Appeal No. 17-1137
(Consolidated with Appeals 17-1135 and 17-1136)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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 – Appellees,

v.

LISA FLEMING and **LYNNE A. VALENTI,**
in their official capacities.

Defendants – Appellants.

On Appeal from the United States District Court
District of South Dakota – Western Division
The Honorable Jeffrey L. Viken

BRIEF OF APPELLANTS LISA FLEMING AND LYNNE A. VALENTI

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SUMMARY OF THE CASE

The Plaintiffs initiated a 42 U.S.C. §1983 claim against the Defendants, in their official capacities, seeking declaratory and prospective injunctive relief regarding the emergency temporary custody process in the Seventh Judicial Circuit, Pennington County, South Dakota. The District Court granted the Plaintiffs' motion for summary judgment determining that the emergency temporary custody process, involving Indian children as defined by the Indian Child Welfare Act, violated Due Process and the Indian Child Welfare Act. As a result, the Court issued a Declaratory Judgment ruling and a Permanent Injunction against Ms. Fleming and Ms. Valenti, in their official capacities.

Ms. Fleming and Ms. Valenti respectfully request the Court of Appeals allow a minimum of twenty minutes of oral argument for each side.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendants Lisa Fleming and Lynne A. Valenti state they are not a nongovernmental corporation.

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JURISDICTIONAL STATEMENT

The Plaintiffs brought this action under the Fourteenth Amendment to the Constitution and the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 et seq. (ICWA), seeking declaratory and injunctive relief under 42 U.S.C. § 1983. The District Court had jurisdiction[1] pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

On January 28, 2014, the District Court entered an Order Denying Motions to Dismiss by the Defendants. [Add. 1; Appx. 040 – 082]. On March 30, 2015, the District Court entered an Order granting the Plaintiffs' motion for partial summary judgment on liability. [Add. 3; Appx. 247 – 291]. On December 15, 2016, the District Court entered an Order on the interpretation of 25 U.S.C. § 1922 [Add. 5; Appx. 314 – 320], an Order setting out the basis for its Declaratory Judgment and Permanent Injunction [Add. 6; Appx. 321 – 347], a Declaratory Judgment [Add. 7; Appx. 348 – 355], and a Permanent Injunction [Add. 8; Appx. 356 – 363].

Ms. Fleming and Ms. Valenti filed a timely appeal on January 13, 2017. [Docket 312]. This Court's jurisdiction is based on 28 U.S.C. §§ 1291 and 1292(a)(1).

[1] Ms. Fleming and Ms. Valenti do challenge subject matter jurisdiction of the Federal Courts under the Eleventh Amendment and address that issue in the body of the brief.

STATEMENT OF ISSUES

1. **Do the Claims of the Plaintiffs Regarding the Emergency Temporary Custody Process, When There is Imminent Risk and Danger to a Child's Health, Safety, and Welfare, Implicate Special Sovereignty Interests of the State Thereby Foreclosing the *Ex Parte Young* Exception to Eleventh Amendment Immunity?**

   Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997); *Manzano v. S.D. Dep't of Soc. Servs.*, 60 F.3d 505 (8th Cir. 1995); *Whisman v. Rinehart*, 119 F.3d 1303 (8th Cir. 1997); *Ex Parte Young*, 209 U.S. 123 (1908).

2. **Due to the Fact That Neither the Plaintiffs nor the District Court Identified a State Policy or Custom, for Which Fleming and Valenti Are Responsible, That Caused a Constitutional Violation, Did The District Court Err in Granting Partial Summary Judgment on Plaintiffs' 42 U.S.C. §1983 Claim and Entry of All Subsequent Orders?**

   Kentucky v. Graham, 473 U.S. 159 (1985); *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Clay v. Conlee*, 815 F.2d 1164 (8th Cir. 1987); *Hafer v. Melo*, 502 U.S. 21 (1991).

3. **Due to the Fact That Ms. Fleming and Ms. Valenti are State Officials Sued in Their Official Capacities, Did the District Court Err in Granting Partial Summary Judgment When it Determined That They Were Policymakers and That as Policymakers, Their Alleged Acquiescence to the Presiding Circuit Court Judge's Alleged Policies, Practices, and Customs Made Them Liable?**

   Will v. Michigan Department of State Police, 491 U.S. 58 (1989); *Crawford v. Van Buren County*, 678 F.3d 666 (8th Cir. 2012); *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989); *Clay v. Conlee*, 815 F.2d 1164 (8th Cir. 1987).

4. Due to the Fact That Neither the Plaintiffs nor the District Court Identified a State Policy or Custom, for Which Fleming and Valenti Are Responsible, That Caused a Constitutional Violation, Did the District Court Violate *Ex Parte Young* When No Violation Was Identified That Would be a Continuing Violation Thereby Foreclosing Issuance of a Declaratory Judgment and Permanent Injunction?

Ford Motor Co., v. Dept. of Treasury, 323 U.S. 459 (1945); *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 362 F.3d 512 (8th Cir. 2004); *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034 (8th Cir. 2002); *Ex Parte Young*, 209 U.S. 123 (1908).

STATEMENT OF THE CASE

A. Background of A & N Process in South Dakota.

In South Dakota, the A & N process involves three phases: the emergency removal, the adjudication phase, and the dispositional phase. These phases involve a series of hearings. The A & N process begins when a child is taken into emergency protective custody by law enforcement. SDCL 26-7A-14. This can be accomplished without prior court approval, pursuant to SDCL 26-7A-12, or with prior court approval by a circuit court judge or an authorized intake officer, who may approve the child's out-of-home placement and issue a temporary custody directive, pursuant to SDCL 26-7A-13. Within approximately 48 hours, a 48-hour or temporary custody hearing is held. SDCL 26-7A-14. This is an informal proceeding to determine whether temporary custody should be continued. Although it is an informal hearing, attempts are made to notify the parents and the tribe, if an Indian child is involved, of the time and place for the hearing. SDCL 26-7A-15.

The next hearing is an advisory hearing which informs all interested parties (parents/child/Indian custodian) of their rights, including the right to court appointed counsel, confront and cross-examine witnesses, and remain silent. SDCL 26-7A-54. It is at this point that the parties are advised of the allegations of abuse and neglect in the petition, the applicable burden of proof, and the respective

statutory and constitutional rights of the parties. *Id.* Neither of these initial hearings is conducted according to the South Dakota Rules of Civil Procedure, or the Rules of Evidence. SDCL 26-7A-34.

