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AN INSUFFICIENT SCREENING: THE CONSTITUTIONALITY OF MICHIGAN'S NEWBORN SCREENING PROGRAM

Abstract: In June 2019, the Sixth Circuit Court of Appeals, in *Kanuszewski v. Michigan Department of Health and Human Services*, declined to answer whether Michigan's mandatory newborn screening program violated parents' fundamental rights to control the medical care of their children, as well as whether the screening constituted an unconstitutional infringement of their children's Fourth Amendment protections. As a matter of first impression, the Sixth Circuit dismissed these claims under the doctrine of qualified immunity, declining to exercise its discretion to answer the underlying constitutional claims. Although the Sixth Circuit correctly dismissed the defendants on qualified immunity grounds, it missed an opportunity to answer constitutional questions bearing on the effectiveness of Michigan's public health policy. This Comment argues that Michigan has not sufficiently narrowly tailored its mandatory newborn screening program to its purported goal of protecting the health and well-being of its newest citizens.

INTRODUCTION

Every newborn baby in Michigan, ideally within twenty-four to thirty-six hours of birth, undergoes statutorily mandated blood screening.¹ Under penalty of misdemeanor, a health professional must collect a few drops of blood from the baby's heel and then send the sample to the Michigan Department of Health and Human Services to be tested for over fifty different disorders.² The professionals conduct the initial blood draws and subsequent testing without parental consent; the statute expressly rejects any informed consent requirements.³

The Sixth Circuit considered the constitutionality of Michigan's newborn screening program in 2019 in *Kanuszewski v. Michigan Department of Health*

¹ MICH. COMP. LAWS § 333.5431(1) (2018); *Michigan Newborn Screening Questions and Answers*, MICH. DEP'T OF HEALTH & HUMAN SERVS., https://www.michigan.gov/mdhhs/0,5885,7-339-73971_4911_4916-233319--,00.html#How_many_babies_are_found [<https://perma.cc/6GVJ-3VW2>] [hereinafter *Screening Questions and Answers*].

² MICH. COMP. LAWS § 333.5431(5); *Disorder List*, MICH. DEP'T OF HEALTH & HUMAN SERVS., https://www.michigan.gov/documents/mdch/NBS_Disorder_List_1106_181347_7.pdf; *Screening Questions and Answers*, *supra* note 1.

³ MICH. COMP. LAWS § 333.5431(2). The newborn screening statute defines informed consent by reference to a broader predictive genetic testing statute. *Id.* § 333.5431(2) n.1. Informed consent requires that a patient or the patient's legal guardian sign a written document signifying that the physician adequately explained the effectiveness, impact, and purpose of the test, as well as who can access the results and any potential uses for the results. MICH. COMP. LAWS § 333.17020(2).

& Human Services (*Kanuszewski II*).⁴ Parents of infants born in Michigan challenged the initial blood draws and testing, among other components of Michigan's newborn screening program, for impermissibly bypassing their consent.⁵ They contended that Michigan's program violated not only their fundamental rights to direct the medical care of their children, but also their newborn infants' Fourth Amendment rights.⁶

Part I of this Comment introduces the facts of *Kanuszewski II*, as well as background legal principles implicated by the asserted constitutional violations.⁷ Part II closely examines the Sixth Circuit Court of Appeals' handling of two constitutional questions regarding Michigan's newborn screening program: the parents' Fourteenth Amendment claims and the infants' Fourth Amendment claims.⁸ Lastly, Part III discusses the Sixth Circuit's missed opportunity to address the merits of the constitutional claims, and argues that Michigan's screening program may not be sufficiently narrowly tailored to meet its compelling interest of protecting its citizens' health and well-being.⁹

I. LEGAL CONTEXT AND FRAMEWORK OF *KANUSZEWSKI II*

Section A of this Part will first provide the procedural and factual context of *Kanuszewski II*.¹⁰ Next, this Part will describe the legal landscape in relation to the different constitutional issues in *Kanuszewski II*.¹¹ More specifically, Section B will discuss parents' fundamental rights to direct the upbringing of their children, Section C will describe blood draws as they relate to the Fourth Amendment as well as a "special needs" test applied in non-law enforcement situations, and finally Section D will outline the doctrine of qualified immunity.¹²

A. Procedural History and Factual Background of *Kanuszewski II*

The State of Michigan operates a newborn screening program, originating in the 1960s, that statutorily mandates health professionals to take blood sam-

⁴ 927 F.3d 396, 403–04 (6th Cir. 2019) (*Kanuszewski II*).

⁵ *Id.*; *Kanuszewski v. Mich. Dep't of Health & Human Servs.*, 333 F. Supp. 3d 716, 719 (E.D. Mich. 2018) (*Kanuszewski I*). The parents also challenged the storage of their infants' blood samples and expressed fear that the Michigan Department of Health and Human Services might sell the blood samples in the future. *Kanuszewski II*, 927 F.3d at 404.

⁶ *Kanuszewski II*, 927 F.3d at 405; see U.S. CONST. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ."); U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

⁷ See *infra* notes 13–44 and accompanying text.

⁸ See *infra* notes 45–68 and accompanying text.

⁹ See *infra* notes 69–102 and accompanying text.

¹⁰ See *infra* notes 13–21 and accompanying text.

¹¹ See *infra* notes 23–44 and accompanying text.

¹² See *infra* notes 23–44 and accompanying text.

ples from newborn babies to test for various diseases.¹³ After being tested, the blood samples are transferred to the Michigan Neonatal Bank and stored “indefinitely” for testing and further research.¹⁴ The plaintiffs in *Kanuszewski II* were three parents, suing as parent-guardians to their minor children, asserting they did not know of, nor consent to, Michigan’s testing and subsequent storage of their newborns’ blood.¹⁵

The plaintiffs initially brought five counts against the Michigan Department of Health and Human Services, as well as various individuals in their official and individual capacities (collectively, the defendants) alleging that: (I) the defendants violated their Fourteenth Amendment liberty interests to refuse, on behalf of their children, unwanted medical procedures by drawing blood without parental consent; (II) their consent was incomplete, or otherwise improperly and falsely obtained; (III) the defendants violated their Fourth Amendment rights to be free from unreasonable searches and seizures when the defendants conducted the initial extraction and seizure for testing without parental consent; and (IV/V) the defendants indefinitely stored the infants’

