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

RACHEL E. GOODMAN
American Civil Liberties Union Foundation
125 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' REPLY BRIEF RE: MOTION TO COMPEL

INTRODUCTION

This Court has determined that Plaintiffs have a federal right, due to the unique importance of this evidence, to examine on an expedited basis particular transcripts of 48-hour hearings conducted since January 1, 2010 in South Dakota's Seventh Judicial Circuit. *See Oglala Sioux Tribe v. Van Hunnik*, 2014 WL 940718 (D.S.D. Jan. 28, 2014).

However, state officials are refusing to produce those transcripts, thereby preventing Plaintiffs from exercising that right. These refusals are occurring despite the fact that (1) the requested transcripts are "necessary for the preliminary injunction hearing" that Plaintiffs intend to pursue, (2) the transcripts are "[t]he only way to show" whether Defendants are engaging in the systemic practices of which they stand accused, (3) any state-created privacy interests in the transcripts "'must yield to the federal interest in discovering' whether the defendants in this action have engaged in policies, practices and customs which violate plaintiffs' constitutional rights," and (4) all of these transcripts will be fully protected against unauthorized disclosure by this Court's Protective Order. *Id*. at **5-6 (citing *Ginest v. Bd. of County Comm'rs of Carbon Cnty.*, 306 F. Supp. 2d 1158, 1159-60 (D. Wyo. 2004)).

Judge Davis and the non-party judges seek to justify their refusal to produce these transcripts by asserting that only a state court judge, and not a federal court judge, can order the production of a 48-hour hearing transcript. Yet this Court *already* rejected the notion that the production of these critical and uniquely significant documents can be withheld on that basis. When this issue was first presented to the Court, Judge Davis pointed out that obtaining these transcripts will require an "order from the presiding state court judge finding the requesting party has a legitimate interest" in having them produced. *See Oglala Sioux Tribe*, 2014 WL 940718 at *5. In response, the Court gave numerous reasons why Plaintiffs *and the Court* have a compelling need to examine this evidence. The transcripts are "the only way" that Plaintiffs can prove systemic violations of their rights sufficient to warrant the issuance of injunctive relief. *Id*. at *6. "The 48-hour ICWA hearing transcripts likely will be determinative" of Plaintiffs'

constitutional claims. *Id*. Given the content of the transcripts and the policies, practices, and customs challenged in this litigation, the production of the transcripts is "necessary in this case." *Id.* at 6. These transcripts will "'better enable'" the Court to adjudicate the request for preliminary injunctive relief, thus warranting expedited production of them. *Id*. at *4 (citing *Edudata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn. 1984)). Moreover, the production of these documents will not jeopardize any state-created privacy interests because, as a result of the Court's Protective Order, "'class counsel will keep the information confidential except to the extent that disclosure is necessary to advise the Court of violations of federal law.'" *Id*. (citing *Ginest*, 306 F. Supp. 2d at 1160).

The non-party judges do not explain in their brief why they are refusing to sign the transcript orders. Judge Davis believes he knows the reason. According to Judge Davis, the non-party judges "have apparently made the decision that there are no 'compelling reasons' to unseal the transcripts in their cases. *See* SDCL 26-7A-36." *See* Defendant Judge Davis's Response to Plaintiffs' Motion to Compel (hereinafter "Davis Brief") at 6 (ECF No. 88). Thus, according to Judge Davis, the non-party judges have determined that the numerous reasons this Court gave for ordering the production these transcripts are unconvincing.

As discussed below, if the non-party judges wanted to implement the Court's discovery order, they could easily do so. For instance, the judges do not (and cannot) deny that they have the authority under state law to order the production of these transcripts. *See* SDCL 26-7A-37. They are simply refusing to exercise that authority.

Similarly, as explained below, the judges on the Seventh Judicial Circuit have an informal process through which one judge can (and often does) assign a fellow judge to preside over a 48-hour hearing *and to then enter all necessary orders* at the conclusion of that hearing. Consequently, another option available to the non-party judges is to assign to Judge Davis the authority to act on the motions pending before them for the production of the transcripts. Judge Davis could then issue a transcript order in those cases. Here again, this is something that these judges could do but will not.[1]

ARGUMENT

The non-party judges have not revealed the reason they refuse to sign the transcript orders. What is clear, however, is that this Court can enforce its discovery decree whether these state officials consent or not. The Supremacy Clause decides this issue for us. *See United States v. Peters*, 9 U.S. 115, 136 (1809).

The situation now before the Court is reminiscent of the era when state officials, including state judges, refused to take any steps to implement federal court orders to desegregate public schools. Indeed, the present situation is even more compelling than in those cases. Here, this Court is merely asking state judges to exercise a power vested in them by state law, whereas in the desegregation cases, state judges were being ordered to implement decrees in a manner that violated state laws. In any event, this Court unquestionably has the authority to issue all necessary orders to effectuate its decrees. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 (1979) (holding that state officials must obey a federal court order even though

[1] As mentioned in Plaintiffs' opening brief, Judge Davis's counsel, Nathan Oviatt, drafted a motion to use for this purpose. The undersigned signed more than 100 of these motions and sent them to counsel for each judge. Judge Davis has signed all of his orders and recently signed the orders in Judge Thorstensen's cases, but the other four non-party judges have taken no action with respect to the motions they received.

a state statute prohibited them from undertaking the activity mandated by the federal court); *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45-46 (1971) (ordering school officials to comply with a district court order to desegregate public schools even though state law prohibited desegregation); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 233-34 (1964) (same).