Then, the second phase begins with scheduling the adjudicatory hearing, which is usually held 30 days after the 48-hour hearing, but never longer than 90 days, except in exceptional circumstances. The adjudicatory hearing determines by clear and convincing evidence whether the child was an abused or neglected child as defined in SDCL 26-8A-2. The adjudicatory hearing is a full evidentiary hearing which follows the rules of evidence and procedure. SDCL 26-7A-56; 26-7A-83. After an adjudication, the parties may petition for an intermediate appeal to the South Dakota Supreme Court. SDCL 26-7A-87. Review hearings are held approximately every 45 days after an adjudication to monitor the necessity for continued custody.

Last comes the dispositional phase and a final dispositional hearing is scheduled for not more than twelve months after the child was taken into custody. SDCL 26-7A-90. At this hearing the court determines whether or not to terminate parental rights and the child's permanent placement goal (reunification, permanent foster care, guardianship, adoption). After a final dispositional order is entered the parties may appeal both the adjudication and final dispositional orders to the South Dakota Supreme Court.

B. The Emergency Custody Process and Department of Social Services Involvement[2].

In most emergency custody situations, law enforcement takes temporary custody of children without a court order. SDCL 26-7A-12. DSS does not have the legal authority to remove children from their homes, except in cases involving protective supervision as stated in SDCL 26-8A-22(1) and SDCL 26-8A-26(1). In some instances, law enforcement, prior to taking custody, may also contact DSS to respond when law enforcement is contemplating taking custody so that DSS can help assess the present danger of the child and assist in making a determination concerning law enforcement taking custody or not.

At the point of initial contact, a Family Services Specialist (FSS) attempts to immediately assess any indication of present danger and if identified, attempts to develop and implement a Present Danger Plan. In present danger, the dangerous situation is in the process of occurring which means it might have just happened, is happening, it happens all the time, or the conditions are so out of control it could happen at any time. Present danger exists as an immediate, significant, and clearly observable family condition, child condition, individual behavior or action or family circumstance which is in the process of occurring and which obviously endangers or threatens to endanger a child and requires immediate action to protect. When possible and appropriate, law enforcement and DSS may

[2] Appx. 161 – 168, ¶¶12-57.

determine that a Present Danger Plan can be implemented in lieu of taking custody. DSS uses a South Dakota Present Danger Decision Making Tool to assess present danger. (Appx. 195 – 199).

If law enforcement and/or DSS determine present danger exists, and a Present Danger Plan cannot be implemented to manage the present danger, law enforcement removes the child from the present danger environment and takes temporary custody of the child. Law enforcement then places the child in temporary emergency custody with DSS. When law enforcement has taken custody of a child, custody is transferred to DSS and a judge is contacted for approval of an out of home placement. Pursuant to SDCL 26-7A-15, when law enforcement takes temporary custody, notification to the parent, guardian, or custodian is given by law enforcement. See also, SDCL 26-7A-15.2. (Appx. 200 – 201).

When law enforcement transfers custody of the child to DSS, the FSS contacts a judge by email or by cell phone and advises of the facts regarding removal and requests approval for out of home placement. See, SDCL 26-7A-13.1. In those cases where an Indian child is taken into emergency custody in Pennington County, counsel for the Rosebud Tribe, Cheyenne River Sioux Tribe and Oglala Sioux Tribe and the ICWA Director for each of these tribes is provided notification by email.

When children are taken into custody, DSS first attempts to determine if there is family available for kinship placement where the child can be safe. This is accomplished through discussion with the parent(s), asking the child(ren) if age appropriate, searching the DSS data base for relative information and other means in the desire to accomplish a kinship placement. DSS utilizes Kinship Locator services to identify placement resources; utilizes enrollment offices to confirm tribal affiliation and inquire into extended family; and utilizes ICWA Directors or Designated Tribal Agents to assist in kinship placement. DSS attempts to place siblings together; attempts to place children in a home where the children can remain close to their family, community, and school; considers cultural considerations; and attempts to place children within the ICWA placement preferences.

Pursuant to SDCL 26-7A-14, a 48-hour hearing must be held in all temporary custody placements. See also, SDCL 26-7A-18. In preparation for the 48-hour hearing, the FSS obtains what information he/she can pertaining to the need for emergency temporary custody prior to the 48-hour hearing. The information is included an Affidavit of the Department and ICWA Affidavit. (Appx. 219 – 221; Appx. 098 – 100).

Of note is the portion of the Affidavit of the Department which provides:

> The Department of Social Services reasonably believes that the temporary custody of the child is warranted because there 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 have been necessary for the protection of the child; thus the Department requests that this Court continue emergency temporary custody of the minor child with the Department of Social Services, and a hearing to be held as soon as possible.

(Appx. 219 – 221).

The hearing is then held consistent with the process as outlined in *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62. If temporary custody is continued, the Judge issues a Temporary Custody Order. (Appx. 238 – 239).

One section of the Temporary Custody Order provides:

> The Department of Social Services is hereby authorized to return full legal and physical 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 imminent child protection issues remain and that temporary custody of the child(ren) is no longer necessary*. [Emphasis supplied].

(Appx. 238 – 239).

To determine whether imminent child protection issues remain, DSS undertakes a process of evaluating whether impending danger exists through the preparation of an Initial Family Assessment (IFA). The FSS gathers information from family members and other appropriate collaterals to assess the family's functioning as a whole. The FSS determines whether there is impending danger for the child, and if so, whether child safety can be managed through an in-home Safety Plan or not. If a Safety Plan can be implemented with the parent, the child

is returned home. If not, the child remains in care until DSS can manage the child's safety in the home.

At the end of the IFA, if no impending danger is identified, then the child is returned to custody of the parent(s) aka reunification. If through the process, an impending danger is identified, then it is determined whether a Safety Plan can be formulated to manage the impending danger. If so, then the child may be returned to the parent(s) with court approval. In other words, so long as an impending danger exists, legal custody remains with DSS. Once the impending danger no longer exists or is alleviated through various means, legal custody is returned to the parent(s).

C. *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62.

On October 10, 2012, the South Dakota Supreme Court issued a decision in *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62. The Cheyenne River Sioux Tribe (Tribe) initiated original proceeding in the Supreme Court for a writ of mandamus or prohibition against the Honorable Jeff W. Davis, then the Presiding Judge of the Seventh Circuit. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶1, 822 N.W.2d at 63.

Three unattended Native American minor children were taken into custody by the Rapid City Police Department in the early morning hours of July 6, 2012. The oldest of the three children was found intoxicated and suffering from seizures

and was hospitalized. The two younger children were placed into foster care. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶ 2, 822 N.W.2d at 63. After the children were taken into custody, a specialist with the South Dakota Department of Social Services (DSS) notified the Tribe as to the custody of the children.

