No. _____

IN THE

Supreme Court of the United States

OGLALA SIOUX TRIBE, ET AL.,

Petitioners,

—v.—

LISA FLEMING, IN HER OFFICIAL CAPACITY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case challenged the procedures that Pennington County, South Dakota officials used for preliminary hearings held within 48 hours of removing American Indian children from their families for alleged parental abuse and neglect. The district court found that during those hearings, parents were provided no notice of why their children were being removed, were not allowed to testify or to confront the welfare worker whose affidavit was the basis for the state action, and were not given a decision based on evidence presented at the hearing. The proceedings led to the removal of 823 Indian children over a four-year period, and the state won 100% of the preliminary hearings. At no point during subsequent hearings in the abuse and neglect proceedings did parents have any opportunity to challenge the procedural adequacy of the initial hearing—even though that hearing led to loss of custody for sixty days. The district court found that the preliminary hearing procedures blatantly violated elemental due process requirements. The court of appeals reversed, holding that the district court should have abstained from hearing plaintiffs' claims under *Younger v. Harris*, 401 U.S. 37 (1971).

The questions presented are:

1. Whether the Eighth Circuit erred in holding, in conflict with decisions of this Court and three other courts of appeals, that the possibility of filing a *separate* mandamus action was in and of itself "sufficient" to provide an "adequate opportunity" requiring *Younger* abstention, where plaintiffs had no opportunity to challenge the constitutionality of the preliminary hearing

procedure in the course of the state's abuse and neglect proceedings?

2. Whether the court of appeals erred in holding, in conflict with three courts of appeals, that the "extraordinary circumstances" exception to *Younger* abstention applies only to flagrantly and patently unconstitutional *statutes*, but not to flagrantly and patently unconstitutional *policies,* and in concluding that separating children from their parents for sixty days with no notice or opportunity to be heard inflicted no irreparable harm?

PARTIES TO THE PROCEEDING

The Oglala Sioux Tribe and the Rosebud Sioux Tribe, federally recognized tribes in South Dakota, filed this action in their capacity as *parens patriae* on behalf of the tribes and their members. The plaintiffs also included Rochelle Walking Eagle, Madonna Pappan, and Lisa Young, and a class of similarly situated American Indian parents. The plaintiffs were appellees in the court of appeals and the Petitioners in this Court.

Respondents in this Court were defendants in the district court and appellants in the court of appeals. They are: Lisa Fleming, in her official capacity as Regional Manager of Region 1 of the South Dakota Department of Social Services (DSS); M. Michael DeSautel, in his official capacity as Secretary of DSS; Craig Pfeifle, in his official capacity as Chief Judge of the Seventh Judicial Circuit of South Dakota; and Mark Vargo, in his

official capacity as State's Attorney for Pennington County, South Dakota.[1]

[1] Lisa Fleming is substituted for her predecessor LuAnn Van Hunnik, Hon. Craig Pfeifle is substituted for his predecessor Hon. Jeff Davis, and M. Michael DeSautel is substituted for his predecessors Kim Malsam-Rysdon and Lynne Valenti. Plaintiff Rochelle Walking Eagle has since passed away and thus is not involved in this Petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 3a-22a) is reported at 904 F.3d 603 (8th Cir. 2018). The district court issued several decisions relevant to this appeal: (1) an order denying defendants' motion to dismiss, reported at 993 F. Supp. 2d 1017 (D.S.D. 2014) (Pet. App. 149a-190a); (2) an order granting summary judgment to plaintiffs, reported at 100 F. Supp. 3d 749 (D.S.D. 2015) (Pet. App. 100a-148a); (3) an order granting in part and denying in part defendants' motion to reconsider, available at 2016 WL 697117 (Pet. App. 78a-99a); (4) an order granting remedies, available at 2016 WL 7324077 (Pet. App. 33a-61a) together with an Injunction (Pet. App. 62a-69a) and a Declaratory Judgment (Pet. App. 70a-77a); and (5) an order denying defendants' motion to stay, available at 2017 WL 530452 (Pet. App. 23a-32a).

JURISDICTION

The judgment below was entered on September 14, 2018. A petition for panel rehearing or rehearing en banc was denied on December 4, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), (4).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law . . . ."

The relevant South Dakota statutory provisions governing the procedures in abuse and neglect proceedings are set forth in the Appendix. Pet. App. 191a-198a.

INTRODUCTION

Plaintiffs challenged a policy by which more than 800 Indian children[2] were forcibly removed from their homes for two months with no notice to parents of the grounds for removal and no meaningful opportunity to be heard. Plaintiffs challenged the procedural adequacy of a preliminary abuse and neglect hearing, held within 48 hours of the state's initial removal of a child from his or her parents. At that hearing, the state provided no notice, and no opportunity to testify or to confront the evidence upon which the removal was based. Decisions were rendered on the basis of affidavits that the state submitted *ex parte* to the court. The hearings typically concluded within minutes because no testimony was permitted and no evidence was introduced. The state won every hearing, and removed 823 Indian children from their parents or guardians over the course of the four years reviewed in this suit. At no subsequent stage in the abuse and neglect proceedings did parents have any opportunity

[2] "Indian child" is defined for purposes of abuse and neglect proceedings in South Dakota, *see* S.D. Codified Laws § 26-7A-15.1, by incorporating the terms contained in the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 *et seq*. Section 1903 of ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

to challenge the procedural inadequacy of the initial "48-hour" hearing.

The district court correctly found that this preliminary 48-hour hearing violated the most basic requirements of due process—notice and a meaningful opportunity to be heard. It granted injunctive and declaratory relief requiring the state to afford minimally adequate procedures at the 48-hour hearings. The Eighth Circuit reversed, holding that abstention was required by *Younger v. Harris*, 401 U.S. 37 (1971). It concluded that plaintiffs could have filed an independent state mandamus action, and that such an action was, in and of itself, "sufficient" to provide an adequate opportunity to pursue plaintiffs' constitutional claims. The Eighth Circuit also speculated that parents and tribes might be able to raise their federal claims through a discretionary interlocutory appeal or through the discretionary consideration of a moot claim on final appeal—even though neither avenue would afford a *right* to raise plaintiffs' constitutional claims, nor an opportunity to redress the irreparable harm of family separation for sixty days. The court further held that a procedure removing children from their parents for two months without even the most minimal due process presented no "extraordinary circumstance" or "irreparable injury" that would counsel against abstention.

The court of appeals' determination that federal courts must abstain under *Younger* if a separate mandamus petition could be filed in state court conflicts with decisions of this Court and of three other circuits, which hold that for *Younger* to apply, the ongoing state court proceeding itself must

afford an adequate opportunity to present plaintiffs' constitutional claims. In *Gerstein v. Pugh,* 420 U.S. 103 (1975), the Court held that criminal defendants subjected to pretrial detention without due process were entitled to federal review of that defect, despite the pendency of their criminal cases, because procedural infirmities regarding pretrial detention "could not be raised in defense of the criminal prosecution" that followed. 420 U.S. at 108 n.9. The Court rejected abstention even though the criminal defendant could have filed a separate mandamus or habeas corpus petition in Florida court. Three other courts of appeals have expressly rejected arguments that *Younger* abstention should apply where plaintiffs had no opportunity to raise their claims in the ongoing state proceedings, but could file a *separate* state mandamus petition.

The court of appeals' ruling would transform *Younger* into a requirement that plaintiffs exhaust state remedies by initiating a separate state action before seeking federal court relief for constitutional violations. That result is in direct contradiction to *Monroe v. Pape*, 365 U.S. 167, 183 (1961), which held that plaintiffs challenging federal constitutional violations under 42 U.S.C. § 1983 need not exhaust state court remedies. Habeas corpus and mandamus actions are available in every state. If the mere existence of a separate mechanism for state mandamus were sufficient to trigger *Younger* abstention, few if any cases challenging state procedures will ever permit federal review. Indeed, the Eighth Circuit's reasoning would have required this Court to abstain in *Gerstein* itself. The abstention doctrine is designed to defer to *ongoing* state proceedings that afford an opportunity to raise

one's federal claims, not to require plaintiffs to file their federal claims in state rather than federal forums in the first instance.

In addition, the court of appeals unduly narrowed the "extraordinary circumstances" exception to *Younger*. Here, the state procedures were flagrantly and patently unconstitutional, and caused irreparable harm to parents who lost custody of their children for sixty days without any meaningful notice or hearing. The court of appeals doubly erred. It limited the "extraordinary circumstances" exception to challenges *to statutes*, not *policies*, in conflict with three other courts of appeals. And it inexplicably ignored the self-evident irreparable harm suffered by parents who lose custody of their children for sixty days with no notice or opportunity to be heard.

In *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013), this Court unanimously reversed the Eighth Circuit's overly broad application of *Younger* abstention, reiterating that where federal jurisdiction exists, "a federal court's obligation to hear and decide a case is virtually unflagging" and that "[p]arallel state-court proceedings do not detract from that obligation." 571 U.S. at 77 (internal quotation marks and citation omitted); *see also id.* at 81 (critiquing the "extraordinary breadth" the Eighth Circuit had given the Court's *Younger* precedent). Here again, the Eighth Circuit has unjustifiably expanded *Younger*, essentially transforming it into the exhaustion requirement that this Court has insisted it is not. This Court should grant certiorari to make clear that the "adequate opportunity" to pursue a federal claim must arise in the ordinary

course of the ongoing state proceeding being challenged, and that abstention is unwarranted where flagrantly and patently unconstitutional policies severely harm parents by separating them from their children without the most basic due process protections.

STATEMENT

A. Statutory Scheme

This case concerns the procedural adequacy of the initial hearings held in emergency child abuse and neglect proceedings brought against Indian families in Pennington County, South Dakota. The procedures for child abuse and neglect proceedings are governed by S.D. Codified Laws Chapters 26-7A and 26-8A and state and local policy. Under this scheme, the state can remove children from their homes where there is an "imminent danger to the child's life or safety." S.D. Codified Laws §§ 26-7A-12(4), -13(1)(b).

After an emergency removal, the parents have a right to a preliminary hearing within 48 hours. *Id.* § 26-7A-14. The parents must be informed that they have "the right to a prompt hearing by the court to determine whether temporary custody should be continued." *Id.* § 26-7A-15. If the child is an Indian child, an effort must also be made to notify the child's tribe, and the tribe has a right to intervene in the proceeding. *Id.* § 26-7A-15.1(1).

The purpose of the initial 48-hour hearing is "to determine whether temporary custody should be continued" or the child should be returned to the parents. *Id.* § 26-7A-15. When the child involved is Indian, the Department of Social Services (DSS)

must support its petition for temporary custody with an "ICWA Affidavit" setting forth the grounds for the state's belief the child is an Indian child and for requesting continued custody of the child. *See* S.D. Supreme Court, *South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases* 39, 41, 119-20 (Mar. 2014), https://ujs.sd.gov/uploads/pubs/SDGuidelinesAandNProceedings.pdf.

At the conclusion of a 48-hour hearing, the court may order that the child be returned home, or issue a Temporary Custody Order directing that custody of the child be continued "under the terms and conditions for duration and placement that the court requires, including placement of temporary custody of the child with the Department of Social Services, in foster care or shelter." S.D. Codified Laws § 26-7A-19(1), (2). If the child is not returned home, "the court shall review the child's temporary custody placement at least once every sixty days," *id.*, and the child will remain in temporary custody "until released by order of the court," *id.* § 26-7A-16.

Within the first sixty days following the 48-hour hearing and entry of the Temporary Custody Order, the state must decide whether to return the child to the parents or file a petition formally alleging abuse and neglect. *See id.* § 26-7A-43. If a petition is filed, an "advisory hearing" is held at which the parents must admit or deny the petition.[3]

[3] As the district court found, defendants always scheduled the advisory hearing approximately sixty days after the date of the Temporary Custody Order. Thus, Indian parents, who *always* lost at the 48-hour hearing, would necessarily lose physical and legal custody of their children for sixty days unless DSS decided

Id. § 26-7A-54. If an admission is made, the case goes to the dispositional phase; if a denial is made, the court schedules an evidentiary ("adjudicatory") hearing. *Id*. § 26-7A-55. The court must enter a new custody order at the conclusion of the advisory hearing. *Id*.

In all cases in which the parents contest the charges in the petition, the court must then schedule "a hearing to determine whether the allegations of a petition alleging that a child is abused or neglected are supported by clear and convincing evidence." *Id*. § 26-7A-1(2). If at that hearing the child is adjudicated as abused or neglected, the court can terminate parental rights or order continued custody of the child with DSS. If continued custody is ordered, "the court shall conduct a review hearing of the foster care status every six months" until there is a disposition. *Id*. § 26-8A-24. "On completion of the dispositional phase of the proceeding, the court shall enter a final decree of disposition." *Id*. § 26-8A-22.

There is no opportunity for parents to challenge the adequacy of the procedures used in the initial 48-hour hearing at any subsequent stage of the abuse and neglect proceedings. All subsequent hearings focus on whether the child should be returned to the parents, guided by the "best interests of the child." *Id*. § 26-7A-5. Thus, whether the parents received adequate procedural protections at the 48-hour hearing will never be relevant or considered by the court at any later stage of the proceedings.

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in its discretion to return the children before the sixty days elapsed. *See* Pet. App. 112a-113a, 120a, 127a.

B. Facts Regarding the 48-Hour Hearings

Plaintiffs adduced extensive evidence of abuse and neglect proceedings involving Indian children conducted by defendants in Rapid City, South Dakota from 2010 through 2013. The district court found that during this four-year period, 823 Indian children were removed from their homes, triggering 48-hour hearings. Pet. App. 112a-113a. At the 48-hour hearing, defendants did not provide Indian parents "copies of the petition for temporary custody," or the welfare worker's affidavit that allegedly supported the charges. Pet. App. 54a; *see also* Pet. App. 39a, 141a. The court found that parents had no opportunity "to confront and cross-examine DSS witnesses," whose testimony provided the sole factual basis for the order taking custody of their children for sixty days. Pet. App. at 145a; *see also* Pet. App. 39a. Parents were not allowed to provide testimony or any other "evidence to contradict the State's removal documents." Pet. App. 145a; Pet. App. 39a. The state submitted *ex parte* documents to the state court that were "not received in evidence at the 48-hour hearings," yet were often the basis of the court's order to remove the children from their homes. Pet. App. 145a-146a; *see also* Pet. App. 39a. Furthermore, indigent "parents ha[d] been deprived of counsel during the course of what should have been an adversarial evidentiary hearing," Pet. App. 143a; *see also* Pet. App. 39a, 55a, 122a. The court found that defendants' 48-hour hearings "usually last less than five minutes" and defendants won every single one of the 48-hour hearings conducted over the four-year period 2010-2013. Pet. App. 102a, 112a-113a. Finally, the court found that "None of the complained of policies or practices are

compelled by state law," but were imposed as a matter of local policy. Pet. App. 127a.

C. Proceedings Below

Plaintiffs filed this lawsuit on March 21, 2013, to challenge the inadequacy of procedural protections provided in connection with the 48-hour hearings described above. Plaintiffs were three parents who had lost their children in 48-hour hearings, and two Native American tribes, the Oglala Sioux Tribe and the Rosebud Sioux Tribe. The parents sued on their own behalf and on behalf of a class of similarly situated Indian parents. The tribes, whose children were the subject of many 48-hour hearings and removals, sued in their *parens patriae* capacity on behalf of themselves and their members. Plaintiffs' complaint alleged that the 48-hour hearings were procedurally deficient in multiple ways, in violation of the Due Process Clause of the Fourteenth Amendment and the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 *et seq*.[4]

Defendants are four state officials who initiate, pursue, and/or adjudicate the preliminary 48-hour hearings: the head of the Rapid City office of DSS, the South Dakota Secretary of DSS, the county prosecutor who initiates and prosecutes 48-hour

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[4] ICWA was enacted to provide certain safeguards to Indian families and Indian tribes in state custody proceedings. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 44-45, 52 (1989). Among other things, ICWA specifies various safeguards, including the burden of proof, that states must meet to remove an Indian child from the home at initial hearings. *See* 25 U.S.C. § 1922. In addition to due process, the district court found that defendants violated § 1922. Pet. App. 130a-139a.

hearings at the request of DSS, and the judge appointed by the South Dakota Supreme Court to preside over the South Dakota Seventh Judicial Circuit, which includes Rapid City, where these hearings took place. All defendants were sued in their official capacities only, and plaintiffs sought only prospective relief to obtain adequate procedural safeguards in future 48-hour hearings.

Defendants moved to dismiss on numerous grounds, including, as relevant here, abstention under *Younger*. On January 28, 2014, the district court denied defendants' motions. Pet. App. 149a-190a. It held that plaintiff Indian tribes had standing on their own behalf and in their *parens patriae* capacity to assert the rights of their members, Pet. App. 162a-165a, and concluded that *Younger* abstention was inappropriate because plaintiffs had no adequate opportunity to challenge the procedural adequacy of the 48-hour hearings in the abuse and neglect proceedings themselves. Pet. App. 151a-160a. The court also noted that *Younger* abstention is inapplicable "where the state process being challenged is 'flagrantly and patently violative of express constitutional prohibitions' or where 'danger of irreparable loss is both great and immediate." Pet. App. 159a (quoting *Younger*, 401 U.S. at 53, 45).[5]

[5] On the same day, the court granted the individual plaintiffs' motion for class certification, certifying a class of "all other members of federally recognized Indian tribes who reside in Pennington County, South Dakota, and who, like plaintiffs, are parents or custodians of Indian children." *Oglala Sioux Tribe v. Van Hunnik*, 2014 WL 317693, at *6 (D.S.D. Jan. 28, 2014). Defendants did not appeal the class certification issue to the Eighth Circuit.

Through discovery, plaintiffs obtained all relevant records, including transcripts, for every third 48-hour hearing defendants conducted between January 1, 2010 and April 1, 2014, involving an Indian child—approximately 120 files from the nearly 360 hearings. Based on this undisputed record, plaintiffs sought summary judgment on their due process and ICWA claims.

As noted above, the district court found that the 48-hour hearings provided neither notice, nor a meaningful opportunity to be heard, nor a decision based upon evidence from the hearing. The court concluded that defendants' 48-hour hearings violated both due process and ICWA, and granted plaintiffs summary judgment. Pet. App. 100a-148a. The court directed each party to submit a proposed remedial plan. Pet. App. 148a. Defendants instead filed a motion to reconsider. The district court modified its decision in minor factual respects but otherwise reaffirmed its decision, and again directed each party to submit a proposed remedial plan. Pet. App. 78a-99a.

Plaintiffs submitted a proposed remedy, but defendants declined to do so. At a remedial hearing on August 17, 2016, the court learned that, seventeen months after the court's summary judgment ruling, defendants were still implementing virtually all of their unconstitutional policies. Pet. App. 45a (finding that defendants still did "not allow any testimony during any 48-hour hearing" or permit parents to confront the welfare worker whose affidavit formed the basis for the petition). The district court concluded that defendants' "only

consistent policy" was to violate plaintiffs' rights. Pet. App. 31a, 39a.

On December 15, 2016, the court issued narrow declaratory and injunctive relief aimed at correcting the specific policies that violated federal law. It required that parents be provided notice of the charges against them, an opportunity to present evidence and to confront the evidence against them, a decision based on evidence adduced at the hearing, and appointment of counsel where parents were indigent. Pet. App. 62a-69a (injunction), 70a-77a (declaratory judgment). The court denied plaintiffs' request for appointment of a monitor. Pet. App. 60a.

Defendants appealed the grant of prospective relief to the Eighth Circuit, but did not appeal the district court's conclusions regarding class certification, standing, discovery, or whether ICWA is enforceable through 42 U.S.C. § 1983. The Eighth Circuit reversed based on *Younger* abstention. Pet. App. 3a-22a. It reasoned that plaintiffs' federal claims regarding the procedural infirmities of the 48-hour hearings could be addressed and remedied through the filing of a separate mandamus action, or through an interlocutory appeal or appeal from a final judgment in custody proceedings. Pet. App. 20a. The Eighth Circuit also concluded that plaintiffs had not shown that they would suffer irreparable injury, despite acknowledging that parents lost custody of their children for up to sixty days on the basis of the procedurally deficient 48-hour hearings. Pet. App. 21a.

Plaintiffs sought rehearing *en banc*, which the court denied. Three judges dissented and would have granted rehearing. Pet. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S HOLDING THAT THE ABILITY TO FILE A SEPARATE STATE LAWSUIT IS AN "ADEQUATE OPPORTUNITY" TO PURSUE FEDERAL CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

The decision below creates a clear split among the courts of appeals over what constitutes an "adequate opportunity" to present one's federal claims in an ongoing state proceeding for purposes of abstention under *Younger v. Harris*. The Eighth Circuit concluded that the opportunity to bring an independent state mandamus action represents an adequate opportunity to raise federal claims, while the First, Third, and Sixth Circuits have held precisely the contrary. The decision below also conflicts with this Court's decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), which held that *Younger* abstention did not apply to a due process challenge to procedural defects in preliminary hearings that are unreviewable in the state court proceeding itself, even where a separate state action under habeas corpus or mandamus could have been filed. And it conflicts with *Monroe v. Pape*, 365 U.S. 167 (1961), by transforming *Younger* into the exhaustion requirement the Court rejected in *Monroe*. Finally, the court of appeals erred in holding that the ability to request discretionary appellate review also represents an adequate opportunity to raise federal claims. As a result, the court denied relief with respect to a policy that led to the removal of

hundreds of Indian children from their parents for months without the barest minimum of procedural protections. The Court should grant certiorari to resolve this important conflict.

Younger held that federal courts "should not act to restrain [a state] criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger,* 401 U.S. at 43-44. The Court has extended *Younger* abstention to certain state law enforcement proceedings beyond criminal prosecutions, but only where the state proceeding itself affords an adequate opportunity to pursue the federal claims.

Plaintiffs here challenge the adequacy of a preliminary "48-hour" hearing that determines whether the state can separate a child from his or her parents for sixty days. Parents have no opportunity to challenge the procedural adequacy of the 48-hour hearing in the course of the subsequent abuse and neglect proceedings. Plaintiffs argued that *Younger* abstention ought not apply for the same reasons that it did not apply in *Gerstein v. Pugh*. Just as a criminal trial, focused on the guilt of the accused, afford no opportunity to review the adequacy of procedures that were afforded during the defendant's initial detention, so South Dakota's abuse and neglect proceeding, which focuses on whether to separate the child from his parents, offers no opportunity to review the procedural sufficiency of the preliminary 48-hour hearing.

The court of appeals nonetheless concluded that plaintiffs had an "adequate opportunity" to raise their federal claims. *First,* it reasoned that they could

have filed a *separate* state mandamus petition. Pet. App. 20 ("The availability of mandamus relief is sufficient to show that state proceedings provide an adequate opportunity to litigate federal claims."). *Second*, the court asserted that the parents could have tried to raise the procedural inadequacy of the initial hearing in an interlocutory appeal, or by appealing at the conclusion of the full abuse and neglect proceeding itself—even though the claims would be moot at that point. Pet. App. 20. Both conclusions conflict with decisions of this Court and other circuits.

A. The Eighth Circuit's Holding that an Independent Mandamus Action Provides an Adequate Opportunity to Raise Constitutional Claims Conflicts with Decisions of Other Courts of Appeals.

The First, Third, and Sixth Circuits have squarely held, contrary to the Eighth Circuit here, that the "adequate opportunity" to raise federal claims must be available *in the ongoing state proceedings themselves*—not in a hypothetical *separate* state lawsuit. In a case challenging the validity of juvenile pretrial detention, the First Circuit held that the "adequate opportunity" required for *Younger* abstention must be "provided in the ordinary course of the pending state proceedings." *Fernandez v. Trias Monge*, 586 F.2d 848, 852 (1st Cir. 1978). The plaintiff in *Fernandez* challenged his detention without due process in the context of a juvenile court proceeding. Defendants invoked *Younger* and argued that the plaintiff could have filed a *separate* state habeas or injunctive action. The

court squarely rejected the contention, concluding that "plaintiff's failure to explore the possible alternative avenue of state habeas corpus relief should not bar plaintiff's suit." *Fernandez*, 586 F.2d at 853.

The Sixth Circuit reached the same result in *Habich v. City of Dearborn*, 331 F.3d 524 (6th Cir. 2003). Habich challenged the city's padlocking of her home without due process in connection with a state administrative process regarding an inspection of her home. The city argued that because Habich could have filed a *separate* state action raising her due process claims regarding the padlocking, abstention was required. The court of appeals rejected that argument, holding that the "adequate opportunity" to have one's claim heard requires that the claim be able to be "resolved by the case-in-chief," and does not include the possibility of filing a separate lawsuit in state court. *Habich*, 331 F.3d at 532. The court explained that if the availability of a *separate* state action were sufficient, "*Younger* abstention would almost always be appropriate, because there are few situations in which a federal plaintiff would not be able to file the federal suit in state court." *Id.* at 531-32.

The Third Circuit has also rejected abstention where the only available state opportunity to raise a particular federal claim is via a separate mandamus action. In *Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399 (3d Cir. 2005), the district court had dismissed a claim for damages arising out of a land use dispute on *Younger* abstention grounds. The court of appeals reversed the district court, and instead recommended staying the federal action to

see whether damages could be sought in the ongoing state land use appeal itself. Noting that under Pennsylvania law, it appeared that a request for damages could not be made in the land use appeal itself, but only in a "separate mandamus action," the court concluded that "*Younger* abstention is only appropriate where the precise claims raised in federal court *are available* in the ongoing state proceedings." *Id.* at 413. (emphasis in original).[6]

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[6] The Eighth Circuit cited two decisions to support its view that the "availability of mandamus relief is sufficient to show that state proceedings provide an adequate opportunity to litigate federal claims." Pet. App. 20a (*citing Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 521 (5th Cir. 2004); *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 202 (2d Cir. 2002)). But neither decision supports the Eighth Circuit's rationale. In *Diamond "D" Construction Corp.*, the Second Circuit ruled that abstention was appropriate in connection with a road construction contractor's challenge to a state labor department's investigation of its wage practices where the contractor *conceded* that the state proceeding was adequate. *See* 282 F.3d at 198 (observing that "[t]he parties here agree" that "the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims"). This holding has no application here, where the crux of plaintiffs' claims is that the state proceeding is *not* adequate. The Second Circuit's only reference to mandamus was as a potential mechanism to address agency delays in adjudicating the contractor's claims. *Id.* at 202.

In *Texas Ass'n of Business,* the Fifth Circuit did not hold that *Younger* applies because a state mandamus mechanism was available. Rather, the court found abstention proper in a challenge to the constitutional validity of a grand jury subpoena, where state court procedure permitted the subpoena to be challenged in the state district court overseeing the grand jury via a motion to quash. *Id.* It did so because the plaintiff could pursue its federal claims in the ordinary course of the state proceedings. The court mentioned mandamus only

Requiring that the "adequate opportunity" be available in the *ongoing state proceeding* makes sense, because *Younger* abstention is designed to avoid unnecessary federal intervention in ongoing state proceedings. Where the federal claims can be raised in that ongoing proceeding, the federal courts should generally defer. But where the federal claims cannot be heard in that proceeding, there is no reason to require plaintiffs to pursue a *separate* state lawsuit rather than pursuing their federal claims in federal court. Indeed, as shown below, to require plaintiffs to initiate a separate state action is in direct contradiction to several decisions of this Court.

B. The Eighth Circuit's Decision Conflicts with Decisions of This Court, Which Make Clear That the Adequate Opportunity Must be Available in the Ongoing State Proceedings.

The court of appeals' decision also conflicts with decisions of this Court, which have made clear that the adequate opportunity referred to in *Younger* must be available *within* the ongoing state proceeding itself, and that § 1983 does not require litigants to exhaust separate state remedies before seeking federal court relief. *See Monroe*, 365 U.S. 167.

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because that is the mechanism under Texas law for appealing the state trial court's decision in the ordinary course of the state proceeding, *id.*, but that is entirely distinct from holding that the possibility of filing a *separate* mandamus action bars federal intervention, as the Eighth Circuit did here.

First, the decision below conflicts with *Gerstein*, 420 U.S. 103. In that case, arrestees in Florida who were detained for trial under a prosecutor's information sued in federal court claiming that they had a constitutional right to have a court promptly determine whether there was probable cause for their detention. 420 U.S. at 105-07. This Court held that *Younger* abstention was inappropriate because plaintiffs' claims challenged "the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *Gerstein*, 420 U.S. at 108 n.9. In other words, because there was no opportunity in the subsequent criminal trial to review the procedural sufficiency of the pretrial detention process, abstention was inappropriate.

The detainees in *Gerstein* could have raised their claims in a separate state action by filing a mandamus or habeas corpus petition in state court. *See State ex rel. Haft v. Adams*, 238 So.2d 843, 844 (Fla. 1970) (noting availability of mandamus as extraordinary writ under Florida law); *State ex rel. Perkins v. Lee*, 142 Fla. 154, 158-59 (Fla. 1940) (same)*;* Fla. Stat. Ann. § 79.01 (authorizing a writ of habeas corpus to any applicant who can demonstrate "probable cause to believe that he or she is detained without lawful authority"). Yet this Court held that abstention was inappropriate because there was no opportunity to raise the detainees' claims *within* their criminal prosecutions.

Other decisions of this Court confirm that the "adequate opportunity" to raise federal claims must arise "in the *ongoing* state proceedings," not a separate action. *Juidice v. Vail*, 430 U.S. 327, 337

(1977) (emphasis added); *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) (describing the abstention inquiry as whether there is "an adequate opportunity *in the state proceedings* to raise constitutional challenges." (emphasis added)).

In each of the cases where this Court has found an "adequate opportunity" to raise a federal claim, the Court has looked to the opportunity the party had within the state proceeding that potentially triggered *Younger* abstention—not whether the party could raise claims in a separate proceeding, such as a mandamus action. Thus, in *Juidice v. Vail*, the Court explained that the plaintiff could have pursued his federal claims at several points in the ongoing state proceeding. 430 U.S. at 337 n.14. The Court did not point to New York State's equivalent of "writs of certiorari to review, mandamus or prohibition," N.Y. C.P.L.R. § 7801, which would have allowed Juidice to commence a new action in the New York appellate division against the judge of the county court, N.Y. C.P.L.R. § 506(b)(1).

Similarly, in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986), this Court found the party seeking federal court intervention would have an adequate opportunity to raise its constitutional claims in the ordinary course of the state process for reviewing decisions of the Ohio Civil Rights Commission. *Id.* at 629 (citing Section 4112.06 of Ohio Rev. Code Ann. (1980)). And in holding that a losing litigant in a state judicial proceeding must pursue his ordinary appellate rights before "seeking relief in the District

Court, unless he can bring himself within one of the exceptions specified in *Younger*," the Court in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), limited its holding to "state proceedings which have *already been initiated*." 420 U.S. at 609 n.21 (emphasis added). The *Huffman* Court was careful to specify that the rule it announced in applying *Younger* would "in no way undermine *Monroe v. Pape*, 365 U.S. 167 (1961)," which holds that "one seeking redress under 42 U.S.C. § 1983 for a deprivation of federal rights need not first initiate state proceedings based on related state causes of action." 420 U.S. at 609 n.21 (citing *Monroe*, 365 U.S. at 183).

As *Huffman* indicates, the Eighth Circuit's ruling here is at odds with *Monroe v. Pape*. By requiring abstention because plaintiffs could in theory file a separate state mandamus action, the court effectively imposed the very exhaustion requirement that the Court rejected in *Monroe* and *Huffman*. Because every state affords opportunities for individuals to file mandamus or habeas petitions, every case challenging a state proceeding could in theory give rise to a separate state action. Yet this Court has made clear that the "adequate opportunity" must arise in the ongoing state proceeding itself, and not in an independent state action.

For the same reason, the court of appeals erred in finding "no meaningful distinction" between this case and *Moore v. Sims*, 442 U.S. 415 (1979). Pet. App. 14a. Other than the fact that it challenged child custody proceedings, *Moore* could not be more distinct. First, the plaintiffs in *Moore* had an adequate opportunity to raise their challenges within

the child custody proceedings. *Id*. at 425 (noting that "Texas law is apparently as accommodating as the federal forum" to the claims plaintiffs were raising) (footnote omitted)). Second, the children in *Moore* had been returned to their parents, so no irreparable injury was presented. *Id.* at 431, 433-34. Third, the relief requested in *Moore* was a far-reaching injunction against the prosecution of *any* state custody proceedings, which would have involved broad federal intrusion into state proceedings and halted the specific action against the plaintiffs. *Id*. at 418, 429. Here, by contrast, and as in *Gerstein*, the relief plaintiffs seek addresses only the procedures at the very outset of the process, does not seek to halt any proceedings, and otherwise leaves state procedures and results fully intact. Indeed, the Court in *Moore* expressly distinguished *Gerstein* on the ground that *Gerstein* concerned a procedural challenge to a preliminary hearing. *Moore*, 442 U.S. at 431. Because plaintiffs bring a directly analogous challenge to a preliminary hearing here, *Younger* does not apply.

C. The Eighth Circuit Erred in Concluding that Plaintiffs Had an Adequate Opportunity to Challenge the Procedural Deficiency of 48-Hour Hearings Through an Interlocutory or Final Judgment Appeal.

The court of appeals also concluded that plaintiffs had an adequate opportunity to raise their federal claims in state court because they had "a right to appeal at the conclusion of abuse and neglect proceedings, or after certain intermediate orders."

Pet. App. 20a. That conclusion is misguided for three reasons. First, an appeal from a final judgment in the abuse and neglect proceeding would come far too late to prevent irreparable injury. An appeal at the conclusion of an abuse and neglect proceeding could not remedy the irreparable harm of having one's child taken from one's arms for sixty days without notice and an opportunity to contest at the preliminary hearing.

