STEPHEN L. PEVAR
American Civil Liberties Union Foundation
330 Main Street, First Floor
Hartford, Connecticut 06106
(860) 570-9830

DANA L. HANNA
Hanna Law Office, P.C.
816 Sixth St.
P.O. Box 3080
Rapid City, South Dakota 57709
(605) 791-1832

ROBERT DOODY
ACLU of South Dakota
P.O. Box 1170
Sioux Falls, SD 57101
(605) 332-2508

RACHEL E. GOODMAN
American Civil Liberties Union Foundation
124 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	Case No. 5:13-cv-05020-JLV **PLAINTIFFS' RESPONSE TO MOTION TO DISMISS OF DEFENDANT VARGO**

INTRODUCTION

Defendant Mark Vargo is the State's Attorney for Pennington County. Whenever a child in Pennington County is removed from his or her home, Vargo is notified of the facts of the case. SDCL § 26-7A-17. It is Vargo who notifies the court of the removal, and Vargo who files the petition with the court. *Id.* If the child has not yet been removed, Vargo may initiate a Department of Social Services ("DSS") investigation or file a petition himself. SDCL § 26-7A-10. Vargo represents DSS in the 48-hour hearings at issue in this case. SDCL § 26-7A-9. During this process, Plaintiffs' complaint alleges, Vargo has a policy, practice, and custom of not providing Indian parents with a copy of the petition or the ICWA affidavit that form the case against them either before the hearing or even during it. *See* Plaintiffs' Complaint ("Compl.") (Dkt. 1) ¶¶ 42, 46. Moreover, as a matter of policy, he never seeks to introduce evidence to comply with the requirements of § 1912(d) and § 1912(e) of the Indian Child Welfare Act ("ICWA"). *Id.* ¶¶ 101, 111. After the court has granted temporary emergency custody to DSS, Vargo, again as a matter of policy, does not seek a meaningful hearing for at least sixty days, instead ratifying and acquiescing to the policy of Defendant Davis that deprives parents of a meaningful post-deprivation hearing at a meaningful time. *Id.* ¶ 47. During this period, Vargo's policy, practice, and custom is to ignore the requirement of ICWA's § 1922 that emergency placement of an Indian child "terminate[ ] immediately" when imminent physical danger has been removed. *Id.* ¶¶ 94-95, 98.

In his Brief in Support of Motion to Dismiss in Lieu of Answer, Dkt. 40 ("Vargo Brief"), Vargo acknowledges these allegations. Vargo Brief at 2. Nonetheless, he contends that it is "difficult to determine what exactly Plaintiffs aver Vargo has done wrong." *Id.* The allegations

above, however, are clear and straightforward. Defendant Vargo directs and participates in the policies, practices, and customs that Plaintiffs allege deprive them of their rights.

At the motion to dismiss stage, Plaintiffs' complaint "'need not include detailed factual allegations.'" *Affordable Communities of Missouri v. Fed. Nat. Mortgage Ass'n*, 714 F.3d 1069, 1073 (8th Cir. 2013) (quoting *C.N. v. Willmar Public School*, 591 F.3d 624, 629 (8th Cir. 2010)). It must only contain facts stating a claim to relief that is "plausible" on its face, that is, "'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id*. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Plaintiffs' Complaint contains more than enough detail to meet this threshold against Defendant Vargo, and thus this Court should deny Vargo's Motion to Dismiss.

Plaintiffs now address the arguments in Vargo's Brief in the order in which they were raised. In addition to the arguments contained *infra*, Plaintiffs incorporate by reference the arguments contained in their Response to Defendant Davis' Motion to Dismiss (Dkt. 43) and those contained in their Response to the Motion to Dismiss of Defendants Van Hunnik and Malsam-Rysdom (Dkt. 44).