The State of South Dakota filed a petition for temporary custody and a 48-hour temporary custody hearing was held before Judge Davis at approximately 1:30 p.m. on July 9, 2012, pursuant to SDCL 26-7A-15[3]. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶ 3, 822 N.W.2d at 63. The mother of the children appeared at the temporary custody hearing and requested appointment of counsel. The Tribe appeared with counsel[4] and was permitted to intervene pursuant to the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963. Based upon the State's petition, the police report and an ICWA affidavit from the DSS Specialist, the judge granted temporary custody of the children to DSS for 60 days. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶4, 822 N.W.2d at 63.

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[3] SDCL 26–7A–15 requires a temporary custody hearing when a child is taken into temporary custody. The hearing must be held within forty-eight hours if the child is an apparent abused or neglected child. *Id.* "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." SDCL 26–7A–18. Temporary custody must be reviewed every sixty days. SDCL 26–7A–19(2). *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, n. 2. 822 N.W.2d 62.

[4] The Tribe's counsel was Mr. Dana Hanna, who is co-counsel in this matter.

At the 48-hour hearing, the Tribe contested the temporary custody order and sought to address the facts of the case and to present evidence by citing ICWA. The Judge denied the Tribe's efforts on the basis that it was a 48-hour hearing and the mother did not yet have representation. The Judge indicated a willingness to revisit the situation later that day or when counsel for mother was available and noted that DSS had authority to return the children at anytime if the situation was remedied or if continued custody was not warranted. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶4, 822 N.W.2d at 63.

Within a week of the 48-hour temporary custody hearing, the case was reassigned from Judge Davis to Judge Thorstenson. At the time of a July 16, 2012, hearing, the Judge was advised that one of the children had been returned to her father, who was her legal guardian. Also at the hearing, issues were being addressed as to the transfer of the two remaining children to Tribal Court. Ultimately, the Judge approved the transfer of the youngest child to Tribal Court, however, continued the matter as to the oldest child. At this point in proceedings, the case was still in the emergency temporary custody timeframe. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶6, 822 N.W.2d at 64.

Another hearing was held on July 23, 2012. The Judge advised that the purpose was to consider a continued request to transfer the oldest child's case to Tribal Court. The Tribe's counsel advised that the Tribe would object to the

transfer because of the absence of a plan for the child. The oldest child's court appointed counsel indicated there would be no objection to a transfer in hope for a placement with an aunt living on the Reservation. The Tribe's counsel once again raised the issue of alleged lack of compliance with ICWA placement preference. At that point, the Judge advised the proceedings were a continuation of the emergency hearing, and that ICWA placement preferences were not yet applicable. However, the Judge did instruct DSS to look into temporary placement with the child's aunt. This was the posture of the proceedings at the time the Tribe filed its writ application with the South Dakota Supreme Court on August 9, 2012. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶7, 822 N.W.2d at 64.

Before the State Supreme Court, the Tribe continued to request a new temporary custody hearing in which the full panoply of ICWA requirements and standards would be applied. The Tribe contended that the lack of such a hearing violated its federal and state rights and that it was irreparably harmed by the lack of any mechanism to contest the trial court's failure to fully follow ICWA at the temporary custody stage. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶8, 822 N.W.2d at 64.

In reviewing pertinent authorities, the State Supreme Court noted that at least five different states have considered and rejected the argument that ICWA fully applies at the stage of a temporary or emergency custody proceeding.

Cheyenne River Sioux Tribe, 2012 S.D. 69, ¶9, 822 N.W.2d at 64. (Citations omitted). While the precise reasoning of five different courts varied with the facts each case and with the individual state's procedure, each decision ultimately rested upon §1922 of ICWA which provides in pertinent part:

> 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. [Emphasis supplied by the Court].

Cheyenne River Sioux Tribe, 2012 S.D. 69, ¶10, 822 N.W.2d at 65; 25 U.S.C. §1922.

The State Supreme Court noted that notwithstanding the "temporarily located" language in §1922, four state courts have specifically recognized §1922's applicability to *all* Indian children. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶10, 822 N.W.2d at 65. (Citations omitted). The Court then determined, based upon §1922, and ICWA's inapplicability to temporary emergency custody proceedings under state law, that both Judge Davis and Judge Thorstenson appropriately rejected the Tribe's implication of ICWA and requests for a new temporary custody hearing conducted in full accord with ICWA. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶10, 822 N.W.2d at 65.

In the writ application, another issue asserted by the Tribe was an alleged violation of state law in the temporary custody hearing process based upon an alleged lack of evidence of a need for temporary custody pursuant to SDCL 26-7A-18. The State Supreme Court noted that the Tribe ignored that the temporary custody hearing proceeded on the State's petition for temporary custody and accompanying police report, and ICWA affidavit from a DSS Specialist. The State Supreme Court recognized that the police report and affidavit set forth facts concerning the need for temporary custody. The Court recognized that while these documents may not constitute evidence within the normal bounds of the Rules of Evidence, those rules are not applicable at a temporary custody hearing, citing SDCL 26-7A-34 and SDCL 26-7A-56. Therefore, the Court determined that the police report and affidavit provided sufficient evidence for temporary custody to permit the Circuit Court Judges to proceed as they did in the matter. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶12, 822 N.W.2d at 65-66.

Recognizing that the Tribe had not made a showing with regard to the two Circuit Court Judges' duty to follow ICWA at a temporary custody hearing, the application for writ was denied. *Cheyenne River Sioux Tribe*, 2012 S.D. 69, ¶14, 822 N.W.2d at 66.

D. The Lawsuit and Resulting District Court Orders.

Less than seven months after the South Dakota Supreme Court issued its decision in *Cheyenne River Sioux Tribe* the Oglala Sioux Tribe and Rosebud Sioux Tribe, et al. filed a Class Action Complaint for Declaratory and Injunctive Relief, dated March 21, 2013, with the U.S. District Court for the District of South Dakota. (Appx. 001 – 039). The following defendants[5] were named: LuAnn Van Hunnik, the South Dakota Department of Social Services Child Protection Services Region 1 Manager; Mark Vargo, Pennington County State's Attorney; the Honorable Jeff W. Davis, Presiding Judge of the Seventh Judicial Circuit; and Kim Malsam-Rysdon, Secretary of the South Dakota Department of Social Services (Appx. 006 – 007). All of the Defendants were sued in their "official capacities only" and the Plaintiffs alleged that "Each Defendant is a 'policymaker' with respect to the policies challenged in this lawsuit." (Appx. 007).