Second, as the court of appeals acknowledged, any issue relating to the adequacy of the procedures afforded parents in their preliminary 48-hour hearing will be moot by the time parents have their only appeal as of right, at final judgment. Pet. App. 20a. Under South Dakota law, each stage of the abuse and neglect process is forward looking, focused exclusively on whether "the best interest of the child" requires return or removal of the child. S.D. Codified Laws § 26-7A-5. Therefore, once the 48-hour hearing ends, a subsequent tribunal will have no reason to address the sufficiency of procedures afforded to parents at the preliminary hearing, for the same reason that an appeal at the conclusion of a criminal trial would not afford an opportunity to review the constitutionality of pretrial detention at issue in *Gerstein*. Nothing in South Dakota law suggests that the question of whether a parent was denied procedural due process in the 48-hour hearing would bear upon the only question that each subsequent hearing, and any final appeal, would address: whether the child should be returned to or separated from his or her parents. *See Larson v. Krebs*, 898 N.W.2d 10, 16-17 (S.D. 2017) (noting that acceptance of moot cases is discretionary and granted only in narrow circumstances).

The court of appeals speculated that even though any issue regarding the 48-hour hearing would be moot on appeal, the South Dakota Supreme Court might decide such a moot question in its discretion. Pet. App. 20a. But the remote chance the South Dakota Supreme Court might exercise discretionary review of a moot question does not represent an "adequate opportunity" to raise the serious constitutional claims at issue here, particularly where any such ruling would come far too late to address plaintiffs' irreparable injuries.

Third, the temporary custody orders that are issued at the conclusion of a 48-hour hearing are interlocutory orders, *see* S.D. Codified Laws § 26-7A-19(2), and interlocutory orders are subject only to *discretionary* review by the South Dakota Supreme Court. *See id.* § 15-26A-3(6) (providing that appeals of interlocutory orders are "not a matter of right, but of sound judicial discretion").[7] The remote possibility of extraordinary discretionary review by a state's high court does not provide an "adequate opportunity" to raise federal claims, particularly where, as here, plaintiffs face severe irreparable injury.

In short, the court of appeals erred in concluding that the state abuse and neglect proceedings afforded an "adequate opportunity" to pursue the due process claims at issue here, and therefore erred in requiring dismissal under *Younger*.

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[7] As the district court found, "[t]here is no right of appellate review of Judge Davis' 48-hour hearing decisions because those decisions are not a final judgment subject to appellate review under South Dakota law. SDCL § 15-26A-3." Pet. App. 127a.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE EXCEPTION TO *YOUNGER* FOR "FLAGRANTLY AND PATENTLY" UNCONSTITUTIONAL STATE ACTION APPLIES ONLY TO STATUTES AND NOT POLICIES, AND IN IGNORING THE IRREPARABLE HARM SUFFERED BY PARENTS WHO LOSE THEIR CHILDREN FOR SIXTY DAYS WITHOUT DUE PROCESS.

Even if the state proceeding provided an adequate opportunity to pursue plaintiffs' federal claims, federal intervention would nonetheless be proper because defendants' policy regarding preliminary hearings was "flagrantly and patently violative of express constitutional prohibitions" and plaintiffs faced grave irreparable harm in losing custody of their children for two months without any meaningful notice or opportunity to contest the state's action. *Younger*, 401 U.S. at 53-54. The court of appeals rejected the exception for "flagrantly and patently violative" state action by treating it as limited to statutes and rejected the exception for irreparable harm by simply closing its eyes to the evident pain and trauma that accompanies two months of forcible family separation.

A. The Exception for "Flagrantly and Patently" Unconstitutional State Action Applies to Policies as well as Statutes.

The court of appeals rejected the "exceptional circumstances" exception to *Younger* abstention by reasoning that it applies only to challenges to state

statutes, and noting that plaintiffs "do not challenge the constitutionality of a statute at all." Pet. App. 21a. That reasoning is contrary to decisions of this Court and other courts of appeals. Where, as here, state action is flagrantly unconstitutional, it should not matter whether the action is grounded in statute or policy. Indeed, it would make no sense based on principles of comity and federalism to permit a federal court to enjoin a flagrantly unconstitutional state statute but not permit it to enjoin an equally unconstitutional policy.

This Court has repeatedly recognized that *Younger* does not bar federal intervention in state law enforcement proceedings in "extraordinary circumstances." *See Younger*, 401 U.S. at 53; *Huffman,* 420 U.S. at 611; *Gibson v. Berryhill*, 411 U.S. 564, 579-80 (1973). The Court cited as one example of such circumstances "a statute [that is] flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it," *Younger,* 401 U.S. at 53-54 (quoting *Watson v. Buck,* 313 U.S. 387, 402 (1941)). The Eighth Circuit mistakenly treated this example as a strict limitation, and refused to consider the "flagrantly and patently violative" exception because plaintiffs' suit challenges a policy rather than a statute. But this Court has never construed the "extraordinary circumstances" exception so narrowly. To the contrary, the Court has explained that *Younger*'s reference to a statute was simply "one example of the type of circumstances that could justify federal intervention." *Kugler v. Helfant*, 421 U.S. 117, 125 n.4 (1975).

In contrast to the court of appeals here, the Sixth, Seventh, and Ninth Circuits have treated the exception as encompassing policies, asking whether a proceeding is so violative of constitutional rights, even where the challenged procedures were the product of a policy. *See Doe v. Univ. of Kentucky*, 860 F.3d 365, 371 (6th Cir. 2017) (examining a student's due process challenge to a university *policy* on its merits and finding that the policy was not flagrantly and patently unconstitutional); *Mulholland v. Marion Cty. Election Bd.*, 746 F.3d 811, 818 (7th Cir. 2014) (holding that the reference to "statute" "is not the test. *Younger* quoted this language as a sufficient condition for rejecting abstention, not a necessary condition."); *Commc'ns Telesystems Int'l v. California Pub. Util. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999) (applying the "flagrantly and patently" exception to review an agency's suspension of telecommunication company's offering of long-distance service and concluding that the suspension was not flagrantly and patently unconstitutional). The Eighth Circuit cited no case in support of the notion that the "flagrantly and patently" exception applies only to statutes, and plaintiffs know of none.

There can be little doubt that defendants' policy was "flagrantly and patently violative" of due process. Deprived of any notice or opportunity to be heard, parents were little more than spectators as the state took their children away. "[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Child custody is a venerable and fundamental liberty interest. Indeed, "the interest of parents in

the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* This right is entitled to "heightened protection against governmental interference" under the Due Process Clause. *Id.* at 65 (internal citation omitted).

South Dakota, therefore, may not deprive a parent of child custody without providing "appropriate procedural safeguards." *See Cleveland Board of Ed. v. Loudermill*, 470 U.S. 532, 541 (1985) (internal quotation marks omitted). The Court has repeatedly and consistently recognized that persons facing the deprivation of liberty interests far less foundational than parents' right to custody of their children must receive at a minimum adequate pre-hearing notice, the rights to present testimony and to confront adverse evidence, and a decision based on evidence adduced in the hearing. *See, e.g., Greene v. McElroy*, 360 U.S. 474, 492, 496-97 (1959) (revocation of government contractor's security clearance, noting, *inter alia*, that the right to confront where, as here, a significant interest is at stake and the decision turns on the credibility of a witness has been recognized for "two centuries" (quoting 5 Wigmore on Evidence (3d ed. 1940) § 1367)); *Willner v. Comm. on Character and Fitness*, 373 U.S. 96, 103-04 (1963) (admission to state bar); *Armstrong v. Manzo*, 380 U.S. 545, 550-51 (1965) (termination of parental rights); *Application of Gault*, 387 U.S. 1, 87 (1967) (determination of juvenile delinquency); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341-42 (1969) (garnishment of wages); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1969) (termination of welfare benefits); *Fuentes v. Shevin*, 407 U.S. 67, 80-84 (1972) (repossession of personal

property); *Goss v. Lopez*, 419 U.S. 565 (1975) (10-day expulsion from public school); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (termination of utility service); *Loudermill*, 470 U.S. at 542 (termination of employment).

The Eighth Circuit did not question the fact that defendants' policy was "flagrantly and patently violative" of due process. Indeed, it would be difficult to imagine a procedure more violative of due process. The fact that this flagrantly and patently unconstitutional action rested on policy rather than statute makes it no less urgent for federal court resolution.

B. The Forcible Separation of Children from their Parents Without Due Process Inflicts Grave and Serious Irreparable Injury.

The court of appeals acknowledged that abstention is unwarranted where plaintiffs face the risk of "irreparable loss [that] is both great and immediate." Pet. App. 21a (quoting *Younger*, 401 U.S. at 45). Yet it rejected this argument because, in its view, plaintiffs "have not established that the alleged procedural deficiencies at the 48-hour hearings threaten" such harm. Pet. App. 21a.

The court of appeals simply closed its eyes to what everyone knows. It cannot seriously be denied that forcibly separating a child from his or her parents for sixty days without any meaningful opportunity to contest the action constitutes irreparable injury, in clear violation of parents' rights under the Due Process Clause. *See, e.g.*, Pet. App. 31a (denying defendants' motion for a stay

pending appeal because "the interests of the plaintiffs will continue to suffer harm through the actions of the defendants if a stay of the permanent injunction is granted." (footnote omitted)). Particularly where, as here, there was no opportunity to remedy those harms in the abuse and neglect proceedings themselves, it was clear error for the court of appeals to ignore those injuries and relegate plaintiffs to a state proceeding that could do nothing to remedy them.

CONCLUSION

For all of the above reasons, the writ of certiorari should be granted.

Respectfully Submitted,

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Date: March 4, 2019

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1135

Oglala Sioux Tribe, et al.

Appellees

v.

Lisa Fleming, in her official capacity

Mark Vargo, in his official capacity

Appellant

Honorable Craig Pfeifle and Lynne A. Valenti, in their official capacities

---

Cherokee Nation, of Oklahoma, et al.

Amici on Behalf of Appellee(s)

No: 17-1136

Oglala Sioux Tribe, et al.

Appellees

v.

Lisa Fleming and Mark Vargo, in their official capacity

Honorable Craig Pfeifle, in his official capacity

Appellant

Lynne A. Valenti, in her official capacity

Cherokee Nation, of Oklahoma, et al.

Amici on Behalf of Appellee(s)

No: 17-1137

Oglala Sioux Tribe, et al.

Appellees

v.

Lisa Fleming, in her official capacity

Appellant

Mark Vargo and Honorable Craig Pfeifle, in their official capacity

Lynne A. Valenti, in her official capacity

Appellant

Cherokee Nation, of Oklahoma, et al.

Amici on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of South Dakota - Rapid City
(5:13-cv-05020-JLV)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judge Shepherd, Judge Kelly, and Judge Erickson would grant the petition for rehearing *en banc*. Judge Grasz did not participate in the consideration or decision of this matter.

December 04, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17-1135

Oglala Sioux Tribe; Rosebud Sioux Tribe, as *parens patriae*, to protect the rights of their tribal members; Madonna Pappan; Lisa Young, individually and on behalf of all other persons similarly situated,

Plaintiffs - Appellees,

v.

Lisa Fleming, in her official capacity,

Defendant,

Mark Vargo, in his official capacity,

Defendant - Appellant,

Honorable Craig Pfeifle; Lynne A. Valenti, in their official capacities,

Defendants.

Cherokee Nation of Oklahoma; ICWA Law Center; National Congress of American Indians; National Indian Child Welfare Association; Navajo Nation;

Amici on Behalf of Appellee(s)

No. 17-1136

Oglala Sioux Tribe; Rosebud Sioux Tribe, as *parens patriae*, to protect the rights of their tribal members; Madonna Pappan; Lisa Young, individually and on behalf of all other persons similarly situated,

Plaintiffs - Appellees,

v.

Lisa Fleming; Mark Vargo, in their official capacities,

Defendants,

Honorable Craig Pfeifle, in his official capacity,

Defendant - Appellant,

Lynne A. Valenti, in her official capacity,

Defendant.

No. 17-1137

Oglala Sioux Tribe; Rosebud Sioux Tribe, as *parens patriae*, to protect the rights of their tribal members; Madonna Pappan; Lisa Young, individually and on behalf of all other persons similarly situated,

Plaintiffs - Appellees,

v.

Lisa Fleming, in her official capacity,

Defendant - Appellant,

Mark Vargo; Honorable Craig Pfeifle, in their official capacities,

Defendants,

Lynne A. Valenti, in her official capacity,

Defendant - Appellant.

Appeals from United States District Court for the District of South Dakota - Rapid City

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Submitted: February 13, 2018
Filed: September 14, 2018

Before SMITH, Chief Judge, MURPHY and COLLOTON, Circuit Judge*

COLLOTON, Circuit Judge.

The Oglala Sioux Tribe, the Rosebud Sioux Tribe, and tribal members Madonna Pappan and Lisa Young brought this action against various South Dakota officials under 42 U.S.C. § 1983. They challenged procedures used in proceedings brought by the State to remove children temporarily from their homes in exigent circumstances. The plaintiffs alleged that the defendants were engaged in ongoing violations of the Due Process Clause of the Fourteenth Amendment and the Indian Child Welfare Act (ICWA), 25 U.S.C. §

* This opinion is filed by Chief Judge Smith and Judge Colloton under Eighth Circuit Rule 47E.

1901 *et seq.*, because their policies and practices deprived Indian parents of a meaningful hearing after their children were taken into temporary state custody.

The district court denied the defendants' motion to dismiss on jurisdictional grounds, and granted partial summary judgment for the plaintiffs on several of their statutory and constitutional claims. The court then entered a declaratory judgment and a permanent injunction. After declaring certain rights of Indian parents, custodians, children, and Tribes at hearings held within 48 hours of the State assuming temporary custody of a child, the court ordered the Department of Social Services (DSS) and the State's Attorney to implement certain procedures to protect these rights.

The defendants appeal, and challenge both the district court's assertion of jurisdiction and its decision to grant declaratory and injunctive relief. We have jurisdiction to review the order granting the permanent injunction under 28 U.S.C. § 1292(a)(1). We also have jurisdiction to consider orders granting declaratory relief and partial summary judgment that are incorporated by, and inextricably bound up with, the injunction. *FDIC v. Bell*, 106 F.3d 258, 262-63 (8th Cir. 1997); *Fogie v. THORN Americas, Inc.*, 95 F.3d 645, 648-49 (8th Cir. 1996).

We ultimately conclude that the district court should have abstained from exercising jurisdiction under principles of federal-state comity articulated in *Younger v. Harris*, 401 U.S. 37 (1971), and later cases. We thus vacate the court's orders granting partial summary judgment and declaratory

and injunctive relief, and remand with instructions to dismiss the claims that gave rise to the orders.[1]

I.

South Dakota law establishes a process for the removal of children from their homes in exigent circumstances. *See* S.D. Codified Laws § 26-7A-1 *et seq*. A law enforcement officer may take a child into temporary state custody without a court order if the officer reasonably believes that there is an "imminent danger to the child's life or safety and there is no time to apply for a court order." *Id.* § 26-7A-12(4). Alternatively, a court may order that the State take temporary custody of a child upon application by a state's attorney, DSS social worker, or law enforcement officer. The application must set forth "good cause to believe . . . [t]here exists an imminent danger to the child's life or safety and immediate removal of the child from the child's parents, guardian, or custodian appears to be necessary for the protection of the child." *Id.* § 26-7A-13(1)(b).

The State may not hold a child in temporary custody for longer than 48 hours, excluding weekends and court holidays, unless it files a petition for temporary custody. *Id.* § 26-7A-14. The statute also requires a temporary custody hearing within 48 hours after the child is taken into custody to determine whether temporary custody should be continued. *Id.* § 26-7A-15. The parties describe this proceeding as the "48-hour hearing." South Dakota

[1] The district court has not yet resolved plaintiffs' claims relating to DSS's alleged failure to train its staff members adequately. These claims are not before us on appeal, and we do not address them.

circuit courts have original jurisdiction over these proceedings. *Id.* § 26-7A-2.

Under South Dakota law, at the 48-hour hearing, "the court shall consider the evidence of the need for continued temporary custody of the child in keeping with the best interests of the child." *Id.* § 26-7A-18. The 48-hour hearings are "conducted under rules prescribed by the court," and neither the rules of civil procedure nor the rules of evidence apply. *Id.* § 26-7A-56. "The rules may be designed by the court to inform the court fully of the exact status of the child and to ascertain the history, environment, and the past and present physical, mental, and moral condition of the child and the child's parents, guardian, and custodian." *Id.*

At the conclusion of a 48-hour hearing, the court may order release of the child to his or her family or continued custody "under the terms and conditions for duration and placement that the court requires." *Id.* § 26-7A-19. If the court orders a child to remain in state custody after the 48-hour hearing, but has not determined that the child is abused or neglected, then South Dakota requires the court to "review the child's temporary custody placement at least once every sixty days." *Id.* § 26-7A-19(2).

The plaintiffs in this case are two Indian Tribes—the Oglala Sioux Tribe and the Rosebud Sioux Tribe—and a class of individual plaintiffs represented by Madonna Pappan and Lisa Young. In their complaint, the plaintiffs alleged that the defendants violated the Due Process Clause of the Fourteenth Amendment and the ICWA by denying Indian parents a meaningful post-deprivation hearing after their children were taken into temporary state

custody. The defendant officials are the Secretary of the South Dakota Department of Social Services and the head of Child Protective Services for Pennington County (together, "the DSS Defendants"), the State's Attorney for Pennington County, and the presiding judge of the Seventh Judicial Circuit Court of the State of South Dakota, all in their official capacities.

The Tribes assert standing under the *parens patriae* doctrine, alleging that they seek "to vindicate rights afforded to their members." They claim "a close affiliation, indeed kinship, with respect to the rights and interests at stake in this litigation." They further allege that "[t]he future and well-being of the Tribes is inextricably linked to the health, welfare, and family integrity of their members." The Tribes also seek to vindicate their own rights under the ICWA.

The named individual plaintiffs, Pappan and Young, both reside in Pennington County and are members of the Oglala Sioux Tribe and the Standing Rock Sioux Tribe, respectively. They claim that they "are not seeking to interfere with, or overturn decisions in, their own cases but rather are seeking to expose and challenge systemic policies, practices, and customs of the Defendants that violate federal law. Both Pappan and Young have two children who were previously taken into State custody under allegations of abuse or neglect. The children remained in State custody for months before returning home. According to the complaint, both mothers "suffered, and watched their children suffer, extreme emotional and psychological trauma as a result of this forced separation." Pappan and Young brought their claims on behalf of themselves and "all other members of federally recognized Indian

tribes who reside in Pennington County, South Dakota and who, like the plaintiffs, are parents or custodians of Indian children." The district court certified a class.

The plaintiffs alleged that it was "[t]he policy, practice, and custom of the Defendants . . . to wait at least sixty days (and more often ninety days) before providing parents whose children have been removed from their custody with adequate notice, an opportunity to present evidence on their behalf, an opportunity to contest the allegations, and a written decision based on competent evidence." They asserted that the 48-hour hearings did not provide these protections. So they sought declaratory and injunctive relief to ensure that Indian families and Tribes were given "adequate notice and a meaningful hearing at a meaningful time following the removal of Indian children from their homes by state officials," as allegedly required by the Due Process Clause and the ICWA.

The defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), arguing, among other things, that the plaintiffs lacked standing under Article III, and that the district court was required to abstain from exercising jurisdiction under the doctrine of *Younger v. Harris*. The district court denied the motion.

Thereafter, the district court granted summary judgment for the plaintiffs on the merits and granted declaratory and injunctive relief. The court ruled that the defendants' practices and policies at the 48-hour hearings violated both § 1922 of the ICWA and the Due Process Clause. The district court declared that Indian children, parents, custodians, and

Tribes have rights at the 48-hour hearings to "adequate notice," to present evidence and subpoena witnesses, to cross-examine DSS witnesses, to receive the assistance of court-appointed counsel if indigent, and to a decision based on the evidence presented at the hearing. Relying on § 1922, the court declared that the State may continue temporary custody of a child after a 48-hour hearing only if it establishes that temporary custody is "necessary to prevent imminent physical damage or harm to the child." If the State does continue temporary custody, the court ordered that DSS must immediately report to the circuit court when the risk of imminent physical damage or harm subsides, and return the child to a parent or custodian at that time. The district court further declared that § 1922 does not permit the State to consider emotional damage or harm.

The declaratory judgment went into some detail on the scope of these rights. For example, the court defined adequate notice to mean that all petitions for temporary custody must include information about the State's burden of proof. As to the right to cross-examination, the court declared that parents, custodians, and Tribes have the right to cross-examine all witnesses "whose statements form the factual basis for any document submitted to the court for consideration during the 48-hour hearing." The court also permanently enjoined the DSS Defendants and the State's Attorney from violating the constitutional and statutory rights declared by the court, and ordered them to comply with the requirements set forth in the declaratory judgment. The court did not order injunctive relief against the presiding judge. *See* 42 U.S.C. § 1983 ("[I]n any action

brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

II.

There are several threshold jurisdictional issues in this appeal, including Article III standing and *Younger* abstention. The defendants raised both standing and abstention in the district court. On appeal, they focus on abstention. Of course, we have an independent obligation to determine whether subject-matter jurisdiction exists before proceeding to the merits, even when no party raises the issue. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-101 (1998). But when both standing and abstention are at issue, we may consider either one first. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85 (1999); *Steel Co.*, 523 U.S. at 100 n.3.

The district court did not address standing of the individual plaintiffs but concluded that the Tribes had standing under the doctrine of *parens patriae*. The court, quoting 25 U.S.C. § 1902, reasoned that the action was "inextricably bound up with the Tribes' ability to maintain their integrity and 'promote the stability and security of Indian tribes and families.'" The court concluded that abstention was not warranted because the plaintiffs sought only "prospective relief." The court later acknowledged that "48-hour hearings involving Indian children will continue to occur during the pendency of this litigation," but still declined to abstain on the

view that the relief requested by the plaintiffs would not "interfere" with ongoing proceedings. We review the district court's decision on abstention for abuse of discretion, but exercise plenary review over underlying legal determinations. *Aaron v. Target Corp.*, 357 F.3d 768, 774 (8th Cir. 2004).

We need not address whether any of the plaintiffs satisfy the requirements for Article III standing, because the district court should have abstained under *Younger*. Abstention is an exception to the general rule that "federal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013). The *Younger* line of cases "counsels federal-court abstention when there is a pending state proceeding" of a certain type. *Moore v. Sims*, 442 U.S. 415, 423 (1979). The doctrine "reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff." *Id.* *Younger* involved state criminal proceedings, but abstention also applies to civil enforcement proceedings that are "akin to a criminal prosecution" in "important respects." *Sprint*, 571 U.S. at 79 (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)).

South Dakota's temporary custody proceedings are civil enforcement proceedings to which *Younger* principles apply. In *Moore*, the Court held that a federal court should have abstained from intervening in a state-initiated proceeding to gain custody of children allegedly abused by their parents. 442 U.S. at 423, 435. The Court observed that the State was party to the

proceedings, and that "the temporary removal of a child in a child-abuse context is . . . 'in aid of and closely related to criminal statutes.'" *Id.* at 423 (quoting *Huffman*, 420 U.S. at 604).

Sprint cited *Moore* with approval, 571 U.S. at 79, and we see no meaningful distinction between the custody proceedings in *Moore* and the temporary custody proceedings in South Dakota. The State is a party to these proceedings and initiates them by filing a petition for temporary custody. *See* S.D. Codified Laws §§ 26-7A-9, 26-7A-14. South Dakota law provides for an investigation by both the State's Attorney and DSS upon reported abuse or neglect of a child, after which the State's Attorney may "[f]ile a petition to commence appropriate proceedings." *Id.* § 26-7A-10(5). And because the proceedings are for the purpose of "protecting the child from abuse or neglect," *id.* § 26-7A-6, they are closely related to criminal statutes and potentially in aid of their enforcement.

The plaintiffs nonetheless argue that *Younger* is inapplicable because there is no ongoing state proceeding and because they lack an adequate opportunity in state proceedings to raise their federal claims. These are additional factors appropriately considered by a federal court before invoking *Younger*. *See Sprint*, 571 U.S. at 81; *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The district court accepted the plaintiffs' argument and declined to abstain based on these factors.

According to the plaintiffs, they sought only prospective relief aimed at future 48-hour proceedings, and the federal proceeding would not

interfere with a pending state proceeding. Even the district court, however, acknowledged that "48-hour hearings involving Indian children will continue to occur during the pendency of this litigation," and we agree. *Younger* may apply even if a 48-hour hearing is not in session at the precise moment when the district court grants relief. The plaintiffs do not dispute that some Indian children were in temporary custody and under the continuing jurisdiction of the circuit court while this federal case was pending. *See* S.D. Codified Laws § 26-7A-19(2). In those circumstances, even if a 48-hour hearing were not in session, temporary custody proceedings would be "ongoing," and the proposed relief would interfere with the ongoing proceedings.

The district court addressed this concern by concluding that the requested relief would not "interfere" with ongoing 48-hour hearings. The court thought the proposed relief instead would "support the state's interest involving the protection of Indian children in abuse and neglect cases." This reasoning misunderstands the sort of interference that *Younger* is designed to prevent. The plaintiffs seek an order that would dictate a host of procedural requirements for the ongoing state proceedings. The question under the abstention doctrine is not whether the claims have merit such that the exercise of federal jurisdiction would "support the state's interest" in affording its residents protection under the law. The issue is whether the federal court should refrain from exercising jurisdiction and allow the claims to be resolved in the state proceedings. A federal court order dictating what procedures must be used in an ongoing state proceeding would "interfere" with that proceeding by inhibiting "the legitimate

functioning of the individual state's judicial system." *Bonner v. Circuit Court of City of St. Louis*, 526 F.2d 1331, 1336 (8th Cir. 1975); *see also J.P. v. DeSanti*, 653 F.2d 1080, 1084 (6th Cir. 1981); *Wallace v. Kern*, 481 F.2d 621, 622 (2d Cir. 1973) (per curiam).

Even setting aside the question of "ongoing" temporary custody proceedings, plaintiffs may not circumvent the abstention doctrine by attempting to accomplish the same type of interference with state proceedings through a claim for prospective relief. In *O'Shea v. Littleton*, 414 U.S. 488 (1974), the Court long ago directed that abstention is warranted when plaintiffs seek "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials." *Id.* at 500.

The plaintiffs in *O'Shea* sought to enjoin state court judges from carrying out allegedly unconstitutional policies and practices relating to bond-setting, sentencing, and jury fees in criminal cases. *Id.* at 491-92. Even though the plaintiffs did not seek to invalidate any statute or enjoin any prosecution, the Court recognized that the plaintiffs sought "nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent." *Id.* at 500. The Court explained that "because an injunction against acts which might occur in the course of future criminal proceedings would necessarily impose continuing obligations of compliance," alleged noncompliance with the injunction would give rise to contempt proceedings in federal court. *Id.* at 501-02. But "such a major

continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint" that the Court recognized in *Younger* and its progeny. *Id.* at 502.

This court reached a similar conclusion in *Bonner*. In that case, twenty black prisoners alleged that officials in St. Louis had "joined in a systematic racially discriminatory conspiracy" to coerce black citizens into pleading guilty to criminal charges. 526 F.2d at 1333. The prisoners did not "challenge their present incarceration or the legality of their sentences," but sought declaratory and injunctive relief directed at "possible future recurrences of the alleged illegal acts." *Id.* at 1335. Applying *O'Shea*, we concluded that abstention was warranted because "a federal court should not intervene where such interference unduly inhibits the legitimate functioning of the individual state's judicial system." *Id.* at 1336.

Other circuits have concluded that abstention is required in similar circumstances. In *Parker v. Turner*, 626 F.2d 1 (6th Cir. 1980), indigent fathers who were behind in their child support and alimony payments sued in federal court, claiming that they were routinely denied due process in state civil contempt proceedings. *Id.* at 2. The plaintiffs alleged that "the juvenile court judges, as a matter of policy, denied fathers their right to counsel, denied them the right to confront and cross-examine witnesses, and denied them the right to testify and present witnesses [on] their behalf." *Id.* They sought declaratory and injunctive relief. *Id.* Although the plaintiffs urged that they were not

seeking to interfere in pending proceedings and sought only prospective relief, the Sixth Circuit concluded that abstention was proper because "federal interference with the state proceedings would be as serious here as it was feared to be in *O'Shea*." *Id.* at 8; *see also Joseph A. ex rel. Corrine Wolfe v. Ingram*, 275 F.3d 1253, 1267-72 (10th Cir. 2002); *Luckey v. Miller*, 976 F.2d 673, 676-79 (11th Cir. 1992); *Wallace*, 520 F.2d at 404-09.

The relief sought by the plaintiffs here, although prospective in nature, warrants abstention for analogous reasons. The plaintiffs do not seek to invalidate a state statute or enjoin a temporary custody proceeding, but they pray for relief that will "be operative only where permissible state [proceedings] are pending against one or more of the beneficiaries of the injunction." *O'Shea*, 414 U.S. at 500. The relief requested would interfere with the state judicial proceedings by requiring the defendants to comply with numerous procedural requirements at future 48-hour hearings. The district court also retained jurisdiction for the purpose of "enforcing and modifying" its orders, and for "the purpose of granting additional relief as may be necessary and appropriate." As in *O'Shea*, failure to comply with the district court's injunction would subject state officials to potential sanctions for contempt of court, and place the district court in the position of conducting an ongoing "federal audit" of South Dakota temporary custody proceedings. *Id.* An injunction of the type contemplated by the plaintiffs and the district court "would disrupt the normal course of proceedings in state courts via resort to the federal suit for determination of the claim ab initio," just as would a request for injunctive relief

from an ongoing state proceeding. *Id.* at 501.

The plaintiffs urge that abstention is unwarranted because the relief they seek resembles that which pretrial detainees sought in *Gerstein v. Pugh*, 420 U.S. 103 (1975). There, the Court held that *Younger* did not bar the plaintiffs' claim for relief because the injunction they sought "was not directed at the state proceedings as such, but only at the legality of pretrial detention without a judicial hearing." *Id.* at 108 n.9. *Gerstein* emphasized, however, that the legality of the plaintiffs' pretrial detention "could not be raised in defense of the criminal prosecution." *Id.* The Supreme Court later confirmed that abstention was inappropriate in *Gerstein* because the federal plaintiffs did not have "an opportunity to press [their] claim in the state courts." *Moore*, 442 U.S. at 432; *see also Middlesex*, 457 U.S. at 432. *Gerstein* therefore does not preclude abstention based on the type of relief sought here, as long as the plaintiffs have an opportunity to litigate their claims in the South Dakota courts.

Although the plaintiffs complain that state court proceedings do not afford parents an adequate opportunity to raise broad constitutional challenges under the Due Process Clause, they have not established that South Dakota courts are unwilling or unable to adjudicate their federal claims. State courts are competent to adjudicate federal constitutional claims, *Moore*, 442 U.S. at 430, and "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil Co.*

v. Texaco, Inc., 481 U.S. 1, 15 (1987).

In this very context, the South Dakota courts have adjudicated federal claims. In *Cheyenne River Sioux Tribe v. Davis*, 822 N.W.2d 62 (S.D. 2012), the Supreme Court of South Dakota resolved a petition for writ of mandamus that sought an order compelling a South Dakota circuit judge to apply procedural rights guaranteed by the ICWA at temporary custody hearings. *Id.* at 64-66. The availability of mandamus relief is sufficient to show that state proceedings provide an adequate opportunity to litigate federal claims. *See, e.g.*, *Tex. Ass'n of Bus. v. Earle*, 388 F.3d 515, 521 (5th Cir. 2004); *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 202 (2d Cir. 2002). The Seventh Judicial Circuit Court, moreover, is a court of general jurisdiction, *March v. Thursby*, 806 N.W.2d 239, 243 (S.D. 2011), so Indian parents or Tribes could raise their federal claims in temporary custody proceedings. South Dakota law also provides a right to appeal at the conclusion of abuse and neglect proceedings, or after certain intermediate orders, *see* S.D. Codified Laws §§ 26-7A-30, 26-7A-86, 26-7A-87, 26-7A-90, and the state supreme court has discretion to "determine a moot question of public importance" if it decides that "the value of its determination as a precedent is sufficient to overcome the rule against considering moot questions." *Larson v. Krebs*, 898 N.W.2d 10, 16-17 (S.D. 2017) (quoting *Cummings v. Mickelson*, 495 N.W.2d 493, 496 (S.D. 1993)).

The district court relied on *LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), and *Family Division Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984), in

concluding that the plaintiffs lacked an adequate opportunity to press their claims in state court. In those cases, however, the D.C. Circuit concluded that family division superior court proceedings were not an adequate forum to adjudicate federal constitutional claims, because of their limited purpose and inability to provide appropriate relief. *LaShawn*, 990 F.2d at 1323; *Moultrie*, 725 F.2d at 703. The best evidence about South Dakota is that state procedures provide an adequate remedy for alleged violations of federal law at 48- hour custody hearings, and the plaintiffs have not presented unambiguous authority to the contrary.

Finally, the plaintiffs point to *Younger*'s recognition that even when ordinary abstention principles favor dismissal, the exercise of federal jurisdiction might be warranted where "a statute [is] flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." 401 U.S. at 53-54 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). This exception for "patently unconstitutional" actions is "extremely narrow," *Plouffe v. Ligon*, 606 F.3d 890, 894 (8th Cir. 2010), and it does not apply here. The plaintiffs do not challenge the constitutionality of a statute at all, and they have not established that the alleged procedural deficiencies at the 48-hour hearings threaten "irreparable loss [that] is both great and immediate." *Younger*, 401 U.S. at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)). Of course, child custody proceedings involve interests of great importance to parents and children, but it would "invert[] traditional abstention logic" to say that

"because the interests involved are important, abstention is inappropriate." *Moore*, 442 U.S. at 434-35. "Family relations are a traditional area of state concern," and federal courts should be "unwilling to conclude that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise in child-welfare litigation." *Id.* at 435.

* * *

For the foregoing reasons, we vacate the orders granting partial summary judgment and declaratory and injunctive relief, and remand with instructions to dismiss the claims that gave rise to the orders.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patriae*, to protect the rights of their tribal members; MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs vs. LISA FLEMING; MARK VARGO; HONORABLE CRAIG PFEIFLE; and LYNNE A. VALENTI, in their official capacities, Defendants.	CIV. 13-5020-JLV ORDER

INTRODUCTION

On December 15, 201 6, the court entered three orders and a permanent injunction. (Dockets 301-30 4). On January 13, 201 7, the defendants appealed the orders and permanent injunction as well as previous orders of the court. (Dockets 309, 312 & 321). At the same time, Defendant Mark Vargo filed a motion to stay portions of the declaratory judgment and to suspend portions of the permanent injunction pending appeal ("motion to stay"). (Docket 310). The other defendants join in Mr.