I. PLAINTIFFS HAVE STATED CLAIMES FOR RELIEF AGAINST VARGO

Vargo contends that he merely follows state law in conducting 48-hour hearings, and thus he cannot be held liable as a policymaker under 42 U.S.C. § 1983. Vargo Brief at 3. A policymaker for purposes of § 1983 liability is one who makes "'a deliberate choice to follow a course of action made from among various alternatives'" *Ware v. Jackson Cnty., Mo*., 150 F.3d 873, 880 (8th Cir. 1998) (quoting *Jane Doe A v. Special Sch. Dist*., 901 F.2d 642, 646 (8th Cir. 1990)) (internal marks omitted). Contrary to Defendant Vargo's contention, he makes many such choices.

There is no South Dakota law preventing Vargo from providing Indian parents with a copy of the petition and ICWA affidavit, *see* Compl. ¶¶ 42, 46; there is no South Dakota law preventing him from seeking to introduce evidence to comply with the requirements of ICWA § 1912(d) and § 1912(e), *see id.* ¶¶ 101, 111; there is no South Dakota law requiring him to wait 60 days to seek a meaningful hearing or to ratify Defendant Davis' practice of waiting 60 days to conduct such a hearing, *see id.* ¶ 47; and there is no South Dakota law that prevents him from ensuring that the emergency placement of an Indian child "terminates immediately" as required by ICWA § 1922, *see id.* ¶¶ 94-95, 98.[1]

A policymaker must also be "'an official who is determined by state law to have the final authority to establish governmental policy.'" *Ware*, 150 F.3d at 880 (quoting *Jane Doe A*, 901 F.2d at 646). *See also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (holding that a policymaker may have authority to establish government policy only on one particular issue, so long as he or she "speak[s] with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue.")

Vargo is the duly-elected State's Attorney for Pennington County. In that capacity, he alone creates and implements all of the policies just listed. If tomorrow Vargo wanted to begin giving Indian parents a copy of the petition for temporary custody and the ICWA affidavit, or to begin requesting that Indian parents receive a timely and meaningful post-deprivation hearing, he could do so without anyone's permission. Vargo could also instruct all of his subordinates to follow that new policy. All deputy state's attorneys serve "subject to the control of the state's attorney." SDCL § 7-16-3. Accordingly, Vargo is a policymaker with respect to the policies, practices, and customs challenged here.

[1] Vargo states that "he is compelled by oath to follow the procedures" challenged in this lawsuit. *See* Vargo Brief at 3. In his reply brief, Vargo should identify with specificity what oath would be violated if he were to begin, for instance, to provide Indian parents with a copy of the petition for temporary custody.

Citing *Slaven v. Engstrom*, 710 F.3d 772 (8th Cir. 2013), Vargo argues that he is not liable for the violations of constitutional and statutory rights that Plaintiffs claim. In *Slaven*, however, the court emphasized that the plaintiffs were attempting to hold county officials liable for the *non*-discretionary duty of enforcing state law. *See id.* 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). *Slaven* thus has no application to the present case. Here, all of the activities that Vargo is engaging in that allegedly violate Plaintiffs' rights are discretionary activities that are *not* required by state law. Vargo has the option of changing all of those policies entirely on his own. Accordingly, *Slaven* is inapposite.

II. PROSECUTORIAL IMMUNITY DOES NOT APPLY TO SUITS FOR PROSPECTIVE RELIEF

Vargo claims that his status as a prosecutor renders him immune from this lawsuit, even though it seeks only declaratory and injunctive relief. Vargo Brief at 4-5. This is incorrect. Prosecutorial immunity protects prosecutors only from suits for damages. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). The inapplicability of prosecutorial immunity to suits seeking prospective relief is well established. *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 531 (8th Cir. 2005) (holding prosecutorial immunity inapplicable to claim for injunctive and declaratory relief); *Simes v. Arkansas Judicial Discipline & Disability Comm'n*, Civ. No. 4:10-01047, 2012 WL 4469264, *7 (E.D. Ark. Sept. 27, 2012) ("Prosecutors are not immune from claims for injunctive relief."); *Winters v. Palumbo* 512 F. Supp. 7, 10 (E.D. Mo. 1980) (dismissing claim for damages against prosecutor based on absolute immunity but retaining claim for injunctive relief because a prosecutor, like a judge, "enjoys no immunity from an action

for equitable relief"). All of the cases cited by Vargo on this issue dealt with prosecutorial immunity from suit for damages and thus have no bearing on the instant case.