The 39 page complaint set out various allegations, legal arguments, and claims. One claim, relevant to this appeal, is a due process claim. The essence of the claim is that Judge Davis, as the Presiding Judge, was allegedly a policymaker

[5] Since the Complaint was originally filed, due to new individuals assuming official capacity roles, Lisa Fleming has been substituted as a defendant in her official capacity as DSS CPS Region 1 Manager for LuAnn Van Hunnik; the Honorable Craig Pfeifle has been substituted as a defendant in his official capacity as Presiding Judge of the Seventh Judicial Circuit for Judge Davis; and Lynne A. Valenti has been substituted as a defendant in her official capacity as Secretary of DSS for Kim Malsam-Rysdon.

whose policies, practices, and customs deprived the Plaintiffs of due process. The Plaintiffs further claimed that the other Defendants also were policymakers, and that the other three Defendants ratified and adopted alleged policymaker Judge Davis' policies, practices and customs as their own. (Appx. 001 – 039, ¶¶ 47, 49, 51, 62-73). In addition, relevant to this appeal, the Plaintiffs made allegations and claims that the Indian Child Welfare Act was being violated by the Defendants. (Appx. 001 – 039, ¶¶ 74-112). In lieu of filing answers, the Defendants moved to dismiss the complaint.

After briefing by the parties, on January 28, 2014, the District Court entered its Order Denying Motions to Dismiss. (Add. 1; Appx. 040 – 082). The Court described that "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)." (Add. 1, pg. 1; Appx. 040).

The District Court first addressed jurisdictional challenges regarding abstention and denied the motions to dismiss on that basis. (Add. 1, pgs. Appx. 042 – 053). After denying any jurisdictional challenge, the Court then addressed the merits of the motion to dismiss. The first issue addressed by the District Court was whether the Defendants were "policymakers" under 42 U.S.C. §1983. (Add. 1, pgs. 19 – 26; Appx. 058 – 065).

The Court addressed whether Judge Davis was a "policymaker[6]." In addressing whether Judge Davis was a "policymaker," the District Court pointed out the Plaintiffs made it clear that they were not challenging the procedures at 48-hour hearings, which are prescribed by South Dakota statute. Instead, the Plaintiffs claimed that Judge Davis had instituted six of his own policies, practices and customs for 48-hour hearings, which allegedly violate the Due Process Clause and ICWA. These alleged policies, practices and customs were:

- 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 breakup 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.

(Add. 1, pgs. 20 -21; Appx. 059 – 060).

[6] The legal authority used and cited by the District Court on the "policymaker" issue was *Monell v. Dep't of Soc. Serv. of City of New York*, 436 U.S. 658 (1978); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989); *Clay v. Conlee*, 815 F.2d 1164 (8th Cir. 1987); and *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

Accepting the allegations as true, the District Court found that "Judge Davis is a policymaker." (Add. 1, pg. 21; Appx. 060). The District Court then went on to determine whether the Secretary of the South Dakota Department of Social Services and the Child Protection Service Region 1 Manager were policymakers[7].

The District Court pointed to allegations in the Plaintiffs' Complaint, which alleged that DSS had 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; Plaintiffs argue Defendants' failure to train DSS staff accordingly, violates Plaintiffs' due process rights. The Plaintiffs also allege that DSS failed to take appropriate action *during and after* the 48-hour hearing to satisfy their constitutional duty to insure that Indian parents receive an adequate post deprivation hearing. Plaintiffs argued that the DSS Defendants should do everything they reasonably can to insure that the parents receive a meaningful hearing at a meaningful time. (Add. 1, pgs. 21 – 22; Appx. 060 – 061).

The District Court accepted as true, that instead of fulfilling these alleged obligations, the Complaint alleged Fleming and Valenti "had a policy, practice, and custom of ratifying and acquiescing in the policy, practice and custom of Judge Davis to deny Indian parents a meaningful hearing at a meaningful time."

[7] The District Court also found the facts set forth in the Complaint, accepting them as true, supported a finding that State's Attorney Vargo was a policymaker. (Add. 1, pg. 26; Appx. 065).

(Add. 1, pgs. 22 – 23; Appx. 061 – 062). Accepting the allegations as true, the Court went on to find "Ms. [Valenti] and Ms. [Fleming] are policymakers with regard to the allegation made in the complaint." (Add. 1, pg. 24; Appx. 063).

On January 28, 2014, the District Court entered an Order Granting Class Certification. The District Court granted class certification for the purpose of litigating the following issues in this case:

- Whether defendants maintain policies, practices or customs related to the removal of Indian children from their homes without affording them, their parents, custodians, or tribes a timely and adequate hearing in violation of the Fourteenth Amendment's Due Process Clause;

- Whether defendants maintain policies, practices or customs related to the removal of Indian children from their homes without affording them, their parents, custodians or tribes a timely and adequate hearing in violation of the Indian Child Welfare Act; and

- Whether defendants maintain policies, practices or customs which coerce parents or custodians into waiving their rights under the Fourteenth Amendment's Due Process Clause and the Indian Child Welfare Act to such a hearing.

(Add. 2, pgs. 14 – 15; Appx. 096 – 097).

After some discovery, the Plaintiffs moved for partial summary judgment[8] on the issue of Due Process and ICWA §1922. On March 30, 2015, the District

[8] Plaintiffs filed two separate motions for partial summary judgment, Docket 108 & 110. The District Court identified Docket 110 as the "Section 1922 Claims" and Docket 108 as the "Due Process Claims." (Appx. 254 – 255).

Court entered its Order on the motions for partial summary judgment. (Add. 3; Appx. 247 – 291). In the District Court's introduction, the Court stated:

> The court finds that Judge Davis, States Attorney Vargo, Secretary Valenti and Ms. [Fleming] 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.

(Add. 3, pg. 4; Appx. 250).

The Court found that there were 823 Indian children involved in 48-hour hearings in Pennington County, South Dakota, during the years 2010 to 2013. Of those 823 children:

- 87 children were discharged from DSS custody the day of the 48-hour hearing;
- 268 children were discharged from DSS custody within 1 to 15 days after the 48-hour hearing;
- 114 were discharged from DSS custody within 16 to 30 days after the 48-hour hearing;
- 44 children were discharged from DSS custody within 31 to 45 days after the 48-hour hearing;
- 50 children were discharged from DSS custody within 46 to 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.

(Add. 3, pgs. 12 – 13; Appx. 258 – 259).