Vargo's motion to stay. (Docket 315 & 322). Plaintiffs oppose the motion to stay. (Docket 331). For the reasons stated below, the motion to stay is denied.

ANALYSIS

Mr. Vargo moves the court to stay "portions [of] the Declaratory Judgment . . . and suspend[] portions [of] the Permanent Injunction . . . pending appeal . . . ." (Docket 310 at p. 1) (referencing Dockets 303 & 304). Specifically, Mr. Vargo asks the court to stay the portions of the declaratory judgment and suspend the portions of the permanent injunction which do not permit the defendants to consider imminent emotional damage or harm in emergency proceedings brought under 25 U.S.C. § 1922. (Docket 311 at p. 2). Mr. Vargo claims the court's decision "fails to protect Indian children from imminent emotional damage or harm." Id. at pp. 2-3.

Mr. Vargo argues the court's decision to limit § 1922 emergency removal considerations to "imminent physical damage or harm" is at odds with the recently published Department of the Interior Executive Summary to its Final Rule located at 25 CFR § 23. Id. at p. 4 (referencing 81 Fed. Reg. 38778 (June 14, 2016)). He contends the Executive Summary "rejected the proposed definition of 'present or impending risk of serious bodily injury or death' because that definition excluded 'neglect and emotional or mental (psychological) harm.'" Id. at p. 5 (parentheses in original; emphasis omitted) (referencing 81 Fed. Reg. at 38794). He claims "the statutory phrase 'imminent physical damage or harm' (the § 1922 emergency removal standard) 'focuses on the child's health, safety, and welfare' and

that Congress intended the statutory phrase to include more than just 'bodily injury or death.'" Id. (parentheses in original; emphasis omitted) (referencing 81 Fed. Reg. at 38794).

Mr. Vargo contends the Guidelines for Implementing the Indian Child Welfare Act issued by the Department of the Interior similarly intend that the "imminent physical damage or harm" provision of § 1922 includes situations where a "child is immediately threatened with harm" or where there is "an immediate threat to the safety of the child." Id. at p. 6 (emphasis omitted) (referencing Guidelines C. 2 and C.3). Mr. Vargo also believes the Frequently Asked Questions section of the Final Rule Proceedings of June 17, 2016, extends § 1922 to include "any 'endangerment of the child's health, safety, and welfare, not just bodily injury or death.'" Id. at p. 7 (emphasis omitted) (referencing Frequently Asked Questions at p. 6). Based on this analysis, Mr. Vargo argues "[t]he § 1922 standard includes more than just physical injury and this Court's ruling that the standard is solely physical damage or physical harm is incorrect." Id. Mr. Vargo asserts that because this issue is "one of first impression . . . . [,] [t]he magnitude of this Court's ruling warrants a stay to preserve the status quo until the Eighth Circuit rules on this question of law." Id. at p. 8.

Mr. Vargo claims "[a]ll Defendants will suffer irreparable harm without a stay . . . . [and that] [p]rohibiting Defendants from protecting Indian children from imminent emotional harm when state law allows Defendants to protect non-Indian children from imminent emotional harm poses Equal

Protection implications." Id. at p. 9 (referencing SDCL § 26-7A-18). He further asserts "Plaintiffs, as parents or custodians of Indian children, will not be substantially injured if their children are protected from imminent emotional harm pursuant to ICWA's emergency proceedings and protected from being returned to environments where they may suffer imminent emotional harm during the pendency of this appeal." Id. at p. 10. Finally, Mr. Vargo argues "[t]he public interest heavily favors a stay. Returning Indian children to environments in which they may suffer imminent emotional harm is unsafe and Indian children will be irreparably harmed. There is a strong public interest [in] protecting children from such harm." Id. at p. 11. He concludes "[i]t is profoundly wrong to fail to protect Indian children from imminent emotional harm during emergency proceedings and the public's interest in protecting Indian children during the pendency of the appeal is great." Id.

In response, the plaintiffs argue "Federal courts do not (and cannot) issue injunctions unless necessary to prevent irreparable harm . . . . In most instances, then, it would be inherently inconsistent to grant an injunction and then stay its application." (Docket 331 at p. 1) (parentheses in original). Contrary to Mr. Vargo's argument, plaintiffs submit "the Court's ruling faithfully applied and enforced § 1922 of the Indian Child Welfare Act, which provides greater protection to Indian children in emergency custody proceedings than non- Indian children, not less protection." Id. at p. 3 (emphasis omitted). Plaintiffs argue "[§] 1922 was enacted in order to prevent " state social services caseworkers "from using their [own] personal perception of

'emotional harm' in deciding whether to remove Indian children from their homes on an emergency basis." Id. at pp. 3-4.

Plaintiffs contend Mr. Vargo "will not suffer irreparable harm absent a stay, either personally or in his official capacity. Even if he may be considered to 'represent' the interests of Indian children in custody proceedings, this Court has specifically determined that the interests of Indian children are best served by the enforcement of § 1922 in the manner that Congress intended." Id. at p. 5. Plaintiffs argue that they and the Indian families they represent will be harmed if a stay is granted: "Mr. Vargo has been injuring Indian families and Indian tribes for many years by his refusal to obey§ 1922. He should not be allowed to continue inflicting those injuries . . . . Congress has found that it is in the national interest to adopt and enforce the Indian Child Welfare Act. Mr. Vargo has shown no reason why he should be allowed to continue his persistent violations of ICWA."[1] Id. at p. 6.

In determining whether to grant a stay pending an appeal, the court considers the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public

[1] The court informally invited Mr. Vargo and the other defendants to file reply briefs in support of the motion to stay on or before February 3, 2017, but the defendants chose not to do so.

interest lies." Hilton v. Braunskill, 481 U.S. 770, 776 (1987). See also Reserve Mining Co. v. United States, 498 F. 2d 10 73, 1076-77 (8th Cir. 1974) (applying the same four factors to analyze a motion for stay of a preliminary injunction under Fed. R. Civ. P. 62 and Fed. R. App. P. 8). "A stay is not a matter of right, even if irreparable injury might otherwise result . . . . It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case. . . . The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Nken v. Holder, 556 U.S. 418, 433-3 4 (2009) (internal citations, quotation marks and brackets omitted). For the reasons stated in the orders (Dockets 150, 217 and 301-303) resulting in the permanent injunction (Docket 30 4), the court makes the following findings.

First, Mr. Vargo and the other defendants are not likely to succeed on the merits of their appeal. Based on the well developed record, the court found the defendants were violating 25 U.S.C. § 1922 and they have shown no intent to change their conduct and fully comply with§ 1922. See Dockets 150 at p. 4 4 ; 21 7 at pp. 20-21 ; 302 at pp. 7-1 7 & 21-24.

The court considered the Executive Summary to the 2016 ICWA regulations referenced by Mr. Vargo. See Docket 301 at pp. 5-6. That examination disclosed:

> During the comment period for updating the ICWA regulations this past year, "[m]any commenters opposed the proposed definition of 'imminent physical harm or damage' because they

> asserted .. . [t]he proposed definition is too narrow in omitting neglect and emotional or mental (psychological) harm and would preclude emergency measures to protect a child from these types of harms . . . ." The Executive Summary declined to incorporate emotional harm within the parameters of § 1922, stating "[t]he 'imminent physical damage or harm' standard applies only to emergency proceedings, which are not subject to the same procedural and substantive protections as other types of child-custody proceedings . . . ." The Executive Summary advised "Congress used the standard of 'imminent physical damage or harm' to guard against emergency removals where there is no imminent physical damage or harm . . . . ICWA requires that an emergency proceeding terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child."

Id. at p. 5 (referencing 81 Fed. Reg. at 38793- 94 & 38817). Mr. Vargo's present argument repeats the same position previously rejected by this court. (Docket 269 at p. 8). Mr. Vargo's interpretation of the Executive Summary is inaccurate and is not an appropriate application of the Executive Summary to the issue before the court.

Second, neither Mr. Vargo nor the other defendants will suffer harm, either personally or

professionally, absent a stay of the permanent injunction. As the court stated in its earlier decision:

> During an emergency proceeding involving the removal of an Indian child from the custody of an Indian parent or custodian and the subsequent determination of whether the child should be returned to the custody of the parent or custodian without initiation of an abuse and neglect petition, "the emergency removal or placement" must "terminate immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child . . . ." By contrast, subsequent child-custody adjudication hearings are bound by the language of § 191 2, which states: "No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"

(Docket 301 at pp. 4 and 5 n. 4) (emphasis added) (citing 25 U.S.C. § 1922 and § 1912) ("§ 1912 standard"). "The distinction between the § 1922 standard and the § 1912 standard was intentional." (Docket 301 at p. 6). "Congress intended § 1922 to be limited solely to 'imminent physical damage or harm' in determining whether to initiate or terminate emergency proceedings." Id. at p. 7.

If Mr. Vargo believes an Indian child is suffering emotional damage or harm, he can initiate an abuse and neglect petition under South Dakota law as authorized by § 1912. In an abuse and neglect proceeding, continued custody of an Indian child by the Department of Social Services may occur if the child is subjected to "serious emotional or physical damage." 25 U.S.C. § 1912.

Third, the interests of the plaintiffs will continue to suffer harm through the actions of the defendants if a stay of the permanent injunction is granted.[2] It is undisputed that "in approximately seventy-five percent of Indian custody cases [conducted pursuant to§ 1922], continued custody is sought based exclusively on emotional damage." (Docket 301 at p. 2) (references to the record omitted). Accepting Mr. Vargo's status quo argument would constitute an injustice for the hundreds of Indian parents, custodians and children who have been subjected to the defective Seventh Judicial Circuit 48-hour emergency hearing procedures these past six years and to those who would continue to suffer a violation of their rights if the court stays its injunction and order.

Fourth, the public interest lies in proper application of § 1922's emergency hearing and child removal procedures. Protection of every citizen's constitutional and statutory rights is fundamental to

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[2] "Since January 2010, approximately one hundred 48-hour hearings involving Indian children are held each year in Pennington County." (Docket 302 at p. 5). "The undisputed testimony at the remedies hearing indicates this figure remained constant for 2015 and the 2016 figure will be approximately the same." Id. at p. 5 n. 7.

protecting the public interest. This court will not stay or suspend its remedial order and injunction because it concluded that "Defendants' only consistent policy for handling the ICWA and Due Process Rights of Indian children, parents, custodians and tribes is defendants' violation of those rights." (Docket 302 at p. 7) (capitalization omitted).

After balancing all four factors, the court finds Mr. Vargo has not carried his burden to warrant a stay of the declaratory judgment order or the permanent injunction.

ORDER

Accordingly, it is

ORDERED that defendant Mark Vargo's motion (Docket 310) and the joinder motions of the other defendants (Dockets 315 & 322) to stay portions of the declaratory judgment (Docket 303) and to suspend portions of the permanent injunction (Docket 304) are denied.

Dated February 9, 2017.

BY THE COURT:

JEFFREY L. VIKEN
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patriae*, to protect the rights of their tribal members; MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs vs. LISA FLEMING; MARK VARGO; HONORABLE CRAIG PFEIFLE; and LYNNE A. VALENTI, in their official capacities, Defendants.	CIV. 13-5020-JLV ORDER

I. Preliminary Statement

The defendants continue to disregard this court's March 30, 2015, partial summary judgment order. That order outlined the defendants' violations of the rights of Indian children, parents, custodians and tribes guaranteed by the Due Process Clause of the Fourteenth Amendment and by the Indian Child Welfare Act. Notwithstanding testimony confirming that South Dakota Circuit Court Judges in Meade County Brown County Hughes County and

Minnehaha County are conducting adversarial hearings in accord with the March 2015 order prior to the extended removal of Indian children from their homes, defendants refuse to reform their violative policies and practices. The court repeatedly invited the defendants to propose a plan for compliance with their constitutional and statutory obligations but the defendants rejected that opportunity.

This order discusses the need and the authority for this court to impose remedies to vindicate plaintiff rights. Orders for declaratory and injunctive relief are filed simultaneously with this order.

II. Procedural History

On March 21, 20 13, plaintiffs filed this civil rights action pursuant to 42 U.S.C. § 1983 asserting defendants' policies, practices and procedures relating to the removal of Native American children from their homes during state court 48-hour hearings[1] violate the Indian Child Welfare Act ("ICWA")[2] and the Due Process Clause of the Fourteenth Amendment. (Docket 1). Defendants denied plaintiffs' claims. (Dockets 76, 80 & 81).

On July 11, 20 14, plaintiff filed two separate motions for partial summary judgment. (Dockets 108 & 110). Those motions will be identified as the

[1] SDCL § 26-7A-14 directs "no child may be held in temporary custody longer than forty-eight hours . . . excluding Saturdays, Sundays, and court holidays, unless a . . . petition has been filed . . . and the court orders longer custody during a noticed hearing . . . ." These proceedings are commonly referred to as a "48-hour hearing."

[2] 25 U.S.C. § 1901 *et seq*.

"Section 1922 Claims" (Docket 110) and the "Due Process Claims" (Docket 108). Following extensive submissions by the parties, on March 30, 2015, the court entered an order granting plaintiffs' motions ("2015 order"). (Docket 150 at p. 44). By the 2015 order, the court reserved ruling on plaintiff request for declaratory and injunctive relief. Id. On August 17, 2016, a hearing was held to address plaintiffs' prayer for relief ("remedies hearing"). (Docket 277). For the reasons stated below, plaintiffs' request for a declaratory judgment is granted, plaintiffs' request for injunctive relief is granted in part and plaintiff request for appointment of a monitor is denied without prejudice as premature.

Plaintiff Oglala Sioux Tribe and Rosebud Sioux Tribe are Indian tribes officially recognized by the United States with reservations located within the State of South Dakota. (Docket 150 at p. 1 1). Both tribes have treaties with the federal government. Id. The court granted *parens patriae* status to both tribes. (Docket 69 at p. 17).

Plaintiff Madonna Pappan and Lisa Young reside in Pennington County South Dakota, and are members of the Oglala Sioux Tribe and the Standing Rock Sioux Tribe, respectively. (Docket 150 at p. 1 1). The court certified these individual plaintiffs as class representatives for all similarly situated Indian parents (Docket 70 at pp. 14-15). The class of plaintiff includes "all other members of federally recognized Indian tribes who reside in Pennington County South Dakota, and who, like plaintiff are parents or custodians of Indian children." Id. at p. 14.

Defendant Lynne A. Valenti is the Secretary of the South Dakota Department of Social Services ("DSS").[3] Id. Defendant Lisa Fleming is the person in charge of DSS Child Protection Services ("CPS") for Pennington County, South Dakota.[4] In state court cases involving Ms. Pappan and Ms. Young, CPS employees under their supervision signed ICWA affidavits alleging the children of these Indian parents were at risk of serious injury if the children remained at home. (Docket 217 at p. 6).

Defendant Mark Vargo is the duly elected States Attorney for Pennington County (Docket 150 at p. 11). A Deputy States Attorney under States Attorney Vargo's supervision prepares the petitions for temporary custody for all ICWA cases. (Docket 217 at p. 6). Defendant Craig Pfeifle is the presiding judge of the Seventh Judicial Circuit Court of the State of South Dakota and is the chief administrator of the Seventh Judicial Circuit Court.[5]

Section 1922 of ICWA states:

Nothing in this subchapter shall be

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[3] Pursuant to Fed. R. Civ. P. 25(d), Ms. Valenti was substituted as a proper party in her official capacity effective February 24, 2014. (Docket 150 at p. 11 n. 12).

[4] Pursuant to Fed. R. Civ. P. 25(d), Ms. Fleming was substituted as a proper party in her official capacity effective March 7, 20 16. See Dockets 22 1 & 226.

[5] On May 21, 2015, Circuit Court Judge Craig Pfeifle was appointed presiding judge of the Seventh Judicial Circuit by the Chief Justice of the South Dakota Supreme Court. (Docket 226 at p. 1 n.1) (referencing Docket 205 ¶ 4). Pursuant to Fed. R. Civ. P. 25(d), Judge Pfeifle was substituted as a proper party in his official capacity effective March 7, 2016. See Dockets 205, 222 & 226.

> construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

25 U.S.C. § 1922.

Since January 2010, approximately one hundred 48-hour hearings involving Indian children[6] are held each year in Pennington County (Docket 150 at p. 12).[7] In March 2015, the court found that

[6] Unless otherwise indicated, all references to "child(ren)," "parent(s)," and "custodian(s)" will mean Indians as that term is defined by 25 U.S.C. § 1903(3).

[7] The undisputed testimony at the remedies hearing indicates this this remained constant for 2015 and the 2016 figure will be

despite "the clear intent of ICWA, the [Department of the Interior] Guidelines[8] and the SD Guidelines,[9] all of which contemplate evidence will be presented on the record in open court, Judge Davis[10] relied on the ICWA affidavit and petition for temporary custody which routinely are disclosed only to him and not to the Indian parents, their attorney or custodians." (Docket 150 at pp. 34-35). These undisclosed documents are not subject to cross-examination or challenge by the presentation of contradictory evidence. Id. at p. 35. The practice of the state court was to "authorize DSS to perform the function of determining if, or when, the imminent risk of physical harm to an Indian child has passed and to restore custody to the child's parents. . . . This authorization vests full discretion in DSS to make the decision if and when an Indian child may be reunited with the parents." Id. (italics in original; internal citations omitted). The court found this

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approximately the same.

[8] The Department of Interior Guidelines for State Courts; Indian Child Custody Proceedings ("DOI Guidelines") were promulgated to aid in the interpretation of ICWA's provisions. 44 Fed. Reg. 67584 67595 (Nov. 26, 1979). The DOI Guidelines were revised on February 19, 2015 ("DOI Revised Guidelines"). (Docket 150 at p. 29). The DOI Regulations were updated December 12, 2016. See 81 Fed. Reg. 38778-38876 (June 14, 2016) and 25 CFR part 23.

[9] "South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases" were available as of March 30, 2015, at http://ujs.sd.gov/uploads/pubs/SDGuidelinesAandNProceedings.pdf. (Docket 150 at p. 32 n. 29).

[10] Judge Davis was the Presiding Judge of the Seventh Judicial Circuit and the judge presiding over most 48-hour hearings during the time frame of 2010 to 2013.

"abdication of judicial authority "violated "the protections guaranteed Indian parents, children and tribes under ICWA." Id.

In the March 20 15 order, the court found the defendants violated plaintiffs' due process rights under the Fourteenth Amendment during the course of 48-hour hearings. (Docket 150 at pp. 36-42). The violations are summarized as follows: (1) failing to appoint counsel in advance of the 48-hour hearing; (2) failing to provide notice of the claims against Indian parents, the issues to be resolved and the state's burden of proof; (3) denial of the right to cross-examine adverse witnesses; (4) denying Indian parents or custodians the right to present evidence in their own defense; and (5) removing Indian children on grounds not based on evidence presented in the hearing. Id.

III. Defendants' Only Consistent Policy for Handling the ICWA and Due Process Rights of Indian Children, Parents, Custodians and Tribes is Defendants' Violation of Those Rights

During the August 17, 2016, remedies hearing, the court admitted the transcripts of the deposition of Virgena Wieseler, Director of the Division of Child Protection Services, and Cara Beers, Program Specialist for Training, within the South Dakota Department of Social Services. (Remedies Hearing Exhibits 1 and 2). Ms. Wieseler testified that following the 20 15 order and through the date of her July 20, 2016, deposition, CPS made a decision not to apply the § 1922 standard in training CPS staff (Remedies Hearing Exhibit 1 at pp. 128:15-133:25).

Ms. Beers testified during her July 21, 2016, deposition that DSS had not developed any new training for its staff based on the 2015 order. (Remedies Hearing Exhibit 2 at p. 96:15-21). During the remedies hearing, counsel argued the DSS defendants were in full compliance with their obligations under South Dakota state law and federal law but offered no supporting evidence.

States Attorney Vargo and Deputy States Attorney Roxanne Erickson testified during the remedies hearing. Mr. Vargo acknowledged having read plaintiffs' March 2 1, 20 13, complaint sometime after it was served. (Docket 286 at p. 33:22-24). The complaint specified alleged that at 48-hour hearings:

> [Indian parents] were (a) not allowed to see the petition, (b) not allowed to see the affidavit, (c) not allowed to cross-examine the person who submitted the affidavit, (d) not allowed to off any evidence contesting the allegations, (e) not allowed to offer any evidence as to whether the state had made active efforts to prevent the break-up of the family and (f) not allowed to offer any evidence regarding whether removal of their children was the least restrictive alternative. The only "evidence" mentioned at the hearing were hearsay statements from the state's attorney.

(Docket 1 ¶ 51).

Addressing the defendants' motions to dismiss in a January 28, 20 14, order ("2014 order"), the court held that "[o]ne of the core purposes of the Due

Process Clause is to provide individuals with notice of claims against them. In this case, taking the allegations in the complaint as true, the court finds the risk of erroneous deprivation high when Indian parents are not afforded the opportunity to know what the petition against them alleges. . . . Keeping Indian parents in the dark as to the allegations against them while removing a child from the home for 60 to 90 days certainly raises a due process issue. . . . The petition and affidavit are provided to the presiding judge and can at very little cost be provided to Indian parents." (Docket 69 at pp. 38-39).

Mr. Vargo testified that after reviewing the complaint and the 2014 order he felt the need to conduct his own research to resolve the issues raised in plaintiff complaint. (Docket 286 at pp. 36:19-37:4). It was not until May 2014 that he concluded a copy of the petition for temporary custody should be provided to Indian parents at the 48-hour hearing. Id. at p. 36:8-18. It was 14 months after the complaint was filed and 4 months after the 2014 order that Mr. Vargo acknowledged this basic due process principle. Yet even at the remedies hearing Mr. Vargo testified Indian parents have no constitutional right to the petition for temporary custody in advance of a 48-hour hearing so long as they are info about the content of the petition. Id. at p. 43: 24-25.

Mr. Vargo testified he never specifically examined the 2015 order for the purpose of curing any constitutional deficiencies occurring in 48-hour hearings. Id. at p. 46:4-9. He had no explanation as to why he did not review the order and discuss its content with Deputy States Attorney Roxanne

Erickson who handles most 48-hour hearings. Id. at p. 49:5-25. He claims it was not until reading plaintiff April 20, 20 16, remedies brief that he became aware of potential continuing ICWA violations. Id. at pp. 50:18-51:4.

During the remedies hearing on August 17, 2016, Mr. Vargo instructed Ms. Erickson to change the petition for temporary custody to include ICWA language, although he was not specific as to what language would be included. Id. at p. 52:23-24. He asserted he gave this directive even though he believed no change in the petition was necessary since the ICWA affidavit prepared by the CPS staff member contains language about ICWA. Id. at p. 55:18-20. Mr. Vargo insists it would not be an appropriate remedy to require his office to include the § 1922 standard for the removal of Indian children in future petitions for temporary custody. Id. at p. 56:6-7 & 9-21.

Mr. Vargo testified he initiated a policy that regardless of the outcome of a 48-hour hearing, a second hearing would be held within 15 days. Id. at p. 59:14-18. He could not recall when this policy was initiated and did not testify that the judges of the Seventh Judicial Circuit were incorporating this second hearing into all ICWA proceedings.

Mr. Vargo acknowledged Ms. Erickson brought to his attention the fact that South Dakota Circuit Court Judges in Meade County, Brown County, Hughes County and Minnehaha County were conducting adversarial 48-hour hearings. Id. at p. 63:10-23. Other than this general knowledge, Mr. Vargo made no inquiry of Ms. Erickson or the States Attorneys in those counties to determine the impact

adversarial 48-hour hearings had on their courts' dockets. Id. at p. 69:13-20. Mr. Vargo testified he did not make the inquiry because he felt it would not be helpful since those counties did not have the same number of 48-hour hearings involving Indian families as did Pennington County. Id. at pp. 69:22-70:5.

Ms. Erickson testified that since 2011 she has been the principal Deputy States Attorney assigned in Pennington County to handle 48-hour hearings. Id. at p. 73:5-7. She testified that since June 2002 she has handled approximately 1,000 abuse and neglect cases. Id. at p. 72:23-73:10. She said the Pennington County Circuit Court typically conducts 48-hour hearings every Monday at 1:30 p.m. and every Thursday at 1 p.m. Id. at p. 73:18-25. She estimated there are about one hundred 48-hour hearings involving Indian children each year and that approximately 50 percent of all 48-hour hearings in the county involve Indian children. Id. at p. 74:1-13. Ms. Erickson stated that twice a week there could be from one to five 48-hour hearings conducted. Id. at p. 110:6-10. If five hearings are held, they can require a total of one hour of court time. Id.

Ms. Erickson testified Circuit Judge Robert Gusinsky took over all abuse and neglect proceedings in mid-January 2016. Id. at p. 83:4-9. She indicated he was well aware of this ICWA lawsuit and conducted his own legal research into the issues raised by plaintiffs. Id. at pp. 84:15-85:1.

Ms. Erickson testified that around April 2016 Judge Gusinsky held a meeting with her, Attorney Dana Hanna as counsel for plaintiffs, and Attorney

Daniel Leon of the Pennington County Public Defender's Office to discuss 48-hour hearings and ICWA.[11] Judge Gusinsky requested briefing before the meeting on a number of issues, including which standard applied to 48-hour hearings: the South Dakota state standard or the § 1922 standard. Id. at p. 75:8-14. In the States Attorney's submission to Judge Gusinsky Ms. Erickson argued Cheyenne River Sioux Tribe v. Davis, 822 N.W.2d 62 (S.D. 2012), applied to 48-hour hearings and not § 1922. Id. at pp. 77:23-78:1; see also Docket 239-6 at p. 10:9-18.

According to Ms. Erickson, following the meeting Judge Gusinsky concluded that (1) § 1922 was the correct standard to apply; (2) DSS should change the temporary custody order to conform to § 1922; (3) the ICWA affidavit prepared by CPS staff should incorporate § 1922; (4) Indian parents and their attorneys should have access to the record at some time; (5) Judge Gusinsky would accept as factually true the affidavits and police reports presented to him during 48-hour hearings, but if there were any factual objections lodged, he would accept an offer of proof from the States Attorney and then allow a hearing at a later date. (Docket 286 at pp. 76:7-77:2). Ms. Erickson testified Judge Gusinsky now appoints counsel to indigent Indian parents at the 48-hour hearing and makes sure they have the petition for temporary custody and the ICWA affidavit signed by a CPS staff member. Judge

[11] During the course of a 48-hour hearing on April 18, 2016, Judge Gusinsky engaged in a discussion with the same attorneys about the 2015 order, § 1922 and their impact on the proceeding. (Docket 239-6 at pp. 6:24-13:6).

Gusinsky receives medical records, which may be made available to the attorneys present, but those records are not given to parents who are without counsel. Id. at p. 100:7-15. Judge Gusinsky considers any relevant police reports or summaries of the reports in the ICWA affidavit, but he does not allow police reports to be given to parents at a 48-hour hearing because of state law.[12] Id. at pp. 96:24-97:15. Ms. Erickson testified Judge Gusinsky does not allow any testimony during any 48-hour hearing and that for the past three years no Seventh Circuit Judge has permitted live testimony at any 48-hour hearing. Id. at p. 81:3-6. She testified Judge Gusinsky does not allow parents or their attorneys to cross-examine any witnesses until three or four months later at the adjudicatory hearing.[13] Id. at p. 85:8-17.

Unless Judge Gusinsky retains supervision over abuse and neglect cases through June 2017, Ms. Erickson testified a different Seventh Circuit Judge will be assigned by Presiding Judge Pfeifle to take over those cases beginning in January 2017. Id. at pp. 111:21-112:6. She observed that since 2002 the abuse and neglect case procedures changed with every Seventh Circuit Judge assignment. Id. at p. 82:13.

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[12] The reference is to SDCL §§ 26-7A-27 and 26-27A-29 which prohibit disclosure of police reports to a parent or a parent's attorney without a court order.

[13] Under South Dakota law, at an adjudicatory hearing the circuit court judge "shall consider whether the allegations of the petition are supported by clear and convincing evidence concerning an alleged abused or neglected child . . . ." SDCL § 26-7A-82.

Ms. Erickson testified that after the 2015 order she attended a states attorney's conference and spoke with other South Dakota States Attorneys or deputies handling 48-hour hearings involving Indian families. Id. at pp. 104:12-105:8. She also visited with some of those attorneys at other times about how they handle 48-hour hearings. Id. Ms. Erickson testified four counties in South Dakota, Meade, Brown, Hughes and Minnehaha, conduct 48-hour hearings as full adversarial hearings. Id. at pp. 105:10-106:18. In each county sworn live testimony is presented and the CPS worker and other witnesses are subject to cross-examination by Indian parents or their attorneys. Id. When she brought this information to Mr. Vargo's attention, they did not discuss the details of how the other counties were conducting adversarial hearings. Ms. Erickson never broached the subject with Judge Gusinsky. Id. at p. 107:1-5.

Ms. Erickson testified in her May 25, 2016, deposition that Mr. Vargo never discussed with her how the States Attorney's Office could reconcile the 2015 order with Cheyenne River Sioux Tribe v. Davis. See Remedies Hearing Exhibit 3 at p. 19:19-23.

Mr. Vargo's 15-day hearing proposal was not presented in his remedies brief as a justification for opposing declaratory judgment or injunctive relief. See Docket 257. There is a reference to a 14-day hearing proposal in an affidavit of Luann Van Hunnik. See Docket 132-1 ¶¶ 81-85. Apparently beginning in September 2013 a policy was implemented that a "continued temporary custody hearing[] [would be] typically scheduled within

fourteen days of the 48 hour hearing." Id. ¶ 85. At this status hearing a "Report to the Court" would be presented and "if an additional hearing [was] required, CPS staff will usually request that an advisory hearing be scheduled within thirty days." Id. ¶ 85. Defendants offer no evidence this plan was adopted by all the Seventh Circuit Judges.

For the same reasons expressed in the 2015 order, this "status hearing" procedure does not satisfy the ICWA rights or due process rights of Indian parents, their children, custodians or tribes. See Docket 150 at pp. 36-42.

As recently as April 18, 2016, Judge Gusinsky followed a different procedural policy. See Docket 239-6 at p. 4. During a 48-hour hearing, Judge Gusinsky held "[t]his is a temporary custody hearing. I will make the determination as to whether up to 60 days continued temporary custody of the children is appropriate based upon the information provided to me."[14] Id. at p. 4:14-18. See also Docket 239-3 at p. 4:5-9 (April 4, 2016, 48-hour hearing with the same approach by Judge Gusinsky).

Illustrative of how 48-hour hearings were conducted in 2014 by Circuit Court Judge Robert Mandel is the following pronouncement to Indian parents:

> This is the time and place for the temporary custody of your children. What happens today is I consider the State's request for continued temporary

[14] Under South Dakota law, a temporary custody order must be reviewed every 60 days. SDCL § 26-7A-19(2).

custody of the children. The children have come to the attention of the Department of Social Services. When that happens, the matter comes before me for determination as to whether the State's request for continued temporary custody is in the children's best interests. This [is] an informal proceeding, and by that I mean there's no testimony taken. I rely upon the information that is provided to me here today to make a determination as to whether continued temporary custody is appropriate and in the children's best interests.

At this point in time, there's not been a formal petition alleging that the children are abused and neglected filed. That certainly can happen. You need to know that in the event that the State does file a formal petition, you have certain rights. You will have the right to have a hearing on the petition at which time the State would be required to prove by clear and convincing evidence the allegations in that petition. You would have the right to have the assistance of counsel, and if you're unable to afford counsel, one would be appointed for you. You'd have the right to ask me to order the attendance of witnesses to testify on your behalf and you'd have the right to cross-examine any witnesses that the State might present at that hearing.

> What you need to know for the purposes of today's hearing is that the maximum possible consequences that can occur, in the event a formal petition is filed and in the event that the State proves those allegations, could be the termination of your parental rights and the placement of the children with the State of South Dakota for purposes of adoption. That's not where we're at today. This is a temporary custody hearing. I can make a determination as to whether continued temporary custody of the children is appropriate based upon the information provided to me for a period of up to 60 days.

(Docket 118-1 at pp. 469:15-471:7).[15] After hearing from the Deputy States Attorney, Judge Mandel ruled: "I am going to grant the temporary custody [to DSS] for a period of 16 days and I will continue this hearing [to a time and date]. I'm not going to appoint counsel at this time, but depending where we're going, we'll see about it when we're there." Id. at p. 473:18-23. Between January 24 and July 31, 2014, Judge Mandel set temporary custody hearings inconsistently anywhere between 12 and 70 days into the future.[16]

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[15] See also Dockets 118-1 at pp. 479: 11-48 1:1; 132-31 at pp. 29:19-31:7; 132-31 at pp. 36:13-38: 1; 132-31 at pp. 49:2-50:15; 132:31 at pp. 56:13-58:1;132-31 at pp. 69:11-70:22; 132-31 at pp. 75:10-76:23; 132-31 at pp. 105: 19-107:6. These hearings occurred between January 24, 2014, and July 3 1, 2014. See id.

[16] See Dockets 118-1 at p. 483:7-11 (14 days); 132-31 at p. 33: 9-13 (14 days); 132-31 at p. 53:4-6 (15 days); 132-31 at p. 66:9-11

On April 24, 2015, Judge Mandel e-mailed to Ms. Erickson, Eric Whitcher, the Director of the Pennington County Public Defender's Office, and Mr. Hanna a copy of an article entitled, "*Federal law in the state courts---The freedom of state courts to ignore interpretations of federal law by lower federal courts*," Steven H. Steinglass, 1 Section 1983 Litigation in State Courts § 5:8 (2014). See Docket 239-2 at pp. 2-8. In his e-mail, Judge Mandel advised "I'm passing this article along, as I think it is of interest in this matter and accurately states the law." Id. at p. 1. While Judge Mandel may believe the article accurately states the law, it must be pointed out the author cautioned readers: "The issue of whether state courts should give precedential value to lower federal court cases is different from the application of the principles of preclusion against parties who have had issues decided against them." Id. at p. 5 n.4.