The issue now before the Court is not *whether* to order the production of these transcripts, but *how* to ensure that Plaintiffs will receive the transcripts already ordered to be produced.[2] Plaintiffs' opening brief discussed three options, and each of them remains viable. Since then, three additional options have presented themselves. The three original options are:

1. Order Judge Davis to sign all the transcript orders; or

2. Order the five judges to sign their respective orders; or

3. Order the court reporters to produce the transcripts without signed orders from the five judges.

1. <u>The New Option Proposed by Judge Davis</u>

The first page of the Davis Brief suggests an option that can easily resolve the current impasse. According to Judge Davis, Plaintiffs need only "follow Rule 34(c) and Rule 45 to obtain the transcripts of these cases from the non-party judges." *See* Davis

[2] Notably, Judge Davis seeks to relitigate the threshold question of *whether* the Court should order the production of these transcripts. Citing the *Rooker-Feldman* doctrine, Judge Davis argues that the production of these transcripts would undermine state court decisions and, therefore, the Court should deny Plaintiffs' request for these documents altogether. *See* Davis Brief at 10-11. Similarly, Judge Davis argues that, even if some transcripts should be produced, allowing production since 2010 "seems drastic and unnecessary." *Id.* at 10. Judge Davis made these identical arguments earlier, and the Court rejected them. Accordingly, Plaintiffs decline to address those arguments once again.

Brief at 1; *see also id*. at 11-12 (stating that Plaintiffs "are not without a remedy" because they can obtain the transcripts by serving a Rule 45 subpoena on the non-party judges).[3]

Within hours after reading the Davis Brief, Plaintiffs served on the non-party judges (through their attorney, Robert Anderson) a request for the transcripts under Rules 34(c) and 45. A copy of that pleading is attached to the Affidavit of Stephen L. Pevar, which accompanies this brief.

This entire matter would be rendered moot if the non-party judges agree with Judge Davis and produced the transcripts in response to the subpoena. Unfortunately, however, Mr. Anderson informed Plaintiffs that his clients will likely move to quash the subpoena. *See* Aff. of Stephen L. Pevar ("Pevar Aff't") at ¶ 3. Therefore, Judge Davis's suggestion will not resolve the impasse without the Court's assistance.

A case decided by this Court on February 25, 2014, demonstrates that Judge Davis is correct with regard to the Rule 34(c) and Rule 45 request. *See Heil v. Belle Starr Saloon & Casino, Inc.*, Nos. CIV 09-5074-JLV, 09-5099-JLV, 2014 WL 791933 (D.S.D. Feb. 25, 2014). Given that the non-party judges have the ability to acquire possession of the hearing transcripts, they can be compelled to produce them pursuant to Rule 34(c) and Rule 45. As the Court explained in *Heil* in granting a motion to compel the production of telephone records that the objecting party did not possess but had the ability to acquire:

> Production of documents is required when those materials are in a party's "possession, custody, or control . . . ." Fed.R.Civ.P. 34(a)(1). "Inspection can be had if the party to whom the request is made has the

[3] Judge Davis claims that he "presumed" that the Plaintiffs would use the subpoena process to obtain these transcripts. *See* Davis Brief at 2. Why, then, would Mr. Oviatt draft a model motion that utilizes an entirely different method to obtain the transcripts and then recommend to Mr. Pevar that he sign more than 100 such motions? Be that as it may, Plaintiffs are grateful to Judge Davis for now suggesting a much easier process.

> legal right to obtain the document, even though in fact it has no copy." 8B Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 2210 (2010).

Id. at *14 (additional citations omitted). *See also In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995) ("Federal courts have consistently held that documents are deemed to be within the 'possession, custody or control' for purposes of Rule 34 if the party has actual possession, custody or control, *or has the legal right to obtain the documents on demand.*" (emphasis added.)); *Beyer v, Medico Ins. Group*, No. CIV. 08-5058, 2009 WL 736759, at *5 (D.S.D. Mar. 17, 2009) ("The rule that has developed is that if a party 'has the legal right to obtain the document,' then the document is within that party's 'control' and, thus, subject to production under Rule 34." (citation omitted)).