¹³ MICH. COMP. LAWS § 333.5431. Michigan is not unique in this regard; every state has implemented some variation of a newborn screening program. See Sonia M. Suter, *Did You Give the Government Your Baby's DNA? Rethinking Consent in Newborn Screening*, 15 MINN. J. L. SCI. & TECH. 729, 737 (2014) (providing an overview of newborn screening in the United States). Every state tests for at least twenty-nine conditions, and Michigan tests for over fifty. *Id.*; *Disorder List*, MICH. DEP'T OF HEALTH & HUMAN SERVS., https://www.michigan.gov/documents/mdch/NBS_Disorder_List_1106_181347_7.pdf; Brief for Defendants-Appellees at 12, *Kanuszewski II*, 927 F.3d 396 (6th Cir. 2019) (No. 18-1896) (supporting Michigan’s program by highlighting nationwide newborn screening requirements). The Michigan statute rejects any informed consent requirements for its mandatory screening tests. MICH. COMP. LAWS § 333.5431(1)–(2). This “mandatory without exception” requirement is “one extreme,” and violation of the statute is a misdemeanor. *Id.* § 333.5431(5); see Suter, *supra*, at 746–47 (identifying “mandatory without exception” screening state statutes and state statutes requiring affirmative parental consent as the two extremes of newborn screening statutes). Many states employ an “opt-out” approach in which no affirmative parental consent is required. Suter, *supra*, at 746–47. In states where testing is not mandatory, although many states permit parents to opt out of testing on any basis, some states restrict opting out to religious reasons only. *Id.* In Michigan, some families must pay for the newborn screening program themselves. Michigan Newborn Screening, MICH. DEP'T OF HEALTH & HUMAN SERVS., (Sept. 2017), https://www.michigan.gov/documents/newborn_screening_broc_110897_7.pdf (explaining that the hospital charge incorporates the cost of Michigan’s newborn screening program).

¹⁴ Appellants’ Brief at 14, *Kanuszewski II*, 927 F.3d 396 (No. 18-1896).

¹⁵ *Kanuszewski II*, 927 F.3d at 403; Corrected Complaint ¶¶ 3–4, *Kanuszewski I*, 333 F. Supp. 3d 716 (No. 1:18-cv-10472-TLL-PTM). The record is unclear on whether the parents had the opportunity to opt out of donating the blood to further research. *Kanuszewski II*, 927 F.3d at 404 n.3. After a newborn screening test, parents may demand the disposal of their children’s leftover blood. State Defendants’ Motion to Dismiss First Amended Complaint at *8, *Kanuszewski I*, 333 F. Supp. 3d 716 (E.D. Mich. 2018) (No. 1:18-cv-10472-TLL-PTM). Further, in 2010, Michigan implemented an “opt-in” consent process for parents to consent to their children’s blood being used for further research, but not for the screening itself. *Id.* Although the parents conceded that they may have consented to their children’s blood being used for research, they contended that they nevertheless were not offered adequate information to provide informed consent. Appellants’ Brief, *supra* note 14, at 18.

blood without parental consent.¹⁶ The plaintiffs sought declaratory relief, various forms of prospective injunctive relief, and damages.¹⁷ The defendants subsequently filed motions to dismiss, which the district court granted in full.¹⁸

On appeal, the Sixth Circuit Court of Appeals affirmed the district court's dismissal of each of the plaintiffs' Fourteenth and Fourth Amendment claims, except those involving the defendants' continuing storage of the infants' samples.¹⁹ The Sixth Circuit declined to determine whether the initial blood samples drawn from the infants violated the parents' substantive due process rights, in light of the individual defendants' entitlement to qualified immunity for that claim.²⁰ Similarly, the court did not opine on whether the mandatory initial blood draws violated the infants' Fourth Amendment rights.²¹

¹⁶ *Kanuszewski I*, 333 F. Supp. 3d at 719. The issue of whether the screening violated the infants' Fourth Amendment rights was inexorably intertwined with the issue of parental consent. See *Kanuszewski II*, 927 F.3d at 423 (framing the infants' Fourth Amendment claims to account for parental consent). The Sixth Circuit made clear in a different discussion that infants cannot make their own medical decisions by virtue of being infants, and it is their parents that make these decisions on their behalf. *Id.* at 414–15 (exercising discretion to hold that the children's substantive due process rights to direct their own medical care were not violated because children cannot take care of themselves).

¹⁷ *Kanuszewski II*, 927 F.3d at 405 (requesting declaratory judgment that the defendants violated plaintiffs' Fourth and Fourteenth Amendment rights, injunctive relief to "stop illegal processes and procedures" and require destruction of blood samples along with any associated data obtained without parental consent, and damages for violation of the plaintiffs' asserted constitutional rights).

¹⁸ *Kanuszewski I*, 333 F. Supp. 3d at 730. The state defendants moved to dismiss on the grounds that the plaintiffs failed to state a claim for violations of their Fourth and Fourteenth Amendment rights. State Defendants' Motion to Dismiss First Amended Complaint, *supra* note 15, at *9. In addition, the state defendants maintained that the Eleventh Amendment barred each claim except those for prospective injunctive relief against the Michigan Department of Health and Human Services, as well as individual defendants. *Id.* (arguing that "lawsuits against state officials in their official capacity are deemed to be lawsuits against the State itself and are also barred by the Eleventh amendment"). They also argued that qualified immunity barred damages against the individual defendants because there was no violation of clearly established constitutional rights. *Id.*

¹⁹ *Kanuszewski II*, 927 F.3d at 421–22, 425–26. The Sixth Circuit began its opinion with an extensive discussion of the plaintiffs' standing to bring the different claims. *Id.* at 405–12 (finding that for Fourth and Fourteenth Amendments claims stemming from the initial blood draws, the children and parents had standing to seek only damages, and for Fourth and Fourteenth Amendment claims stemming from ongoing storage of blood samples, the children and parents had standing to seek injunctive and declaratory relief as well as damages). The court then divided the claims for which the plaintiffs had standing into two groups, those relating to the Fourteenth Amendment and those to the Fourth Amendment. *Id.* at 412. From there, the court further separated the Fourteenth Amendment claims based on whether the claims stemmed from the alleged violation of the infants' rights or the parents' rights. *Id.* Finally, the court split the Fourth Amendment analysis into two parts, examining the initial blood draws independently of the ongoing blood sample retention. *Id.* at 422. The Sixth Circuit remanded for further review of what, if any, compelling interest the defendants had in ongoing storage of the infants' blood. *Id.* at 421. The Sixth Circuit also instructed the parties to determine whether the parents had consented to further research on their infants' blood after the initial screening. *Id.* at 420. If the parents did not provide informed consent, then the Sixth Circuit suggested that any ongoing storage or sale of the infants' blood would violate the parents' substantive due process rights. *Id.*

²⁰ *Id.* at 416 (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2008)) (declining to exercise discretion in the context of qualified immunity because the initial screening did not clearly violate the par-

*B. Parents' Fundamental Rights to Make Decisions as to the "Care, Custody, and Control" of Their Children*²²

The Fourteenth Amendment to the United States Constitution encompasses both procedural and substantive due process.²³ The substantive component protects "certain fundamental rights and liberty interests" from governmental intrusion.²⁴ In 1923, in the case of *Meyer v. Nebraska*, the United States Supreme Court recognized parents' fundamental liberty interests in the upbringing of their children.²⁵ The Supreme Court has repeatedly affirmed that, although not unfettered, parents have a fundamental liberty interest in the "care, custody, and control of their children."²⁶

ents' substantive due process rights). The court dismissed the claims against the state defendants with respect to constitutional claims connected to the initial blood draws because of state sovereign immunity. *Id.* State sovereign immunity typically prevents plaintiffs from pursuing damages against states or "state agents and instrumentalities" in federal court. *Id.* at 413.