In May 2015, Presiding Judge Pfeifle made clear his position regarding the state court's response to the 2015 order. He declared:

> It is my obligation at this point in time to follow the law that the South Dakota Supreme Court has provided to me. Whether or not I agree with Judge Viken in my estimation is not relevant to the inquiry because the Supreme Court of South Dakota has very clearly determined for me in Cheyenne Sioux Tribe v. Davis that 1922 does not apply

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(70 days); 132-31 at p. 72:9-11 (14 days); 132-31 at p. 78:21-23 (45 days); 132-31 at p. 111:6-8 (12 days); 239-6 at p. 8:19-21 (14 days); and 239-6 at p. 14:6-8 (14 days).

> to this particular hearing, and until a Court that has the capacity to advise me of the same enters a formal order, I simply cannot do anything further than rely on that representation, so I choose to do so at this particular point in time.
>
> I also choose to follow the holding of that particular Court indicating that the manner in which these hearings are held under South Dakota law in terms of the evidence that I have received is appropriate, and I believe that I have followed those dictates, again which I am required to follow to the letter of the law here this afternoon.

(Docket 239-1 at p. 12:5-23). Prior to the commencement of the 48-hour hearing, Judge Pfeifle did not appoint counsel for the Indian parent present, but he did appoint counsel for the hearing to occur 10 days later. Id. at pp. 12: 24-13:5. Judge Gusinsky follows the same policy. (Docket 239-3 at pp. 8:23-9:10).

IV. Federal Court Authority to Impose Declaratory and Injunctive Relief

Plaintiffs seek declaratory and injunctive relief against Defendant Vargo and the DSS Defendants. (Docket 1 at p.38 ¶¶ 3 and 4). Plaintiffs seek only declaratory relief against Defendant Presiding Judge Pfeifle "unless he . . . ignores the declaratory judgment." (Docket 239 at p.7 n.4).

This court has "original jurisdiction . . . to redress the deprivation, under color of any State law . . . of any right . . . secured by the Constitution . . . ."

28 U.S.C. § 1343(a)(3). The court also has jurisdiction "to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." 28 U. S.C. § 1343(a)(4).

"The focus of this litigation is not to redress past injuries to plaintiffs; rather, it is to prevent future violations of the Due Process Clause of the Fourteenth Amendment and ICWA." (Docket 150 at p.42) (internal citation omitted). As part of its equitable power to protect civil rights, the court has the authority to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. "Any such declaration shall have the full force and effect of a final judgment . . . ." Id. If required to enforce the court's declaratory judgment, "[f]urther necessary or proper relief . . . may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202.

The court's exercise of remedial powers has long been authorized by the United States Supreme Court.

> [I]t is established practice for [the Supreme Court] to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the state to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to

> adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Bell v. Hood, 327 U.S. 678, 684 (1946).

Congress restricted the court's ability to impose an injunction on a state court judicial officer. "[I]n 1996, Congress enacted the Federal Courts Improvement Act ("FCIA"), Pub.L. No. 104-317, 110 Stat. 3847 (1996), in which it amended § 1983 to provide that 'injunctive relief shall not be granted' in an action brought against "a judicial officer for an act or omission taken in such officer's judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable." Bolin v. Story, 225 F.3d 1234, 1242 (11th Cir. 2000). This amendment "bars injunctive relief against . . . state judges" and "limits the type of relief available to plaintiff who sue judges [for] declaratory relief." Johnson v. McCuskey, 72 Fed. App'x 475 at *2 (7th Cir. 2003) (referencing Bolin, 225 F.3d at 1242).

"In fashioning a remedy, the District Court [has] ample authority to go beyond earlier orders and to address each element contributing to the violation." Hutto v. Finney, 437 U.S. 678, 687 (1978). "The controlling principle consistently expounded [by the Supreme Court] is that the scope of the remedy is determined by the nature and extent of the constitutional violation." Milliken v. Bradley, 418 U.S. 717, 744 (1974). "Once invoked, the scope of a

district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Hutto, 437 U.S. at 687 n.9 (internal quotation marks omitted).

The court is "guided by equitable principles." Brown v. Board of Education of Topeka, Kansas, 349 U.S. 294, 300 (1955). "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." Id. This case "call[s] for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiff in" enforcement of their ICWA and due process rights "as soon as practicable . . . ." Id. "To effectuate this interest" will require the court to "eliminat[e] . . . a variety of obstacles" by requiring the defendants to conform to the constitutional and statutory principles identified in the 2015 order. Id. "Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." Id. Addressing the issues presented in this case, the court is "not remedying the present effects of a violation in the past. It [is] seeking to bring an ongoing violation to an immediate halt." Hutto, 437 U.S. at 687 n.9.

DECLARATORY JUDGMENT

Plaintiffs have proved by the greater convincing weight of the evidence that the defendants have neither implemented the court's 2015 order nor otherwise complied with § 1922 and

the Due Process Clause when dealing with Indian children, parents, custodians and tribes in 48-hour hearings. The court finds the following conduct of the defendants relevant to this conclusion:

1. Notwithstanding the clear holdings announced in the 2015 order, petitions for temporary custody prepared by Mr. Vargo's office and presented to Indian parents or custodians at 48-hour hearings still fail to incorporate any reference to the § 1922 standard. See Dockets 239-4 and 239-5.

2. The court found the judges of Seventh Judicial Circuit failed to give copies of the petition for temporary custody and the ICWA affidavit to Indian parents or custodians in advance of 48-hour hearings. (Docket 150 at p. 38). In the 2015 order, the court also expressed concern about the non-disclosure of police reports which were being presented to the judges presiding over 48-hour hearings. Id. at pp. 38-39. While the state judges now appear to be providing copies of the petition for temporary custody and the ICWA affidavit to Indian parents or custodians at 48-hour hearings, the policy against disclosure of police reports remains. As pointed out in the 2015 order, all that is required to satisfy both SDCL § 26-7A-29 and ICWA would be for the state judge to direct in advance or in open court that police reports be provided to the Indian parents or custodians and counsel. (Docket 150 at p. 39). The state judges have failed to incorporate this requirement into their 48-hour hearings to comply with "the clear mandate of ICWA and due process." Id.

3. The court found that appointment of counsel for indigent parents at 48-hour hearings is constitutionally mandated. (Docket 150 at pp. 39-40). "Appointing counsel and continuing the 48-hour hearing for a few hours or even a day to allow court-appointed counsel to confer with the Indian parents and become familiar with the critical documents upon which the 48-hour hearing is based would result in an 'equal contest of oppos[ing] interests.'" Id. at p. 40 (citing Lassiter v. Department of Social Services of Durham County, N.C., 452 U.S. 18, 28 (1981)). The state court judges have either not appointed counsel or appointed counsel and continued DSS custody of Indian children for up to 60 days without reconvening the 48-hour hearing.

"Federal procedural due process guarantees prompt post-deprivation judicial review in child custody cases. . . . When the state deprives parents and children of their right to familial integrity, even in an emergency situation, without a prior due process hearing, the state has the burden to initiate prompt judicial proceedings to provide a post deprivation hearing." (Docket 150 at p. 37) (internal citations omitted). If a continuance is necessary to allow counsel to become familiar with the case, the court finds a "prompt judicial proceeding" should be held within 24 hours. Id.

4. The court found the decision of the state court judges to prevent cross-examination of the ICWA affidavit preparers and to prohibit oral testimony at 48-hour hearings violates due process. Id. at p. 41. The state court judges continue to accept as true the ICWA affidavit, the petition for temporary custody and any police reports presented

at 48-hour hearings. The judges still prohibit Indian parents, custodians or their attorneys from cross-examining witnesses or presenting evidence at 48-hour hearings.

5. In the 2015 order, the court found it was a requirement of § 1922 that the state court must "*order* restoration of custody to Indian parents when the risk of imminent physical harm no longer exists." Id. at p. 35 (italics in original). Despite this ruling, in 48-hour hearings the state court judges continue to place Indian children in the temporary custody of DSS using the standard of SDCL § 26-7A-18, that is "in keeping with the best interests of the child."

6 Presiding Judge Pfeifle claims he is no longer handling abuse and neglect cases, but rather those cases are now assigned to other judges, so that he has no authority over what occurs during 48-hour hearings. This position ignores the fact that Judge Pfeifle is responsible for assigning his colleagues to the abuse and neglect docket. The due process rights and ICWA rights of Indian children, parents, custodians and tribes cannot be left to the personal preferences of each circuit court judge. It is Presiding Judge Pfeifle's obligation to appoint to abuse and neglect cases only those Seventh Circuit Judges who will honor the due process rights and the ICWA rights of Indian children, parents, custodians and tribes.

The defendants were violating plaintiffs' ICWA rights and their rights under the Due Process Clause at the time of the 2015 order. They continue to do so today. The court has no assurance anything will change in the future without the court's intervention.

"[A]lthough the All Writs Act, 28 U.S.C. § 1651(a), authorizes federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,' the Act does not create an independent source of federal jurisdiction." Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 364 (8th Cir. 2007). "[T]he All Writs Act does not operate to confer jurisdiction upon the district court, rather the Act only aids jurisdiction the district court already possesses." Id. at 365 (referencing Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C., 992 F.2d 932, 937 (9th Cir.1993)). "Although not a base of jurisdiction, the All Writs Act has been held to give the federal courts the power to implement the orders they issue by compelling persons not parties to the action to act, or by ordering them not to act." Id. at 365 n.6 (citing 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3691 (3d ed.1998)).

Although the other judges of the Seventh Judicial Circuit are not parties to this action, their obligation to enforce the due process rights and ICWA rights of Indian children, parents, custodians and tribes is central to the effective resolution of plaintiffs' claims for relief. Should the judges fail to honor that obligation, the court will entertain plaintiffs' motion to individually add all the Seventh Judicial Circuit Judges to this action pursuant to Fed. R. Civ. P. 20(a)(2)(B).

Contrary to the defendants' arguments that declaratory relief is not necessary, the court finds "it is *absolutely clear*" that the violative policies and

procedures of the defendants can "be expected to recur." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 66 (1987) (italics in original). The defendants have not convinced the court otherwise. For these reasons, the court will separately enter a declaratory judgment order directing Presiding Judge Pfeifle, States Attorney Vargo and the DSS defendants to take certain actions.

INJUNCTIVE RELIEF

In order to grant a request for a permanent injunction, plaintiffs are required to show: "(1) that [they have] suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). "The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." Id.

As a matter of law, the violation of plaintiffs' constitutional rights constitutes irreparable injury. See Elrod v. Burns, 427 U.S. 347, 373 (1976). Plaintiff have satisfied the first two factors by proving that they, and the class members whom they represent, have been and will be deprived of their constitutional and statutory rights in the future if the defendants' conduct is not enjoined. eBay Inc., 547 U.S. at 391.

The third factor, balance of hardships, strongly favors plaintiffs. The harm suffered by plaintiffs as a result of the defendants' unconstitutional conduct is far greater than any administrative or financial hardship the defendants and the Seventh Judicial Circuit may suffer in honoring plaintiffs' constitutional and statutory rights. Id. Finally, the public interest and the Congressional purpose in creating the Indian Child Welfare Act will be served by injunctive relief.[17] Id.

Plaintiffs are entitled to a permanent injunction against Defendant Vargo and the DSS Defendants. At this juncture the court is expressly prohibited from granting injunctive relief against Presiding Judge Pfeifle. Bolin, 225 F.3d at 1242. Plaintiffs' request for injunctive relief is granted in part. The court will separately enter a permanent injunction against States Attorney Vargo and the DSS defendants.

V. Plaintiffs' Request for a Monitor

Plaintiffs request the court appoint a monitor pursuant to Fed. R. Civ. P. 53 to supervise defendants' compliance with the court's orders. (Docket 239 at p. 22). Defendant Vargo opposes the request and asserts that a monitor is not necessary. (Docket 257 at p. 10). The DSS defendants oppose the request and argue plaintiffs' appointment of a

[17] See also M.D. v. Abbott, 152 F. Supp. 3d 684, 823 (S.D. Tex. 2015), *appeal dismissed* (April 5, 2016) ("the public interest will not be harmed by an injunction requiring Texas to conform its foster care system to the Constitution. With all four factors met, the Court holds that injunctive relief is appropriate in this case.").

monitor is premature as there are no exceptional conditions present to warrant monitoring. (Docket 260 at pp. 8-9).

The defendants have long failed to comply with the holdings in the court's earlier orders. Once presented with this order, the declaratory judgment and the permanent injunction, the court expects the defendants will comply with this court's rulings. Compliance with the court's rulings will make appointment of a monitor unnecessary. Plaintiffs' request for appointment of a monitor is denied without prejudice as premature.

ORDER

Based on the above analysis, it is

ORDERED that plaintiffs' request for a declaratory judgment (Docket 1 at p. 38) is granted. A declaratory judgment will be entered as a separate order.

IT IS FURTHER ORDERED that plaintiffs' request for injunctive relief (Docket 1 at pp. 38-39) is granted in part. A permanent injunction will be entered as a separate order.

IT IS FURTHER ORDERED that plaintiffs' request for appointment of a monitor is denied without prejudice as premature.

Dated December 15, 2016.

BY THE COURT:

JEFFREY L. VIKEN
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patriae*, to protect the rights of their tribal members; MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs vs. LISA FLEMING; MARK VARGO; HONORABLE CRAIG PFEIFLE; and LYNNE A. VALENTI, in their official capacities, Defendants.	CIV. 13-5020-JLV PERMANENT INJUNCTION

Incorporating the order of March 30, 2015 (Docket 150), the order of February 19, 2016 (Docket 217), the orders of December 15, 2016 (Dockets 301 and 302), and the declaratory judgment of December 15, 2016 (Docket 303), for good cause shown and pursuant to the court's inherent equitable authority, it is

ORDERED that defendants Lisa Fleming, Mark Vargo and Lynne A. Valenti, in their official capacities, are hereby immediately and permanently

restrained and enjoined from engaging in the following activities:

1. Violating the constitutional rights of the plaintiffs[1] guaranteed by the Due Process Clause of the Fourteenth Amendment;

2. Violating the statutory rights of the plaintiffs guaranteed by the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 *et seq*., and particularly those rights guaranteed by 25 U.S.C. § 1922; and

3. Violating the constitutional and statutory rights of the plaintiffs as set out in the Declaratory Judgment entered on December 15, 2016, (Docket 303) and restated herein pursuant to Fed. R. Civ. P. 65(d)(l)(C).

IT IS FURTHER ORDERED that defendants Lisa Fleming and Lynne A. Valenti, in their official capacities, are immediately and permanently required to comply with the following in all 48-hour hearings[2] involving Indian children[3], parents, custodians and tribes and in all subsequent

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[1] "Plaintiffs" include the class members certified by the court's order of January 28, 2014. (Docket 70 at pp. 14-15).

[2] SDCL § 26-7 A-14 directs "no child may be held in temporary custody longer than forty-eight hours . . . excluding Saturdays, Sundays, and court holidays, unless a . . . petition has been filed . . . and the court orders longer custody during a noticed hearing . . . ." These proceedings are commonly referred to as a "48-hour hearing."

[3] All references to "child(ren)," "parent(s),"' and "custodian(s)" will mean Indians as that term is defined by 25 U.S.C. § 1903(3).

emergency proceedings:[4]

1. The ICWA affidavit must state with sufficient detail the facts[5] which justify the emergency removal of a child from its parent or custodian and the facts which warrant the continued separation of a child from its parent or custodian to "prevent imminent physical damage or harm to the child;"[6]

2. To use active efforts[7] to reunite the family; and

3. In the event a temporary custody order is entered at the conclusion of a 48-hour hearing, the South Dakota Department of Social Services shall immediately report to

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[4] "Emergency proceeding means and includes any court action that involves an emergency removal or emergency placement of an Indian child." 25 CFR § 23.2 (December 12, 2016). "These proceedings are distinct from other types of 'child-custody proceedings' under [ICWA]." Executive Summary to the Department of the Interior's regulations implementing ICWA, 81 Fed. Reg. 38778-38876, 38793 (June 14, 2016).

[5] At this point these are only "alleged facts" until proven during a 48-hour hearing but will be referred to as "facts" unless otherwise indicated.

[6] 25 U.S.C. § 1922. "[Section] 1922 does not permit consideration of 'emotional damage or harm' in § 1922 emergency proceedings under 25 CFR part 23." (Docket 301 at p. 7).

[7] "Any party seeking to effect a foster care placement of ... an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

25 U.S.C. § 1912(d). See also 23 CFR § 23. 2 (December 12, 2016) which defines "active efforts."

the State court that the justification for the temporary custody order has ended because returning the child to its parent or custodian will not place the child at imminent risk of physical damage or harm.

IT IS FURTHER ORDERED that defendant Mark Vargo, in his official capacity, is immediately and permanently required to comply with the following in all 48-hour hearings involving Indian children, parents, custodians and tribes, and in all subsequent emergency proceedings:

1. The ICWA affidavit must state with sufficient detail the facts which justify the emergency removal of a child from its parent or custodian and the facts which warrant the continued separation of a child from its parent or custodian to prevent imminent physical damage or harm to the child;

2. The petition for temporary custody ("petition") must:

   a. state what documents, if any, are incorporated by reference and copies of all incorporated documents[8] must be attached to the petition;

   b. describe that the purpose of the petition is to seek continued temporary custody of

[8] If the incorporated document is a police report subject to the provisions of SDCL § 26-7 A-29, the States Attorney or his designated deputy must file a written motion or make an oral motion to the court permitting the disclosure of the police report to the Indian parent or custodian and their attorney.

a child with the South Dakota Department of Social Services ("DSS");

c. advise that the State has the burden to prove by a preponderance of the evidence that continued removal is necessary to prevent imminent physical damage or harm to the child;

d. advise the parent or custodian of the possible immediate an ultimate consequences of the proceeding;

e. advise the parent or custodian of the right to request that the state proceedings be transferred to tribal court;[9]

f. advise that if the parent or custodian is indigent, the court will appoint counsel and will grant a continuance, not to exceed 24 hours, to enable counsel to become familiar with the facts of the case and confer with the parent or custodian;[10] and

g. state that the parent or custodian and their attorney have the following rights at the 48-hour hearing:

    1. to contest the allegations in the petition;

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[9] As required by 25 U. S. C. § 1911(b).

[10] "In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding." 25 U.S. C. § 1912(b).

2. to require the State to present evidence in support of the petition;

3. to cross-examine the State's witnesses and the preparers of any documents presented to the court; and

4. to subpoena witnesses and present testimony.

3. The parent or custodian and tribe must be given a copy of the ICWA affidavit and the petition at the earliest practical time but in no event later than the commencement of the 48-hour hearing;

4. The parents, custodians and tribes have the right to subpoena witnesses and must be permitted to present sworn testimony and other evidence during a 48-hour hearing;

5. The parents, custodians and tribes have the right to subpoena any person who provided information in support of or in contradiction to the ICWA affidavit or petition;

6. The parents, custodians and tribes have the right to cross-examine witnesses including the DSS child protection services staff member who signed the ICWA affidavit as well as all other witnesses whose statements form the factual basis for any document submitted to the court for consideration during the 48-hour hearing;

7. If indigent, parents and custodians have the right to the assistance of court-appointed counsel;

8. If counsel is requested, but not immediately available, or if counsel is appointed, counsel may request the 48-hour hearing be continued for a period of time not to exceed 24 hours, to permit the parent, custodian and tribe and counsel to prepare for the hearing;

9. The decision of the State court must be based solely on testimony and evidence presented during the 48-hour hearing;

10. The States Attorney's presentation must include testimony showing the active efforts of DSS to reunify the family following the emergency removal or placement;

11. The decision of the State court must be articulated on the record and include specific findings as to whether DSS engaged in active efforts to reunify the family and any reason authorized by § 1922 that continued placement with DSS is necessary to prevent imminent physical damage or harm to the child;

12. At the conclusion of a 48-hour hearing, a child must be restored to the custody of its parent or custodian unless the State proved by a preponderance of the evidence that continued custody with DSS is necessary to prevent imminent physical damage or harm to the child;

13. In the event a temporary custody order is entered at the conclusion of a 48-hour hearing, DSS shall immediately report to the State court that the justification for the

temporary custody order has ended because returning the child to its parent or custodian will not place the child at imminent risk of physical damage or harm; and

14. In the event a temporary custody order is entered at the conclusion of a 48-hour hearing, the State court shall immediately return the child to its parent or custodian as soon as justification for the temporary custody order has ended because returning the child will not place the child at imminent risk of physical damage or harm.

IT IS FURTHER ORDERED that this permanent injunction is binding upon defendants' officers, agents, employees, attorneys and upon those persons in active concert or participation with them who receive actual notice of this order.

IT IS FURTHER ORDERED that the court retains jurisdiction for the purpose of enforcing and modifying this permanent injunction and for the purpose of granting additional relief as may be necessary and appropriate.

Dated December 15, 2016.

BY THE COURT:

JEFFREY L. VIKEN
F JUD

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patriae*, to protect the rights of their tribal members; MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs vs. LISA FLEMING; MARK VARGO; HONORABLE CRAIG PFEIFLE; and LYNNE A. VALENTI, in their official capacities, Defendants.	CIV. 13-5020-JLV DECLARATORY JUDGEMENT

Incorporating the order of March 30, 2015 (Docket 150), the order of February 19, 20 16 (Docket 217), and the court's orders of December 15, 2016, (Dockets 301 and 302), for good cause shown and pursuant to the court's inherent equitable authority, the court enters the following declaratory judgment.

IT IS ORDERED, ADJUDGED AND DECREED that pursuant to the Indian Child Welfare Act[1] and the Due Process Clause of the

[1] 25 U. S. C. § 1901 et seq. ("ICWA").

Fourteenth Amendment, the following rights exist for the benefit of Indian children, parents, custodians and tribes in 48-hour hearings[2] and all subsequent emergency proceedings:[3]

THE RIGHT TO ADEQUATE NOTICE

1. The ICWA affidavit must state with sufficient detail the facts[4] which justify the emergency removal of an Indian child[5] from its parent or custodian and the facts which warrant the continued separation of a child from its parent or custodian to "prevent imminent physical damage or harm to the child;"[6]

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[2] SDCL § 26-7 A-14 directs "no child may be held in temporary custody longer than forty-eight hours . . . excluding Saturdays, Sundays, and court holidays, unless a . . . petition has been filed . . . and the court orders longer custody during a noticed hearing . . . ." These proceedings are commonly referred to as a "48-hour hearing."

[3] "Emergency proceeding means and includes any court action that involves an emergency removal or emergency placement of an Indian child." 25 CFR § 23.2 (December 12, 2016). "These proceedings are distinct from other types of 'child-custody proceedings' under [ICWA]. " Executive Summary to the Department of the Interior's regulations implementing ICWA, 81 Fed. Reg. 38778-38876, 38793 (June 14, 2016) ("Executive Summary").

[4] At this point these are only "alleged facts" until proven during a 48-hour hearing but will be referred to as "facts" unless otherwise indicated.

[5] All references to "child(ren)," "parent(s)," and "custodian(s)" will mean Indians as that term is defined by 25 U.S.C. § 1903(3).

[6] 25 U. S.C. § 1922. "[Section] 1922 does not permit consideration of 'emotional damage or harm' in § 1922

2. The petition for temporary custody ("petition") must:

   a. state what documents, if any, are incorporated by reference and copies of all incorporated documents[7] must be attached to the petition;

   b. describe that the purpose of the petition is to seek continued temporary custody of a child with the South Dakota Department of Social Services ("DSS");

   c. advise that the State has the burden to prove by a preponderance of the evidence that continued removal is necessary to prevent imminent physical damage or harm to the child;

   d. advise the parent or custodian of the possible immediate and ultimate consequences of the proceeding;

   e. advise the parent or custodian of the right to request that the state proceedings be transferred to tribal court;[8]

   f. advise that if the parent or custodian is indigent, the court will appoint counsel and will grant a continuance, not to exceed 24

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emergency proceedings under 25 CFR part 23." (Docket 301 at p. 7).

[7] If the incorporated document is a police report subject to the provisions of SDCL § 26-7A-29, the States Attorney or his designated deputy must file a written motion or make an oral motion to the court permitting the disclosure of the police report to the Indian parent or custodian and their attorney.

[8] As required by 25 U.S.C. § 1911(b).

hours, to enable counsel to become familiar with the facts of the case and confer with the parent or custodian;[9] and

g. state that the parent or custodian and their attorney have the following rights at the 48-hour hearing:

1. to contest the allegations in the petition;

2. to require the State to present evidence in support of the petition;

3. to cross-examine the State's witnesses and the preparers of any documents presented to the court; and

4. to subpoena witnesses and present testimony.

3. The parent or custodian and tribe must be given a copy of the ICWA affidavit and the petition at the earliest practical time but in no event later than the commencement of the 48-hour hearing; and

4. At the commencement of the 48-hour hearing, on the record the court must:

a. state what documents have been provided to the court and confirm that copies of the documents have been given to the parent or custodian and tribe;

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[9] "In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding." 25 U.S.C. § 1912(b).

b. provide a clear statement of the purpose of the proceeding and the possible immediate and ultimate consequences of the hearing;

c. advise of the right to counsel and appoint counsel if the parent or custodian is indigent and requests the assistance of counsel;

d. grant a continuance, not to exceed 24 hours, to permit counsel to prepare and consult with the parent or custodian and tribe; and

e. state to the parent or custodian and tribe that they have the certain rights with respect to the petition, namely:

1. to request that the State proceedings be transferred to tribal court;

2. to contest the allegations in the petition;

3. to require the State to present sworn testimony in support of the petition;

4. to cross-examine the State's witnesses;

5. to subpoena and present witnesses in opposition to the petition;

6. to require the State to prove by a preponderance of the evidence presented during the 48-hour hearing that continued removal of a child is necessary to prevent imminent physical damage or harm to the child; and

7. to require the State and the DSS to use active efforts[10] to reunite the family.

THE RIGHT TO PRESENT EVIDENCE

1. Parents, custodians and tribes have the right to subpoena witnesses and must be permitted to present sworn testimony and other evidence during a 48-hour hearing; and
2. Parents, custodians and tribes have the right to subpoena any person who provided information in support of or in contradiction to the ICWA affidavit or petition.

THE RIGHT TO CROSS-EXAMINE

1. Parents, custodians and tribes have the right to cross-examine witnesses including the DSS child protection services staff member who signed the ICWA affidavit as well as all other witnesses whose statements form the factual basis for any document submitted to the court for consideration during the 48-hour hearing.

THE RIGHT TO COUNSEL

1. If indigent, parents and custodians have the right to the assistance of court-appointed counsel; and

[10] Any party seeking to effect a foster care placement of ... an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S. C. § 1912(d). See also 23 CFR § 23.2 (December 12, 20 16) which defines "active efforts."

2. If counsel is requested, but not immediately available, or if counsel is appointed, counsel may request the 48-hour hearing be continued for a period of time not to exceed 24 hours, to permit the parent, custodian and tribe and counsel to prepare for the hearing.

THE RIGHT TO A DECISION BASED ON THE EVIDENCE PRESENTED AT THE HEARING

1. The decision of the State court must be based solely on testimony and evidence presented during the 48-hour hearing;
2. The States Attorney's presentation must include testimony showing the active efforts of DSS to reunify the family following the emergency removal or placement; and
3. The decision of the State court must be articulated on the record and include specific findings as to whether DSS engaged in active efforts to reunify the family and any reason authorized by § 1922 that continued placement with DSS is necessary to prevent imminent physical damage or harm to the child.

THE 48-HOUR HEARING MUST USE THE § 1922 STANDARD

1. At the conclusion of a 48-hour hearing, a child must be restored to the custody of its parent or custodian unless the State proved by a preponderance of the evidence that continued custody with DSS is necessary to prevent imminent physical damage or harm to the child.

DSS MUST USE THE § 1922 STANDARD IN DETERMINING WHEN TO RETURN AN INDIAN CHILD TO THE HOME

1. In the event a temporary custody order is entered at the conclusion of a 48-hour hearing, DSS shall immediately report to the court that the justification for the temporary custody order has ended because returning the child to its parent or custodian will not place the child at imminent risk of physical damage or harm; and

2. In the event a temporary custody order is entered at the conclusion of a 48-hour hearing, the court shall immediately return the child to its parent or custodian as soon as justification for the temporary custody order has ended because returning the child will not place the child at imminent risk of physical damage or or harm.

IT IS FURTHER ORDERED that the court retains jurisdiction for the purpose of enforcing and modifying this declaratory judgment and for the purpose of granting additional relief as may be necessary and appropriate.

Dated December 15, 2016.

BY THE COURT

:

JEFFREY L. VIKEN
F JUD

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patriae*, to protect the rights of their tribal members; and ROCHELLE WALKING EAGLE, MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs, vs. LUANN VAN HUNNIK; MARK VARGO; HON. JEFF DAVIS; and KIM MALSAM-RYSDON, in their official capacities, Defendants.	CIV. 13-5020-JLV ORDER

INTRODUCTION

On March 30, 2015, the court entered an order granting partial summary judgment to plaintiffs. (Docket 150). Defendants filed motions for reconsideration of the order granting partial summary judgment. (Dockets 167, 169 & 170). For the reasons stated below, the Van Hunnik and Valenti defendants' motion (Docket 167) is granted in part and denied in part. Motions for reconsideration by Judge Davis and States Attorney Vargo (Dockets

169 & 170) are denied.

DISCUSSION

Defendants Luann Van Hunnik and Lynne A. Valenti (the "DSS Defendants") filed a motion for reconsideration pursuant to Fed. R. Civ. P. 59(a)(2)[1] or, in the alternative, Fed. R. Civ. P. 60. (Docket 167 at pp. 1-2). Defendant States Attorney Vargo's motion for reconsideration is filed pursuant to Rule 59(e) and Rule 60(b)(2). (Docket 169). Defendant Judge Davis' motion for reconsideration is filed pursuant to Rule 59(a)(2)[2] and Rule 60. (Docket 170).

Federal Rule of Civil Procedure 59(a)(2) provides that "[a]fter a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." Rule 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Rule 60 provides in material part:

> The court may correct a . . . mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. . . . On motion . . . the court may relieve a party . . . from a final judgment, order or other

[1] The DSS Defendants' brief argues the application of Fed. R. Civ. P. 56(e), but makes no reference to Rule 59(a)(2). (Docket 168).

[2] Judge Davis' brief cites to Fed. R. Civ. P. 59(e), but makes no reference to Rule 59(a)(2). (Docket 172 at p. 3).

> proceeding for the following reasons: . . .
> any other reason that justifies relief.

Fed. R. Civ. P. 60(a) and (b)(6).

"Rule 59(e) motions are motions to alter or amend a judgment, not any nonfinal order." Broadway v. Norris, 193 F.3d 987, 989 (8th Cir. 1999) (internal quotation marks omitted). Because the order of March 30, 2015, is not the product of a nonjury trial and is not an "order from which an appeal lies" under Rule 54(a), Rule 59(a)(2) is not an appropriate mechanism for the parties to seek modification of the court's order. "By its terms, only Rule 60(b) encompasses a motion filed in response to an order." Broadway, 193 F.3d at 989. "[M]otion[s] for reconsideration should be construed as . . . Rule 60(b) motion[s]." Id.

"Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." Hagerman v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir. 1988). "[A] motion for reconsideration [should not] serve as the occasion to tender new legal theories for the first time." Id. Defendants' motions do not seek to present any new evidence. While Judge Davis and States Attorney Vargo make no mention of new evidence, the DSS Defendants say "[n]o newly discovered evidence was present in the motion to reconsider." (Docket 198 at p. 2). Because of the commonality of the defendants' motions, the court will address the motions in a fashion most useful for analysis. All references will be to the March 30, 2015, partial summary judgment order (Docket 150) unless otherwise indicated.

A. CHALLENGES TO UNDISPUTED MATERIAL FACTS

The DSS Defendants submit the March 30, 2015, order contains a number of erroneous findings of material facts. (Docket 168 at pp. 4 & 7). Judge Davis claims the court made a factual error in finding that "no testimony is permitted at the 48-hour hearings." (Docket 172 at p. 12). States Attorney Vargo does not challenge the court's statement of undisputed material facts. (Docket 169). The defendants' factual challenges are separately addressed.

1. CHILD PROTECTION SERVICES ("CPS") EMPLOYEES DO NOT PREPARE A PETITION FOR TEMPORARY CUSTODY

In the introduction section of the order, the court stated "CPS employees under policy guidance from and the supervision of Ms. Valenti and Ms. Van Hunnik prepare a petition for temporary custody and sign an Indian Child Welfare Act[3] affidavit alleging an Indian child is at risk of serious injury if the child remains in the parents' home." (Docket 150 at p. 3). In the statement of undisputed material facts section of the order, the court found that "[i]n state court cases involving Ms. Pappen and Ms. Young, CPS employees under [Ms. Valenti's and Ms. Van Hunnick's] supervision prepared petitions for temporary custody and signed ICWA affidavits alleging the children of these Indian parents were at risk of serious injury if the children remained at home." Id. at p. 11 (record reference and footnote

[3] 25 U.S.C. § 1901 *et seq*. ("ICWA").

omitted).

The DSS Defendants object to both of these statements. (Docket 168 at p. 4). The DSS Defendants assert "CPS employees do not prepare the petitions for temporary custody. The State's Attorney's office prepares a Petition for Temporary Custody and temporary custody paperwork." Id. (record references omitted).

Plaintiffs' complaint alleged that in the individual plaintiffs' state court "cases, DSS employees under the supervision of [the DSS Defendants] prepared a petition and signed an ICWA affidavit alleging that the children of these parents were at risk of serious injury if they remained in their homes." (Docket 1 ¶ 51). The DSS Defendants' answer stated "Petitions for Temporary Custody in each case was [sic] prepared by a Pennington County Deputy States Attorney. An ICWA Affidavit for each Plaintiff was executed by a DSS employee and such Affidavit sets forth many things, including but not limited to, why returning a child to a particular parent would result in serious emotional and physical damage." (Docket 81 ¶ 16). States Attorney Vargo's answer "admits that in [the individual plaintiffs'] cases, DSS employees under the supervision of [DSS Defendants] signed an ICWA Affidavit alleging that the children of these parents were at risk of serious injury if they remained in their homes." (Docket 76 ¶ 12).