III. PLAINTIFFS SET FORTH A VIABLE CLAIM AGAINST VARGO FOR COERCION

Vargo contends that there are no allegations in the complaint tying him to Plaintiffs' coercion claim. Vargo Brief at 5-6. This is incorrect. True, Plaintiffs' complaint often uses the word "Defendants" without any further identification, but each time that term is used, it encompasses all of the Defendants. Thus, the allegations in Plaintiffs' complaint that accuse the Defendants of coercing Indian parents into waiving their federal right to adequate notice and a timely and meaningful hearing apply equally to Vargo as well as to the other defendants.

According to Plaintiffs' complaint, Vargo has a policy, practice, and custom of keeping Indian parents uninformed about the facts of the case against them until *after* they must decide whether to waive their federal rights, by withholding from them the petition for temporary custody and the ICWA affidavit. *See* Compl. ¶¶ 119, 129. The result of this policy is to prevent Indian parents from making a knowing and voluntary waiver. As explained more fully in Plaintiffs' brief responding to Judge Davis' motion to dismiss (Dkt. 43), the Defendants unfairly coerce Indian parents into waiving their rights under both the Due Process Clause and ICWA.

IV. NEITHER *ROOKER-FELDMAN* NOR *YOUNGER* APPLIES HERE

Vargo argues that the *Rooker-Feldman* abstention doctrine requires dismissal of this suit. Vargo Brief at 6-7. However, that doctrine has no application to Plaintiffs' claims. *Rooker-Feldman* occupies a "narrow ground," applying only to "cases brought by state-court losers complaining of injuries caused by state-court judgments . . . and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The *Rooker-Feldman* doctrine bars litigants "from seeking what in substance would

be appellate review of the state *judgment* in a United States district court." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994) (emphasis added). Here, however, the Plaintiffs are not asking this Court to review the judgments in their cases. Stated differently, this federal court action has nothing to do with the *merits* of Plaintiffs' state court custody cases; rather, it deals exclusively with the inadequacy of the procedures employed in those cases.

The outcomes of Plaintiffs' state court proceedings are not the subject of this suit. Instead, the Plaintiffs challenge the policies, practices, and procedures employed by the Defendants during that process. *Rooker-Feldman* presents no bar to such a "due process allegation [which] does not implicate the merits of the [state] decree, only the procedures leading up to it." *Catz v. Chalker*, 142 F.3d 279, 294 (6th Cir. 1998), *opinion amended on other grounds on denial of reh'g*, 243 F.3d 234 (6th Cir. 2001); *see also Riehm v. Engelking*, 538 F.3d 952, 965 (8th Cir.2008) (holding *Rooker-Feldman* inapplicable to a complaint that "alleges unconstitutional actions by [the defendant] in seeking and executing [an] ex parte order," where the plaintiff was not challenging the order on the merits).

Vargo cites repeatedly to *Carson P. v. Heineman*, 240 F.R.D. 456 (D. Neb. 2007), but that case only hurts him, as it rejects a *Rooker-Feldman* argument very similar to the one he proffers here. In *Carson P.*, foster children sought injunctive and declaratory relief against the state's foster care system. The court found that *Rooker-Feldman* did not apply because, while the injunction sought by the plaintiffs might "affect the outcome of future juvenile court review proceedings, [it would] not effectively reverse past rulings." *Id*. at 523; *see also Friends of Lake View Sch. Dist. Inc. No. 25 v. Beebe*, 578 F.3d 753, 758-59 (8th Cir. 2009) (where federal plaintiffs "do not claim to be aggrieved by the outcome of [prior state-court] litigation . . . [t]hat

fact alone would seem to foreclose the defendants' argument that the *Rooker-Feldman* doctrine applies"). Here, as in the cases just cited, the Plaintiffs are not seeking to reverse past rulings.