Here, the non-party judges have the legal right to obtain the transcripts on demand. Therefore, they must produce these highly relevant documents in response to Plaintiffs' Rule 34(c) and Rule 45 requests. *See Jones v. National American University*, No. CIV. 06-5075-KES, 2008 WL 4616684 at *1 (D.S.D. 2008) (citing case law for the principle that non-parties must produce documents pursuant to Rule 45 to the same extent that parties must produce them pursuant to Rule 34). Indeed, as Judge Schreier observed in *Jones*, one purpose of Rule 45 is "to facilitate access outside the deposition procedure provided by Rule 30 to documents and other information in the possession of persons who are not parties." *Id*. (citing Fed.R.Civ.P. 45 Advisory Committee Notes); *see also United States v. Three Bank Accounts*, Nos. CIV. 05-4145-KES, 06-4005-KES, 2008 WL 915199 at *7 (D.S.D. Apr. 2, 2008) (requiring non-party pursuant to Rule 45 to obtain documents not in that party's possession but which that party had the ability to obtain).

In their brief, the non-party judges contend that ordering them to make a predetermined finding that a transcript order should be produced would "violate[] concepts of comity and federalism" and result in "commandeering" state courts for a federal purpose in violation of settled law. *See* Response to Plaintiffs' Motion to Compel on Behalf [of] Non-Party Court Judges ("Non-Party Brief") (ECF No. 89) at 3-4. However, this Court can avoid all such pitfalls by entering an order pursuant to the All Writs Act, 28 U.S.C. § 1651, that requires these judges to do nothing more than exercise the discretion vested in them under state law to determine if any interests outweigh the substantial interests cited by this Court in favoring the production of the transcripts.

Comity, in other words, is a two-way street. The Court's order enumerates numerous reasons why Plaintiffs have a right to examine, and why the Court has a need to consider, these transcripts. Therefore, as a matter of comity, the non-party judges should rule upon the motions pending before them, rather than ignore them. These judges could have already issued notices in all of those cases giving the parties ten days to show cause why transcript orders should not be issued, and then signed transcript orders in each case unless a party made a showing sufficient to outweigh the compelling interests set forth in this Court's order.[4] Given that the non-party judges have not undertaken any such efforts, this Court has the authority to direct them to do so.

2. <u>The New Option Available to the Non-Party Judges and Judge Davis</u>

Plaintiffs recently started receiving transcripts in Judge Davis's 48-hour hearings. Four of those transcripts reveal that *other* judges presided over those hearings and issued

[4] In their brief, the non-party judges stat that they should not be directed by a federal court "to sign [transcript] orders without hearing or notice to any party and without the opportunity to exercise any judicial discretion." *See* Non-Party Brief at 6. Nothing prevents the judges from providing notice and exercising discretion in all of these cases.

temporary custody orders, after which each case was returned to Judge Davis. When Plaintiffs inquired about this, Mr. Oviatt explained that an informal process exists in the Seventh Judicial Circuit whereby a judge may assign tasks to other judges in abuse and neglect cases, including authorizing these other judges to enter orders. *See* Pevar Aff't at ¶ 2.

At the time Plaintiffs filed their opening brief, they were unaware of this informal process. It now seems clear that by utilizing this process, the current impasse can be circumvented. This Court can direct the non-party judges to make a choice (and to do so with all deliberate speed): either decide the merits of the motions themselves or assign Judge Davis to decide those motions. Once assigned, Judge Davis would then exercise his discretion under state law and issue transcript orders in the same manner as he has already issued orders in his own cases. Judge Davis should be expected to take all reasonable measures to effectuate this process. *See United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 736 (8th Cir. 2001).

3. <u>The New Option Regarding the Court Reporters</u>

Plaintiffs advised in their opening brief that this Court has the authority under the All Writs Act to order the various court reporters to produce all of the identified transcripts. While that remains an option, another option has presented itself. If the Court wishes, Plaintiffs can serve a Rule 45 subpoena on the court reporters (in the same fashion as the judges were subpoenaed). True, a state law prevents these reporters from producing the transcripts without an order from the presiding judge. However, as discussed earlier, it is also true that state laws cannot, consistent with the Supremacy Clause, be allowed to frustrate the implementation of, or the exercise of, a federal right.

Therefore, if this is the option the Court selects, Plaintiffs will immediately serve Rule 45 subpoenas on all the court reporters seeking production of all the transcripts at issue.

CONCLUSION

"Federal courts are not reduced to [issuing orders] and hoping for compliance. Once entered, that [order] may be enforced." *Frew v. Hawkins*, 540 U.S. 431, 432 (2004). The discovery order issued by this Court on January 28, 2014 remains largely dormant due to the refusal of state officials to take reasonable steps to implement it. The Court has several options to overcome this resistance.

Respectfully submitted this 4th day of April, 2014.

By: /s/ Stephen L. Pevar
Stephen L. Pevar
Dana L. Hanna
Rachel E. Goodman

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2014, I electronically filed the foregoing Reply Briefn with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel for Defendants, and that I sent by electronic mail a copy of this brief to counsel for the five judges, Robert Anderson, listed below:

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	noviatt@goodsellquinn.com
J. Crisman Palmer	cpalmer@gpnalaw.com
Robert B. Anderson	rba@magt.com

/s/ Stephen L. Pevar
Stephen L. Pevar