The Court also, after reviewing the transcripts of 48-hour hearings[9] in which at least one Indian parent or custodian appeared, determined that the transcript did not disclose or mention an ICWA affidavit or petition for temporary custody in 77 out of 78 cases. (Add. 3, pgs. 13 – 14; Appx. 259 – 260).

The Court also addressed the temporary custody orders issued by the Seventh Circuit Judges and referenced Docket 1-7 attached to the Complaint. In citing one section of the temporary custody order, it appears the District Court mistakenly mis-cited the temporary custody order, by omitting the word "imminent" when it cited 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 [sic] protection issues remain and that temporary custody of the child(ren) is no longer necessary.

(Add. 3, pg. 2; Appx. 266; See also, Appx. 238 – 239).

Docket 1-7 actually provides:

> The Department of Social Services is hereby authorized to return full legal and physical 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

[9] In its Order, referencing the Hearing Transcript for File No. 10-1170, the District Court found the DSS worker advised the Circuit Judge they intended to proceed informally with the parent and not file a formal abuse and neglect petition. The Court was mistaken as the individual who advised the circuit judge was a deputy state's attorney. She advised "I expect the [name redacted] matter to start informal. I kind of think that will resolve itself, so that likely will be an informal case." (Appx. 241, lines 16-18).

> Social Services concludes that no further [***imminent***] child protection issues remain and that temporary custody of the child(ren) is no longer necessary.

(Appx. 238 – 239).

The District Court then set forth and began its legal analysis by first addressing the question, "Are Defendants Policy Makers[10]." The District Court pointed out that the Plaintiffs alleged that the Defendants in their official capacities "pursued policies and practices that deprived parents of custody of hundreds of Indian children without providing those parents and children with even rudimentary due process." (Add. 3, pg. 22; Appx. 268). The Court acknowledged that each of the Defendants claim that none of them have "final policymaking authority." *Id*.

The District Court began its analysis citing to essentially the same legal authority it did in the Order Denying Motions to Dismiss and cited to its own reported decision, *Oglala Sioux Tribe v. Van Hunnik*, 993 F.Supp.2d 1017 (D.S.D. 2014). The Court then examined the claims against Judge Davis, and listed the same alleged six Judge Davis initiated polices, practices and customs for 48-hour hearings which allegedly violate the Due Process Clause and ICWA that the Court listed in the Order Denying Motions to Dismiss. The list is:

- Not allowing parents to see the ICWA petition filed against them;

[10] Recall that the Court had already ruled, accepting the allegations in the Complaint as true, that all the Defendants were "policymakers." (Appx. 58 – 65).

- Not allowing the parent to see the affidavits supporting the ICWA 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" they made to prevent the break-up of the family; and
- Failing to take expert testimony that continued custody of the child by the Indian parents or custodian is likely to result in serious emotional or physical damage to the child.

(Add. 3, pg. 24; Appx. 270).

The District Court then determined that Judge Davis' decisions are "final decisions" for purposes of §1983, and he established each of the policies and procedures for conducting 48-hour hearings and Judge Davis was empowered to change them at anytime. (Add. 3, pg. 25; Appx. 271).

As to State's Attorney Vargo, DSS Secretary Valenti and Ms. Fleming, the District Court pointed out that the Plaintiffs asserted that these three defendants "acquiesced" in Judge Davis' policies regarding the manner in which 48-hour hearings were conducted. (Add. 3, pg. 26; Appx. 272). The Court determined that "There is no evidence any of these three defendants or their courtroom representatives, Deputy States Attorneys or case workers sought to change the practices established by Judge Davis." *Id*.

The District Court went on to rule:

> 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 long standing practice' of Judge Davis 'which constitutes the standard operating procedure' of the Seventh Circuit Court, these defendants exposed themselves to liability. [*Jett v. Dallas Independent School District*, 491 U.S. 701,737 (1989)].
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The defendants are policy makers for purposes of 42 U.S.C. §1983. (Add. 3, pgs. 26 – 27; Appx. 272 – 273).

Once the District Court determined that the Defendants were "policymakers," the court addressed the "Section 1922 Claims" and "Due Process Claims." On the Section 1922 Claims, the Court observed that the case focuses on "the obligations of the Indian Child Welfare Act and its interface with South Dakota law." (Add. 3, pg. 27; Appx. 273).

Of note is that when the Court addressed the Section 1922 Claims, it began to characterize the "defendants" collectively. For example, the Court held that "A simple examination of [the DOI Guidelines and SD Guidelines] should have convinced the *defendants that their policies and procedures*[11] were not in conformity with ICWA §1922, the DOI Guidelines or the

[11] These policies and procedures would be the alleged policies and procedures allegedly created by alleged policymaker Judge Davis to which the other alleged policymakers acquiesced to. (Add. 3, pgs. 24 – 27; Appx. 270 – 273).

Guidelines promulgated by the South Dakota Unified Judicial System." [Emphasis added]. (Add. 3, pg. 34; Appx. 280). The Court then went on to address Judge Davis' alleged conduct in handling the 48-hour hearings which apparently the Court felt the other Defendants acquiesced to, which in turn made them liable. (Add. 3, pgs. 34 – 35; Appx. 280 – 281).

The District Court then moved to the "Due Process Claims." (Add. 3, pgs. 36 – 42; Appx. 282 – 288). The Court continued to characterize the "defendants" collectively. The Court noted that the Plaintiffs claim "defendants" have violated the Due Process Clause, allegedly in five areas, since January 1, 2010, as follows:

- 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;
- Defendants have denied parents the opportunity to present evidence in their defense;
- Defendants have denied parents the opportunity to confront and cross-examine adverse witnesses;
- Defendants have failed to provide indigent parents with the opportunity to be represented by appointed counsel; and
- 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.

(Add. 3, pg. 36; Appx. 282).

The District Court then analyzed the due process claims. (Add. 3, pgs. 36 – 42; Appx. 282 – 288). The Court then held:

- 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 decision which were not provided to the parents and which were not received into evidence at the 48-hour hearings.

(Add. 3, pg. 42; Appx. 288). [Emphasis supplied].

After the District Court issued its Order on Plaintiffs' Motion for Partial Summary Judgment, Ms. Fleming and Ms. Valenti requested the Court to reconsider its ruling on various issues involving DSS. The first request pertained to an error concerning the preparation of the petition for temporary custody. The District Court corrected this error. (Add. 4, pg. 6; Appx. 297).