Vargo claims that the *Rooker-Feldman* doctrine has application here because this suit is akin to an appeal of *Cheyenne River Sioux Tribe v. Davis*, 822 N.W.2d 62 (S.D. 2012). But the Plaintiffs were not parties to that litigation. Having not participated in *Cheyenne River*, the Plaintiffs are "not in a 'position to ask this Court to review the state court's judgment,'" and *Rooker-Feldman* is inapplicable. *Lance v. Dennis*, 546 U.S. 459, 465 (2006) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994)).

Similarly, since Plaintiffs did not themselves participate in *Cheyenne River*, the doctrine of claim preclusion does not prevent them from bringing their claims to this Court. *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) ("'It is a principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party.'") (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

Finally, in response to Defendant Vargo's one-sentence contention that the *Younger* abstention doctrine bars Plaintiffs' claims, Plaintiffs incorporate by reference the argument on that subject that they submitted in their response to Defendant Davis' motion to dismiss (Dkt. 43). Neither *Rooker-Feldman* nor *Younger* applies to this case, and the Court should not abstain from deciding Plaintiffs' federal claims.

V. THE INDIVIDUAL NAMED PLAINTIFFS HAVE STANDING

In order to have standing to bring a claim in federal court, a plaintiff must demonstrate: (1) the existence of an injury in fact, which is concrete and particularized, and actual or imminent; (2) that the injury is fairly traceable to the defendant; and (3) that the injury is one that could be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted); *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006).

Plaintiffs Rochelle Walking Eagle, Madonna Pappan, and Lisa Young (hereinafter "Named Plaintiffs") meet all three of these requirements, and thus, have standing to sue.

First, the Named Plaintiffs have alleged concrete, particularized, and actual injuries. Each Named Plaintiff alleges that her child was removed from her home in accordance with Defendants' deficient policies, causing her to suffer extreme emotional and psychological trauma that constitutes irreparable injury. Dkt. 1 ¶¶ 6, 50, 59-61, 73, 97-98, 102, 112, 124-27. Each Named Plaintiff remains at risk of being subjected to these procedures again. *Id.* ¶¶ 6, 73, 112.

Despite Vargo's contention, Plaintiffs' claims do not constitute "generalized grievances," *See* Vargo Brief at 12, as that term is used in the standing doctrine. A generalized grievance is a claim in which the impact on the party bringing suit is "undifferentiated and 'common to all members of the public.'" *U.S. v. Richardson*, 418 U.S. 166, 176-77 (1974) (citing *Ex parte Levitt*, 302 U.S. 633, 634 (1937); *Laird v. Tatum*, 408 U.S. 1, 13 (1972)). Such a claim will fail to meet the standing requirement if no specific, personalized injury-in-fact has been suffered by the plaintiff. *See FEC v. Akins*, 524 U.S. 11, 24 (1998). But "where a harm is concrete, though widely shared," injury-in-fact exists. *Id.* (citation omitted). *See also U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."). Plaintiffs have described concrete harms that they personally suffered and may suffer again at any time; thus, their claims are not "generalized grievances."

Second, the individual named Plaintiffs have also adequately alleged that their injury is fairly traceable to the actions of the Defendants, including Defendant Vargo. The complaint includes numerous examples of the ways in which Defendants' policies, practices, and customs

violated Plaintiffs' constitutional and statutory rights and details the ways in which those violations irreparably injured Plaintiffs and their children. Compl. ¶¶ 50, 59-61, 73, 97-98, 102, 112, 124-27.

Third, the injuries alleged by the individual named Plaintiffs would be redressed by a favorable outcome in this case. A favorable outcome would result in voiding all of the policies, practices and customs of the Defendants that are challenged in this lawsuit.