²¹ *Id.* at 423 (exercising discretion under the qualified immunity doctrine to not address whether Michigan's newborn screening program unconstitutionally impinged on the infants' Fourth Amendment rights). The Sixth Circuit did note that the infants would be incapable of directing their own medical care. *Id.* at 414–15 (differentiating infants from competent individuals, who do have a fundamental right to refuse medical care).

²² *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

²³ U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."); *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (explaining that the Due Process Clause extends beyond simply procedural protections).

²⁴ *Glucksberg*, 521 U.S. at 720. The substantive due process analysis focuses on defining "a narrow category of liberty interests that are deemed sufficiently 'fundamental,'" and require any violation of such right to be "narrowly tailored to serve a compelling state interest." Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L. J. 408, 427 (2010). A fundamental right is one that is "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Glucksberg*, 521 U.S. at 720–21 (citations omitted).

²⁵ See generally 262 U.S. 390, 400 (1923) (addressing whether parents have a liberty interest in directing the education of their children). The Supreme Court in *Meyer v. Nebraska* addressed a statute forbidding children from learning any language other than English before completing the eighth grade. *Id.* at 396–97. In holding the statute unconstitutional, the Court opined that parents' rights to allow a teacher to educate their children on a foreign language is a constitutionally protected liberty right. *Id.* at 400.

²⁶ *Troxel*, 530 U.S. at 65 (recognizing the history of the liberty interest). This fundamental liberty interest in a parent's right to parent has been invoked in varying circumstances, including custody decisions, education, and commitment to a mental facility. See *id.* at 67 (holding a Washington statute allowing a court to disregard visitation decisions by fit parents too broad); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (rejecting any presumption that a state agency's substitute judgment is superior to that of a parent); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (addressing the liberty interest in a right to parent in the context of education); see also Shmuel Bushwick, Note, *Circumcision: Constitutionality, Decision Making Authority, and Suggestions for a Permissible Regulatory Framework in Light of Attempts to Prohibit the Practice*, 17 MICH. ST. U. J. MED. & L. 1, 11 (2012) (observing that courts show a heightened deference to parents in medical decisions). Despite this interest, the Court has recognized some boundaries. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (providing examples of activities so important—such as compulsory school attendance or restrictions on compelled labor—that courts may appropriately restrict parental control); *Jacobson v. Massachu-*

Courts will review alleged violations of fundamental liberty interests with strict scrutiny.²⁷ Under this standard, a government action that infringes on constitutional rights will only be permissible if it is “narrowly tailored to serve a compelling state interest.”²⁸ Pertinent to the state’s compelling interest, as it relates to the parent-child relationship, is its role as *parens patriae*.²⁹ Pursuant to this doctrine, the state may act in a parental capacity in certain situations to ensure the best interests of the child.³⁰ *Parens patriae* is not a catch-all justification, however, and the Supreme Court has recognized that “[t]he child is not the mere creature of the State.”³¹

C. Blood Draws and the Fourth Amendment

Courts have on numerous occasions examined whether blood draws violate the Fourth Amendment’s prohibition against unreasonable searches and seizures.³² The Supreme Court has stated that blood draws constitute a search of the person under the Fourth Amendment.³³ Although a warrantless search is

setts, 197 U.S. 11, 26 (1905) (noting that the Constitution does not contemplate an unassailable right to total independence of the person in all situations).

²⁷ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (noting that statutes impinging on an individual’s constitutional rights will be “sustained only if they are suitably tailored to serve a compelling state interest”).

²⁸ *Reno v. Flores*, 507 U.S. 292, 302 (1993); see Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B.C. L. REV. 1545, 1589–90 (2019) (noting that the Government bears the burden of establishing that the intrusion of a fundamental right passes strict scrutiny review). Additionally, courts will find a statute insufficiently narrowly tailored where the statute is under-inclusive because, despite serving a permissible governmental aim, it does not “confer [the] same benefit or place [the] same burden” on individuals “similarly situated.” Note, *Equal Protection*, 82 HARV. L. REV. 1076, 1084 (1969).

²⁹ See Suter, *supra* note 13, at 751 (explaining the rationale for *parens patriae* as a justification for newborn screening programs); Gregory Thomas, *Limitations on Parens Patriae: The State and the Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51, 53 (2005) (chronicling the development of *parens patriae* as it relates to the family); *Parens Patriae*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The state regarded as a sovereign; the state in its capacity as provider of protection for those unable to care for themselves.”).

³⁰ See STEVEN OLSON & ADAM C. BERGER, CHALLENGES AND OPPORTUNITIES IN USING RESIDUAL NEWBORN SCREENING SAMPLES FOR TRANSLATIONAL RESEARCH 7 (Inst. of Med. of the Nat’l Acad. ed., 2010) (arguing that the *parens patriae* doctrine justifies newborn screening programs because of the programs’ benefits for children); Suter, *supra* note 13, at 750 (describing that the state may use its authority under *parens patriae* where a child’s parents have failed to act in the best interest of their child). For further examples of when the Court has applied the *parens patriae* doctrine, see Thomas, *supra* note 29, at 53–54.

³¹ *Pierce*, 268 U.S. at 535.

³² See, e.g., *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016) (noting that the Supreme Court has previously considered cases concerning whether a blood draw triggers Fourth Amendment protections). See generally U.S. CONST. amend. IV (explicitly contemplating “the right of the people to be secure in their persons”).

³³ *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2534 (2019) (citing *Birchfield*, 136 S. Ct. at 2174). That a blood draw amounts to a search triggering the Fourth Amendment has been well settled since

presumptively unreasonable, there are narrow exceptions.³⁴ One such exception is when a search falls within the “special needs doctrine.”³⁵

The special needs doctrine applies in non-law enforcement situations where the government’s needs exceed an individual’s right to privacy, such as when a search is considered reasonable because a citizen’s well-being requires it.³⁶ Where the government alleges a special need, courts balance the nature of the privacy interest and the intrusion against the nature of the government’s concerns.³⁷

the Supreme Court decided in 1966, in *Schmerber v. California*, that “[s]uch testing procedures plainly constitute searches of ‘persons.’” 384 U.S. 757, 767 (1966).