As part of the summary judgment submission, the DSS Defendants stated an "Affidavit of the Department and the ICWA Affidavit is prepared by a CPS Family Services Specialist." (Docket 132-1 ¶ 71). They also stated "[t]he State's Attorney's office

prepares a Petition for Temporary Custody . . . . In most circumstances, CPS does not receive a copy of the Petition for Temporary Custody at the time of the 48 Hour hearing, but receives a copy of the applicable CPS file in the mail at the Rapid City office." Id. ¶¶ 79 & 80. A Deputy States Attorney on States Attorney Vargo's staff testified her "office prepares the temporary custody paperwork" and "DSS will provide me with the ICWA Affidavits and a DSS Affidavit." (Docket 132-26 ¶¶ 32 & 36).

In response to plaintiffs' statement of undisputed material fact, the defendants' jointly responded that the Petition for Temporary Custody was "prepared by the State's Attorney's Office. DSS does not have a policy for distribution of a State's Attorney prepared document." (Docket 131 ¶ 8, response).

The court finds its original description of material facts in the March 30, 2015, order contained minor misstatements on these points. The DSS Defendants' motion for reconsideration on this ground is granted.

The court amends page three of the introduction section of the order to read as follows:

> CPS employees under policy guidance from and under the supervision of Ms. Valenti and Ms. Van Hunnik sign an Indian Child Welfare Act affidavit alleging an Indian child is at risk of serious injury if the child remains in the parents' home.

The court amends page eleven of the undisputed material facts section of the order to read

as follows:

> In state court cases involving Ms. Pappan and Ms. Young, CPS employees under their supervision signed ICWA affidavits alleging the children of these Indian parents were at risk of serious injury if the children remained at home.

The court further amends the last paragraph at page eleven to include after the first sentence the following:

> A Deputy States Attorney under States Attorney Vargo's supervision prepares the petitions for temporary custody for all ICWA cases.

2. THE ICWA AFFIDAVIT AND HEARING TRANSCRIPT ISSUES

The DSS Defendants object to the court's finding that in seven 48-hour hearings "parents . . . did not receive the ICWA Affidavit either because the Tribe's counsel (who also represent the Plaintiffs in this action) made 'comments' in the hearing transcript that the parent allegedly did not receive the document, or that the transcript omits reference to the parent actually receiving the ICWA Affidavit." (Docket 168 at p. 7). The DSS Defendants claim that "[a]s to the alleged lack of notice as to why the children were removed from the custody of the parents, the parents could not claim ignorance of the situation." Id. at p. 5. Defendants argue that "[n]o affidavits were provided indicating that ICWA Affidavits were not provided to the parents by a DSS representative. . . . there is no competent evidence in the summary judgment materials reviewed by the

Court." Id. at p. 7. They also object to the court's conclusion that "the Deputy State's Attorney, DSS or the judge failed to contradict the alleged statements of the parents or the Tribe's counsel or recess the proceedings for the purpose of reviewing the ICWA Affidavit or Petition for Temporary Custody." Id. (citing Docket 150 at p. 15). The DSS Defendants claim the court improperly "weighed the evidence due to the 'omission' in the transcript and made a conclusion by omission." Id.

The DSS Defendants miss the point of the court's findings. The issue is not what the Indian parents knew about the reasons their children were initially removed from the parents' custody, but rather the factual basis supporting continued separation of the family. This is the information mandated for disclosure to the parents and for consideration by the state court judges in determining whether continued separation of the family is necessary under ICWA. (Docket 150 at pp. 27-28).

The court acknowledged the DSS Defendants claimed to have provided the ICWA affidavit. See id. at p. 13. What was troubling to the court and justified the findings made on the issue was that "disclosure of an ICWA affidavit and petition for temporary custody to a parent was not mentioned in 77 out of 78 cases." Id. at pp. 13-14. Then in seven cases there were specific references in the transcripts to complaints by the parents or the Tribe's counsel that they had not received the documents allegedly justifying continued placement with DSS. Id. at pp. 14-15.

DSS Defendants' citations to the inadmissibility of unsworn statements for summary judgment purposes are misleading. Both sides in this litigation submitted transcripts of 48-hour hearings for consideration in resolving plaintiffs' motions for partial summary judgment. Those transcripts constitute the official record. SDCL § 26-7A-35; see also Fed. R. Evid. 803(8) & 902(4).

In not one of the seven transcripts referenced in the order "did a Deputy States Attorney, DSS representative or the judge contradict the statements of the Indian parents or counsel or recess the proceedings to allow the parties to receive and review the ICWA affidavit and petition for temporary custody." (Docket 150 at p. 15). The official record of those proceedings speaks loudly and clearly. Silence by those individuals responsible for disclosing the ICWA affidavit and the petition for temporary custody can only be an adoption of the declaration made by the parents or counsel. The DSS Defendants' motion for reconsideration on this ground is denied.

3. VALENTI AND VAN HUNNIK UNDERSTAND 48-HOUR HEARINGS ARE INTENDED TO BE EVIDENTIARY HEARINGS

The DSS Defendants object to the court's conclusion that they "understood 48-hour hearings are intended to be evidentiary hearings." (Docket 168 at p. 7) (citing Docket 150 at p. 26). The DSS Defendants claim "[t]here [is] no competent evidence in the record that could lead to such a conclusion." Id.

The DSS Defendants fail to acknowledge the

existence of the *Department of Interior Guidelines for State Courts*; *Indian Child Custody Proceedings*, 44 Fed. Reg. 67584-67595 (Nov. 26, 1979) ("DOI Guidelines") and the 2007 South Dakota Unified Judicial System *South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases* ("SD Guidelines") referenced in the footnote accompanying the court's statement. See Docket 150 at p. 26 n.27. Instead of claiming these administrative guidelines need not be followed, the DSS Defendants' summary judgment brief points out a mistake made by plaintiffs in citing to the SD Guidelines and ignores the remainder of plaintiffs' argument regarding the DOI Guidelines and the SD Guidelines. Compare Docket 129 at p. 12 and Docket 108 at pp. 15 & 28.

The defendants' argument is frivolous. The DOI Guidelines are "an administrative interpretation of ICWA entitled to great weight." (Docket 150 at p. 29) (references omitted). The SD Guidelines include the ICWA affidavit form submitted in this case and also specifically incorporate as an appendix the DOI Guidelines.[4] The DSS Defendants are bound to know and understand the law applicable to ICWA proceedings, a fundamental competence lacking in this case. The DSS Defendants' reliance on Cheyenne River Sioux Tribe v. Davis, 822 N.W.2d 62 (S.D. 2012) is misplaced. In Cheyenne River Sioux Tribe it is obvious that the South Dakota Supreme Court assumed the ICWA affidavit, police reports and the petition for temporary custody were all given to

[4]http://ujs.sd.gov/uploads/pubs/SDGuidelinesAandNProceedings.pdf at pp. 111-12 and 139-58.

Native American parents appearing at 48-hour hearings. "Based upon State's petition, the police report and an ICWA affidavit from a DSS specialist, the court granted temporary custody of the children to DSS for sixty days." Id. at p. 63.

Cheyenne River Sioux Tribe is not state court precedent governing the factual or legal issues presented for summary judgment in this case. The South Dakota Supreme Court in Cheyenne River Sioux Tribe focused on the first sentence of 25 U.S.C. § 1922 while the issues before this court require application of the second sentence. The DSS Defendants' motion for reconsideration on this ground is denied.

4. TESTIMONY PERMITTED AT THE 48-HOUR HEARINGS

Judge Davis claims this court made a finding "that Judge Davis stated no testimony is permitted at the 48-hour hearing." (Docket 172 at p. 12) (referencing Docket 150 at p. 41). Judge Davis' objection is a misstatement of the record. The court's order accepted "Judge Davis' own declaration that no oral testimony is permitted during the 48-hour hearings he conducts." (Docket 150 at p 41) (emphasis added). Judge Davis' motion for reconsideration on this ground is denied.

B. CHALLENGES TO THE COURT'S LEGAL CONCLUSIONS

Defendants' challenges to the court's legal conclusions are little more than a repeat of losing arguments made in earlier filings. Nothing raised by defendants points out "a manifest error of law"

requiring reconsideration.

1. JUDGE DAVIS IS A POLICY MAKER

Judge Davis objects to the court's conclusion of law that he is a policy maker. (Dockets 172 at p. 3). He argues that "[u]nder South Dakota state law, there appear to be at least four means for the South Dakota Supreme Court to review and ratify or reject 'procedures' used by a circuit court judge during a temporary custody hearing." Id. Judge Davis asserts "[n]o court has concluded that a constitutionally elected state court judge is a 'final policymaker' under Monell v. Dept. of Soc. Serv's of City of New York, 436 U.S. 658, 694 (1978)." Id. at p. 4. Rather, Judge Davis argues the South Dakota Supreme Court is the final policy maker. Id. at p. 6.

Were the court to adopt Judge Davis' rationale, the United States Supreme Court would be the only final policy maker based on its authority to review a state court decision through a writ of certiorari. The Supreme Court considers a writ of certiorari if "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals . . . [or] a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(b) & (c).

Judge Davis' argument that plaintiffs have alternative paths of recourse with the South Dakota Supreme Court is without merit under Pulliam v.

Allen, 466 U.S. 522 (1984). "Congress enacted § 1983 . . . to provide an independent avenue for protection of federal constitutional rights. . . . We remain steadfast in our conclusion, nevertheless, that Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review." Id. at pp. 540-41. As summarized in Tesmer v. Granholm, "Pulliam's emphasis on the fact that § 1983 was intended to be an independent protection for federal rights undermines Defendants' claim that an indigent defendant's only recourse is to appeal the denial of appellate counsel and, when those appeals are exhausted, file a petition for writ of habeas corpus." Tesmer v. Granholm, 114 F. Supp. 2d 603, 617 (E.D. Mich. 2000), rev'd on other grounds, 333 F.3d 683 (6th Cir.2003), rev'd on standing grounds, 543 U.S. 125 (2004) (federal court's declaratory judgment that a state judicial practice was unconstitutional constituted a declaratory decree within the meaning of § 1983 because its effect was to prohibit state court judges from engaging in the unconstitutional practice). The United States Supreme Court subsequently endorsed the ruling in Pulliam. See Mireles v. Waco, 502 U.S. 9, 10 n.1 (1991) ("The Court . . . has recognized that a judge is not absolutely immune . . . from a suit for prospective injunctive relief . . . ." (referencing Pulliam, 466 U.S. at 536-43)).

Judge Davis' declaration that "[n]o court has concluded that a constitutionally elected state court judge is a 'final policymaker' under Monell" is disingenuous. (Docket 172 at p. 4). The court's order

cited Monell for the proposition that Judge Davis' six practices identified by the court were policies which "may fairly be said to represent official policy." (Docket 150 at p. 22) (citing Oglala Sioux Tribe v. Van Hunnik, 993 F. Supp. 2d 1017, 1029 (D.S.D. 2014) (citing Monell, 436 U.S. at 694). The Supreme Court's directive in Pulliam as it relates to the action of a judge was not premised on the "final policy maker" mandate of Monell. Rather, as the court's March 30, 2015, order found, "Judge Davis' decisions are 'final decisions' for purposes of § 1983. He established each of the policies and procedures for conducting 48-hour hearings and Judge Davis is empowered to change them at any time." (Docket 150 at p. 25). This rule-making function subjected Judge Davis to § 1983 jurisdiction for declaratory and injunctive relief purposes. Id. (referencing Pulliam, 466 U.S. 522). See also Eggar v. City of Livingston, 40 F.3d 312, 317 (9th Cir. 1994) ("a state judge does not enjoy judicial immunity from unconstitutional behavior when the facts are sufficient to grant a party declaratory or injunctive relief against a judge.") (referencing Pulliam, 446 U.S. at 541-42).

This conclusion is supported by Smith v. Pezzetti, No. 03-74213, 2005 WL 5421316 (E.D. Mich. April 4, 2005). In that case, the district court issued a declaratory judgment on plaintiffs' § 1983 claims against two Michigan County Circuit Court Judges. Smith, 2005 WL 5421316 *17. Those judges issued separate procedural orders removing plaintiffs' adoptive children from their custody without notice pending a further hearing on other parties' challenges to a final adoption decree. The defendant judges argued their decisions were not final because further state court proceedings would

necessarily occur. Id. at 2005 WL 5421316 *12. The district court found "Plaintiffs had no opportunity to be heard in both . . . County Courts before their legal status as parents were stripped from them, and their children were removed from them." Id. at 2005 WL 5421316 *13. The court then "granted partial summary judgment/declaratory relief on [plaintiffs'] claim under 42 U.S.C. § 1983 against Judges Pezzetti and [Robertson] . . . . The Court finds that there is no genuine issue of material fact that: (1) there was a violation of the Smith Plaintiffs' right to due process secured by the Constitution and laws of the United States, and (2) that the alleged deprivation was committed by a person or persons acting under color of state law, to wit Judges Pezzetti and Robertson . . . ." Id. at 2005 WL 5421316 *14.

"The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' " Mitchum v. Foster, 407 U.S. 225, 242 (1972) (citing Ex parte Virginia, 100 U.S. 339, 346 (1879)). "In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." Id. (referencing Ex parte Young, 209 U.S. 123 (1908)).

Judge Davis' motion for reconsideration is denied.

2. DSS DEFENDANTS ARE POLICY MAKERS

The DSS Defendants object to the court's conclusion that they are policy makers. (Docket 168 at pp. 11-13). They argue "Plaintiffs asserted no evidence or legal argument with 'relevant materials' to address whether Ms. Valenti or Ms. Van Hunnik were 'final policy makers.' " Id. at p. 12.

The plaintiffs' statement of undisputed material facts contained the following declaration:

> [A]lthough the ICWA affidavits prepared by DSS employees and submitted in 48-hour hearings often discussed the events that led up to the child being removed from the home, they almost never discussed in any meaningful or comprehensive manner whether the child would likely suffer injury if returned to the home.

(Docket 107 ¶ 38). The DSS Defendants' response to this statement did not challenge its content, but rather said "[t]he Department's training requires an analysis on 'imminent danger' based on not only immediate harm, but also the foreseeability or recurrent danger. During the 48-hour hearing, the court is determining whether emergency custody should continue. These decisions are based on the record evidence." (Docket 130 ¶ 38).

The DSS Defendants acknowledge the court must resolve as a matter of law whether the

defendants are final policy makers. (Docket 168 at p. 12). Without restating the analysis conducted, the order of March 30, 2015, properly reaches the conclusion that the DSS Defendants are final policy makers under Monell.

The DSS Defendants object to the court's conclusion that their acquiescence in Judge Davis' policies for conducting 48-hour hearings made his policies their own. (Docket 168 at p. 14). The DSS Defendants' argue Judge Davis is not a subordinate to them such that they could ratify his policies. Id. at pp. 14-15. Judge Davis clearly was not a subordinate to these defendants. But contrary to the DSS Defendants' argument, Coleman v. Watt[5] stands for the proposition that a separate, non-subordinate entity, such as the Department of Social Services, may be held liable by adopting the policies of a judge. See Coleman, 40 F.3d at 262 (plaintiff must prove "the chief of police or some other policymaker adopted Judge Watt's order as an official policy . . . .") (emphasis added).

This court concluded "[w]hen these defendants did not challenge Judge Davis' policies for conducting 48-hour hearings, his policies became the official policy governing their own agencies." (Docket 150 at p. 26) (referencing Coleman, 40 F.3d at 262). The adoption of Judge Davis' policies as the policies of the Department of Social Services occurred " 'by acquiescence in a longstanding practice' of Judge Davis . . . ." Id. at p. 27 (citing Jett v. Dallas Independent School District, 491 U.S. 701, 737 (1989) (internal quotation marks omitted).

[5] 40 F.3d 255 (8th Cir. 1994).

The DSS Defendants' argument also fails because the state has an official policy—the SD Guidelines. These defendants did not object to the court's consideration of the Guidelines, only to the interpretation of how the SD Guidelines apply in this case. (Docket 129 at pp. 12-13). Despite the comprehensive SD Guidelines, discussed in detail at pages 29-34 of the March 30, 2015, order, the DSS Defendants ignored the SD Guidelines and adopted the policies of Judge Davis as their own. The policies of Judge Davis and the policies of the DSS Defendants were the "moving force" behind the violation of plaintiffs' constitutional and federal rights. Clay v. Conlee, 815 F.2d 1164, 1170 (8th Cir. 1987).

The DSS Defendants' motion for reconsideration is denied.

3. STATES ATTORNEY VARGO IS A POLICY MAKER

States Attorney Vargo argues the court failed to identify the entity for which he was a final policy maker. (Docket 174 at p. 5). This argument is frivolous at best. The court specifically identified States Attorney Vargo as "the elected States Attorney for Pennington County, South Dakota. . . . [and that] Mr. Vargo controls the policies and procedures followed by his staff attorneys." (Docket 150 at pp. 2-3). As the Pennington County States Attorney, Mr. Vargo "appear[s] in all courts in his county and prosecute[s] . . . on behalf of the state or his county . . ." all civil proceedings. Id. at p. 3 n.5 (citing SDCL § 7-16-9).

States Attorney Vargo claims he should not be a named defendant but rather Pennington County should be the named defendant. (Docket 174 at pp. 6-7). This argument ignores the long-standing precedent that in § 1983 cases seeking prospective declaratory judgment and injunctive relief, it is the individually named prosecutor who is called upon to defend the policies of his office. See Supreme Court of Virginia v. Consumers Union of U. S., Inc., 446 U.S. 719, 736 (1980) (Prosecutors "are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law."); Bolin v. Story, 225 F.3d 1234, 1242 (11th Cir. 2000) ("prosecutors are not immune from claims for injunctive relief . . . ."); Miller v. Mitchell, 598 F.3d 139, 155 (3d Cir. 2010) (preliminary injunction issued against district attorney).

States Attorney Vargo argues neither he nor "his courtroom deputies . . . [have] the authority to stop Judge Davis's conduct, regardless of whether or not it was a violation of plaintiffs' constitutional rights." (Docket 174 at p. 8 (citing Granda v. City of St. Louis, No. 4:04-CV-1689-MLM, 2006 WL 1026978 at *8 (E.D. Mo. Apr. 13, 2006) (citing Russell v. Hennepin County, 420 F.3d 841, 849 (8th Cir.2005)). Granda concluded that "mere awareness" by the mayor or a judge of the actions of another judge "does not create a custom or policy of the City." Id.

Granda is far removed from the facts in the present case. States Attorney Vargo and his courtroom deputies are actively involved in every 48-hour hearing occurring in the courtrooms of the Seventh Judicial Circuit. Mr. Vargo has an

independent "obligation to follow federal and state law . . . and to seek justice at all times." (Docket 150 at p. 3). This includes his obligation to comply with the Indian Child Welfare Act.

States Attorney Vargo objects to the court's use of Coleman[6] to hold him responsible through his acquiescence in the policies of Judge Davis. (Docket 174 at p. 9). This argument is without merit as the Coleman court acknowledged one of the plaintiff's unresolved "evidentiary hurdles" was the factual issue of "the role of municipal officials in adopting Judge Watt's order as official policy." Coleman, 40 F.3d at 262. That evidentiary hurdle is not present here.

States Attorney Vargo asserts that the issue of whether the defendants' decisions caused the deprivation of constitutional rights alleged by plaintiffs is a jury question. (Docket 174 at p. 11). A careful review of the pleadings reveals this argument is without merit. Plaintiffs' complaint invokes the equity jurisdiction of the court seeking a declaratory judgment and an injunction against the defendants. (Docket 1 at p. 38 ¶¶ 3 & 4). See Northgate Homes, Inc. v. City of Dayton, 126 F.3d 1095, 1099 (8th Cir. 1997). Even if defendants had been entitled to a jury trial on plaintiffs' declaratory judgment claim, none of the defendants' answers demanded a jury trial. (Dockets 76, 80 & 81). Nor did any defendant file a demand for jury trial within 14 days of the service of the last pleading. Fed. R. Civ. P. 38(b)(1). When a demand for jury trial is not properly made all issues

[6] Coleman involved a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Coleman, 40 F.3d at 258.

are to be resolved by the court. Fed. R. Civ. P. 39(b).

States Attorney Vargo's motion for reconsideration on these grounds is denied. His other grounds for reconsideration are the same as those advanced by Judge Davis and the DSS Defendants. For the same reasons articulated above, States Attorney Vargo's motion for reconsideration on those grounds is denied.

4. THE DSS DEFENDANTS ARE NOT SUBJECT TO PROSPECTIVE INJUNCTIVE RELIEF

The DSS Defendants argue the March 30, 2015, order will not support "an injunction against [the DSS Defendants] for prospective injunctive relief to prevent future violations of federal law." (Docket 168 at p. 15). The court concluded that notwithstanding the DSS Defendants' change in procedures following the commencement of this litigation, those actions do not encompass all of the issues addressed in the March 30, 2015, order. Furthermore, "[d]efendants have not shown 'it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' " (Docket 150 at p. 44) (citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U. S. 49, 66 (1987) (italics in original).

The extent to which the DSS Defendants are subject to prospective injunctive relief will be resolved during the remedy phase of these proceedings. The DSS Defendants' motion for reconsideration on this ground is denied.

ORDER

Based on the above analysis, it is

ORDERED that the DSS Defendants' motion for reconsideration (Docket 167) is granted in part and denied in part consistent with this order.

IT IS FURTHER ORDERED that defendant State Attorney Vargo's motion for reconsideration (Docket 169) is denied.

IT IS FURTHER ORDERED that defendant Judge Davis' motion for reconsideration (Docket 170) is denied.

IT IS FURTHER ORDERED that the March 30, 2015, order (Docket 150) is amended consistent with the modification noted at page six of this order.

IT IS FURTHER ORDERED that a separate injunction and declaratory judgment order shall issue after a hearing at which the parties present their positions on injunctive relief.

Dated February 19, 2016.

BY THE COURT:

JEFFREY L. VIKEN
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patriae*, to protect the rights of their tribal members; MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs vs. LUANN VAN HUNNIK; MARK VARGO; HON. JEFF DAVIS; and LYNNE A. VALENTI, in their official capacities, Defendants.	CIV. 13-5020-JLV ORDER

"A cornerstone of Lakota culture can be summed up in the words family and kinship. Family is the backbone, the foundation of our culture. We are given substance, nurtured, and sustained by family."[1]

Joseph M. Marshall III, Sicangu Lakota (Rosebud)

"Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum

[1] the lakota way, Penguin Group Inc., New York, 2001, p. 210.

Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ."[2]

Congress of the United States

"This wholesale removal of Indian children from their homes prompted Congress to enact the [Indian Child Welfare Act], which establishes federal standards that govern state-court child custody proceedings involving Indian children."[3]

Supreme Court of the United States

INTRODUCTION

The Honorable Jeff Davis is a judge of the Seventh Judicial Circuit, part of the South Dakota United Judicial System. Judge Davis is the presiding judge of the Seventh Circuit. He administers the court system for the Circuit and sets policies and procedures in his courtroom. His Seventh Circuit judicial colleagues follow Judge Davis' policies and procedures for the removal of Indian children from their parents' homes.

Judge Davis typically conducts hearings within 48 hours of an Indian child's removal from the parents' care. The hearings usually last less than five minutes.[4] The removed Indian children often spend

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[2] 25 U.S.C. § 1902.

[3] *Adoptive Couple v. Baby Girl*, __ U.S. __ , 133 S. Ct. 2552, 2557 (2013) (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (internal quotation marks omitted).

[4] See, for example, transcripts 10-50, 10-177, 10-253, 11-480,

weeks or months in foster care away from their parents, Indian custodians and Tribes.

Mark Vargo is the elected States Attorney for Pennington County, South Dakota. His staff attorneys appear before Judge Davis and other Seventh Circuit judges in cases involving the removal of Indian children from their parents. Mr. Vargo has an obligation to follow federal and state law, to advocate the State's position and to seek justice at all times.[5] These obligations are independent from the judicial function. Mr. Vargo controls the policies and procedures followed by his staff attorneys.

Lynne A. Valenti is the Secretary of the South Dakota Department of Social Services ("DSS"). LuAnn Van Hunnik is the person in charge of DSS Child Protection Services ("CPS") for Pennington

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11-497, 12-191, 14-455 and 14-456.

[5] "The states attorney shall appear in all courts of his county and prosecute . . . on behalf of the state or his county all actions or proceedings, civil or criminal, in which the state or county is interested or a party." SDCL § 7-16-9. "Prosecutors have a special 'duty to seek justice, not merely to convict.'" Connick v. Thompson, __ U.S. __, 131 S. Ct. 1350, 1362 (2011) (quoting ABA Standards for Criminal Justice 3-1.1(c) (2d ed.1980) (other citation omitted). "The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected." National District Attorneys Association, *National Prosecution Standards*, Third Edition, 1-1.1 (updated 2009).

County, South Dakota. CPS employees under policy guidance from and the supervision of Ms. Valenti and Ms. Van Hunnik prepare a petition for temporary custody and sign an Indian Child Welfare Act[6] affidavit alleging an Indian child is at risk of serious injury if the child remains in the parents' home.

The court granted *parens patriae* status to the Oglala Sioux Tribe and the Rosebud Sioux Tribe. The court certified the individual plaintiffs, Madonna Pappan and Lisa Young, as class representatives for all similarly situated Indian parents.[7]

Plaintiffs moved for partial summary judgment on the grounds defendants violate the Indian Child Welfare Act and the Due Process Clause in the removal of Indian children from their parents or Indian custodians. Plaintiffs seek only prospective declaratory and injunctive relief.[8] Defendants vigorously oppose plaintiffs' motions for partial summary judgment.

The court finds that Judge Davis, States Attorney Vargo, Secretary Valenti and Ms. Van Hunnik developed and implemented policies and procedures for the removal of Indian children from their parents' custody in violation of the mandates of the Indian Child Welfare Act and in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

For the reasons stated below, plaintiffs' motions for partial summary judgment are granted.

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[6] 25 U.S.C. § 1901 *et seq*. ("ICWA ").

[7] Dockets 69 at p.17 and 70 at pp. 14-15.

[8] Docket 1 p.38 ¶¶ 3 & 4.

THE INDIAN CHILD WELFARE ACT

Congressional findings to support the passage of ICWA included the following declarations:

> [T]hat there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> [T]hat an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> [T]hat the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901(3), (4) & (5). The Indian Child Welfare Act "establishes minimum Federal standards and procedural safeguards to protect Indian families when faced with child custody proceedings against them in State agencies or

courts."[9]

"The Indian Child Welfare Act . . . was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." Mississippi Band of Choctaw Indians, 490 U.S. at 32. Indian tribes have an interest in the custody of Indian children "which is distinct from but on parity with the interest of the parents" and which "finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize." Id. at 52. "[T]he purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-a-vis state authorities." Id. at 44-45.

Section 1912 of ICWA addresses the rights of Indian parents during any court proceeding. "In any involuntary proceeding in a State court . . . the party seeking the foster care placement of . . . an Indian child shall notify the parent or Indian custodian . . . and the . . . tribe . . . of the pending proceedings . . ." 25 U.S.C.§ 1912(a). In the event of indigency, Indian

[9] 124 Congressional Record 38102 (1978) (remarks of Rep. Udall).

parents are entitled "to court-appointed counsel in any removal . . . proceeding." Id. at § 1912(b). "Each party to a foster care placement . . . under State law involving an Indian child shall have the right to examine all reports and other documents led with the court upon which any decision with respect to such action may be based." Id. at § 1912(c). "Any party seeking to effect a foster care placement of . . . an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these e orts have proved unsuccessful." Id. at § 1912(d). "No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Id. at §1912(e). A "foster care placement" for purposes of ICWA "mean[s] any action removing an

Indian child from its parents or Indian custodian for temporary placement in a foster home or institution . . . where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated . . . ." 25 U.S.C. § 1903(1)(i).

Section 1922 of ICWA states:

> Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off

> the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

25 U.S.C. § 1922.

THE DUE PROCESS CLAUSE

The Due Process Clause of the Fourteenth Amendment provides "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Amend. XIV, section 1. "[T]he Due Process Clause of the Fourteenth Amendment confers both substantive and procedural rights." Albright v. Oliver, 510 U.S. 266, 272 (1994) (internal references omitted).

"[T]he Amendment's Due Process Clause . . . guarantees more than fair process. . . . [it] also includes a substantive component that provides heightened protection against governmental interference with certain fundamental rights and liberty interests." Troxel v. Granville, 530 U.S. 57, 65 (2000) (internal citations and internal quotation marks omitted). "The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Id. at 66.

PROCEDURAL HISTORY

Plaintiffs led this action asserting defendants' policies, practices and procedures relating to the removal of Native American children from their homes during state court 48-hour hearings[10] violate ICWA and the Due Process Clause of the Fourteenth Amendment.[11] (Docket 1). Defendants deny plaintiffs' claims. (Dockets 76, 80 & 81).

Plaintiffs led two separate motions for partial summary judgment. (Dockets 108 & 110). Those

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[10] SDCL § 26-7A-14 directs "no child may be held in temporary custody longer than forty -eight hours . . . excluding Saturdays, Sundays, and court holidays, unless a . . . petition has been led . . . and the court orders longer custody during a noticed hearing . . . ." These proceedings are commonly referred to as a "48-hour hearing."

[11] Plaintiffs seek relief pursuant to 42 U.S.C. § 1983. (Docket 1 ¶ 1). The court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). Venue is proper pursuant to 28 U.S.C. § 1391(b). Defendants acknowledge all acts undertaken by them were done under color of state law. (Dockets 1 ¶ 12; 76 ¶ 10; 80 ¶ 13 & 81 ¶ 12). Each defendant is sued in their official capacity only. Id.

motions will be identified as the "Section 1922 Claims" (Docket 110) and the "Due Process Claims" (Docket 108). Following extensive submissions by the parties, the motions are ripe for resolution.

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(a), a movant is entitled to summary judgment if the movant can "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Only disputes over facts that might a affect the outcome of the case under the governing substantive law will properly preclude summary judgment. Anderson v. Liberty Lob Inc., 477 U.S. 242, 248 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for Summary judgment; the requirement is that there be no genuine issue of material fact." Id. at 247-48 (emphasis in original).

In determining whether summary judgment should issue, the facts and inferences from those facts must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). In order to withstand a motion for summary judgment, the nonmoving party "must substantiate [their] allegations with 'sufficient probative evidence [that] would permit a finding in [their] favor on more than mere speculation, conjecture, or fantasy.'" Moody v. St. Charles County, 23 F.3d 1410, 1412 (8th Cir. 1994) (citing Gregory v. Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992).

In assessing a motion for summary judgment, the court is to "consider only admissible evidence and disregard portions of various affidavits and depositions that were made without personal knowledge, consist of hearsay, or purport to state legal conclusions as fact." Howard v. Columbia Public School District, 363 F.3d 797, 801 (8th Cir. 2004); see Fed. R. Civ. P. 56(e) (a party may not rely on his own pleadings in resisting a motion for summary judgment; any disputed facts must be supported by affidavit, deposition, or other sworn or certified evidence). The nonmoving party's own conclusions, without supporting evidence, are insufficient to create a genuine issue of material fact. Anderson, 477 U.S. at 256; Thomas v. Corwin, 483 F.3d 516, 527 (8th Cir. 2007); Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011) (en bane).

UNDISPUTED MATERIAL FACTS

The following recitation consists of the material facts undisputed by the parties. These facts are developed from the complaint (Docket 1), defendants' answers and amended answers (Dockets 74-76, 80 & 81), plaintiffs' statement of undisputed material facts (Dockets 109), and defendants' response to plaintiffs' statement of undisputed material facts (Dockets 130 & 131). Where a statement of fact is admitted by the opposing party, the court will only reference the initiating document. The facts material to plaintiffs' motions for partial summary judgment are as follows.

Plaintiffs Oglala Sioux Tribe and Rosebud Sioux Tribe are Indian tribes officially recognized by the United States with reservations located within

the State of South Dakota. (Docket 1 ¶ 2). Both tribes have treaties with the federal government. Id. Plaintiffs Madonna Pappan and Lisa Young reside in Pennington County, South Dakota, and are members of the Oglala Sioux Tribe and the Standing Rock Sioux Tribe, respectively. Id. ¶ 5.

Defendant Lynne A. Valenti is the Secretary of the South Dakota Department of Social Services ("DSS").[12] Id. ¶ 9. Defendant LuAnn Van Hunnik is the person in charge of DSS Child Protection Services ("CPS") for Pennington County, South Dakota. Id. In state court cases involving Ms. Pappan and Ms. Young, CPS employees under their supervision prepared petitions for temporary custody and signed ICWA affidavits[13] alleging the children of these Indian parents were at risk of serious injury if the children remained at home. Id. ¶ 51.

Defendant Mark Vargo is the duly elected States Attorney for Pennington County. Id. ¶ 10. Defendant Jeff Davis is the presiding judge of the Seventh Judicial Circuit Court of the State of South Dakota, and is the chief administrator of the Seventh Judicial Circuit Court. Id. ¶ 11.

Approximately one hundred 48-hour hearings involving Indian children[14] are held each year in the

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[12] Pursuant to Fed. R. Civ. P. 25(d), Ms. Valenti was substituted as a proper party in her official capacity effective February 24, 2014. See Dockets 79 & 82.

[13] An ICWA a davit used by the defendants is attached to the complaint. (Docket 1-3).

[14] Unless otherwise indicated, all references to "child(ren)," "parent(s), "and "custodian(s)" will mean Indians as that term is defined by 25 U.S.C.§ 1903(3).

Seventh Circuit Court for Pennington County. (Docket 130 ¶ 1). Excluding those cases where jurisdiction over a child was promptly transferred to a tribal court, in 100 percent of the 48-hour hearings conducted by Judge Davis from January 2010 to July 2014,[15] he granted motions by the States Attorney and DSS for continued custody of all Indian children involved in those hearings. (Dockets 109 ¶ 1 & 131 ¶ 1).

> Eight hundred twenty-three Indian children were involved in 48-hour hearings in Pennington County, South Dakota, during the years 2010 to 2013. (Docket 131 ¶ 2). Of those 823 Indian children
>
> - 87 children were discharged from DSS custody the day of the 48-Hour hearing;
> - 268 children were discharged from DSS custody within 1-15 days after the 48-hour hearing[16];
> - 114 children were discharged from DSS custody within 16-30 days after the 48-hour hearing;

[15] Unless a different time frame is specifically identified, all references are to the January 2010 to July 2014 period.