Another issue addressed was the ICWA affidavit and hearing transcript issue. The District Court acknowledged DSS's practice, prior to June 2012, was to provide a copy of the ICWA affidavit to parents who attended the 48-hour hearing. The Court also acknowledged the existence of DSS's written policy since 2012, to provide the ICWA affidavit to parents attending the hearing. (Add. 3, pg. 13; Appx. 259). Ms. Fleming and Ms. Valenti pointed out that no affidavits were

provided by anyone indicating that ICWA affidavits *were not* provided to the parents by a DSS representative. It was the position of Ms. Fleming and Ms. Valenti that there was no competent evidence in the summary judgment materials reviewed that parents did not receive the ICWA affidavits. The only evidence cited by the District Court was the lack of reference in the 48-hour hearing transcripts referencing that the parents actually received the ICWA affidavit and comments in the hearing transcripts, which allegedly were not contradicted. The Court denied the request on this issue indicating "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." (Add. 4, pgs. 8 – 9; Appx. 299 – 300).

Ms. Fleming and Valenti also brought forth to the District Court's attention issues pertaining to the 48-hour hearing and it being an evidentiary hearing. Ms. Fleming and Ms. Valenti pointed out that the South Dakota Supreme Court in *Cheyenne River Sioux Tribe v. Davis*, 212 S.D. 69, 822 N.W.2d 62, held that the police reports and affidavit provided sufficient evidence of a need for temporary custody to permit the trial courts to proceed. *Cheyenne River Sioux Tribe*, 212 S.D. 69, ¶12, 822 N.W.2d 62. The importance of this was in relation to the Court's findings concerning Judge Davis' authority in conducting 48-hour hearings as a policymaker. The point being, that there was no policy of Judge Davis for Ms.

Fleming and Ms. Valenti to challenge because the procedure at a 48-hour hearing had been expressed and approved by the South Dakota Supreme Court in *Cheyenne River Sioux Tribe*. The Court denied the motion on this issue. (Add. 4, pgs. 9 – 10; Appx. 300 – 301).

Other issues were brought to the District Court's attention for reconsideration to include: the failure of the Plaintiffs or Court to identify any "official policy" or any "governmental custom"; the lack of analysis or legal reference to relevant legal materials, including state and local law, as well as "custom" and "usage" having the force of law, that must be considered by the Court while identifying "those officials or governmental bodies who speak with final policymaking authority" alleged to have caused the particular Constitutional or statutory violation at issue; the "acquiescence" determination made by the Court; and the failure of the Court to point out or address what alleged policies, alleged customs, or alleged conduct of Ms. Fleming and Ms. Valenti, in their official capacities, caused them to be liable for any alleged due process violations. The District Court rejected the challenges to its legal conclusions. (Appx. 302 – 313).

On December 15, 2016, the District Court entered an Order following an August 17, 2016 "remedies hearing." (Add. 6; Appx. 321 - 347). Following the

entry of this Order, the Court entered a Declaratory Judgment (Add. 7; Appx. 348 – 345) and Permanent Injunction (Add. 8; Appx. 356 – 363).

In the December 15, 2017, Order, the Court continued to refer to the Defendants collectively as "defendants." The Court did not point to or identify any unconstitutional governmental policy or custom of the State of South Dakota that Ms. Fleming and/or Ms. Valenti were responsible for in their "official capacities." Instead, it is apparent that the Court continued its erroneous determination that Ms. Fleming and Ms. Valenti as alleged "policymakers" acquiesced or ratified the policies of alleged policymaker Presiding Judge Davis. In addition to not identifying any unconstitutional governmental policy or custom of the State, the Court did not identify any unconstitutional governmental policy or custom of the State that was ongoing and violated federal law. In spite of this failure, the District Court issued a Permanent Injunction against Ms. Fleming and Ms. Valenti. (Add. 8, pgs. 1 – 8; Appx. 356 – 363).

SUMMARY OF THE ARGUMENT

Ms. Fleming and Ms. Valenti urge the Court of Appeals to consider whether federal subject matter jurisdiction exists in this case. The case centers on the emergency custody process applicable to all children – Indian and non-Indian – when children are facing imminent threat to their health, safety, and welfare due to the commissions or omissions of their parents. The State has a strong interest in

the welfare of all children in the state, and the relief sought in this case implicates those special sovereignty interests.

Under normal circumstances, the State officials would have Eleventh Amendment immunity because the claims are against Ms. Fleming and Ms. Valenti in their official capacities, which are really claims against the State of South Dakota. But due to the existence of the *Ex Parte Young* fiction, the Eleventh Amendment defense is allegedly avoided because declaratory and prospective equitable relief is sought. Yet it is believed that *Ex Parte Young* should not be invoked, and the Eleventh Amendment immunity avoided, because to do so will "implicate special sovereignty interests" of the State of South Dakota. See, *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Those "special sovereignty interests" being the State of South Dakota's obligation and need to protect all children from imminent harm to their health, safety, and welfare.

42 U.S.C. §1983 provides a remedy if a plaintiff has been deprived of a statutory or constitutional right under color of state law. To do so in a official capacity suit, a governmental entity [the State] must have an official policy or custom that deprives one of such rights, and such official policy or custom must cause or be the moving force behind the alleged deprivation. No such official policy or custom, for which Ms. Fleming or Ms. Valenti is responsible for, exists

in the facts, evidence, or the record. If such does not exist, such cannot be the cause or moving force of the alleged deprivation.

The Plaintiffs recognized no official policy or custom existed, so they alleged that Ms. Fleming and Ms. Valenti were policymakers under *Monell v. Dep't of Soc. Serv. of City of New York*, 436 U.S. 658 (1978). No evidence was presented to support such a conclusion. Further, the District Court did not undertake any analysis as to whether Ms. Fleming and/or Ms. Valenti were policymakers under state law. Instead, the Court agreed twice with the Plaintiffs and concluded Ms. Fleming and Ms. Valenti, state officials sued in their official capacities, were policymakers. The same assertion was made by the Plaintiffs as to Seventh Circuit Presiding Judge Davis and Mr. Vargo, and the District Court concluded they were also policymakers, without any analysis of state law on the subject.

