim fails.

Plaintiffs claim that Defendants were engaging in human research experimentation in violation of 45 C.F.R. § 46.101, et seq. (also known as the "Common Rule") (Doc. 1, ¶ ¶ 25-26). Plaintiffs appear to bring this action under §1983 of the Civil Rights Act. But because 45 C.F.R. § 46.101, et seq. does not give rise to a federal right or a private cause of action, Plaintiffs' claim fails.

Section 1983 provides a remedy for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. To pursue a remedy through § 1983, a plaintiff "must assert a violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone,* 520 U.S. 329, 340 (1997) (emphasis in original). Only Congress is able to create new rights that are enforceable through § 1983; agency regulations will not give rise to a private cause of action unless the authorizing statute confers such a right. *See Gonzaga Univ. v. Doe,* 536

U.S. 273, 290 (2002) ("if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms"); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("private rights of action to enforce federal law must be created by Congress").

Plaintiffs merely allege a violation of a federal *law*, and not a federal right. The Common Rule regulates the manufacturing of investigational new drugs used in clinical trials, and establishes certain protections for the human subjects enrolled in these clinical trials. 45 C.F.R. § 46.101, *et seq.; see also Wright v. Fred Hutchinson Cancer Research Center*, 269 F.Supp.1286, 1289 (2002). These regulations do not apply to the DRE program, but even if they did, they do not give rise to a federal right enforceable through § 1983. *Wright*, 269 F. Supp. at 1289-90.

Because Plaintiffs seek redress for the violation of a federal regulation, which does not give rise to a private cause of action enforceable through §1983, this claim must be dismissed.

B. Deputy Suchy Is Entitled to Qualified Immunity Because Plaintiffs Fail To State Any Constitutional Violation, Let Alone Violation Of A Clearly Established Constitutional Right.

Because Plaintiffs articulate no constitutional violation, the analysis can end here. If this Court determines, however, that Plaintiffs allege a proper claim for violation of their constitutional rights against Deputy Suchy, he is entitled to the protection of qualified immunity because it is not clearly established that a reasonable police officer would violate an individual's constitutional rights under similar circumstances. "Clearly established Federal law . . . refers to the holdings, as opposed to the dicta, of [the

Supreme] Court's decisions at the time of the relevant state-court decision." *Carey v. Musladin*, 127 S. Ct. 649, 653 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

Qualified immunity ensures "that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. at 206. "For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1958)). The unlawfulness must be apparent in light of pre-existing law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

It was not clearly established that Plaintiffs' participation in the DRE program, as alleged, would violate their constitutional rights under the First, Fourth, Eighth, or Fourteenth Amendments. The Minnesota State Patrol's DRE training program and others around the country have been judicially recognized as reliable and effective law enforcement tools. *See State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994) (discussing history of DRE programs and holding that Minnesota's DRE protocol is not a new or novel scientific technique and that the protocol meets the Minnesota Rules of Evidence relative to admissibility). Because Deputy Suchy did not violate a clearly established constitutional right through Plaintiffs' participation in the DRE program, he is entitled to qualified immunity.

III. THE RAMSEY COUNTY SHERIFF'S OFFICE IS NOT AN ENTITY SUBJECT TO SUIT.

Plaintiffs improperly name departments and sheriff's offices as Defendants. Municipal police departments are not legal entities subject to suit but are instead departments or subdivisions of the city. *Ketchum v. City of West Memphis*, 974 F.2d 81, 82 (8th Cir. 1992); *Anderson v. City of Hopkins*, 805 F.Supp.2d 712, 719 (D. Minn. 2011). Similarly, a sheriff's department is not subject to suit since it does not have a legal existence separate from the county. *Franco v. Grant*, No. 09-0552, 2010 WL 653855, *6 (D. Minn. Feb. 22, 2010). Therefore, the Ramsey County Sheriff's Office is not a legal entity subject to suit.

IV. PLAINTIFFS DO NOT ASSERT A VIABLE *MONELL* CLAIM.

Even if Plaintiffs' Complaint were amended to name Ramsey County, Plaintiffs' claims against it would fail. Plaintiff's official-capacity suit against Deputy Suchy also fails for the same reasons. Suits against government officials in their official capacities are actually suits against the government entity itself. *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985). For a government entity to be liable for depriving an individual of Constitutional rights, a plaintiff must show that the government entity had a policy or custom that played a part in violating federal law. *See Monell v. New York, City Dep't of Social Services*, 436 U.S. 658, 694 (1978). Plaintiffs appear to allege a *Monell* claim against the Ramsey County Sheriff's Office based on negligent training or failure to train (Doc. 1, ¶ 55).

A plaintiff must prove that a municipal policy or custom was the "moving force [behind] the constitutional violation." *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999). "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985); *Davison v. City of Minneapolis*, 490 F.3d 648, 659 (8th Cir. 2007).

Plaintiffs plead no facts alleging a widespread Ramsey County policy or custom that would require or cause their constitutional rights to be violated. Moreover, Plaintiffs do not explain how it is even plausible that a Ramsey County Sheriff's Department policy or custom would have any connection to or influence over the Minnesota State Patrol's DRE training program, let alone how it could be the "moving force" behind the alleged violations of the Plaintiffs' rights.

Additionally, with no constitutional violation by Deputy Suchy, there can be no § 1983 or *Monell* failure to train municipal liability. *See Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (8th Cir. 2007). Because Plaintiffs fail to allege an unconstitutional act attributable to an unconstitutional Ramsey County policy or custom or failure to train, Plaintiffs' § 1983 claims against Ramsey County and against Deputy Suchy in his official capacity must be dismissed.

V. PLAINTIFFS' FAIL TO STATE A CLAIM FOR RELIEF UNDER THE MINNESOTA TORT CLAIMS ACT.

Plaintiffs assert claims against all Defendants under the Minnesota Tort Claims Act, Minn. Stat. § 3.763 (Doc. 1, ¶64-66). These claims fail as a matter of law against the Ramsey County Defendants for two reasons.

First, the Minnesota Tort Claims Act does not create an independent cause of action. Instead, the Minnesota Tort Claims Act establishes a limited waiver of sovereign immunity on behalf of officials of the State of Minnesota and allows Plaintiffs to pursue tort claims against the State in certain circumstances and after certain procedures are followed. *See* Minn. Stat. § 3.736. Thus, Plaintiffs' allegation that Defendants have "violated" the Tort Claims Act fails as a matter of law (See Compl., ¶ 656.) There is no independent cause of action for violating the Tort Claims Act.

Second, to the extent the Minnesota Tort Claims Act might theoretically allow Plaintiffs to pursue tort claims in this case, any such tort claims would have to be asserted against Minnesota State officials; not county actors. *See* § 3.736. The Minnesota Tort Claims Act does not apply to Ramsey County or its officials. *Id.*

As a result, Count Two of Plaintiffs' Complaint fails as a matter of law as to the Ramsey County Defendants.

CONCLUSION

For the foregoing reasons, Ramsey County Defendants respectfully request that this Court grant their Motion to Dismiss and dismiss Plaintiffs' claims in their entirety, with prejudice, together with costs and disbursements.

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Dated: March 28, 2013

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