[16] Defendants identified the number of children in this category as "207." (Docket 131 ¶ 2). Applying the percentage calculation presented by defendants [736 children remaining in DSS custody after the 48-hour hearing x 36.4% = 267.9 children], the correct number is "268." Using the number 268 also accounts for all 823 children in the analysis.

- 44 children were discharged from DSS custody within 31-45 days after the 48-hour hearing;
- 50 children were discharged from DSS custody within 46-60 days after the 48-hour hearing; and
- 260 children remained in DSS court-ordered custody for more than 60 days after the 48-hour hearing.

Id.

The defendants acknowledge Seventh Circuit judges receive an ICWA affidavit prior to the 48-hour hearing, but the affidavit is not marked as a hearing exhibit. (Docket 131 ¶ 37). Indian parents who are present at the 48-hour hearings only began receiving a copy of the petition for temporary custody in May 2014. (Docket 109 ¶ 10). DSS asserts that prior to June 2012 it was the practice of DSS to provide parents attending a 48-hour hearing with a copy of the ICWA affidavit. (Docket 131 ¶ 8). DSS also asserts that since June 2012 it has been DSS's written policy to provide the ICWA affidavit to parents attending a 48-hour hearing. Id. DSS claims that if a parent did not receive the ICWA affidavit, it was an oversight and not an intentional decision by the child protection staff. Id.

Based on the court's review of the transcripts of 48-hour hearings submitted by the parties at which at least one Indian parent or custodian appeared, disclosure of an ICWA affidavit and a petition for temporary custody to a parent was not

mentioned in 77 out of 78 cases.[17] In a number of transcripts there are specific exchanges with a judge in which an Indian parent asked about the allegations against them or why their children were removed. See transcript 10-1119 (father would like to know what the allegations were and the allegations are explained to him without any reference to either the ICWA affidavit or the petition for temporary custody); transcript 10-1320 (Judge Thorstenson indicated the documents would be given to the parents at the next hearing); transcript 11-497 (mother wanted to know what the issues were and no explanation was given); transcript 12-36 (neither mother nor the Tribe's attorney were given the ICWA affidavit or petition for temporary custody); transcript 12-571 (Tribe's attorney stated he was not given any copies of reports); transcript 13-20 (Tribe's attorney noted neither the ICWA a davit nor the petition for temporary custody were given to the

[17] See transcripts 10-50, 10-177, 10-253, 10-270, 10-304, 10-306, 10-358, 10-494, 10-460, 10-487,10-523, 10-649, 10-773, 10-783, 10-901, 10-955, 10-1007, 10-1064, 10-1116, 10-1119, 10-1170, 10-1191, 10-1238, 10-1320, 11-480, 11-497, 11-645, 11-1004, 11-1060, 11-1075, 12-36, 12-168, 12-191, 12-219, 12-244, 12-245, 12-302, 12-375, 12-468, 12-571, 12-648, 12-668, 12-698, 12-712, 12-749, 12-805, 12-867, 12-1152, 13-20, 13-30, 13-49, 13-53, 13-298, 13-560, 13-609, 13-616, 13-665, 13-697, 13-698, 13-731, 13-805, 13-806, 13-845, 14-47, 14-60, 14-103, 14-114, 14-144, 14-145, 14-304, 14-311, 14-443, 14-446 (3 cases), 14-455, 14-456, and 14-527. In only one case did Judge Davis make reference to "paperwork," suggesting the ICWA affidavit may have been provided to the parents of the Indian child. See transcript 10-773. In another case, Judge Thorstenson referenced the ICWA affidavit and petition for temporary custody, but did not indicate the parent was given documents and did not summarize the nature of the allegations. See transcript 12-168.

parent); and transcript 13-49 (Tribe's attorney noted neither he nor the parent were provided with documentation for the hearing). In none of these hearings did a Deputy States Attorney, DSS representative or the judge contradict the statements of the Indian parents or counsel or recess the proceedings to allow the parties to receive and review the ICWA affidavit and petition for temporary custody.

In cases not involving Judge Davis, other Seventh Circuit Court judges asked the State for a summary of the allegations which prompted law enforcement to take custody of the children. Those cases were handled by Judge Thorstenson,[18] Judge Pfeifle[19] and Judge Mandei.[20]

In all 48-hour hearings over which he presided, Judge Davis conveyed the same information using virtually the same language. Following confirmation that at least one Indian parent or custodian was present and confirming DSS intended to proceed on a formal basis, Judge Davis advised the Indian party:

> THE COURT: As you know by now there have [sic] been an instance with the respective children in your families that have come to the attention of the State of South Dakota through the

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[18] See transcripts 12-375; 12-468; 12-712; 12-749; 12-805; 12-867; and 12-1152.

[19] See transcripts 13-20; 13-30; 13-49; 13-53; 13-298; 13-560; 13-609; 13-616; 13-665; 13-697; 13-698; 13-731; 13-805; and 13-806.

[20] See transcripts 13-845; 14-47; 14-60; 14-103; 14-114; 14-144; 14-145; 14-304; 14-311; and 14-527.

Department of Social Services. That then goes to the state's attorney's office and ends up in this court.

As we sit here at this point in the proceedings everyone's plan or hope is for reunification, that is a return of the children. I have been informed though that the state intends to file a formal A&N [Abuse and Neglect] petition here, which puts things on a little more formal basis immediately. The purpose of the temporary custody hearing is to determine what is in the best interests of the children in the interim until this A&N petition is filed and the matter starts to proceed through the court.

You're entitled to be represented by an attorney in all stages of the proceedings against you. If you cannot afford an attorney one is appointed if you qualify for the representation. Any money spent for court-appointed fees is a bill or lien against any property that you own. The commissioners in Pennington County have a legal right and ability to foreclose or collect on the bill and get back any money spent. Court-appointed counsel fees are in the nature of a loan to you from the county. They are not a gift.

You're entitled to a full formal hearing, an adjudicatory hearing, where the allegations made by the state in the petition must be proven. If the matter is

involving the Indian Child Welfare Act, that standard of proof is beyond a reasonable doubt. If the petition is filed under normal state statutes not involving the Indian Child Welfare Act, a preponderance of the evidence is the proof. You're entitled to be present in person, through your counsel, to cross-examine witnesses or ask them questions concerning testimony they give against you. You are entitled to subpoena witnesses to come in to court and testify on your behalf, that is to help you tell your side of the story. They can't be told what to say, but they can be told to be present and tell what they know about particular facts or matters that might be at issue in the lawsuit. This is not a criminal proceeding, nevertheless I always like to advise everyone that you need to be careful as to what you say. Sometimes these allegations involve direct action on your part that place the children in a potentially dangerous situation or a failure on your part to act as a parent to protect the children properly. Anything that you say or admit to throughout the proceedings that might implicate you, either in a direct action or failure to act, could and would be used against you at subsequent hearings or proceedings.

You're entitled to request a new hearing if you feel that evidence has been discovered that was not presented. You

> may appeal to the Supreme Court of our state any decision rendered in this court. That must be done within 30 days after entry of judgment.
>
> If the state proves the petition by a sufficient standard of proof, the matter would go on to a dispositional hearing. If the state doesn't prove the allegations in the petition, it's dismissed, the children are generally returned and life goes back to how you knew it before the state became involved.
>
> If the matter goes to dispositional hearing, that's governed by statute and it goes to the ultimate care, custody and control in the best interests of the children. It can involve a placement back in the family under supervised conditions, a general return, other sorts of kinship or foster placements, any sort of out-of-home placement where the children are properly supervised and provided for, up to arid including a termination of parental rights and placement of the children for adoption. So these are very serious matters and you'll want to make certain that you know and fully understand and exercise your rights.

Transcript 10-304.[21]

[21] See also transcripts 10-50; 10-253; 10-270; 10-306; 10-358; and 10-773.

When the DSS worker advised the court they intended to proceed informally with the parent and not file a formal abuse and neglect petition, Judge Davis provided the following advisement:

> THE COURT: [T]he state anticipates that [it] will go informal, which would mean that you are welcome, if you wish, to work with the Department of Social Services for a period of time, roughly the 60-day temporary custody time frame, and see if the issues that were raised can be resolved, and everybody's intention is for reunification of the family.
>
> At any time during that 60 days that you feel things aren't going the way you think they should or if you have additional questions or feel that you would like to be represented by an attorney, you just need to ask your family service specialist, the state's attorney's office or my office and we'll kind of back the bus up, so to speak, and appoint counsel and approach the matter a little more formally, which is a full hearing, an adjudicatory hearing, with a petition led and the state having to prove those allegations in the petition.

Transcript 10-1170.[22] Judge Davis goes on to explain

[22] See also transcripts 10-901; 10-1064; 10-1007; 10 1170; 10-1191; 11-497; 12-191; 12-219; 12-648; 12-712; 14-446; 14-455; and 14-456.

the formal adjudicatory and dispositional process, but there is no mention of ICWA, appointment of counsel or the burden of proof for a 48-hour hearing. Id. On several occasions, Judge Davis advised Indian parents there was no need for an attorney because of the option to work informally with DSS for 60 days. See, for example, transcripts 10-901; 12-219; 14-443, 14-446. In two cases, Judge Thorstenson advised the parents there was no need for an attorney if they wanted to work informally with DSS. See transcripts 12-244 and 12-375. Seventh Circuit Judges Thorstenson,[23] Eklund[24] and Pfeifle[25] incorporated the option of informally working with DSS for 60 days using virtually the same language as Judge Davis.

Judge Davis and the other Seventh Circuit judges presiding over 48-hour hearings (all jointly referred to as the "Seventh Circuit judges") never advised any Indian parent or custodian they had a right to contest the state's petition for temporary custody during the 48-hour hearing. (Docket 109 ¶ 25). The Seventh Circuit judges never advised Indian parents they had a right to call witnesses at the 48-hour hearing. Id. ¶ 23. The Seventh Circuit judges never required the State to present sworn testimony from a live witness. Id. ¶ 36.

Judge Davis never advised Indian parents of their right to testify at the 48-hour hearing. (Docket 131 ¶ 19). Judge Davis did not specifically ask

[23] See transcripts 10-1116; 12-168; 12-244; 12-302; 12-375; 12-468; 12-571; 12-749; 12-805; and 12-1152.

[24] See transcripts 12-1238; 11-480; and 11-645.

[25] See transcripts 13-20; 13-30; 13-49; 13-53; and 13-298.

parents if they wanted the opportunity to cross-examine the affiant of the ICWA affidavit during the 48-hour hearing. (Docket 131 ¶ 28). During the 48-hour hearings over which he presided in 2010, Judge Davis did not ask parents if they wanted the opportunity to present evidence as to whether the State had in fact undertaken active efforts to prevent a break-up of their family or whether their child could be safely returned to their home. Id. ¶ 24. Judge Davis admits "no oral testimony is taken at a 48-hour hearing." (Docket 109 ¶ 21).

Parents were never advised they could request a brief continuance of the 48-hour hearing to allow the parent to retain counsel. (Docket 109 ¶ 29). Every time the Seventh Circuit judges agreed during a 48-hour hearing to appoint counsel for indigent parents, the judges delayed the appointment of counsel until after granting DSS custody. Id. ¶ 32.

The Seventh Circuit judges used a standardized temporary custody order[26] which functioned as a checklist. (Dockets 109 ¶ 40; 131 ¶ 40). Following 48-hour hearings in which no witness testified and no documents were offered or received as evidence, the Seventh Circuit judges placed checkmarks next to findings of fact without providing any explanation regarding the basis for their findings. Id. The Seventh Circuit judges signed temporary custody orders detailing findings of fact that had never been described on the record or explained to the Indian parents present at the 48-hour hearing. (Docket 109 ¶¶ 38 & 41; 131 ¶¶ 38 & 41).

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[26] A copy of the Temporary Custody Order used by the defendants is attached to plaintiffs' complaint. (Docket 1-7).

At the conclusion of every 48-hour hearing, Judge Davis entered a temporary custody order finding that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proven unsuccessful," and "continued custody of the child(ren) by the parents or Indian custodian is likely to result in serious emotional or physical damage to the child(ren)." (Docket 109 ¶ 42). This language appears in the standardized temporary custody order used by all the Seventh Circuit judges when removing Indian children from their parents.

Every temporary custody order issued by the Seventh Circuit judges granting custody of lndian children to DSS at the conclusion of 48-hour hearings contained the following provision:

> The Department of Social Services is hereby authorized to return full and legal custody of the minor child(ren) to the parent(s), guardian or custodian (without further court hearing) at any time during the custody period granted by this Court, if the Department of Social Services concludes that no further child protection issues remain and that temporary custody of the child(ren) is no longer necessary.

Id. ¶ 43; see also Docket 1-7.

Judge Davis admits Indian parents have rights under both the Due Process Clause and ICWA, but he classifies 48-hour hearings as emergency custody proceedings. (Docket 130 ¶ 113; Docket 80 ¶

43). Judge Davis distinguishes between a petition for temporary custody presented by the State during 48-hour hearings and formal petitions for temporary custody which parents must specifically request during a 48-hour hearing. (Docket 109 ¶ 13). Judge Davis believes 25 U.S.C. § 1922 is a statute of deferment. (Docket 130 ¶ 4). He argues "§ 1922 authorizes state courts to defer applying the protections contained in ICWA until proceedings that occur after 48-hour hearings are held." Id. (emphasis in original).

Judge Davis acknowledged in at least one 48-hour hearing that his concern was not why the children were removed from their parents' custody. (Docket 1 ¶ 53). In at least one 48-hour hearing Judge Davis stated. "I don't have what I need here today at the 48 hour hearing to make [a decision to return the children to the mother who was present]." Id. ¶ 54.

Judge Davis admits § 1922 requires first, as a matter of procedure, State authorities "'shall expeditiously initiate a child custody proceeding' that must comply with ICWA." Id. ¶ 92 (citing § 1922). And second, as a matter of substance, State officials "shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child." Id. ¶ 93 (citing § 1922) (emphasis in original). As recently as June 23, 2014, petitions for temporary custody of Indian children submitted by the States Attorney's staff to the Seventh Circuit judges routinely filed to cite § 1922 or its mandates. (Docket 109 ¶ 18).

ANALYSIS

ARE DEFENDANTS POLICY MAKERS?

Plaintiffs allege Judge Davis, Mr. Vargo, Ms. Valenti, and Ms. Van Hunnik in their official capacities "pursued policies and practices that deprive parents of custody of hundreds of Indian children without providing those parents and children with even rudimentary due process." (Docket 108 at p. 6). See also Docket 1 at p.38 (alleging violations of the Due Process Clause of the Fourteenth Amendment and ICWA). "Plaintiffs are not seeking a ruling at the present time as to whether Judge Davis is responsible for the actions of the other judges . . . . Plaintiffs are confining this motion . . . [to] all of his 48-hour hearings . . . and the policies and practices of the other three named Defendants . . . ." (Docket 108 at p. 6 n.4) (italics removed). Defendants claim none of them have "final policymaking authority." (Docket 129 at p. 19).

Plaintiffs seek to vindicate their rights through 42 U.S.C. § 1983. "Liability . . . under 42 U.S.C. § 1983 can exist only where the challenged policy or practice is 'made by its lawmakers or by those whose edicts or acts may faiirly be said to represent official policy.'" Oglala Sioux Tribe v.Van Hunnik, 993 F. Supp. 2d 1017, 1029 (D.S.D. 2014) (citing Monell v. Department of Social Services of City of New York, 436 U.S.658, 694 (1978)). "A policy maker is one who 'speak[s] with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue,' that is one with 'the power to make official policy on a particular issue.'" Id. (citing

Jett v. Dallas Independent School District, 491 U.S. 701, 737 (1989)). "[T]he . . . individual defendant . . . [must be] a 'moving force' behind the violation." Id. (citing Clay v. Conlee, 815 F.2d 1164, 1170 (8th Cir. 1987)). "[T]here must be an 'affirmative link' . . . between the policy and the particular constitutional violation alleged." Id. (citing Clay, 815 F.2d at 1170). "An 'official policy' involves a deliberate choice to follow a course of action made from among various alternatives by an official who has the final authority to establish governmental policy." Id. (citing Pembaur v. City of Cincinnati, 475 U.S.469, 483 (1986)).

Liability under § 1983 "attaches only where the decisionmaker possesses final authority to establish . . . policy with respect to the action ordered." Pembaur, 475 U.S.at 481. "'[O]fficial policy' often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." Id. at 480-81. "If the decision to adopt that particular course of action is properly made by ...authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." Id. at 481. "The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to . . . liability based on an exercise of that discretion . . . . The official must also be responsible for establishing final government policy respecting such activity before the [entity] can be held liable. Authority to make . . . policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority

. . . ." Id. at 481-83. "[W]hether an official had final policymaking authority is a question of state law." Id. at 483.

Plaintiffs claim Judge Davis initiated six policies, practices and customs for 48-hour hearings which violate the Due Process Clause and ICWA. (Docket 69 at p. 20). Those are:

1. Not allowing parents to see the ICWA petition led against them;
2. Not allowing the parents to see the affidavit supporting the petition;
3. Not allowing the parents to cross-examine the person who signed the affidavit;
4. Not permitting the parents to present evidence;
5. Placing Indian children in foster care for a minimum of 60 days without receiving any testimony from qualified experts related to "active efforts" being made to prevent the break-up of the family; and
6. Failing to take expert testimony that continued custody of the child by the Indian parent or custodian is likely to result in serious emotional or physical damage to the child.

Id. at pp. 20-21. Judge Davis claims his "decisions are not 'policies, practices, or customs,' they are

adjudications of 25 U.S.C. § 1922, and the applicable state law procedures." (Docket 129 at p. 19). Judge Davis argues he is "an initial decision maker, but he is not a final policy maker" for purposes of § 1983 because his decisions are subject to appellate review. (Docket 128 at p. 13). Judge Davis asserts his decisions are not final decisions and he is not "a proper defendant under § 1983." (Docket 129 at p. 19).

Plaintiffs counter that Judge Davis "created all of the practices for which [he is] being sued in this litigation, and recently changed a few of them." (Docket 136 at p. 28) (italics removed). Plaintiffs argue Judge Davis "select[ed] the practices challenged in this lawsuit. This is not adjudicating; that is rule making, and judges can be sued like anyone else for rules they make that violate federal law." Id. (referencing Pulliam v. Allen, 466 U.S. 522 (1984) (italics removed).

None of the complained of policies or practices are compelled by state law or § 1922. Judge Davis cannot point to any provision of South Dakota law or ICWA which supports the six actions he created for 48-hour hearings. There is no right of appellate review of Judge Davis' 48-hour hearing decisions because those decisions are not a final judgment subject to appellate review under South Dakota law. SDCL § 15-26A-3. "To be final, a judgment must finally and completely adjudicate all of the issues of fact and law involved in the case." Midcom, Inc. v. Oehlerking, 722 N.W.2d 722, 725 (S.D. 2006) (internal quotation marks and citations omitted).

Judge Davis' decisions are "final decisions" for purposes of § 1983. He established each of the policies and procedures for conducting 48-hour hearings and Judge Davis is empowered to change them at any time.

Plaintiffs assert States Attorney Vargo, DSS Secretary Valenti and Ms. Van Hunnik acquiesced in Judge Davis' policies regarding the manner in which 48-hour hearings are conducted. (Dockets 110 at p. 12; 136 at p. 31). Defendants argue Judge Davis has not "enacted a policy, practice, or custom, [to] which the other . . . defendants . . . could acquiesce." (Docket 128 at p.5). Defendants' position is untenable.

Defendants Vargo, Valenti and Van Hunnik understand 48-hour hearings are intended to be evidentiary hearings.[27] They also are aware Judge Davis does not permit Indian parents to present evidence opposing the State's petition for temporary custody. Judge Davis prevents Indian parents from cross-examining any of the State's witnesses who would support of the petition. Judge Davis does not require the States Attorney or DSS to call witnesses to support removal of Indian children nor does Judge Davis permit testimony as to whether a removed child is in immediate risk of harm if returned to her parents. There is no evidence any one of these three defendants or their courtroom representatives,

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[27] See the *Department of Interior Guidelines for State Courts*; *Indian Child Custody Proceedings*, 44 Fed. Reg. 67584-67595 (Nov. 26, 1979) and the 2007 South Dakota United Judicial System *South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases* discussed at pp. 29-34 and the court's due process analysis at pp. 36-42.

Deputy States Attorneys or case workers sought to change the practices established by Judge Davis. When these defendants did not challenge Judge Davis' policies for conducting 48-hour hearings, his policies became the official policy governing their own agencies. Coleman v. Watt, 40 F.3d 255, 262 (8th Cir. 1994). "[B]y acquiescence in a longstanding practice" of Judge Davis "which constitutes the standard operating procedure" of the Seventh Circuit Court, these defendants exposed themselves to liability. Jett, 491 U.S. at 737 (internal quotation marks omitted).

Defendants created the appearance of regularity in a highly irregular process. Judicial and prosecutorial immunity do not extend to plaintiffs' claims for injunctive and declaratory relief under § 1983. Pulliam, 466 U.S. at 541-42; Timmerman v. Brown, 528 F.2d 811, 814 (4th Cir. 1975); Oglala Sioux Tribe, 993 F. Supp. 2d at 1033 (citations omitted). The defendants are policy makers for purposes of 42 U.S.C. § 1983.

REMOVAL OF INDIAN CHILDREN FROM THEIR PARENTS, INDIAN CUSTODIANS AND TRIBES: THE INDIAN CHILD WELFARE ACT VIOLATIONS

This case focuses on the obligations of the defendants under the Indian Child Welfare Act and its interface with South Dakota law. In South Dakota, any "child may be taken into temporary custody by a law enforcement officer without order of the court . . . [i]f the child is abandoned or seriously endangered . . . and immediate removal of the child appears to be necessary for the child's protection . . .

." SDCL§ 26-7A-12(2). The court is then authorized to "issue a written temporary custody directive . . . ." SDCL § 26-7A-13. "An apparent abused or neglected child taken into temporary custody and not released to the child's parent, guardian, or custodian may be placed in the temporary care of the Department of Social Services . . . ." SDCL§ 26-7A-14. "[N]o child may be held in temporary custody longer than forty-eight hours . . . excluding Saturdays, Sundays, and court holidays, unless a . . . petition has been filed . . . and the court orders longer custody during a noticed hearing . . . ." Id. A 48-hour hearing under South Dakota law is a temporary custody hearing included in the definition of "foster care placement" under 25 U.S.C. § 1903(1)(i) ("'foster care placement' . . . shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement . . . where the parent or Indian custodian cannot have the child returned upon demand . . . .").

At a 48-hour hearing under South Dakota law, "the court shall consider the evidence of the need for continued temporary custody of the child in keeping with the best interests of the child." SDCL§ 26-7A-18. If the court retains the child in the custody of DSS, state law requires judicial review "every sixty days." SDCL § 26-7A-19(3).

Judge Davis argues "§ 1922 defers 'the full panoply of ICWA rights, 'specifically §§ 1912(d) and (3) of ICWA, until a 'child custody proceeding,' as defined in § 1903, is held." (Docket 128 at p. 14). Judge Davis asserts "whether analyzed under state law or§ 1922,'the imminent danger to the child' triggers the respective emergency custody statutes where it appears 'necessary' to protect the child's

best interests." Id. at p. 15 (citation to earlier briefing and bracketing omitted).

Section 1922 is not a "statute of deferment." Section 1922 mandates that state officials "insure that the emergency removal . . . terminates immediately when such removal . . . is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of [ICWA], transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate." 25 U.S.C. § 1922. Deferring application of § 1922 would undermine the Congressional declaration that a State's emergency custody authority immediately terminates when "imminent physical damage or harm to the child" is no longer present.

The *Department of Interior Guidelines for State Courts*; *Indian Child Custody Proceedings* ("DOI Guidelines") were promulgated to aid in the interpretation of ICWA's provisions. 44 Fed. Reg. 67584-67595 (Nov. 26, 1979). The DOI Guidelines were updated for the first time in thirty-five years on February 19, 2015 ("DOI Revised Guidelines").[28] See Docket 140-1.

The DOI Guidelines are not binding on the court but are an administrative interpretation of ICWA entitled to great weight. United States v. American Trucking Associations, 310 U.S. 534, 549 (1940); Mitchell v. Burgess, 239 F.2d 484, 487 (8th

[28] Before addressing the DOI Revised Guidelines, the court must focus on the DOI Guidelines as they existed during the pendency of this litigation before February 19, 2015.

Cir. 1956). The DOI Guidelines are clear that "[p]roceedings in state courts involving the custody of Indian children shall follow strict procedures and meet stringent requirements to justify any result in an individual case contrary to [ICWA's] preferences [for keeping Indian children with their families]." 44 Fed. Reg. at 67586. "The entire legislative history makes it clear that [ICWA] is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child-whether on a permanent or temporary basis." Id. at 67587.

Focusing on emergency removal situations, the DOI Guidelines state "[s]ince emergency action must be taken without the careful advance deliberation normally required, procedures must be established to assure that the emergency actions are quickly subjected to review. . . .The legislative history clearly states that placements under such emergency procedures are to be as short as possible. If the emergency ends, the placement shall end." Id. at 67590. "Unless there is some kind of time limit on the length of an 'emergency removal' (that is, any removal not made pursuant to a finding by the court that there is clear and convincing evidence that continued parental custody would make serious physical or emotional harm likely), the safeguards of the Act could be evaded by use of long-term emergency removals." Id.

The DOI Guidelines contemplate that "[e]ach party to a foster care placement . . . under State law involving an Indian child has the right to examine all reports or other documents led with the court upon which any decision with respect to such action may

be based. No decision of the court shall be based on any report or other document not filed with the court." Id. at 67592.

The DOI Revised Guidelines "expand upon the emergency procedure provisions in light of evidence that some States routinely rely upon emergency removal and placements in a manner that bypasses implementation of ICWA." (Docket 140-1 at p. 8). The DOI Revised Guidelines "provide minimum Federal standards and best practices to ensure compliance with ICWA and should be applied in all child custody proceedings in which the Act applies." Id. at p. 23. These guidelines recognize and maintain the definition of "foster care placement" to include "any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution . . . where the parent or Indian custodian cannot have the child returned upon demand, although parental rights have not been terminated . . . ." Id. at p. 17.

The DOI Revised Guidelines require a state court to "[p]romptly hold a hearing to hear evidence and evaluate whether the removal or placement continues to be necessary whenever new information is received or assertions are made that the emergency situation has ended[] and . . . [i]mmediately terminate the emergency removal or placement once the court possesses sufficient evidence to determine that the emergency has ended." Id. at p. 35. "The emergency removal or placement must terminate as soon as the imminent physical damage or harm to the child which resulted in the emergency removal or placement no longer exists . . . ." Id. at p. 37.

Of significance for the present litigation, the DOI Revised Guidelines reiterate that "[t]he court must inform each party to a foster care placement . . . of his or her right to timely examination of all reports and other documents led with the court and all files upon which any decision with respect to such action may be based . . . . [and] [d]ecisions of the court may be based only upon reports, documents or testimony presented on the record." Id. at p. 41.

In 2007, the South Dakota United Judicial System promulgated the *South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases*. ("SD Guidelines").[29] (Docket 1 ¶ 34). The SD Guidelines state:

> Pursuant to SDCL 26-7A-18, at the Temporary Custody 48 Hour Hearing the court shall consider evidence of the need for continued temporary custody . . . to determine whether continued temporary custody outside the home is necessary to protect the child. The purpose is to decide whether the child can be safely returned home and when. The decision should be based on a competent assessment of the risks and dangers to the child. The Court should evaluate the current and future danger to the child and what can be done to eliminate the danger.

[29] The SD Guidelines were updated in March 2014. Those are available at http://ujs.sd.gov/uploads/pubs/SDGuidelinesAandNProceedings.pdf. Like the DOI Guidelines, the court will focus on the SD Guidelines as they existed throughout the majority of this litigation.

Id. (citing SD Guidelines at p. 33). The SD Guidelines provide that "[t]he family services specialist should be ready to detail reasonable efforts [to avoid removal of the child] at the 48 hour hearing, "including current and historical information, such as contacts with the parents since the child's removal and previous abuse or neglect issues. Id. ¶ 36 (citing SD Guidelines at pp. 37-38). The SD Guidelines provide where a child is an Indian, DSS must support its petition for temporary custody with an ICWA affidavit or by testimony from a "qualified expert that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child (25 USC 1912(e))." Id. ¶ 37 (citing SD Guidelines at p. 46). In any 48-hour hearing involving an Indian child, the SD Guidelines state that "the Court must determine whether [DSS] has made active efforts to preserve the family (25 U.S.C.A. 1912(d))" and whether the person endangering the child has "been removed from the home so the child could remain." Id. ¶ 38 (citing SD Guidelines at p. 38).

The SD Guidelines contemplate that a 48-hour hearing is an evidentiary hearing which may be extended when necessary.

> A 48 Hour Temporary Custody Hearing involves substantial time and resources. . . . [The court's decision must be] based on careful consideration of the circumstances of the case. Due to constraints of time, it might not be possible for the Court to conduct a complete initial custody hearing. In these circumstances, the Court should .

> . . (c) Continue the 48 Hour Temporary Custody Hearing and set the time, date and place of the continued hearing.

Id. ¶ 40 (citing SD Guidelines at pp. 41-42) (emphasis in original). At the conclusion of the hearing, the court must "determine that removal of the child is or was necessary because continued presence in the home or return to the home would be contrary to the child's welfare." Id. ¶ 38 (citing SD Guidelines at p. 37). The Guidelines recommend use of a temporary custody order with the following language:

> That there is probable cause to believe that the child(ren) is/are abused or neglected, ... That temporary custody is the least restrictive alternative in the child(ren)'s best interest . . . . That active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proven unsuccessful . . . . That continued custody of the child by the parents or Indian custodian is likely to result in serious emotional or physical damage to the child.

Id. ¶ 39.

The DOI Guidelines and the SD Guidelines were publically available to the Seventh Circuit judges including Judge Davis and to the other defendants. A simple examination of these administrative materials should have convinced the defendants that their policies and procedures were not in conformity with ICWA § 1922, the DOI

Guidelines or the Guidelines promulgated by the South Dakota United Judicial System. Indian children, parents and tribes deserve better.

Judge Davis does not conduct any inquiry during the 48-hour hearings to determine whether emergency removal remains necessary.[30] He permits no testimony by the Indian parents or presentation of testimony by the tribal attorney to determine whether the risk of imminent physical harm has passed. Contrary to the clear intent of ICWA, the DOI Guidelines and the SD Guidelines, all of which contemplate evidence will be presented on the record in open court, Judge Davis relies on the ICWA affidavit and petition for temporary custody which routinely are disclosed only to him and not to the Indian parents, their attorney or custodians. These undisclosed documents are not subject to cross-examination or challenge by the presentation of contradictory evidence.

The defendants acknowledge the practice of Judge Davis is to *authorize* DSS to perform the function of determining if, or when, the imminent risk of physical harm to an Indian child has passed and to restore custody to the child's parents. (Docket 130 at p.3; see also Docket 1-7). This authorization

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[30] Defendants claim Indian parents were asked during the 48-hour hearings if the emergency which required removal of their children had terminated. (Docket 131 ¶ 17). Defendants claim "this inquiry is always made even if it is not verbalized on the record." Id. Defendants refer to three cases handled by Judge Thorstenson, but none by Judge Davis. Id. While another judge may have made such an inquiry, defendants' mere allegations unsupported by specific evidence is insufficient to withstand a motion for summa judgment. Thomas, 483 F.3d at 527.

vests full discretion in DSS to make the decision if and when an Indian child may be reunited with the parents. This abdication of judicial authority is contrary to the protections guaranteed Indian parents, children and tribes under ICWA.

The policy and practice of Judge Davis does not comply with the requirement of § 1922 to order restoration of custody to Indian parents when the risk of imminent physical harm no longer exists. While Judge Davis may believe granting DSS discretion shortens the potential time period of an emergency placement, the policy ignores the mandate of § 1922 and removes the court from the decision-making process. A competently conducted evidentiary hearing held on an expedited basis is fundamental to ICWA's purposes. ICWA requires the state court to make the custody decision at the earliest possible moment. The court cannot delegate the authority to make the custody decision to a state agency or its employees.

Plaintiffs are entitled to judgment as a matter of law on their Indian Child Welfare Act claims.

REMOVAL OF INDIAN CHILDREN FROM THEIR PARENTS, INDIAN CUSTODIANS AND TRIBES: THE DUE PROCESS VIOLATIONS

"The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children." Troxel, 530 U.S. at 66. Defendants agree the basic elements of due process are required at 48-hour hearings. (Docket 129 at p. 1).

Plaintiffs claim the defendants have violated the Due Process Clause since January 1, 2010, in five different areas:

1. Defendants have failed to give parents adequate notice of the claims against them, the issues to be decided, and the State's burden of proof;

2. Defendants have denied parents the opportunity to present evidence in their defense;

3. Defendants have denied parents the opportunity to confront and cross-examine adverse witnesses;

4. Defendants have failed to provide indigent parents with the opportunity to be represented by appointed counsel; and

5. Defendants have removed Indian children from their homes without basing their removal orders on evidence adduced in the hearing, and then subsequently issued written findings that bore no resemblance to the facts presented at the hearing.

(Docket 108 at pp.7-8).

"It is well settled that state law does not define the parameters of due process for the purposes of the Fourteenth Amendment." Brown v. Daniels, 290 F. App'x 467, 471 (3d Cir. 2008) (referencing Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541

(1985) ("(O]nce it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the [state] statute. ") (citation and internal quotation marks omitted); Swipies v. Kofka, 419 F.3d 709, 716 (8th Cir. 2005) (holding that "a state statute cannot dictate what procedural protections must attend a liberty interest . . . as this is the sole province of federal law"). "Federal procedural due process guarantees prompt post-deprivation judicial review in child custody cases." Campbell v. Burt, 141 F.3d 927, 929 (9th Cir. 1998). "When the state deprives parents and children of their right to familial integrity, even in an emergency situation, without a prior due process hearing, the state has the burden to initiate prompt judicial proceedings to provide a post deprivation hearing." Whisman v. Rinehart, 119 F.3d 1303, 1311 (8th Cir. 1997).