Here, Plaintiffs allege in their complaint that the challenged policies, practices, and customs are ongoing, such that Plaintiffs may be subject to them again at any time and may again experience irreparable injury at any time. Compl. ¶¶ 6, 49, 73, 112. The Supreme Court has made it clear that where a defendant's policies or practices "may arise again" and affect the named plaintiff in the future, the plaintiff has standing to seek injunctive relief against the further application of those policies and practices. *See U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 398 (1980). *See also Baur v. Veneman*, 352 F.3d 625, 637 (2d Cir. 2003) (holding that standing for injunctive relief was present where "alleged risk of harm arises from an established government policy"); *31 Foster Children v. Bush,* 329 F.3d 1255, 1266 (11th Cir. 2003) ("[W]hen the threatened acts that will cause injury are authorized or part of a policy, it is significantly more likely that the injury will occur again."); *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998) (plaintiffs who "continue to suffer harm from the challenged conduct" have standing to seek injunction against police department policy); *Chavez v. United States,* 226 F. App'x 732, 737 (9th Cir. 2007) (plaintiffs have sufficiently alleged "a likelihood of substantial and immediate irreparable injury" where "the gravamen of the complaint is an allegation that the [challenged activities] have caused injury on numerous occasions and will

continue to do so") (citations omitted). If the Plaintiffs obtain the injunctive and declaratory relief they seek, this threat of future injury would be removed.

Vargo points out in his brief that in order to establish standing to obtain injunctive relief, a plaintiff must show that he or she faces a realistic threat of future injury by the policies or practices being challenged. *See* Vargo Brief at 9-10. Plaintiffs have a two-part response to that argument. First, Plaintiffs Walking Eagle, Pappan, and Young were at the time this lawsuit was filed, and remain now, Indian parents residing with Indian children in Pennington County. As a result, they remain subject to the policies, practices and customs challenged in this lawsuit. Defendants conduct at least fifty and perhaps as many as one hundred 48-hour hearings each year involving Indian parents, and the chances are high that the three Named Plaintiffs will again be subjected to 48-hour hearing. Indeed, as Defendant Davis indicated in his brief (Dkt. 34), Plaintiff Walking Eagle, just weeks after this lawsuit was filed, appears to have once again been the subject of an abuse and neglect proceeding. Thus, the Named Plaintiffs have standing to seek injunctive relief.

Second, if there is a doubt as to whether the Named Plaintiffs face a realistic threat of future injury, then the Court should hold this issuance in abeyance and permit the Named Plaintiffs to engage in jurisdictional discovery. The Named Plaintiffs should be allowed to discover facts (which are in Defendants' possession) regarding how frequently an Indian parent in Pennington County who has already appeared in one 48-hour hearing will appear in a second one. The overwhelming authority--and precedent in the Eighth Circuit--is that where a dispute exists as to whether a plaintiff at the pleading stage has shown sufficient evidence of standing, but evidence that will buttress the plaintiff's claim may be obtained through discovery, the court will permit such discovery before making a decision on the issue. *See, e.g., City of Clarkson*

Valley v. Mineta, 495 F.3d 567, 569 (8th Cir. 2007). This rule is consistent with the principle that allegations in the complaint must be presumed true at the pleading stage. *See, e.g., Butler v. Bank of America, N.A.*, 690 F.3d 959, 961 (8th Cir. 2012); *Palmer v. Ill. Farmers Ins. Co.*, 666 F.3d 1081, 1083 (8th Cir. 2012). As the Eighth Circuit has explained:

> This "threshold inquiry" [on standing] normally requires an evaluation of (1) injury, (2) causation, and (3) redressability. *See, e.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). However, in cases where, as here, the plaintiffs assert a procedural injury, they "can assert that right without meeting all the normal standards for redressability and immediacy," *id.* at 572 n. 7, 112 S.Ct. 2130, "so long as the procedures in question are designed to protect some threatened concrete interest of [theirs] that is the ultimate basis of [their] standing." *Id.* at 573 n. 8, 112 S.Ct. 2130. . . .[I]n response to a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice, for . . . we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990)) (alteration in original).