By labeling Judge Davis as a policymaker, this allowed the Plaintiffs to assert, and convince the District Court, that Judge Davis was policymaker who had established and formulated policies, practices and customs pertaining to the temporary emergency custody process involving Indian children. By the District Court labeling Ms. Fleming and Ms. Valenti and Judge Davis as policymakers, that allowed the Plaintiffs to assert, and convince the District Court, that Ms. Fleming and Ms. Valenti had acquiesced or ratified Judge Davis' alleged policies, practices,

and customs. The District Court concluded that such acquiescence made Ms. Fleming and Ms. Valenti liable. The District Court came to this erroneous conclusion solely based upon one case - *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994). A case decided based upon, *Monell v. Dep't of Soc. Serv. of City of New York*, 436 U.S. 658 (1978), in which Mr. Coleman alleged that the City of Little Rock's Chief of Police, as an alleged policymaker, had "adopted" a City Judge's general order. When the Chief did so, it was "alleged" that the conduct of the Chief of Police, as a policymaker, made the City Judge's general order an official policy of the City. The District Court's decision, based upon *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994), to grant summary judgment against Ms. Fleming and Ms. Valenti was in error.

The liability decision against Ms. Fleming and Ms. Valenti was at the core of all orders and edicts issued by the District Court thereafter. Neither the Court, nor the Plaintiffs pointed to any policies or customs of Ms. Fleming or Ms. Valenti causing a constitutional deprivation, and did not show any continuing constitutional or statutory violations causing a deprivation of rights. Thus, there was no legal or justifiable basis for issuance of the Declaratory Judgment or Permanent Injunction against Ms. Fleming or Ms. Valenti.

ARGUMENT

1. The Claims of the Plaintiffs Regarding the Emergency Temporary Custody Process, When There is Imminent Risk and Danger to a Child's Health, Safety, and Welfare, Implicate Special Sovereignty Interests of the State Thereby Foreclosing the *Ex Parte Young* Exception to Eleventh Amendment Immunity.

a. Standard of Review

Ms. Fleming and Ms. Valenti asserted the Eleventh Amendment as a defense in their Answer and Amended Answer. The District Court did not have occasion to address the issue.

The Eleventh Amendment is regarded as going to subject matter jurisdiction. Either the Court or any party may raise an issue of subject matter jurisdiction at anytime. *Fromm v. Commission of Veteran Affairs*, 220 F.3d 887, 890 (8th Cir. 2000).

b. Argument

The South Dakota Supreme Court has recognized:

> The State, as parens patriae must take a strong interest in the welfare of every child within its parameters. It must be remembered that children are not merely chattels; they have rights as sacred and secure in the law as those of their parents. The mere fact of parentage does not give one a license to abuse children either by omission or commission.

Matter of L.M.T., 305 N.W.2d 399, 402 – 403 (SD 1981).

Parents have a liberty interest "in the care, custody, and management of their children." *Manzano v. S.D. Dep't of Soc. Servs.,* 60 F.3d 505, 509 (8th Cir. 1995).

Parents and children have a constitutionally protected liberty interest in the care and companionship of each other. *Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. 1997). This Court has noted however, "the liberty interest in familial relations is limited by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." *Manzano v. S.D. Dep't of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995). In cases in which continued parental custody poses an imminent threat to the child's health or welfare, emergency removal of children without a court order is constitutionally permitted. *K.D. v. County of Crow Wing*, 434 F.3d 1051, 1056 (8th Cir. 2006).

In South Dakota, a child facing an imminent threat to the child's health or welfare can be taken into emergency protective custody by law enforcement. SDCL 26-7A-14. This can be accomplished without prior court approval, pursuant to SDCL 26-7A-12, or with prior court approval by a Circuit Court Judge or an authorized intake officer, who may approve the child's out-of-home placement and issue a temporary custody directive, pursuant to SDCL 26-7A-13. Within approximately 48 hours, a 48-hour or temporary custody hearing is held. SDCL 26-7A-14. This is an informal proceeding to determine whether temporary custody should be continued. Although it is an informal hearing, attempts are made to

notify the parents and the tribe, if an Indian child is involved, of the time and place for the hearing. SDCL 26-7A-15.

With the aforementioned as the backdrop, Ms. Fleming and Ms. Valenti assert that the Eleventh Amendment applies to the Plaintiffs' claims and the *Ex Parte Young* doctrine does not apply because the equitable relief sought in this case[12] "implicates special sovereignty interests" of the State of South Dakota. See, *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). The special sovereignty interest of the State of South Dakota implicated, is the protection of children from imminent harm to their health, safety, and welfare.

A fundamental aspect of the United States Constitution is its federal structure; it recognizes that the national government is constituted of individual states which retained a "residual and inviolable sovereignty." *Alden v. Maine*, 527 U.S. 706, 713 – 14 (1997). An essential attribute of sovereignty is the immunity from being sued without consent. *Alden*, 527 U.S. at 715 – 16.

The Eleventh Amendment has long been recognized to reflect more than the literal meaning of its text. *Hans v. Louisiana*, 134 U.S. 1, 18 (1890). Instead, it reflects the underlying notion that our government is comprised of dual sovereigns,

[12] It is important to reiterate that this case before the Court is not an adjudication of abuse and neglect regarding Indian children, not a foster care placement of Indian children, not a termination of parental rights to Indian children, and not an adoption of Indian children. It is a case concerning emergency temporary custody of Indian children under state law.

state and federal, and that states entered the union with their inherent sovereignty intact. *Federal Maritime Comm'n v. SCPA*, 535 U.S. 743, 751 (2002). Ultimately, the Eleventh Amendment stands "not so much for what it says, but for the presupposition of our constitutional structure which it confirms." *Id*. at 753.

The United States Supreme Court in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), recognized that while the *Ex Parte Young* doctrine serves an important purpose, it is "an obvious fiction" and its application is necessarily limited by the sovereignty of states and the resulting protections they are entitled to under the federal system. As a result, application of the fiction must be based on "a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997).

While the decision in *Coeur d'Alene Tribe* was fractured as to both result and rationale, the majority agreed on two crucial points. First, applying *Ex Parte Young* in every case that seeks prospective injunctive relief "would be to adhere to an empty formalism" and application of the fiction must instead "reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflective reliance on an obvious fiction." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997). Second, exercising jurisdiction over an action to declare that the State of Idaho did not have title to certain submerged lands and to enjoin it

from regulating those lands upset the federalist balance by invading an area historically recognized as a key incident of state sovereignty. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 284, 287 (1997).

The key incident of state sovereignty in the case at bar is the State of South Dakota's strong interest in the welfare of every child within the State of South Dakota. When imminent threat to a child's health or welfare exists, emergency removal of children without a court order allows the State to carryout its special sovereignty interest for the protection of all children.

Congress recognized the states' special sovereignty interest in protecting children, in the adoption of the Indian Child Welfare Act when there exists imminent threat to any child's health or welfare. Congress did this by the adoption of 25 U.S.C. §1922. 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.