³⁴ See *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 528–29 (1967) (stating that only in specifically defined subsets of cases is a search without a warrant reasonable); see also Jason E. Zakai, Note, *You Say Yes, but Can I Say No?*, 73 BROOK. L. REV. 421, 424–26 (2008) (delimiting several exceptions to the default rule finding warrantless searches unreasonable).

³⁵ See *Bd. of Educ. of Indep. School Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 829 (2002) (recognizing the special needs test); see also *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (stating that the Fourth Amendment warrant requirement does not apply where an individual gives voluntary consent); Zakai, *supra* note 34, at 424–25 (explaining the consent exception to warrantless searches under the Fourth Amendment). A third recognized exception exists when exigent circumstances necessitate a warrantless search because time does not allow for an official to obtain a warrant. See *Missouri v. McNeely*, 569 U.S. 141, 149 (2013) (explaining the exigent circumstances exception).

³⁶ See Jennifer E. Smiley, Note, *Rethinking the “Special Needs” Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 NW. U. L. REV. 811, 814–16 (2001) (explaining the special needs doctrine as it relates to warrantless searches and the Fourth Amendment); see also *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989) (applying a balancing test that weighs an individual’s expectation of privacy against the government’s articulated special need).

³⁷ See, e.g., *Earls*, 536 U.S. at 829–38 (applying the balancing test to mandatory drug testing for participation in public middle and high school extracurriculars). In *Earls*, two students, alongside their parents, challenged their public school’s drug testing policy that required students to submit to urinalysis before participating in extracurricular activities. *Id.* at 826–27. They argued that the policy violated their Fourth Amendment rights. *Id.* at 827. The Supreme Court applied the special needs balancing test and ultimately held the school’s drug testing policy constitutional. *Id.* at 830. The Supreme Court concluded that the nature of the students’ privacy interests was minimal, especially because they voluntarily participated in the extracurricular activities. *Id.* at 831–32. Next, the Court similarly considered the nature of the privacy invasion to be minimal because of the procedure by which a school administrator or teacher collected the sample, the fact that the samples were largely confidential, as well as that the school did not turn over the samples to law enforcement in the event of a positive test. *Id.* at 832–34. Finally, the Supreme Court concluded that the school possessed a compelling interest in preventing drug use among students, with the interest heightened because the school had experienced increasing rates of student drug abuse. *Id.* at 835–37. Where the special needs doctrine applies, the traditional requirement of individualized suspicion in Fourth Amendment cases need not exist. See *Von Raab*, 489 U.S. at 665 (reaffirming that reasonableness in the Fourth Amendment context does not always require individualized suspicion); *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 624 (1989) (explaining that drug tests of employees absent individualized suspicion does not necessarily violate Fourth Amendment protections because “a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable”); Smiley, *supra* note 36, at 815 (tracing the Supreme Court’s jurisprudence on “reasonableness” in the Fourth Amendment).

D. Qualified Immunity

Qualified immunity protects government officials from liability for conduct falling within their official capacity unless a “reasonable person” recognizes the right as “clearly established.”³⁸ The doctrine has undergone substantial changes since the Supreme Court first established it in the 1970s.³⁹ What began as a two-pronged analysis encompassing both subjective and objective elements became a single inquiry into “the objective reasonableness of an official’s conduct, as measured by reference to clearly established law.”⁴⁰ So long as an official’s conduct did not violate a clearly established constitutional right, he or she will be dismissed from the suit.⁴¹ The Supreme Court has provided little insight into what amounts to a “clearly established” constitutional right, leaving it to the lower courts to devise an appropriate standard.⁴²

³⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (stating that qualified immunity protects government officials’ conduct unless such conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known”); see 42 U.S.C. § 1983 (2018) (creating a cause of action where a state actor deprives an individual of constitutional rights). The doctrine arose out of a desire to minimize the threat of suit against public officials acting in their official capacity. See John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1298–1300 (2012) (explaining the origin of qualified immunity to provide a better understanding of its doctrinal evolution). Because Michigan’s statute mandates screening, and thereby may involve state-sponsored actors, the defendants invoked the doctrine of qualified immunity. See 42 U.S.C. § 1983 (making actionable claims against state actors); MICH. COMP. LAWS § 333.5431 (requiring screenings by health officials); *Kanuszewski I*, 333 F. Supp. 3d at 720 (describing the defendants’ invocation of qualified immunity).

³⁹ Williams, *supra* note 38, at 1299–1300 (identifying two cases, *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and *Wood v. Strickland*, 420 U.S. 308 (1975), as the origins of the qualified immunity doctrine); John C. Jefferies, Jr., *What’s Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (suggesting that qualified immunity’s journey from a mixed subjective-objective inquiry to its current single, objective inquiry resulted from the Supreme Court’s desire to decide more qualified immunity cases at earlier stages of litigation).

⁴⁰ *Harlow*, 457 U.S. at 818 (establishing the standard for adjudicating qualified immunity defenses). The Court reasoned that this shift away from a subjective inquiry would better allow the government to carry out its duties and resolve claims at the summary judgment stage. *Id.* Courts do not examine an official’s “subjective motives” in a qualified immunity analysis. Williams, *supra* note 38, at 1298 (observing that courts apply “an objective test that asks whether the defendant should have known that her action violated the plaintiffs’ right”). *Harlow* additionally provided governmental defendants the option of pleading “extraordinary circumstances” to gain qualified immunity. 457 U.S. at 819. For further insight into the implications of the *Harlow* decision, see Williams, *supra* note 38, at 1302–04.

⁴¹ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (noting that qualified immunity constitutes an “immunity from suit rather than a mere defense to liability”); Williams, *supra* note 38, at 1298 (providing a broad overview of qualified immunity).

⁴² See Note, *Federal Jurisdiction and Procedure*, 123 HARV. L. REV. 272, 278 (2009) [hereinafter *Procedure*] (observing that what amounts to a clearly established right has not been clarified); Williams, *supra* note 38, at 1299 (noting that whether a court finds a clearly established right depends on the jurisdiction and the judge). Williams also highlighted three difficulties courts face in deciding whether a right is clearly established: (1) determining how specifically the plaintiff must state the allegedly violated right, (2) what sources of law courts may permissibly use to discern the clarity of the right, and (3) whether it is ever possible for a right to be clearly established if courts have issued

When raised, qualified immunity may operate as a threshold inquiry and a court need not decide whether a constitutional violation has occurred before dismissing a particular claim.⁴³ Courts may use their discretion in “cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right” to *not* answer whether a constitutional violation has occurred.⁴⁴