City of Clarkson Valley, 495 F.3d at 569. *See also Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1024 (D.C. Cir. 1998) (remanding for discovery on the plaintiff's standing to seek injunctive relief "consistent with our precedent allowing jurisdictional discovery and factfinding if allegations indicate its likely utility"); *B.A. ex rel. Randall v. Missouri,* Civ. No. 4:09-1269, 2010 WL 1254655, *4 (E.D. Mo. Mar. 24, 2010) (denying motion to dismiss because "it would be premature to determine whether Plaintiff lacks standing to pursue injunctive relief without the completion of discovery"); *C. ex rel. Connor v. Missouri State Bd. of Educ.*,Civ. No. 4:08-1853, 2009 WL 2928758, *4 (E.D. Mo. Sept. 8, 2009) (same).

In *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983), the Supreme Court held that the plaintiff, a motorist who had been stopped by police and placed into a chokehold that injured his neck, did not have standing to seek injunctive relief because the chance that he would again be arrested and placed into a chokehold was remote. In so holding, the Court stated that the

motorist would have standing to seek injunctive relief if he could reasonably allege that "all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter." *Id.* at 106.

Here, Plaintiffs' complaint describes policies, practices, and customs pursuant to which they were injured and have a substantial likelihood of causing injury to the Plaintiffs in the future. Plaintiffs' complaint alleges that all of the judges, DSS employees, and state's attorneys in Pennington County always deny due process and ICWA rights to any Indian parents whom they subject to 48-hour hearings. Accordingly, the Plaintiffs have met the *Lyons* requirements for seeking injunctive relief. There is a sufficient likelihood that these violations "may arise again" and injure these same plaintiffs again. *See U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388, 398 (1980). *See also Smith v. Arkansas Dep't of Correction*, 103 F.3d 637, 644 (8th Cir. 1996) (inmate plaintiff had standing to seek injunctive relief where he continued to reside in unit alleged to be unconstitutionally dangerous); *Janis v. Nelson*, Civ. No. 09-5019, 2009 WL 4505935 at *3 (D.S.D. Nov. 24, 2009) (holding that Indians who resided in a voting district that suffered from unlawful voting schemes had standing to seek injunctive relief where plaintiffs had "no assurance that their voting rights in future elections would not be similarly infringed" as they had been in the past); *Carson P.*, 240 F.R.D. at 511-13 (holding that the juveniles who had "aged out" of the foster care system lacked the requisite standing to challenge the adequacy of that system, while those who remained subject to the challenged policies retained standing). If any doubt exists as to whether the Named Plaintiffs face a realistic threat, the Court should delay a ruling until the Plaintiffs have engaged in reasonable discovery.

Finally, Defendant Vargo includes in his brief an extensive discussion of the standard for obtaining a permanent injunction. Vargo Brief at 10-11, 12. But Plaintiffs have not moved the

Court for a permanent injunction, and thus they are not yet required to make the four showings required by that standard. All that the Plaintiffs need to do at the pleading stage is demonstrate that they have *standing to seek* injunctive relief, and not show proof that the Court should grant that relief on the merits. Plaintiffs have satisfied that burden.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that this Court deny the Motion to Dismiss of Defendant Vargo and allow their claims to proceed.

Respectfully submitted this 10th day of June, 2013.

By: /s/ Stephen L. Pevar

Stephen L. Pevar
Dana L. Hanna
Robert Doody
Rachel E. Goodman
Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on June 10, 2013, I electronically filed the foregoing Brief with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel for Defendants:

Sara Frankenstein	sfrankenstein@gpnalaw.com
Roxanne Giedd	Roxanne.giedd@state.sd.us
Ann F. Mines	ann.mines@state.sd.us
Robert L. Morris	bobmorris@westriverlaw.com
Nathan R. Oviatt	nate@goodsellquinn.com
J. Crisman Palmer	cpalmer@gpnalaw.com

/s/ Stephen L. Pevar
Stephen L. Pevar