"One of the core purposes of the Due Process Clause is to provide individuals with notice of claims against them." Oglala Sioux Tribe, 993 F. Supp. 2d at 1037. A significant component of procedural due process notice is that the "notice should include the date, time and place of the hearing; a clear statement of the purpose of the proceedings and the possible consequences to the subject thereof; the alleged actual basis for the proposed commitment; and a statement of the legal standard upon which commitment is authorized." Syrovatka v. Erlich, 608 F.2d 307, 310 (8th Cir. 1979) (quoting Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 25 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976)).

"The due process clause ensures every individual subject to a deprivation 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" Oglala Sioux Tribe, 993 F. Supp. 2d at 1036 (citing Swipies, 419 F. 3d at 715) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))). "In the context of child removal cases, the 'meaningful time' and 'meaningful manner' assurances impose a duty on the state to hold a hearing promptly after the removal." Swipies, 419 F.3d at 715 (referencing Whisman, 119 F.3d at 1310-11).

As the court concluded in its analysis of ICWA violations, there is no procedure in the Seventh Judicial Circuit ensuring that Indian parents or custodians are given copies of the petition for temporary custody and the ICWA affidavit at 48-hour hearings. Some Seventh Circuit judges do generally require the State to recite a summary of the allegations which form the basis for the emergency removal of Indian children. But that practice must "yield to the requirements that the . . . parents or guardian be notified, in writing, of the specific charge or factual allegations to be considered at the hearing, and that such written notice be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation." Application of Gault, 387 U.S. 1, 33 (1967).

Defendants refuse to give parents a copy of any police reports which may accompany the ICWA affidavit and petition for temporary custody. (Docket 129 at p. 25). Defendants argue SDCL § 26-7A-29

prohibits them from disclosing police reports. Id. This interpretation of the statute directly contradicts the clear mandate of ICWA and due process which require that all documents to be considered by the court must be disclosed to the parties. 25 U.S.C. § 1912(c) and DOI Guidelines 44 Fed. Reg. at 67592. A judge's order directing that police reports be provided to the Indian parents would satisfy SDCL § 26-7A-29.

Defendants acknowledge indigent Indian parents attending 48-hour hearings are entitled to court appointed-counsel but disagree as to when an appointment of counsel must be made. (Docket 129 at p. 27). The Seventh Circuit judges' practice is to appoint counsel after entry of the temporary custody order. That is, after the court orders foster care placement for the Indian child. Defendants claim their practice of appointing counsel at the end of the 48-hour hearing is not prejudicial because if counsel is appointed, the Indian parent always retains the right to notice a further hearing at which the attorney may appear with them. Id. This practice defies logic because the damage is already done—Indian parents have been deprived of counsel during the course of what should have been an adversarial evidentiary hearing conducted in advance of a court order imposing out-of-home custody for an Indian child.[31]

"[I]t is the [party's] interest in personal freedom . . . which triggers the right to appointed

[31] ICWA mandates appointment of counsel for indigent Indian parents "in any removal, placement or termination proceeding." 25 U.S.C. § 1912(b).

counsel . . . ." Lassiter v. Department of Social Services of Durham County, N.C., 452 U.S. 18, 25 (1981). "[A] fundamental requisite of due process of law is the opportunity to be heard . . . [and] [t]he right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel." Goldberg v. Kelly, 397 U.S. 254, 267 and 270 (1970). "Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision." Lassiter, 452 U.S.at 27. "If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal." Id. at 28.

Appointing counsel and continuing the 48-hour hearing for a few hours or even a day to allow court-appointed counsel to confer with the Indian parents and become familiar with the critical documents upon which the 48-hour hearing is based would result in an "equal contest of oppos[ing] interests." Id. at 28. This process undoubtedly will require additional time and more county and judicial resources but these concerns are not adequate reasons to forego rights mandated by ICWA and fundamental due process. "A parent's interest in the accuracy and justice in the decision . . . is . . . a commanding one." Id. at 27.

"Ordinarily, the right to present evidence is basic to a fair hearing . . . ." Wolff v. McDonnell, 418 U.S.539, 566 (1974). "[T]he Due Process Clause

grants the aggrieved party the opportunity to present his case and have its merits fairly judged." Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982). The United States Supreme Court has "frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." Jenkins v. McKeithen, 395 U.S. 411, 428 (1969) (references omitted). It is a central element of due process that a party has the "right to be confronted with all adverse evidence and to cross-examine witnesses." Nevels v. Hanlon, 656 F.2d 372, 376 (8th Cir. 1981). *Ex parte* communications between a Deputy States Attorney, a DSS representative and the judge, whether in the form of undisclosed affidavits and reports or oral communications, violate this fundamental right. Id.

Defendants argue "[a]t the 48-hour hearings, parents are not prevented by Judge Davis from offering evidence or testifying." (Docket 129 at p. 29). This argument is contradicted by Judge Davis' own declaration that no oral testimony is permitted during the 48-hour hearings he conducts. (Docket 130 at p. 5). Defendants cannot create a disputed material fact to defeat summary judgment by ignoring Judge Davis' own admission. Anderson, 477 U.S. at 256.

Defendants argue the ICWA affidavit and petition for temporary custody prepared by the State and presented to the judges prior to the 48-hour hearings qualify as evidence in accord with Cheyenne River Sioux Tribe v. Davis, 822 N.W.2d 62 (S.D. 2012). (Docket 129 at pp. 32-33). This argument ignores the parents' due process rights to see these documents, confront them and cross-examine the

document preparers.

The Due Process Clause requires a judge to base a decision solely on the evidence presented during a hearing. "[T]he decisionmaker's [action] . . . must rest solely on the legal rules and evidence adduced at the hearing." Goldberg, 397 U.S. at 271. "To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on . . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." Id. (internal citation omitted).[32]

Judge Davis and the other defendants failed to protect Indian parents' fundamental rights to a fair hearing by not allowing them to present evidence to contradict the State's removal documents. The defendants failed by not allowing the parents to confront and cross-examine DSS witnesses. The defendants failed by using documents as a basis for the court's decisions which were not provided to the parents and which were not received in evidence at the 48-hour hearings.

Plaintiffs are entitled to judgment as a matter of law on their Due Process Clause claims.

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[32] See the court's description of the standardized temporary custody order which purports to make findings justifying continued state custody though no documents were received in evidence and the State presented no witnesses at the 48-hour hearing, supra, pp. 19-20.

RELIEF

"The focus of this litigation is not to redress past injuries to plaintiffs; rather, it is to prevent future violations of the Due Process Clause of the Fourteenth Amendment and ICWA." Oglala Sioux Tribe, 993 F. Supp. 2d at 1028. This litigation "is inextricably bound up with the Tribes' ability to maintain their integrity and 'promote the stability and security of the Indian tribes and families.'" Id. (citing 25 U.S.C.§ 1902).

Defendants argue plaintiffs are not entitled to declaratory relief against Judge Davis or injunctive relief against the other defendants because plaintiffs' claims have been rectified by an agreement with Attorney Dana Hanna as counsel for the two Tribes. (Docket 129 at p. 34). Defendants argue "there is no longer a case or controversy for purpose of this Court's Article III jurisdiction and Plaintiffs' requested declaratory and injunctive relief should be denied on that basis." Id.

"[A]s a general rule, voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot."; Los Angeles County v. Davis, 440 U.S. 625, 631 (1979). But jurisdiction, properly acquired, may abate if the case becomes moot because:

> (1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur . . . [;] and
>
> (2) interim relief or events have completely and irrevocably eradicated

the effects of the alleged violation.

Id. (internal citations and quotation marks omitted). "When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." Id. See also Strutton v. Meade, 668 F.3d 549, 556 (8th Cir. 2012) ("Mere voluntary cessation of a challenged action does not moot a case. Rather a case becomes moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.") (internal quotation marks and citations omitted).

Based on the court's analysis, plaintiffs' claims have not been fully resolved. Defendants' informal agreement with Attorney Hanna did not address or resolve a single issue raised in plaintiffs' two motions for partial summary judgment.

The fact States Attorney Vargo and DSS now represent that as of May 2014 they are providing both the petition for temporary custody and the ICWA affidavit to Indian parents at 48-hour hearings does not diminish plaintiffs' right to relief. Judge Davis still maintains § 1922 and the due process rights discussed above do not apply at 48-hour hearings. (Docket 130 at p. 5).

Defendants have not shown "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gwaltney of Smitheld, Ltd.v. Chesapeake Bay Found., Inc., 484 U.S. 49, 66 (1987) (italics in original).

Plaintiffs are entitled to injunctive and declaratory relief.

ORDER

Based on the above analysis, it is hereby

ORDERED that plaintiffs' motions for partial summary judgment (Dockets 108 & 110) are granted. A separate injunction and declaratory judgment order shall issue after submissions by the parties addressing the appropriate remedies, those submissions to be filed with the court on or before **May 1, 2015**.

IT IS FURTHER ORDERED that the motion to defer ruling on plaintiffs' pending motion regarding 25 U.S.C. § 1922 (Docket 137) is denied as moot.

Dated March 30, 2015.

BY THE COURT:

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patriae*, to protect the rights of their tribal members; and ROCHELLE WALKING EAGLE, MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs, vs. LUANN VAN HUNNIK; MARK VARGO; HON. JEFF DAVIS; and KIM MALSAM-RYSDON, in their official capacities, Defendants.	CIV. 13-5020-JLV ORDER DENYING MOTIONS TO DISMISS

INTRODUCTION

Plaintiffs Oglala Sioux Tribe, Rosebud Sioux Tribe, Rochelle Walking Eagle, Madonna Pappan and Lisa Young (collectively referred to as "plaintiffs") filed a complaint against defendants Luann Van Hunnik, Mark Vargo, Hon. Jeff Davis and Kim Malsam-Rysdon (collectively referred to as "defendants") in their official capacities. (Docket 1). The complaint asserts defendants' policies, practices and procedures relating to the removal of Native

American children from their homes during 48-hour hearings violate the Fourteenth Amendment's Due Process Clause and the Indian Child Welfare Act (ICWA). Id. Specifically, plaintiffs contend the defendants' policies, practices and customs "(1) remov[e] Indian children from their homes without affording them, their parents, or their tribe a timely and adequate hearing as required by the Due Process Clause, (2) remov[e] Indian children from their homes without affording them, their parents, or their tribe a timely and adequate hearing as required by the Indian Child Welfare Act, and (3) remove Indian children from their homes without affording them, their parents, or their tribe a timely and adequate hearing and then coercing the parents into waiving their rights under the Due Process Clause and Indian Child Welfare Act to such a hearing." Id. at p. 3.

Pending before the court are motions to dismiss the complaint by all defendants.[1] (Dockets 33, 37, & 39). Defendants contend (1) that court should not entertain this action under the Younger[2] and Rooker-Felderman[3] abstention doctrines; (2) plaintiffs failed to exhaust their state court remedies; (3) plaintiffs lack standing; (4) plaintiffs have failed to state a claim upon which relief can be granted; and (5) plaintiffs' ICWA claims cannot be vindicated under 42 U.S.C. § 1983. (Docket 34). Based on the

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[1] In addition to filing their own motions to dismiss, Kim Malsam-Rysdon, Luann Van Hunnik, and Mark Vargo joined in Judge Davis' motion to dismiss. (Dockets 36 & 39).

[2] Younger v. Harris, 401 U.S. 37 (1971).

[3] D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fid. Trust Co., 263 U.S. 413 (1923).

court's analysis, the defendants' motions to dismiss are denied.

DISCUSSION

A. Younger Abstention Doctrine

"Under Younger v. Harris, . . . federal courts should abstain from exercising jurisdiction in cases where equitable relief would interfere with pending state proceedings in a way that offends principles of comity and federalism." Aaron v. Target Corp., 357 F.3d 768, 774 (8th Cir. 2004). The Supreme Court of the United States recently clarified the limited applicability of the Younger abstention doctrine in Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2014).[4] The Supreme Court reversed the United States Court of Appeals for the Eighth Circuit's decision applying the Younger doctrine, held the Eighth Circuit's criteria for use of Younger abstention was overly permissible, and adopted a more restrictive test for application of the Younger doctrine. Sprint, 134 S. Ct. at 591. The Supreme Court held Younger abstention applies in only three categories of cases:

> First, Younger preclude[s] federal intrusion into ongoing state criminal prosecutions. Second, certain civil enforcement proceedings warrant[]

[4] Sprint was decided on December 10, 2013. Thereafter, the court ordered the parties to file supplemental briefing discussing the impact of Sprint on the issues pending in defendants' motions to dismiss. (Docket 58) The parties subsequently filed additional briefing. (Dockets 59, 62, 63, 64 & 65).

> abstention. Finally, federal courts refrain[] from interfering with pending civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions.

Id. at 591 (citations omitted).

Prior to the decision in Sprint, the Younger abstention analysis in the Eighth Circuit revolved around the three-part test derived from the Supreme Court's decision in Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432-37 (1982). In Middlesex, the court identified several factors that should lead to abstention under Younger: (1) the existence of an ongoing state judicial proceeding, (2) which implicates important state interests, and (3) which provides an adequate opportunity to raise constitutional challenges. Middlesex, 457 U.S. at 432. However, in Sprint, the Supreme Court clarified that these three factors are "not dispositive; they [are] instead, *additional* factors appropriately considered by the federal court before invoking Younger," which itself sets forth the three limited circumstances discussed above in which abstention is appropriate. Sprint, 134 S. Ct. at 593 (emphasis in original).

Defendants assert abstention is appropriate under the second and third exceptional circumstances to federal jurisdiction discussed in Sprint as well as the factors established in Middlesex. (Dockets 34 at pp. 22-27; 59 at pp. 2-5). Plaintiffs argue none of the exceptional circumstances are applicable in this case.

1. Ongoing state criminal prosecution

Although defendants do not expressly discuss the first exceptional circumstance, they imply in their argument that neglect proceedings could potentially result in the filing of a formal complaint or charge. (Docket 59 at p. 2). In Sprint, the Court found abstention is appropriate under Younger to preclude intrusion into an *ongoing* state criminal prosecution. Sprint, 134 S. Ct. at 591 (emphasis added). Defendants point out Ms. Walking Eagle's case is ongoing and "there continues to be ongoing judicial proceedings involving the temporary care and custody of Indian children in Pennington County who are part of plaintiffs' proposed class of plaintiffs. (Docket 59 at p. 4).

In this case, plaintiffs are not challenging any ongoing state criminal proceeding. (Docket 1 at ¶¶ 3-4). In fact, plaintiffs point out numerous times in their briefing they are not challenging any prior or ongoing state proceeding. Rather, the remedies sought by plaintiffs would operate prospectively. (Docket 62 at p. 7, n.3). The court finds this first exceptional circumstance is not applicable because any order by this court would not intrude into an ongoing state criminal prosecution.

2. Civil enforcement proceedings

Defendants assert abstention is appropriate under the holding in Sprint because this court is faced with an action which requests interference with state civil proceedings. (Docket 59 at p. 2). In Sprint, the Court clarified that abstention is appropriate in certain civil enforcement proceedings. Sprint, 134 S. Ct. at 591. The Court explained "[o]ur

decisions applying Younger to instances of civil enforcement have generally concerned state proceedings 'akin to a criminal prosecution' in 'important respects.' " Id. at 592. "Such enforcement actions are characteristically initiated to sanction the federal plaintiff, *i.e.*, the party challenging the state action, for some wrongful act." Id. (citations omitted). "In cases of this genre, a state actor is routinely a party to the state proceeding and often initiates the action." Id.

Defendants contend Judge Davis is a named defendant in this litigation "because of his role in the enforcement of child welfare laws of the State of South Dakota and the Indian Child Welfare Act." (Docket 59 at p. 2). Defendants assert "investigations are conducted when allegations of abuse and neglect are made to the State. . . . [and] [w]hen warranted, such investigations result in the filing of a formal complaint or charge." Id. As a result, defendants assert this case meets the second factor established by the Supreme Court in Sprint and makes abstention appropriate.

In support of their position, defendants cite Moore v. Sims, 442 U.S. 415, 419-20 (1979), which involved an action commenced by parents against state actors alleging the removal of Moore's children was a violation of the law.[5]

Plaintiffs argue this second exceptional circumstance does not apply because there is "no civil proceeding akin to a criminal proceeding . . . pending

[5] In Sprint, the Supreme Court also cited to Moore when discussing the applicability of abstention to civil enforcement proceedings. Sprint, 134 S. Ct. at 592.

against any of the plaintiffs." (Docket 62 at p. 7). Plaintiffs also argue Moore is factually distinguishable from this case because in Moore, plaintiffs sought a federal injunction halting the continuation of the state's proceedings against them, whereas in this case, plaintiffs are only seeking prospective relief, which will not interfere with any ongoing case. Id.

The court finds the second exceptional circumstance is not applicable in this case. Defendants' reliance on Moore is misplaced. In Moore, the issue was whether the district court should have exercised jurisdiction in light of the pending state proceedings. Moore, 442 U.S. at 418. Any ruling by the federal court in Moore would have necessarily impacted the underlying state proceeding. As a result, the Supreme Court held the district court should not have exercised jurisdiction. Id. Unlike the facts in Moore, plaintiffs in this case are not challenging any pending state court action. Neither are plaintiffs challenging any ruling by the state court. Rather, plaintiffs are only seeking prospective relief and, as such, any order by this court would not impact an ongoing state proceeding. The court finds abstention is not appropriate under the second exceptional circumstance.

3. Civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions

Defendants contend "this case qualifies under the third class of 'exceptional circumstances'" because they assert "[p]laintiffs are seeking to dictate how state court proceedings are conducted by

requiring the state courts to conduct a full adjudication at the 48-hour hearing of the emergency-removal stage of the proceedings." (Docket 59 at p. 3). Defendants claim plaintiffs' "action seeks to interfere with the state courts' ability to perform their judicial functions under state law." Id. at pp. 4-5.

Plaintiffs argue "no orders or judgments issued by a state court will be rendered unenforceable or impaired if this Court grants the relief sought by the Plaintiffs." (Docket 62 at p. 9). Plaintiffs reiterate they are challenging the policies and practices employed by state officials in connection with judicial proceedings and are not challenging prior state court judgments or orders. Id. Plaintiffs contend defendants' arguments go to the merits of the case and should not be considered at this juncture of the proceedings. Id.

Plaintiffs' complaint seeks prospective relief. Nothing in the complaint seeks to interfere with any ongoing state judicial function or challenges any previous state court ruling. At this stage of the litigation the court is not considering the merits of plaintiffs' claims. Rather, the court is concerned with whether plaintiffs failed to state a claim upon which relief can be granted. Based on the complaint filed in this case, the court finds abstention under the third exceptional circumstance outlined in Sprint would be inappropriate.

4. Additional factors under Middlesex

Having determined the three exceptional circumstances requiring abstention under Younger are not applicable in this case, it is not necessary for

the court to consider the additional factors for abstention established in Middlesex. See Middlesex, 457 U.S. at 432. In Sprint, the Court held the Middlesex factors are "not dispositve; they [are] instead, *additional* factors appropriately considered by the federal court before invoking Younger." Sprint, 134 S. Ct. at 593 (emphasis in original). Even considering the additional factors, the court finds abstention would be inappropriate.

a. Existence of an ongoing state judicial proceeding

Defendants contend there are ongoing state proceedings involving Ms. Walking Eagle.[6] Docket 34 at p. 23). Furthermore, defendants contend "there is no question regarding the existence of ongoing state proceedings involving the temporary care and custody of Indian children in Pennington County and that there will continue to be such proceedings commenced even after the instigation of this litigation." Id. Defendants contend these future hearings require the court to abstain from adjudicating plaintiffs' federal claims. Id.

Plaintiffs argue there is no pending state court litigation involving the plaintiffs which would be impacted by a ruling from this court on the merits of the complaint. (Docket 43 at p. 24). Plaintiffs assert Ms. Walking Eagle's ongoing case is unrelated to the

[6] On January 27, 2014, counsel for plaintiffs notified the court that the Seventh Judicial Circuit Court dismissed a pending abuse and neglect case involving plaintiff Rochelle Walking Eagle and transferred jurisdiction to the Oglala Sioux Tribal Court pursuant to the provisions of the Indian Child Welfare Act. (Docket 68). A copy of the court's order of dismissal was attached to the notice. (Docket 68-1).

current action and does not deprive the court of jurisdiction to decide the merits of this case. Id. Plaintiffs also contend the mere fact future 48-hour hearings are going to take place is not a reason for this court to abstain from adjudicating the claims. Id.

The court agrees 48-hour hearings involving Indian children will continue to occur during the pendency of this litigation, however, "the question presented under the first prong of the Younger inquiry is not simply whether there are ongoing state judicial proceedings, but whether the federal proceedings at issue will interfere with such state proceedings." Olivia Y. ex rel. Johnson v. Barbour, 351 F. Supp. 2d 543, 567 (S.D. Miss. 2004). The court concludes the relief requested by plaintiffs will not interfere with ongoing state court proceedings. As set out in the complaint, plaintiffs allege defendants' failures include removing Indian children from their homes without affording them, their parents, or their Tribe a timely and adequate hearing and coercing the parents into waiving their rights under the Due Process Clause and the Indian Child Welfare Act. (Docket 1 at p. 3).

If these claims are proven, an order by this court remedying such failures would not interfere with ongoing 48-hour hearings involving Indian children. Plaintiffs are not seeking to enjoin any state proceedings nor are they seeking to enjoin defendants from enforcing state law. Rather, the relief sought by plaintiffs would support the state's interest involving the protection of Indian children in abuse and neglect cases.

b. Important state interests

The second factor requires this court to determine whether the issue implicates important state interests. Middlesex, 457 U.S. at 432. Defendants and plaintiffs agree the state has an important interest in protecting children from abuse and neglect. (Dockets 34 at p. 24 and 43 a p. 26). The second factor is satisfied.

c. Adequate opportunity to raise constitutional challenges

The third factor requires this court to consider whether the state forum "afford[s] an adequate opportunity to raise . . . constitutional claims." Middlesex, 457 U.S. at 432. Defendants contend the South Dakota Supreme Court resolved the issues plaintiffs allege in their complaint in Cheyenne River Sioux Tribe v. Davis, 822 N.W.2d 62 (S.D. 2012). (Docket 34 at p. 25). In that case, the South Dakota Supreme Court held ICWA was not applicable at the temporary or emergency custody stage. Id. Defendants argue this decision clearly demonstrates how plaintiffs' constitutional claims can be presented to the state courts. Id.

Plaintiffs contend, "[m]erely because a state forum is available does not mean the forum provides an adequate opportunity to (1) raise all the constitutional claims the plaintiff is raising in the federal suit, or (2) obtain a ruling in state court prior to suffering irreparable injury." (Docket 43 at p. 26). Under Younger, abstention is not warranted where the state process being challenged is "flagrantly and patently violative of express constitutional prohibitions" or where "danger of irreparable loss is

both great and immediate." Younger, 401 U.S. at 53, 45 (citations omitted).

Plaintiffs' complaint alleges the 48-hour hearings result in significant and irreparable loss, including the separation of parents from their children. (Docket 43 at pp. 26-27). In this case, plaintiffs are not parties to any pending suit in state court through which their constitutional challenges could be resolved. In addition, a state court challenge would preclude plaintiffs from raising all the claims in their federal complaint. See LaShawn A. v. Kelly, 990 F.2d 1319, 1323 (D.C. Cir. 1993) (finding "no pending judicial proceeding in the District of Columbia which could have served as an adequate forum for the class of children . . . to present its multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law."); Family Div. Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie, 725 F.2d 695 (D.C. Cir. 1984) (finding abstention inappropriate because "plaintiff- appellants were not parties to any pending suit in the local courts in which their constitutional challenges could naturally be resolved."). The court finds abstention improper under the third factor.

Abstention under Younger, as clarified by the Supreme Court in Sprint, is not appropriate in this case. In addition, the court finds abstention is not appropriate under the additional factors established in Middlesex. The motions to dismiss based on the Younger abstention doctrine are denied.

B. Rooker-Feldman Abstention Doctrine

Defendant Mark Vargo asserts this court lacks subject matter jurisdiction under the Rooker-Feldman doctrine. (Docket 39 at pp. 6-7). The Eighth Circuit described this doctrine as follows:

> The Rooker-Feldman doctrine forecloses not only straightforward appeals but also more indirect attempts by federal plaintiffs to undermine state court decisions. Thus, a corollary to the basic rule against reviewing judgments prohibits federal district courts from exercising jurisdiction over general constitutional claims that are "inextricably intertwined" with specific claims already adjudicated in state court. A general federal claim is inextricably intertwined with a state court judgment "if the federal claim succeeds only to the extent that the state court wrongly decided the issue before it." In such cases, "where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceedings as, in substance, anything other than a prohibited appeal of the state-court judgment." The state and federal claims need not be identical.

Lemonds v. St. Louis County, 222 F.3d 488, 492–93 (8th Cir. 2000) (internal citations omitted).

Plaintiffs contend, and the court agrees, Mr. Vargo's reliance on the Rooker-Feldman doctrine is

misplaced. "The Rooker-Feldman doctrine is confined to cases . . . brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobile Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 281 (2005). In this case, plaintiffs are not seeking review of the state court judgments in their cases or asking this court to review the merits of those cases. Rather, plaintiffs are requesting the court review the alleged inadequacies of the procedures employed during 48-hour hearings. If plaintiffs are successful in their claims, any order by this court would apply prospectively and would not impact prior state court rulings. This action is not "inextricably intertwined" with the state court judgments against the plaintiffs. See Lemonds, 222 F.3d at 492-93. The court finds the Rooker-Feldman doctrine does not deprive the court of subject matter jurisdiction.

C. Standing

Defendants contend the Oglala Sioux Tribe and Rosebud Sioux Tribe lack standing to bring this action. "In every federal case, the party bringing the suit must establish standing to prosecute the action." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Id. (citing Warth v. Seldin, 422 U.S. 490, 498 (1975). The doctrine of "standing is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). To satisfy the

case-or-controversy requirement, "a plaintiff must, generally speaking, demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." Bennett v. Spear, 520 U.S. 154, 162 (1997) (internal quotations omitted).

The complaint alleges:

> The Tribes bring this action as *parens patriae* to vindicate rights afforded to their members by the Due Process Clause of the Fourteenth Amendment and by ICWA. The Tribes and their members have a close affiliation, indeed kinship, with respect to the rights and interests at stake in this litigation. The future and well-being of the Tribes is inextricably linked to the health, welfare, and family integrity of their members.

(Docket 1 at p. 4).

Defendants contend the only section of ICWA that applies to emergency custody proceedings is § 1922. (Docket 34 at p. 29). Defendants assert because § 1922 "does not confer any discernible rights to the tribes, the Oglala Sioux Tribe and Rosebud Sioux Tribe cannot demonstrate any injury capable ofredress . . . ." Id. Defendants argue the Tribes "may not sue under § 1983 to vindicate a sovereign right" because the Tribes are not "persons" under the Act. Id.

Defendants suggest the only way the Tribes can "have standing is to vicariously assert the rights afforded to their members." Id. at p. 30. Defendants contend the Tribes cannot assert the doctrine of *parens patriae* to satisfy the justiciability requirement because they are not representing the interest of "all" Tribal members, "but only those members who are parents and custodians of Indian children." Id.

In order for the Tribes to have standing *parens patriae*, the Tribes must show the claims "are asserted on behalf of *all* of the sovereign's citizens. The *parens patriae* doctrine cannot be used to confer standing on the Tribe to assert the rights of a dozen or so members of the Tribe." United States v. Santee Sioux Tribe of Nebraska, 254 F.3d 728, 734 (8th Cir. 2001) (citations omitted, emphasis in original).

Plaintiffs claim this requirement is met, arguing the Tribes "filed this lawsuit because they are fighting for their survival, not just fighting for the families who appear in Defendants' 48-hour hearings." (Docket 43 at p. 32). In Dep't of Health and Social Servs. v. Native Village of Curyung, 151 P.3d 388, 402 (Alaska 2006), the court held the Village could bring the suit *parens patriae* to "prevent future violations of the Adoption Act and the Indian Child Welfare Act." The court found "the well-being of individual families and children [were] inextricably bound up with the villages' ability to maintain their integrity, which 'is something that can occur only through the children of the Village." Id.

The purpose of ICWA, as declared by Congress, is to "protect the best interests of Indian

children and to promote the stability and security of Indian tribes and families . . . ." 25 U.S.C. § 1902. Congress specifically found "that Indian tribes than their children . . . ." 25 U.S.C. § 1901(3).

Given the Congressionally established purposes of the Indian Child Welfare Act, the court finds the Tribes have *parens patriae* standing to bring this action and to litigate the alleged violations of the Due Process Clause and ICWA. The focus of this litigation is not to redress past injuries to plaintiffs; rather, it is to prevent future violations of the Due Process Clause of the Fourteenth Amendment and ICWA. The court finds this action is inextricably bound up with the Tribes' ability to maintain their integrity and "promote the stability and security of the Indian tribes and families." 25 U.S.C. § 1902. The motions to dismiss for lack of standing are denied.

D. Administrative Remedies

Defendants move for dismissal based on plaintiffs' failure to exhaust their state law remedies. (Docket 34 at pp. 27-29). Defendants contend the Eighth Circuit requires "a litigant asserting a deprivation of procedural due process" to exhaust state law remedies "before such an allegation states a claim under § 1983." Id. at pp. 27-28 (quoting Wax'n Works v. City of St. Paul, 213 F.3d 1016, 1019 (8th Cir. 2000).

Defendants attempt to apply Wax'n Works too expansively. See Wax'n Works, 213 F.3d at 1019 (finding "a litigant asserting a deprivation of [a property right violation of] procedural due process must exhaust state before such an allegation states a

claim under § 1983."). The Eighth Circuit limited the holding in Wax'n Works to suits seeking redress for loss of a property interest. See Crooks v. Lynch, 557 F.3d 846, 848 (8th Cir. 2009). "A 1983 plaintiff . . . is not required to exhaust state judicial or administrative remedies before proceeding in federal court." Bressman v. Farrier, 900 F.2d 1305, 1310 (8th Cir. 1990) (citing Patsy v. Florida Bd. of Regents, 457 U.S. 496, 500-07 (1982)). The Eighth Circuit recognized an exception to the general rule. Exhaustion of state remedies prior to bringing a § 1983 claim is not required.

The holding in Wax'n Works does not control the outcome in this case. The motions to dismiss for failure to exhaust state law remedies are denied on this basis.

E. Motion to Dismiss Standard

Rule 12(b)(6) provides for dismissal if the plaintiffs fail to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In evaluating the defendants' Rule 12(b)(6) motion, the court accepts as true all of the factual allegations contained in plaintiffs' complaint and grants all reasonable inferences in favor of plaintiffs as the nonmoving party. Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) ("a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' ") (citing Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009). See also Crooks, 557 F.3d at 848 (the court must review "a Rule 12(b)(6) motion to dismiss for failure to state a claim, accepting the facts alleged in the complaint as true and granting all reasonable inferences in favor

of the plaintiff, the nonmoving party.") (brackets omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." Iqbal, 556 U.S. at 679.

1. Whether the defendants are policymakers under § 1983

Liability for a government entity under 42 U.S.C. § 1983 can exist only where the challenged policy or practice is "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 694 (1978). A policy maker is one who "speak[s] with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue," that is one with "the power to make official policy on a particular issue." Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989); see also Clay v. Conlee, 815 F.2d 1164, 1170 (8th Cir. 1987) ("In an official- capacity suit, the plaintiff must prove more than that his constitutional rights were violated by the named individual defendant, for a governmental entity is liable under § 1983 only when the entity itself is a 'moving force' behind the violation. That is, the entity's 'policy or custom' must have 'caused' the constitutional violation; there must be an

'affirmative link' or a 'causal connection' between the policy and the particular constitutional violation alleged.").

An "official policy" involves a deliberate choice to follow a course of action made from among various alternatives by an official who has the final authority to establish governmental policy. Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986).

a. Judge Davis

Judge Davis asserts "[i]n order for the Court to sustain Plaintiffs' Due Process claims, Plaintiffs' must first make the threshold showing [he] is a 'policymaker.' " (Docket 34 at p. 12). Judge Davis contends "the process involved in the 48-hour hearings is set by statute . . . [and he] is compelled by oath to follow the procedures set forth in those statutes." Id.

Plaintiffs say they are not challenging the procedures at 48-hour hearings which are prescribed by South Dakota statute. (Docket 43 at p. 20). Rather, plaintiffs claim Judge Davis has instituted six of his own policies, practices and customs for 48-hour hearings which violate the Due Process Clause and ICWA. (Docket 43 at pp. 3-4). These include: not allowing Indian parents to see the ICWA petition filed against them; not allowing the parents to see the affidavit supporting the petition; not allowing the parents to cross- examine the person who signed the affidavit; not permitting the parents to present evidence; placing Indian children in foster care for a minimum of 60 days without receiving any testimony from qualified experts related to "active efforts" being made to prevent the break-up of the family; and

failing to take expert testimony that continued custody of the child by the Indian parent or custodian is likely to result in serious emotional or physical damage to the child. Id. at pp. 2-4.

Taking the allegations in the complaint as true, the court finds that Judge Davis is a policymaker.

b. Kim Malsam-Rysdon and Luann Van Hunnik

Ms. Malsam-Rysdon is the Cabinet Secretary for the South Dakota Department of Social Services (SDDSS) and is responsible for the administration and functioning of the SDDSS. (Docket 38 at p. 1). Ms. Van Hunnik is a Regional Manager for Region 1 which is comprised of Pennington County. Id. at p. 2. As the Regional Manager, Ms. Van Hunnik oversees the Rapid City office for the Division of Child Protection Services and supervises Child Protection Supervisors within the region. Id.

Ms. Malsam-Rysdon and Ms. Van Hunnik (hereinafter referred to as "DSS defendants") contend they are not policymakers because "the process beginning at the 48-hour hearing juncture is fully within the control of the presiding judicial official" and SDDSS employees and officials "clearly have no control over a judicial official's interpretation or application of applicable law." Id. at p. 4. DSS defendants contend the complaint does "not allege that an unconstitutional 'policy or custom' of the State or South Dakota Department of Social Services was the 'moving force' behind the injuries." Id. at p. 6. DSS defendants suggest the complaint does not identify any policy, practice or custom of DSS that

"restricts the level of due process afforded at the 48 hour hearings." Id. at p. 8.