II. SITUATING THE *KANUSZEWSKI II* CLAIMS WITHIN NON-CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS

As discussed in Section I, this Comment will focus on the initial blood draws as they relate to two distinct constitutional claims.⁴⁵ Section A discusses the Sixth Circuit Court of Appeals' decision in *Kanuszewski II* not to answer whether the mandatory initial screening of their newborns violated the parents' Fourteenth Amendment rights.⁴⁶ Section B examines the separate but related decision by the court not to exercise its discretion to answer whether the initial

conflicting opinions on the matter. Williams, *supra* note 38, at 1305–14. The Sixth Circuit, in analyzing the viability of a qualified immunity defense, first determines whether a “reasonable official would understand that what he is doing violates that right.” *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1994). If the court finds such a right, the inquiry then turns to whether the plaintiff pled “non-conclusory allegations” that the officer unreasonably acted in violating the right. *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994) (explaining pleading standards as “whether plaintiff has alleged sufficient facts supported by sufficient evidence to indicate what [the official] allegedly did was objectively unreasonable in light of these clearly established constitutional rights”). The Sixth Circuit will first consider Supreme Court precedent, then its own case law, and finally other circuits' opinions to decide whether such opinions “placed the . . . constitutional question beyond debate.” *Harring v. Sliowski*, 712 F.3d 275, 280 (6th Cir. 2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

⁴³ See *Pearson*, 555 U.S. at 236 (establishing a new rule that courts may determine on a case-by-case basis whether to address a constitutional claim). In *Pearson*, the Court reversed course from its earlier decision in *Saucier v. Katz*. *Id.*; see *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001) (requiring courts to examine allegedly violated constitutional right). Under *Saucier*, courts were required to follow a two-step sequential analysis. 533 U.S. at 201 (noting that an examination of the underlying constitutional question “must be the initial inquiry”). A court would first examine whether a constitutional violation occurred, and if so, whether the violated constitutional right was “clearly established.” *Id.* *Pearson* eliminated the sequential nature of the test, allowing courts to skip an initial inquiry into whether a violation occurred and instead only answer whether the allegedly violated right constituted a clearly established right. 555 U.S. at 236 (acknowledging that although *Saucier*'s sequencing may be proper in some instances, it should not be mandatory in all instances).

⁴⁴ *Pearson*, 555 U.S. at 237.

⁴⁵ See *Kanuszewski II*, 927 F.3d 396, 415–16, 422–23 (6th Cir. 2019) (separating the constitutional claims into, among other categories, those stemming from the initial blood draws relating to the parents' substantive due process rights and those relating to the children's Fourth Amendment rights). In its analysis, the court addressed four additional constitutional claims relating to the infants' Fourteenth Amendment rights in connection with the initial blood draws, as well as claims stemming from the transfer and retention of the blood. *Id.* at 413–26.

⁴⁶ See *infra* notes 48–60 and accompanying text.

blood draws violated the infants' Fourth Amendment rights to be free from unreasonable searches.⁴⁷

A. *Declining to Decide the Parents' Fourteenth Amendment Claims*

In *Kanuszewski II*, the Sixth Circuit addressed the parents' Fourteenth Amendment claims which stemmed from their asserted fundamental liberty interest in directing the care of their children.⁴⁸ In so doing, the Sixth Circuit recognized United States Supreme Court precedent affirming parents' substantive due process rights to be in charge of their children's upbringing.⁴⁹ The parents alleged that the defendants violated their substantive due process rights when they initially drew their children's blood.⁵⁰ The court did not address the merits of the parents' claims and dismissed them under qualified immunity.⁵¹

In declining to exercise its discretion, the Sixth Circuit focused on the fact that the Supreme Court has not definitively addressed the extent to which parents' substantive due process rights include controlling their children's medical care.⁵² The Sixth Circuit further concluded that the small body of law on this topic did not substantially track the parents' claims.⁵³ Specifically, the court noted that the plaintiffs' reliance on a case addressing parental rights to direct their children's medical care—a 2003 case out of the Tenth Circuit Court of Appeals, *Dubbs v. Head Start, Inc.*—did not explicitly address the question before the Sixth Circuit, and was an out-of-circuit case.⁵⁴

⁴⁷ See *infra* notes 61–68 and accompanying text.

⁴⁸ See *Kanuszewski II*, 927 F.3d at 415–16.

⁴⁹ See *id.* at 415 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925)) (relying on *Pierce* for the proposition that parents' substantive due process rights encompass their rights to make decisions concerning their children).

⁵⁰ *Id.* Michigan maintained that the parents erroneously brought their substantive due process allegation before the district court because the parents were not the “real parties in interest” and “due process rights may not be asserted vicariously.” Brief for Defendants-Appellees, *supra* note 13, at 33 (asserting that, because the infants were the named plaintiffs and their parents were just guardians, the infants were “the real parties in interest” and could not bring any claims on their parents' behalf). Additionally, Michigan submitted that the court should only address the Fourth Amendment claims because, where feasible, the more specific amendment should guide the inquiry. *Id.* at 31 (citing *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998)).

⁵¹ See *Kanuszewski II*, 927 F.3d at 416 (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)) (explaining that the complaint did not clearly establish whether the initial blood draws violated the parents' substantive due process “right[s] to direct their children's medical care”).

⁵² *Id.*

⁵³ *Id.* at 415.

⁵⁴ *Id.* at 415–16; see *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1204 (10th Cir. 2003) (declining to decide parents' claims concerning their fundamental rights to control their children's medical care because of the lack of detailed arguments on appeal resulting from the plaintiffs' briefs and the district court opinion).

At issue in *Dubbs* were physical examinations, including blood draws, performed on children in a Head Start program without parental consent.⁵⁵ In reversing the dismissal of the parents' Fourteenth Amendment claims that the physical examinations interfered with their fundamental liberty interest in directing their children's medical care, the Tenth Circuit focused on the standard of review the parents' claim required.⁵⁶ The court concluded that the district court improperly applied a "shocks the conscience" standard of review to the parents' claims without considering other standards of review for fundamental rights.⁵⁷ Because the lower court did not consider other standards of review, and because parents' rights to direct their children's medical care plausibly constitutes a fundamental right, the Tenth Circuit remanded this claim for additional consideration.⁵⁸

Without a relevant case answering whether the initial blood draws constituted a violation of a fundamental liberty interest similar to a parents' right to control their children's upbringing, the Sixth Circuit could not clearly identify whether Michigan's mandatory screening program violated the parents' Fourteenth Amendment rights.⁵⁹ The court therefore determined it appropriate to grant qualified immunity to the individual defendants without answering whether the mandatory screening violated the parents' substantive due process rights.⁶⁰

B. Declining to Decide the Children's Fourth Amendment Claims

Like with the parents' Fourteenth Amendment claims, the Sixth Circuit, in addressing the Fourth Amendment claims, held that qualified immunity barred any action for damages and declined to answer whether the Fourth Amendment prohibits the mandatory drawing of a newborn's blood for a medical purpose.⁶¹

⁵⁵ *Dubbs*, 336 F.3d at 1197. The physical examinations in *Dubbs* involved blood pricks as well as the children removing their clothing and having their genitalia examined by a nurse without a doctor present. *Id.* at 1199–1200. Except for the bypass of parental consent, the exams largely comported with examination standards. *Id.* at 1200. A Head Start program provides early childhood education to children of low-income families. *Head Start Programs*, U.S. DEP'T OF HEALTH & HUMAN SERVS. <https://www.acf.hhs.gov/ohs/about/head-start> [<https://perma.cc/DZ92-LQJH>].

⁵⁶ *Dubbs*, 336 F.3d at 1202–03.

⁵⁷ *Id.* at 1203. Courts apply a "shocks the conscience" standard of review where plaintiffs allege that tortious conduct violated their Fourteenth Amendment rights. *Id.* The Supreme Court has described conduct that shocks the conscience as that which "violates the 'decencies of civilized conduct.'" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998).

⁵⁸ *Dubbs*, 336 F.3d at 1203.

⁵⁹ *Kanuszewski II*, 927 F.3d at 416. The court noted that even if *Dubbs* had been directly on point, because it fell out of circuit, it would only in "extraordinary cases" result in a clearly established right. *Id.* at 415–16 (citing *Hearing v. Sliwowski*, 712 F.3d 275, 282 (6th Cir. 2013)).

⁶⁰ *Id.* at 416.

⁶¹ *Id.* at 423. The Sixth Circuit observed that the centrality of medical purposes to Michigan's justifications for its screening program may impact the Fourth Amendment claim. *Id.* For a suggestion that the state may be motivated for reasons other than the health of the child, see *Suter*, *supra* note 13, at 752–53.

In granting qualified immunity for the children's Fourth Amendment claims, the court emphasized the unsettled question of whether the disease-screening nature of the test alters the Fourth Amendment analysis.⁶²

The court determined that its 2013 decision, *Hearing v. Sliwowski*, was the only applicable circuit case.⁶³ In *Hearing*, a nurse visually inspected a student's genital area after the student complained of irritation and itchiness.⁶⁴ The student's mother brought suit on her daughter's behalf and alleged that the search violated her daughter's Fourth Amendment rights.⁶⁵ Qualified immunity barred an action for damages against the nurse because the Fourth Amendment's reasonableness requirement did not obviously apply to her medical inspection.⁶⁶ Noting that the *Hearing* court did not reach the underlying constitutional claim, the Sixth Circuit in *Kanuszewski II* concluded that whether the initial blood draws violated the children's Fourth Amendment rights had not been clearly established.⁶⁷ As such, the Sixth Circuit granted the defendants qualified immunity and dismissed them from suit.⁶⁸

III. ADDRESSING THE UNDERLYING CONSTITUTIONAL CLAIMS IN *KANUSZEWSKI II*

The Sixth Circuit Court of Appeals, in granting qualified immunity, explicitly elected not to answer whether Michigan's mandatory newborn screening program violated the parents' Fourteenth Amendment rights to control their children's medical care or whether the initial blood draws violated the infants' Fourth Amendment rights.⁶⁹ As the qualified immunity doctrine stands, the Sixth Circuit arrived at the correct conclusion; neither right was so clearly established that a medical professional drawing a newborn's blood would reasonably be aware of the rights' existence.⁷⁰ This exercise of discretion, howev-

⁶² *Kanuszewski II*, 927 F.3d at 423 (noting that the Sixth Circuit has not answered "whether drawing blood for the purpose of screening for diseases constitutes a search or seizure for Fourth Amendment purposes"). Michigan argued on appeal that other circuits' courts of appeal do not find Fourth Amendment searches when medical reasons motivate the search. Brief for Defendants-Appellees, *supra* note 13, at 41–42. Michigan argued that the Sixth Circuit's decision in *Hearing v. Sliwowski* stood for the proposition that medically motivated procedures do not constitute searches under the Fourth Amendment. 712 F.3d at 282–83 (holding that nurse did not have "fair-warning" that her medical examination could violate the Fourth Amendment, and providing "no opinion as to whether there was a constitutional violation in this case"); Brief for Defendants-Appellees, *supra* note 13, at 41–42.

⁶³ *Kanuszewski II*, 927 F.3d at 423; *Hearing*, 712 F.3d at 281–82.

⁶⁴ *Hearing*, 712 F.3d at 277–78.

⁶⁵ *Id.* at 277.

⁶⁶ *Id.* at 281–82 (holding that, because neither Supreme Court nor out-of-circuit precedent clearly established that a school nurse's medical examination could potentially violate the Fourth Amendment, the school nurse possessed qualified immunity from suit).

⁶⁷ *Kanuszewski II*, 927 F.3d at 423.

⁶⁸ *Id.*

⁶⁹ *Kanuszewski II*, 927 F.3d 396, 416, 423 (6th Cir. 2019).

⁷⁰ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (establishing the qualified immunity test).

er, limits future plaintiffs' opportunities to succeed in similar constitutional challenges.⁷¹ If courts continue to decline answering constitutional questions, as the Sixth Circuit did in *Kanuszewski II*, constitutional rights can never become clearly established.⁷²

The Sixth Circuit should have taken the opportunity to analyze the merits of the parents' Fourteenth and Fourth Amendment claims.⁷³ In order to determine whether the parents alleged colorable constitutional violations, the Sixth Circuit would have needed to look closely at what interest Michigan's newborn screening program fulfills, and whether Michigan designed it to narrowly achieve that interest.⁷⁴ This Part animates such analysis, and concludes that Michigan's mandatory screening program is not sufficiently narrowly tailored to meet its admittedly compelling interest.⁷⁵

In order for the mandatory newborn screening program to pass constitutional muster, Michigan must articulate a compelling interest and a narrowly tailored means to achieve that interest.⁷⁶ Michigan has justified its mandatory newborn screening program by stressing its potential life-saving impact on newborn infants.⁷⁷ Undoubtedly, Michigan has a compelling interest in protecting the health and well-being of its infants.⁷⁸ In protecting the health and well-

⁷¹ See *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (stating that focusing only on whether a right is clearly established does not clarify what constitutes unconstitutional behavior and therefore harms plaintiffs as well as governmental officials); Paul Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 429 (2009) (maintaining that the sequencing of *Saucier* is necessary to establish the contours of a constitutional right); see also *Procedure*, *supra* note 42, at 277 (predicting that the impact of *Pearson v. Callahan*, 555 U.S. 223 (2008), would be to focus courts solely on the clearly established prong of the qualified immunity defense, instead of considering the underlying constitutional claim).

⁷² See *Kanuszewski II*, 927 F.3d at 416, 423 (declining to answer whether constitutional violations occurred); *Procedure*, *supra* note 42, at 282 (stating that an emphasis on whether a right is clearly established does not allow parties to orient their future behavior in line with constitutional principles); Hughes, *supra* note 71, at 404, 430 (opining that "constitutional stagnation" may prevent constitutional rights from ever being clearly established).