Plaintiffs claim DSS defendants are "overlooking the scope of Plaintiffs' allegations against them." (Docket 44 at p. 5). Plaintiffs' complaint alleges DSS has an independent obligation to provide Indian parents with copies of the petition for temporary custody and the ICWA affidavit prior to the 48-hour hearing. Id. Plaintiffs argue defendants' failure to train their staff accordingly violates plaintiffs' rights to due process. Id. Plaintiffs also allege "DSS defendants fail to take appropriate actions *during and after* the 48-hour hearing to satisfy their constitutional duty to ensure that Indian parents receive 'an adequate post-deprivation hearing.' " Id. (emphasis in original). Plaintiffs argue the DSS defendants should do everything they reasonably can to ensure the parents receive a meaningful hearing at a meaningful time. Id. Instead of fulfilling these obligations, the complaint alleges DSS defendants "have a policy, practice, and custom of Judge Davis to deny Indian parents a meaningful hearing at a meaningful time." Id. at pp. 5-6. The complaint also alleges DSS defendants failed to train their staff on how to seek and secure for Indian parents the federal rights to which those parents are entitled and, as a result, Indian parents suffer irreparable injury. (Docket 1 at ¶¶ 46 & 48).

Because neither Ms. Malsam-Rysdon nor Ms. Van Hunnik appear at the 48-hour proceedings personally, the claims made by plaintiffs relate to a "failure to train" other DSS employees whom they supervise. To survive a motion to dismiss on a "failure to train" claim, plaintiffs must show (1) the

policymaker's training practices were inadequate, (2) the policymaker was deliberately indifferent to the rights of the plaintiffs, and (3) the training deficiencies cause constitutional deprivation. Ulrich v. Pope Cnty., 715 F.3d 1054, 1061 (8th Cir. 2013).

At this point in the litigation, the court is "bound to accept as true, for purposes of [a Rule 12(b)(6)] motion, the facts alleged by the plaintiff[s]."Stephens v. Assoc. Dry Goods Corp., 805 F.2d 812, 814 (8th Cir. 1986). Plaintiffs allege "DSS is intimately involved in every aspect of temporary custody proceedings involving Indian children in Pennington County—conducting the investigation, preparing the affidavit, attending the hearing, and controlling what happens to the child during the 60 days following the hearings—and has primary responsibility during that entire time for both the physical and legal custody of the child." (Docket 44 at p. 2).

Specifically, plaintiffs allege DSS defendants contribute to the plaintiffs' injuries by failing to provide a copy of the petition and ICWA affidavit to Indian parents prior to the 48-hour hearing, by adopting the unconstitutional practices of the circuit court during 48-hour hearings, by failing to ensure Indian parents receive an adequate post-deprivation hearing, and by failing to properly work with Indian parents following the 48-hour hearings. These claims, if true, are sufficient to survive a Rule 12(b)(6) motion to dismiss and are cognizable under 42 U.S.C. § 1983. See Whisman ex rel. Whisman v. Rinehart, 119 F.3d 1303, 1310 (8th Cir. 1997) (state officials who remove children from their parents' custody have a constitutional duty to ensure those

parents receive an "adequate post-deprivation hearing"). These allegations, if true, would constitute a "moving force" behind the violations. The court finds Ms. Malsom-Rysdon and Ms. Van Hunnik are policymakers with regard to the allegation made in the complaint.

c. Mark Vargo

Mark Vargo is the State's Attorney for Pennington County. Mr. Vargo asserts plaintiffs' complaint alleges few facts regarding what plaintiffs believe he does or does not do which violates plaintiffs' rights. (Docket 40 at p. 2). Mr. Vargo contends he "has no 'policies, practices, and customs' of his own, but rather follows South Dakota statute regarding 48-hour hearings." Id.

Plaintiffs' complaint alleges Mr. Vargo has a policy, practice and custom of (1) not providing Indian parents with a copy of the petition or ICWA affidavit that forms the case against them either before or during the 48-hour hearing; (2) never seeks to introduce evidence to comply with the requirement of § 1912(d) and (e) of ICWA; (3) never seeks a meaningful hearing for at least sixty days and instead ratifies and acquiesces in the policy of Judge Davis; and (4) ignores ICWA's § 1922 requirement that emergency placement of an Indian child terminate immediately when the imminent physical danger has been removed. (Dockets 45 at p. 2 & 1 at ¶¶ 42, 46-47, 94-95, 98, 101, 111). Plaintiffs assert there is no South Dakota law preventing Mr. Vargo from complying with the alleged requirements.

Mr. Vargo cites Slaven v. Engstrom, 710 F.3d 772 (8th Cir. 2013) in support of his position that he

is merely following South Dakota law and lacks any policymaking authority regarding 48-hour hearings. (Docket 40 at pp. 3-4). However, Slaven is distinguishable from the facts alleged in plaintiffs' complaint. Slaven was decided under the summary judgment standard. In this case, the standard is not whether Mr. Vargo is entitled to judgment as a matter of law; rather, the standard is whether, taking the facts alleged by plaintiffs as true, the complaint fails to state a claim for relief. Braden, 588 liable for the non-discretionary duty of enforcing state law. Slaven, 710 F.3d at 781 ("The Slavens' complaint essentially alleges that *Minnesota law*, and the state court judge's application of that law—not an independent Hennepin County policy—caused the procedural due process violations.") (emphasis in original). In this case, plaintiffs contend "all of the activities that [Mr.] Vargo is engaging in that allegedly violate Plaintiffs' rights are discretionary activities that are *not* required by state law." (Docket 45 at p. 4) (emphasis in original).

A policymaker must be "an official who is determined by state law to have the final authority to establish governmental policy" and who makes "a deliberate choice to follow a course of action made from among various alternatives." Ware v. Jackson County, Mo., 150 F.3d 873, 880 (8th Cir. 1998) (quotation omitted). The facts as set forth in the complaint, which this court is bound to accept as true, are sufficient to support a finding that Mr. Vargo is a policymaker.

Mr. Vargo also asserts he is "entitled to absolute prosecutorial immunity from § 1983 suits when the attorney acts are within the scope of his

prosecutorial duties." (Docket 40 at p. 4). Plaintiffs contend "[p]rosecutorial immunity protects prosecutors only from suits for damages." (Docket 45 at p. 4).

The Supreme Court held "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." Imbler v. Pachtman, 424 U.S. 409, 431 (1976). However, the Supreme Court's holding in Imbler does not establish that prosecutors are immune from suit for declaratory or injunctive relief.

In Heartland Acad. Cmty. Church v. Waddle, 427 F.3d 525 (8th Cir. 2005), "[Michael] Waddle, as Chief Juvenile Officer for the Second Circuit of Missouri, effected the removal of 115 boarding students from Heartland Christian Academy." Id. at 528. Heartland filed suit seeking "declaratory and injunctive relief against Waddle and others under 42 U.S.C. § 1983 for alleged violations of the First, Fourth, and Fourteenth Amendments." Id. at 529. The district court "granted Heartland a permanent injunction and declaratory relief." Id.

Waddle appealed the district court's decision. On appeal, Waddle, citing a Ninth Circuit case, Coverdell v. Dep't of Soc. & Health Servs., 834 F.2d 758, 763 (9th Cir. 1987), argued he was entitled to absolute immunity from civil suit because he was a child services worker. Id. at 530. Waddle argued his position as a child services worker was akin to a prosecutor. Heartland, 427 F.3d at 530-31. The Eighth Circuit expressed some skepticism "that the immunity afforded prosecutors for their work in bringing criminals to justice should be available to juvenile officers in civil removal proceedings that are

to detaining juveniles for reasons of delinquency or their caretakers on criminal charges related to the care of the juveniles," but did not reach the issue. Id. at 531.

The Eighth Circuit concluded the holding in Coverdell was "inapposite" because "[i]n Coverdell, the prosecutorial-immunity defense was raised in response to the plaintiff's claim for damages, not in defense of the request for an injunction." Id. The court found "Heartland [was] not seeking damages from Waddle nor to punish him for his past judgment in effecting the mass removal of student from HCA without notice or hearing. Instead, Heartland has sought and received only declaratory and prospective injunctive relief prohibiting Waddle, as juvenile officer, from acting in violation of the Constitution when and if he removes (or directs the removal of) children from Heartland facilities in the future." Id. The court found Waddle was not entitled to absolute immunity and affirmed the decision of the district court. Id.

Mr. Vargo asserts the Eighth Circuit's holding in Heartland is not applicable here because the court did not indicate the reasons for its holding. (Docket 50 at p. 16). This court disagrees with Mr. Vargo's interpretation. The Eighth Circuit noted Heartland was not seeking damages or punishment of Waddle for his past behavior in removing children. Rather, it was to prevent constitutional violations going forward. This is precisely what plaintiffs' complaint is seeking. Plaintiffs are not seeking money damages from Mr. Vargo violations which plaintiffs claim have already occurred. Plaintiffs' complaint seeks to prevent future constitutional violations. The court

finds Mr. Vargo is not entitled to prosecutorial immunity for prospective injunctive or declaratory relief.

This court is not alone in reaching that conclusion. The courts of appeal for the Eleventh Circuit and Fifth Circuit have held prosecutors are not immune from claims for injunctive relief. See Bolin v. Story, 225 F.3d 1234, 1242 (11th Cir. 2000); Tarter v. Hury, 646 F.2d 1010, 1012 (5th Cir. 1981); see also VanHorn v. Nebraska State Racing Com'n., Civ. Nos. 4:03-cv-3336, 4:09- cv-3378, 2006 WL 3408055, *1 (D. Neb. 2006) (finding the Eighth Circuit and Eleventh Circuit held "that not even prosecutors are immune from suit for injunctive relief under § 1983") (citing Heartland, 427 F.3d at 530-31; Bolin, 225 F.3d at 1242).

In Watkins v. Garrett, Civ. No. 6:09-cv-6077, 2010 WL 2584287, *2 (W.D. Ark. 2010), the district court noted "[w]hile the Supreme Court has not held that prosecutors are immune from declaratory or injunctive relief, a plaintiff seeking such relief must show some substantial likelihood that the past conduct alleged to be illegal will recur." Here, plaintiffs' complaint makes this exact claim, the conduct alleged to be a violation of the Due Process Clause and ICWA will continue to recur at each 48-hour hearing involving Indian parents. Mr. Vargo's motion to dismiss on this basis is denied.

2. Claim II: 25 U.S.C. § 1922

Defendants contend plaintiffs' claim for relief under 25 U.S.C. § 1922 should be dismissed for failure to state a claim. (Docket 34 at pp. 6-12). Plaintiffs' complaint asserts § 1922 provides both

procedural and substantive rights and that defendants are infringing upon those rights. (Docket 1). 25 U.S.C. § 1922 provides:

> Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

25 U.S.C. § 1922.

Defendants claim § 1922 "defers emergency custody cases involving Indian children . . . to the respective state law procedures." (Docket 34 at p. 7). In other words, defendants contend § 1922 "creates an exception to the important requirements of ICWA

in these emergency situations to protect the best interests of the child." Id. Under this interpretation, defendants assert "South Dakota statutory law is the source of the procedures governing emergency custody proceedings, not ICWA." Id. at p. 8.

Plaintiffs agree in part with defendants' interpretation of § 1922. (Docket 43 at p. 6). Plaintiffs agree the first sentence of § 1922 "authorizes state officials to employ state procedures to obtain emergency custody of the child." Id. However, plaintiffs contend the second sentence of § 1922 requires these officials, once emergency custody of an Indian child is obtained, "to do two things for the protection of Indian parents and Indian children: insure that the emergency removal '*terminates immediately*' when the child can be returned home safely, and '*expeditiously initiate* a child custody proceeding.' " Id. (emphasis in original). Defendants disagree, arguing the plaintiffs "focus only on a partial reading of the second sentence." (Docket 48 at p. 4). Defendants point out the second sentence of § 1922 provides "the emergency *removal or placement* terminates immediately when such *removal or placement* is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate child custody proceedings subject to the provisions of this subchapter. . ." Id. (quoting 25 U.S.C. § 1922) (emphasis added).

Defendants also urge this court to consider holdings by six state courts which find that § 1922 is a statute of deferment. (Docket 34 at pp. 7-8). Defendants cite Cheyenne River Sioux Tribe v. Davis, 822 N.W.2d 62 (S.D. 2012); State ex rel. Juvenile Dep't v. Charles, 688 P.2d 1354 (Or. App.

1984); D.E.D. v. State of Alaska, 704 P.2d 774, 779 (Alaska 1985); Matter of the Welfare of J.A.S., 488 N.W.2d 332 (Minn. Ct. App. 1992); In re S.B. v. Jeannie V., 30 Cal. Rptr. 3d 726 (Cal. App. 4th 2005); and State ex rel. Children, Youth and Families Dep't v. Marlene C., 248 P.3d 863 (N.M. 2011). These cases are not binding on this court and, in fact, do not deal with the specific issue involved in this case. These cases stand for the proposition that the first sentence of § 1922 permits state procedures to be used in the initial removal of an Indian child. Plaintiffs agree with this principle.

The court finds under a plain reading of § 1922, the second sentence provides a substantive right to Indian parents. A finding the second sentence of § 1922 contains a substantive right is harmonious with the purposes of ICWA. Both plaintiffs and defendants agree Congress's purpose in enacting ICWA was to curb the alarmingly high rate of removal of Indian children from Indian parents. (Dockets 43 at pp. 8-9 & 48 at p. 3). Congress declared "that it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. Congress found "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3).

Defendants' argument that plaintiffs ignore a portion of the second sentence is overstated. The second sentence of § 1922 provides the "official or [state] agency involved shall insure that the emergency *removal or placement* terminates immediately when such *removal or placement* is no

longer necessary." 25 U.S.C. § 1922 (emphasis added). A plain reading of the sentence contemplates that the emergency which existed when the child was taken from the home may no longer exist at the time of the 48-hour hearing or prior to placement.

The plaintiffs' complaint alleges defendants violate their substantive duties under § 1922 during 48-hour hearings because there is never an "inquiry into whether the cause of the removal has been rectified, nor does the court direct DSS to pursue that inquiry after the hearing." (Docket 1 at ¶ 95). Accepting as true the allegations in the complaint, plaintiffs set forth a valid claim for relief. Defendants' motions to dismiss on this basis are denied.

3. 42 U.S.C. § 1983

Defendants contend even if plaintiffs' ICWA based claims are valid, the plaintiffs nonetheless "cannot vindicate those rights through an action brought pursuant to 42 U.S.C. § 1983" because ICWA provides a comprehensive remedial framework. (Docket 34 at p. 11). Generally, statutes which create individual rights are presumptively enforceable by § 1983. See City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 120 (2005) (recognizing a rebuttable presumption that § 1983 provides an avenue for relief against a state actor who violates federal law); Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002) ("Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983."); Blessing v. Freestone, 520 U.S. 329, 341 (1997) (noting if a plaintiff demonstrates a federal statute creates an individual right, a rebuttable presumption exists

that the right is enforceable under § 1983). A defendant may defeat this presumption by demonstrating "that Congress shut the door to private enforcement either expressly, through 'specific evidence from the statute itself,' or 'impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.' " Gonzaga Univ., 536 U.S. at 284 n. 4 (quotations omitted).

Defendants argue the sole remedy for claims based on alleged ICWA violations is provided in 25 U.S.C. § 1914, which permits an Indian child to petition the court to invalidate an action upon the showing of certain violations. See 25 U.S.C. § 1914. The Eighth Circuit has not considered whether § 1914 was intended to be a comprehensive remedial framework thereby making § 1983 inapplicable to claims based on alleged ICWA violations.

Plaintiffs argue "[n]othing in ICWA expressly displaces § 1983 as a vehicle to vindicate the rights that ICWA creates." (Docket 43 at p. 11). The plaintiffs agree § 1914 of ICWA "established certain remedies that help tribes and families protect some of their rights," but argue "courts have recognized that these remedies were not intended to eliminate the remedies under § 1983. . . ." Id. Other courts have found § 1914 does not eliminate other rights of action available pursuant to § 1983. In Curyung, the Supreme Court of Alaska found "that in passing § 1914, Congress attempted to provide a remedy that is not ordinarily available under § 1983." Curyung, 151 P.3d at 411. The court found "Congress intended § 1914 not to displace § 1983, but rather to supplement it." Id. at 412; see also Native Village of

Venetie I.R.A. Council v. State of Alaska, 944 F.2d 548 (9th Cir. 1991). The court held allowing the § 1983 action to proceed "would not undermine or even affect" § 1914 Curyung, 151 P.3d at 412.

Defendants cite Doe v. Mann, 285 F. Supp. 2d 1229, 1240-41 (N.D. Cal. 2003), in support of their position that ICWA provides a comprehensive remedial framework for litigating alleged violations of ICWA. (Docket 34 a p. 11). On appeal, however, the Ninth Circuit Court of Appeals reaffirmed the holding in Venetie "that Congress intended to create a federal private right of action in tribes and individuals to seek a determination of their ICWA rights and obligations in federal district court . . . ." Doe v. Mann, 415 F.3d 1038, 1045 (9th Cir. 2005).

The court finds § 1914 does not bar plaintiffs from seeking remedies under § 1983 for violations of ICWA to which § 1914 is inapplicable. Rather, § 1914 supplements the remedies available under § 1983. See Curyung, 151 P.3d at 412. Plaintiffs may seek a determination of their ICWA rights under § 1983 in federal court.

4. Claim I: Due Process

Plaintiffs' complaint alleges "[t]he policy, practice, and custom of the Defendants is to wait at least sixty days (and more often ninety days) before providing parents whose children have been removed from their custody with adequate notice, an opportunity to present evidence on their behalf, an opportunity to contest the allegations, and a written decision based on competent evidence." (Docket 1 at ¶ 65). Plaintiffs contend this behavior violates the Due Process Clause. (Docket 1).

"The due process clause ensures every individual subject to a deprivation 'the opportunity to be heard at a meaningful time and in an meaningful manner.' " Swipies v. Kofka, 419 F.3d 709, 715 (8th Cir. 2005) (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976). "To set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake. Second, the plaintiff must prove that the defendant deprives him of such an interest without due process of law." Gordon v. Hansen, 168 F.3d 1109, 1114 (8th Cir. 1999) (citations omitted).

In this case, plaintiffs' complaint meets the first requirement. The Due Process Clause of the Fourteenth Amendment "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (2000). The defendants agree the "private interests of the individual Plaintiffs at stake here are no doubt fundamental." (Docket 34 at p. 13).

Defendants contend the policies, practices, and customs challenged by plaintiffs do not deprive the plaintiffs of due process. Id. at pp. 13-14. In determining what due process requires, the court considers three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the

> functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335.

As indicated above, the first factor is satisfied. The second factor requires this court to consider the risk the procedures used will lead to erroneous decisions. Id. Plaintiffs allege the procedures used by defendants do lead to erroneous decisions because at the 48-hour hearings the Indian parents are not permitted to see the petition filed against them, are not permitted to see the affidavit in support of that petition, are not permitted to cross-examine the person who signed the affidavit, and are not permitted to present evidence. (Docket 1 ¶ 42 & Docket 43 at p. 13). Under a motion to dismiss, the court accepts these allegations as true. Braden, 588 F.3d at 594.

Defendants contend the procedures established and used during 48- hour hearings protect the due process rights of plaintiffs. Defendants compare South Dakota's emergency custody procedures to a probable cause hearing in the criminal context. Defendants note, in the criminal context, after an arrest and arraignment, it is not unusual for a defendant to wait months before receiving a full trial on the merits. (Docket 34 at p. 15). While this may be factually correct, what is distinct is that defendants in a criminal case are often represented by counsel at an arraignment and are provided a copy of the information or indictment. In this case, the plaintiffs allege a copy of the petition is not provided to the parents nor is any

supporting affidavit. Rather, Indian parents are left in the dark not knowing the allegations against them while suffering the consequence of losing custody of a child for 60 to 90 days.

One of the core purposes of the Due Process Clause is to provide individuals with notice of claims against them. In this case, taking the allegations in the complaint as true, the court finds the risk of erroneous deprivation high when Indian parents are not afforded the opportunity to know what the petition against them alleges. This deprivation is compounded if the child is taken from the parents without considering whether the emergency that permitted the child's removal still exists.

Mr. Vargo asserts there is no statute requiring him to provide the Indian parents with the evidence compiled against them at the 48-hour hearings. (Docket 50 at p. 3). Mr. Vargo correctly identifies the issue as whether the "Due Process Clause require[s] that the Petition for Temporary Custody Order and ICWA affidavit be given to the parents before or at the 48-hour hearing." Id. The plaintiffs need not prove their claims at this point. The standard under Rule 12(b)(6) is whether, taking the facts alleged by plaintiffs as true, the complaint fails to state a claim on which relief can be granted. Braden, 588 F.3d at 594. Keeping Indian parents in the dark as to the allegations against them while removing a child from the home for 60 to 90 days certainly raises a due process issue.

The third factor requires the court to consider the fiscal and administrative burdens of providing Indian parents with a copy of the petition and ICWA affidavit at their 48-hour hearings. Eldridge, 424

U.S. at 335. The court finds the burden is inconsequential. The petition and affidavit are provided to the presiding judge and can at very little cost be provided to Indian parents.

Defendants argue permitting evidence to be admitted at the 48-hour hearing and allowing parents to cross-examine the state's witnesses would be an undue burden because it would not provide the child's attorney, the parent's attorney, or the state's attorney an opportunity to fully and fairly investigate and prepare their case. (Docket 34 at p. 15). Plaintiffs argue allowing parents the opportunity to present evidence and cross-examine witnesses is the same burden the defendants shoulder later in the process and merely providing the safeguards sooner is not an undue burden. (Docket 43 at p. 15). Assuming the allegations in the complaint are true, the court cannot say that providing these safeguards sooner imposes an undue administrative or financial burden on defendants. Fundamental rights are at issue in the 48- hour hearings. If the allegations in the complaint are true, under the current procedures, Indian parents are required to wait 60 days or longer before being given the opportunity to present evidence and cross-examine witnesses in an effort to return their children to their care or the care of an Indian custodian. At that point, the deprivation of liberty has occurred. The court finds the allegations in the complaint, taken as true, establish a claim for a violation of plaintiffs' due process rights.

5. Claim III: Coercion

Plaintiffs' complaint alleges Judge Davis and other "Seventh Circuit judges have pursued a policy, practice, and custom of coercing Indian parents into

waiving" their rights under both the Due Process Clause and ICWA. (Docket 1 at ¶ 113). Plaintiffs claim the "presiding judge tells parents at the outset of each 48-hour hearing that if they agree to 'work with' DSS, the court will enter an order that could result in a return of their children by DSS without further court involvement." Id. at ¶ 114. Plaintiffs claim many parents are "[e]nticed by the prospect of an early reunification" and agree to " 'work with' DSS and waive their rights under the state and federal law to adequate notice and timely hearing." Id. at ¶ 115. Plaintiffs allege the presiding judge fails to provide important information to parents prior to asking the parents to waive their rights, including:

> (a) the parents are not provided with adequate notice of the allegations against them and are not shown the petition for temporary custody or the ICWA affidavit; (b) the parents are not told that by agreeing to "work with" DSS, this will authorize DSS to retain custody of their children for at least another sixty days, during which time the parents will be allowed to visit their children only when and if DSS permits it; (c) the parents are not told that if they opt not to "work with" DSS, they may get a hearing more quickly; and (d) the parents are not told that if they decline, DSS has a duty under both state and federal law to work with the parents (and engage in active efforts to reunite the family) *anyway*.

Id. at ¶ 117 (emphasis in original).

Plaintiffs contend the other defendants acquiesce in this procedure. Defendants note South Dakota law allows for this "informal" process "and, therefore, it is an option that parents may choose to exercise." (Docket 34 at p. 20) (citing SDCL § 26-7A-19(2)). Plaintiffs agree South Dakota law permits the "informal" process, however, plaintiffs contend the "manner in which [Judge] Davis (and the other Defendants) offer and apply it" is coercive. (Docket 43 at p. 21). Plaintiffs claim the presiding judge fails to properly explain the consequences of choosing the "informal" process. Id.

A party may waive constitutional rights only if the waiver is knowing and voluntary and the waiving party "understand[s] the significance and consequences of a particular decision and [if] the decision is uncoerced." Godinez v. Moran, 509 U.S. 389, 401 n.12 (1993) (citation omitted). "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (citation and internal quotation marks omitted). "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Id.

A failure to provide parents with the advisement of their fundamental rights or coercing a parent into waiving those rights would certainly amount to a constitutional violation. See Belinda K. v. Baldovinos, Civ. No. 10-02507, 2012 WL 13571, *7 (N.D. Cal. 2012) (finding plaintiff stated a claim for ineffective assistance of counsel where plaintiff's counsel did not adequately explain the significance of waiving rights under ICWA); Rivera v. Marcus, 696 F.2d 1016, 1026 (2d Cir. 1982) (finding no evidence in

the record suggesting the party "intentionally and intelligently waived her due process rights.").

At this point in the litigation, the court is "bound to accept as true, for purposes of [a Rule 12(b)(6)] motion, the facts alleged by the plaintiff[s]." Stephens v. Assoc. Dry Goods Corp., 805 F.2d 812, 814 (8th Cir. 1986). As a result, although defendants contend the procedures followed during a 48-hour hearing appropriately advise parents of their constitutional and statutory rights, the facts as set forth by plaintiffs allege the rights are not appropriately explained, and the proceedings are conducted in such a way that the parents are not voluntarily and knowingly waiving their rights. If the facts alleged by plaintiffs are true, plaintiffs' complaint sets forth a claim upon which relief may be granted. Defendants' motions to dismiss on this basis are denied.

Based on the court's analysis and pursuant to the standards governing Rule 12(b)(6) motions, the court finds the plaintiffs' complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim [for] relief that is plausible on its face.'" Braden, 588 F.3d at 594 ("quoting Iqbal, 556 U.S. at 663). Accordingly, it is hereby

ORDERED that defendant Judge Jeff Davis' motion to dismiss (Docket 33) is denied.

IT IS FURTHER ORDERED that defendants Kim Malsam-Rysdon's and Luann Van Hunnik's motions to dismiss (Dockets 36 & 37) are denied.

IT IS FURTHER ORDERED that defendant Mark Vargo's motion to dismiss (Docket 39) is denied.

Dated January 28, 2014.

BY THE COURT:

/s/ *Jeffrey L. Viken*
JEFFREY L. VIKEN
CHIEF JUDGE

RELEVENT STATUTORY PROVISIONS

S.D. Codified Law § 26-7A-5. Proceedings in best interest of child.

Proceedings under this chapter and chapters 26-8A, 26-8B, and 26-8C shall be in the best interests of the child.

S.D. Codified Law § 26-7A-14. Temporary care of child by caretaker designated by court--Limitation of temporary custody--Release.

An apparent abused or neglected child taken into temporary custody and not released to the child's parents, guardian, or custodian may be placed in the temporary care of the Department of Social Services, foster care, or a shelter as designated by the court to be the least restrictive alternative for the child. A child apparently in need of supervision or an apparent delinquent child taken into temporary custody and not released to the child's parents, guardian, or custodian may be placed in foster care, shelter, or detention as designated by the court to be the least restrictive alternative for the child. The temporary caretaker of the child shall promptly notify the state's attorney of the child's placement.

No child may be held in temporary custody longer than forty-eight hours, or twenty-four hours pursuant to § 26-8B-3, excluding Saturdays, Sundays, and court holidays, unless a temporary custody petition for an apparent abuse or neglect case or other petition has been filed, the child is within the jurisdiction of the court and the court orders longer custody during a noticed hearing or a telephonic hearing.

The court may at any time order the release of a child from temporary custody without holding a hearing, either with or without restriction or condition or upon written promise of the child's parents, guardian, or custodian regarding the care and protection of an apparent abused or neglected child or regarding custody and appearance in court of an apparent child in need of supervision or an apparent delinquent child at a time, date, and place to be determined by the court.

Provisions of this chapter on temporary custody do not abrogate or limit the authority of the court to order temporary custody of any child during any noticed hearing after an action has been commenced.

S.D. Codified Law § 26-7A-15. Notice to parents, guardian, or custodian of child taken into temporary custody--Notice of hearing--Information to Indian custodian or designated tribal agent--Failure to notify.

The officer or party who takes a child into temporary custody, with or without a court order, except under a court order issued during a noticed hearing after an action has been commenced, shall immediately, without unnecessary delay in keeping with the circumstances, inform the child's parents, guardian, or custodian of the temporary custody and of the right to a prompt hearing by the court to determine whether temporary custody should be continued. If the child's parents, guardian, or custodian cannot be located after reasonable inquiry, the officer or party taking temporary custody of the child shall report that fact and the circumstances

immediately to the state's attorney. The state's attorney shall notify the child's parents, guardian, or custodian, without unnecessary delay, of the time, date, and place of the temporary custody hearing. If the temporary custody hearing concerns an apparent abused or neglected Indian child, the state's attorney or Department of Social Services shall make reasonable efforts to inform the Indian custodian and the designated tribal agent for the Indian child's tribe, if known, of the time, date, and place of the temporary custody hearing. The information regarding the temporary custody hearing may be provided to the Indian custodian or the designated tribal agent orally or in writing, including by telephone or facsimile. The hearing shall be held within forty-eight hours if it concerns any apparent abused or neglected child or if it concerns any apparent delinquent child pursuant to § 26-8C-3 or within twenty-four hours if it concerns any apparent child in need of supervision pursuant to § 26-8B-3, excluding Saturdays, Sundays, and court holidays, after taking the child into temporary custody, unless extended by order of the court. Failure to notify the child's parents, guardian, or custodian, or to inform the Indian custodian or the designated tribal agent, of the temporary custody hearing is not cause for delay of the hearing if the child is represented by an attorney at the hearing. As used in this section, the terms, Indian child, Indian custodian, and Indian child's tribe, are defined as in 25 U.S.C. § 1903, as amended to January 1, 2005.

S.D. Codified Law § 26-7A-18. Temporary custody hearing--Best interests of child--Conducted telephonically.

At the temporary custody hearing the court shall consider the evidence of the need for continued temporary custody of the child in keeping with the best interests of the child. The temporary custody hearing may be conducted telephonically when necessary as determined by the court.

S.D. Codified Law § 26-7A-19. Options of court following temporary custody hearing for abused or neglected child.

If the child is an apparent, alleged, or adjudicated abused or neglected child, after the temporary custody hearing the court may:

(1) Order the release of the child from temporary custody, either with or without restriction or condition or upon written promise of the child's parents, guardian, or custodian regarding the care and protection of the child; or

(2) Continue the temporary custody of the child under the terms and conditions for duration and placement that the court requires, including placement of temporary custody of the child with the Department of Social Services, in foster care or shelter. The court and the Department of Social Services shall give placement preference to a relative, custodian, or an individual, not related by birth, adoption, or marriage to the child but who has an emotionally significant relationship with the child, who is available and who has been determined by the department to be qualified, provided that

placement with that relative, custodian, or individual is in the best interest of the child. If temporary custody of the child is continued by the court, the court may provide for visitation of the child by the child's parents, guardian, custodian, or family members in keeping with the best interests of the child. If the child is in temporary custody of the Department of Social Services and has not been adjudicated as an abused or neglected child, the court shall review the child's temporary custody placement at least once every sixty days. . . .

S.D. Codified Law § 26-7A-54. Advisory hearing before adjudicatory hearing.

On appearance of the parties pursuant to summons or at any adjournment or continuance of an appearance, the court shall conduct an advisory hearing before the adjudicatory hearing on the petition, as follows:

(1) The court shall first:

(a) Ascertain the need for any joinder or deletion of parties, determine true names and addresses of parties and their relationships to the child, and determine the true name, date and place of birth, address, and custodial status of the child;

(b) Advise the parties of the nature of the proceedings, the allegations contained in the petition, the burden of proof of the state and the constitutional and statutory rights of the parties; and

(c) Advise the parties of their rights to be represented by attorneys and requirements for court-appointed attorney, if appropriate, and, if requested by any party or if required by the court, the court

may adjourn and continue the advisory hearing to a time, date, and place set by the court to afford opportunity for parties to consult with their attorneys; and

(2) The court shall then receive the answer, response, denial, or admission of the parties and, if appropriate, of the child as follows:

(a) If the petition alleges the child to be abused or neglected, parents, guardian, or custodian of the child may admit the allegations contained in the petition and the court may accept the admissions if the court is satisfied there is a factual basis for them;

(b) If the petition alleges a child to be in need of supervision, parents, guardian, or custodian of the child and the child may admit the allegations contained in the petition and the court may accept the admissions if the court is satisfied there is a factual basis for them;

(c) If the petition alleges the child to be delinquent, the child may admit the allegations contained in the petition and the court may accept the admission if the court is satisfied there is a factual basis for them.

S.D. Codified Law § 26-7A-55. Petition admitted to by all parties--Dispositional hearing--Petition not admitted to--Adjudicatory hearing--Interim order for temporary custody.

If all necessary parties admit the allegations contained in the petition and the court accepts the admissions, the court may find, conclude and make a decision as to adjudication of the child under the

applicable provisions of chapter 26-8A, 26-8B, or 26-8C. The court may then proceed with the dispositional phase of the proceedings without conducting a formal adjudicatory hearing on the petition with the concurrence of all parties. However, at the request of any party or if required by the court, the court shall set a later time and date for the dispositional hearing. The court shall then determine interim dispositional arrangements concerning the child and the parties.

If the petition is not admitted by all necessary parties, including the child, if appropriate, or if the petition is denied by any necessary party or the child, if appropriate, the court shall proceed with the adjudicatory hearing on the petition, if notice has been given as required by § 26-7A-15.1, if applicable, or schedule the adjudicatory hearing for a later time and date.

If the advisory hearing is adjourned and continued or if the advisory hearing is completed and the adjudicatory hearing on the petition is scheduled for a later time and date, the court shall make an interim order regarding temporary custody of the child as determined by the court.

S.D. Codified Law § 26-8A-24. Periodic review hearings of foster care status--Petition for judicial action.

If a child has been adjudicated to be an abused or neglected child, parental rights have not been terminated and the court places custody of the child in the Department of Social Services, the court shall conduct a review hearing of the foster care status every six months. The hearing shall be conducted in

the same manner as a dispositional hearing. If the department at any time finds that further court action is necessary to clarify the child's legal status or, for any other reason, to protect the interests of the child, the Department of Social Services may require the state's attorney to petition the court for a review hearing.