⁷³ See *Kanuszewski II*, 927 F.3d at 416, 423 (declining to answer whether the initial blood screening in Michigan's newborn program violated the parents' fundamental rights to control the medical care of their children and the infants' Fourth Amendment rights).

⁷⁴ See *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (outlining the standard that the government must meet to justify infringing on a fundamental liberty interest).

⁷⁵ See *infra* notes 76–102 and accompanying text.

⁷⁶ See *Reno*, 507 U.S. 292, 301–02 (observing that "unless the [government's] infringement is narrowly tailored to serve a compelling state interest" such infringement violates the Fourteenth Amendment's substantive due process provision).

⁷⁷ State Defendants' Motion to Dismiss First Amended Complaint, *supra* note 15 (stating that newborn screening programs provide early detection of potentially lethal diseases or disorders and thereby facilitate timely and life-saving treatment); see also Michael S. Watson et al., *Newborn Screening: Toward a Uniform Screening Panel and System—Executive Summary*, 117 PEDIATRICS S296, S297 (2006) (describing the purpose of states' newborn screenings as protecting the health of infants).

⁷⁸ *Cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (recognizing the state's "legitimate interests" in protecting the life of the fetus). The interest in the life of a fetus logically

being of its children through its screening program, Michigan has relied on its role as *parens patriae*, which allows the state to interject itself when parents' decisions "constitute abuse or neglect."⁷⁹

Given Michigan's compelling interest, the next step is analyzing the mechanics of the program itself and whether that process is sufficiently narrowly tailored.⁸⁰ Michigan's program statutorily mandates screening, and if the screening returns a positive result, Michigan directs families to "coordinating centers" to arrange for further consultation and treatment.⁸¹ Michigan's immediate responsibility ends at this juncture and the coordinating centers take over.⁸²

Insofar as Michigan's direct support ends at screening, one can reasonably argue that Michigan itself neglects the well-being of the infant by not overseeing, supporting, or funding the medical treatment following an abnormal screening.⁸³ Michigan might argue that its follow-up efforts—communicating abnormal screening results to an infant's healthcare provider and connecting families with coordinating centers scattered across the state—sufficiently support its justification and satisfy the narrowly tailored requirement.⁸⁴ Yet Michigan impermissibly distances itself by putting the impetus on the coordinating centers and primary healthcare providers to facilitate ongoing disease man-

supports the contention that the state has a similar interest in the life of a born child. *See id.* Specific to the newborn screening program, the state's role as *parens patriae* allows it to act for the benefit of the child. *See supra* notes 29–31 and accompanying text (explaining the *parens patriae* doctrine).

⁷⁹ *See Schall v. Martin*, 467 U.S. 263, 265 (1984) ("[I]f parental control falters, the State must play its part as *parens patriae*."); Brief for Defendants-Appellees, *supra* note 13, at 36 (citation omitted) (noting the state's enhanced authority to interject itself with issues involving minors); Suter, *supra* note 13, at 750–51 (describing situations in which a state can use its *parens patriae* powers to direct a child's medical care). Paradigmatic of the state relying on its inherent *parens patriae* power to counteract potentially abusive or neglectful parental decision-making is where parents refuse blood transfusions or chemotherapy for their children. Suter, *supra* note 13, at 750–51. As applied to Michigan's newborn screening program, Michigan's reliance on its innate *parens patriae* power presumes that some parents would neglectfully or abusively not allow screening of their newborns. *See id.* at 751.

⁸⁰ *See Reno*, 507 U.S. at 302 (requiring both a compelling interest and narrowly tailored means); *supra* notes 77–78 and accompanying text (laying out Michigan's compelling interest in protecting the health and well-being of its citizens).

⁸¹ *Newborn Screening Advisory and Medical Management Groups*, MICH. DEP'T OF HEALTH & HUMAN SERVS., https://www.michigan.gov/mdhhs/0,5885,7-339-73971_4911_4916-233589--,00.html [<https://perma.cc/W98M-HCXZ>].

⁸² *Id.* (providing that "the coordinating centers are *responsible*" for follow-up medical care) (emphasis added).

⁸³ *See Suter*, *supra* note 13, at 752–53 (noting that states do not typically provide treatment for children with screened-for diseases, calling into question their motives). Michigan's newborn screening informational pamphlet recognizes that treatment for these diseases begins early and often lasts an individual's lifetime, but it does not suggest that Michigan itself will oversee that treatment. Michigan Newborn Screening, MICH. DEP'T OF HEALTH & HUMAN SERVS. (Sept. 2017), https://www.michigan.gov/documents/newborn_screening_broc_110897_7.pdf. [<https://perma.cc/K5MX-V8LT>]

⁸⁴ *See id.* (stating that if an infant receives a positive screening, the newborn screening follow-up program will notify that infant's primary healthcare provider).

agement, which includes conclusive diagnostic testing.⁸⁵ This means that Michigan, in effect, removes itself from the process before it definitively knows whether an infant has a disorder.⁸⁶ To the extent Michigan's program fails to ensure the well-being of infants post-screening, its program is not narrowly-tailored to achieve its purported compelling interest.⁸⁷

Statutes can fail the narrowly tailored inquiry if they are so "under-inclusive" that they do not adequately satisfy a compelling interest.⁸⁸ Here, Michigan's newborn screening program is under-inclusive.⁸⁹ Simply telling parents that their infant *might* have a disorder does not properly advance Michigan's compelling interest in protecting the health and well-being of its newest citizens.⁹⁰ Indeed, Michigan's lack of direct involvement in subsequent diagnostic testing and treatment suggests that protecting the health and well-being of newborns may not be its actual or sole interest.⁹¹ Governmental interests other than newborns' well-being would implicate a court's analysis of parents' Fourteenth Amendment claims because an identified compelling interest is required to assess, and pass, strict scrutiny.⁹²

⁸⁵ See Isabel Hurden et al., *Michigan Newborn Screening Program Annual Report 2017*, MICH. DEPT OF HEALTH & HUMAN SERVS. 8, 11 (Mar. 2019), https://www.michigan.gov/documents/mdhhs/Annual_Report2017_final_650647_7.pdf [<https://perma.cc/FAR2-7Z9J>](describing the referral process for infants with abnormal screenings to confirm the results).

⁸⁶ See *id.* For further discussions of the implications of inconclusive screenings, see Suter, *supra* note 13, at 741–42 (discussing false-positive screenings extensively and noting their harmful impacts on infants and their families).

⁸⁷ See *Reno*, 507 U.S. at 302 (stating that for an infringement of a fundamental right to pass strict scrutiny, there must be a narrowly tailored means to achieving a compelling state interest).

⁸⁸ See *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 448–49 (2015) (noting that a statute's under-inclusivity can call into question a government's compelling interest). Under-inclusivity of a statute leading to failure of a narrowly-tailored test often arises with equal protection claims. See *Equal Protection*, *supra* note 28, at 1084 (explaining that under-inclusion arises where a state's permissible aim does not equally assist or hinder "similarly situated" people, occasionally being "so arbitrary as to deny equal protection"). Although the constitutional issue in *Kanuszewski II* is not an equal protection claim, the underlying concept of under-inclusivity—that a statute is not sufficiently narrowly tailored to achieve its purported interest—is useful in understanding this Comment's argument. See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104–05 (1979) (concluding, in the context of privacy for juvenile criminal offenders, that an under-inclusive statute failed to further a compelling interest when challenged under the First and Fourteenth Amendments).

⁸⁹ See *supra* notes 83–87 and accompanying text (describing Michigan's newborn screening statute and arguing that it is under-inclusive).

⁹⁰ See *supra* note 86 and accompanying text (addressing potential harms of screening programs).

⁹¹ See Wylie Burke et al., *Genetic Screening*, 33 EPIDEMIOLOGIC REV. 148, 151–52 (2011) (recognizing that the expansion of screened-for disorders may suggest additional government interests, such as improving research capabilities for the government or "inform[ing] future reproductive decisions," and noting concerns regarding the mandatory nature of newborn screening programs in light of this); see also Suter, *supra* note 13, at 753 (suggesting that states may have other interests, besides the health and well-being of the infants, for mandating newborn screening); cf. *Smith*, 443 U.S. at 104–05 (1979) (holding that an under-inclusive statute failed to further the government's compelling interest).

⁹² See *Reno*, 507 U.S. at 301–02 (identifying compelling interest as requisite element of strict scrutiny for a substantive due process claim).

Similarly, a determination that Michigan's interest included something other than protecting the health and well-being of newborns would impact the assessment of the infants' Fourth Amendment claims.⁹³ As applied, the special needs balancing test would include weighing the government's interest in the newborn screening program against the nature of the intrusion and the infants' privacy interests.⁹⁴ Accordingly, determining the government's true interest in pursuing a newborn screening program is significant.⁹⁵

As currently constituted, Michigan's mandatory newborn screening program may not be constitutional.⁹⁶ Even if Michigan's true and only interest is the health and well-being of newborns, its program fails to actually ensure positively screened newborns receive the continued follow-up care required to facilitate their health and well-being.⁹⁷

This is not to say that Michigan should water down its newborn screening program.⁹⁸ Quite the opposite, Michigan's legislature should go further than mandating only screening—it should also oversee the ongoing medical care and treatment for infants with disorders discovered by the mandatory screening.⁹⁹ Without formalized state oversight, families lacking educational or financial resources might not pursue treatment for a disorder.¹⁰⁰ Moreover, state governments have not hesitated to forcefully insert themselves into the realm of parent-child medical decisions in other arenas, notably vaccinations.¹⁰¹ Fi-

⁹³ See *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989) (recognizing governmental interest as component of Fourth Amendment jurisprudence where the “special needs” balancing test applies).

⁹⁴ See *id.* (articulating the appropriate balancing test for Fourth Amendment cases involving the special needs doctrine).

⁹⁵ See *id.* (identifying the importance of the governmental interest in applying the special needs doctrine balancing test).

⁹⁶ See *Reno*, 507 U.S. at 301–02 (requiring any infringement on a fundamental right to be narrowly tailored to achieve a compelling governmental interest); *Von Raab*, 489 U.S. at 665–66 (including governmental interest in the balancing test for determining whether the Fourth Amendment is violated when there is a non-law enforcement motivation for a search).

⁹⁷ See Michigan Newborn Screening, MICH. DEP'T OF HEALTH & HUMAN SERVS. (Sept. 2017), https://www.michigan.gov/documents/newborn_screening_broc_110897_7.pdf (acknowledging that treatment can often last for an individual's lifetime).

⁹⁸ See MICH. COMP. LAWS § 333.5431 (2018) (providing statutory requirement for newborn screenings but not for follow-up care). For an opposing view that states should instead employ an opt-in approach to newborn screening programs, see Suter *supra* note 13, at 789.

⁹⁹ See Michigan Newborn Screening, MICH. DEP'T OF HEALTH & HUMAN SERVS. (Sept. 2017), https://www.michigan.gov/documents/newborn_screening_broc_110897_7.pdf [<https://perma.cc/ADF7-NJAN>] (indicating that Michigan does not directly involve itself in the follow-up of an abnormal screening).

¹⁰⁰ See Suter, *supra* note 13, at 752 (noting that the effectiveness of newborn screening programs is contingent on a child receiving treatment, which may be based on a family's economic situation, among other factors). *But see* Watson, *supra* note 77, at S297 (acknowledging the limits states face in providing the follow-up and lifelong medical care associated with some of the screened-for diseases).

¹⁰¹ See, e.g., Gina Bellafante, *How Far Would You Go to Avoid Vaccinating Your Child?*, N.Y. TIMES (Sept. 15, 2019), <https://www.nytimes.com/2019/09/13/nyregion/vaccination-homeschooling->

nally, requiring Michigan to ensure ongoing treatment for infants with disorders might ensure the constitutionality of the program by solidifying its compelling interest and narrowly tailoring the program to achieve that interest.¹⁰²

CONCLUSION

The Sixth Circuit Court of Appeals in *Kanuszewski v. Michigan Department of Health and Human Services* properly granted defendants qualified immunity and dismissed them from a suit alleging that Michigan's mandatory newborn screening program violated infants' Fourth Amendment rights and their parents' Fourteenth Amendment rights to direct their children's medical care. In dismissing these claims, the Sixth Circuit canvassed relevant case law and determined that no clearly established constitutional rights existed. Therefore, the court did not address the underlying merits of the constitutional claims. The Sixth Circuit should have taken the extra step and examined the pertinent constitutional allegations. Analyzing these claims requires examining Michigan's compelling interest and whether the mandatory newborn screening program is narrowly tailored to achieve that interest. Michigan has justified its newborn screening program because of its interest in the health and well-being of its newest citizens, yet this program is under-inclusive and therefore not narrowly tailored to achieve this interest. Michigan's direct involvement ends before there has been a definitive diagnosis. Simply knowing that an infant might have a disorder does not equate to a means narrowly tailored to ensure an infant's health and well-being. This brings into question Michigan's true interest in newborn screening and implicates any subsequent analysis of the infants' and parents' Fourteenth and Fourth Amendment claims. Michigan should bolster its newborn screening program and oversee the later stages of diagnosis and treatment to achieve its stated purpose of effectively ensuring the health and well-being of its newborns.

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[new-york-city.html](#) [<https://perma.cc/T6G6-WXJX>] (describing the impact of New York's decision to end religious-exemptions for vaccinations).

¹⁰² See *Reno*, 507 U.S. at 302 (requiring, for infringements of fundamental rights, the government to articulate a narrowly tailored means to advance a compelling interest).