The South Dakota Supreme Court in *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62, along with five other states, recognized that §1922 applies to *all* Indian children. *Cheyenne River Sioux Tribe*, 822 N.W.2d at 65. This means that whether an Indian child is residing off the reservation or residing on the reservation and temporarily located off the reservation, §1922 recognizes the states' special sovereignty interest of all children to be protected from imminent threats to a child's health and welfare by recognizing and authorizing emergency temporary custody and placement of endangered children under state law. These children would include Indian children who are domiciled off the reservation or domiciled on the reservation but are temporarily off the reservation.

The Bureau of Indian Affairs (BIA) also recognized the states' special sovereignty interest over all Indian children whose health and welfare were potentially subjected to imminent threat of harm. The BIA did this by acknowledging in the ICWA BIA Guidelines that such emergency temporary custody could be for more than a few days or even a few weeks. Specifically, the BIA Guidelines state "Absent extraordinary circumstance, temporary emergency custody shall not be continued for more than 90 days without a determination by the court, supported by clear and convincing evidence and the testimony of at least one qualified expert, that custody of the child by the parent or Indian custodian is

likely to result in serious emotional or physical damage to the child." (App. 369 – 370).

2. Neither the Plaintiffs nor the District Court Identified a State Policy or Custom, for Which Fleming and Valenti Are Responsible, That Caused a Constitutional Violation. As a Result the District Court Erred in Granting Partial Summary Judgment on Plaintiffs' 42 U.S.C. §1983 Claim and Entry of All Subsequent Orders.

a. Standard of Review

This Court reviews de novo a grant of summary judgment, viewing the record most favorably to the nonmoving party and drawing all reasonable inferences for that party." *Munroe v. Cont'l W. Ins. Co*., 735 F.3d 783, 786 (8th Cir. 2013), citing *Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir. 2011).

b. Personal v. Official Capacity Suits

In *Kentucky v. Graham*, 473 U.S. 159 (1985), the United States Supreme Court sought to eliminate lingering confusion about the distinction between personal and official capacity suits. The Court emphasized that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Suits against state officials in their official capacity therefore should be treated as suits against the state. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

When officials sued in their official capacity in federal court die or leave office, their successors automatically assume their roles in the litigation. Because the real party in interest in an official capacity suit is the governmental entity and not the named official, "the entity's 'policy or custom' must have played a part in the violation of federal law." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

The Plaintiffs originally sued Region 1 Manager Van Hunnik and Secretary Malsam – Rysdon, in their official capacities. As such, the real party in interest became the State of South Dakota. Both Ms. Van Hunnik and Secretary Malsam – Rysdon left office. Ms. Fleming became Region 1 Manager and Ms. Valenti became Secretary of the South Dakota Department of Social Services. They were then substituted as defendants in their official capacities, and the real party in interest remained the State of South Dakota.

c. Argument

42 U.S.C §1983 provides that:

> Every person, who under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the Jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws shall be liable to the party injured.

Generally, to state a claim under §1983 plaintiffs must show a set of facts whereby they have been deprived of a federal statutory right or a constitutional right under color of state law. 42 U.S.C §1983; *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

As mentioned earlier, the real party in interest in an official capacity suit is the governmental entity and not the named official. A governmental entity is liable under 42 U.S.C. §1983, "Only when the entity itself is a moving force behind the violation." That is, the entity's official policy or custom must have caused the constitutional violation. *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987).

In none of the Court's orders did the Court identify any State of South Dakota official policy or custom that deprived the Plaintiffs of a federal statutory right or a constitutional right under color of state law. By the same token, because no official policy or custom was identified by the Court, any official policy or custom could not have "caused" a constitutional violation.

3. Ms. Fleming and Ms. Valenti are State Officials Sued in Their Official Capacities. The District Court Erred in Granting Partial Summary Judgment When it Determined That They Were Policymakers and That as Policymakers, Their Alleged Acquiescence to the Presiding Circuit Court Judge's Alleged Policies, Practices, and Customs Made Them Liable.

a. Standard of Review

This Court reviews de novo a grant of summary judgment, viewing the record most favorably to the nonmoving party and drawing all reasonable

inferences for that party." *Munroe v. Cont'l W. Ins. Co*., 735 F.3d 783, 786 (8th Cir. 2013), citing *Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir. 2011).

b. Argument

i. Ms. Fleming and Ms. Valenti Are Not Policymakers.

42 U.S.C. §1983 provides the federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against the state for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the state has waived its immunity or unless Congress has exercised its undoubted power under §5 of the Fourteenth Amendment to override that immunity[13]. *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989). A suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the state itself. *Will*, 491 U.S. at 71. Nonetheless, a state official, when sued for prospective injunctive relief, in his or her official capacity, is not treated as an action against the state. *Id*. at n. 10 (citing, *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14 (1985)); *Ex Parte Young*, 209 U.S. 123, 159-160 (1908). An official-capacity suit against a government

[13] The State of South Dakota has not waived Eleventh Amendment immunity and nothing in ICWA shows that Congress has exercised its power to override that immunity.

officer is equivalent to suit against the employing governmental entity. *Crawford v. Van Buren County*, 678 F.3d 666, 669 (8th Cir. 2012).

Official-capacity suits typically involve either allegedly unconstitutional state policies or unconstitutional actions taken by state agents possessing final authority over a particular decision. *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989). To establish liability in an official-capacity suit under 42 U.S.C. §1983, the plaintiff must show that either the official named in the suit took an action pursuant to an unconstitutional governmental policy or custom, or that he or she possessed final authority over the subject matter at issue and used that authority in an unconstitutional manner. *Nix*, 879 F.2d at 433. In an official-capacity suit, the plaintiff must prove more than that a constitutional right was 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. *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987).

The "policy or custom" requirement applies in §1983 cases when prospective relief is sought by the plaintiff. *Los Angeles County v. Humphries*, 562 U.S. 29, 131 S. Ct. 447, 454-55 (2010). Congress intended potential §1983 liability where a [governmental entity's] *own* violations were at issue but not where only the violations of *others* were at issue. The "policy or custom" requirement rests upon that distinction and embodies it in law. *Los Angeles*

County, 131 S. Ct. at 453. [Emphasis in original]. A [governmental entity] cannot be held liable *solely* because it employs a tortfeasor – or in other words, a [governmental entity] cannot be held liable under 42 U.S.C. §1983 on a respondeat superior theory. *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 691(1978); *Los Angeles County v. Humphries*, 562 U.S. 29, 131 S. Ct. 447, 454-55 (2010). [Emphasis in original].

There can only be liability for a 42 U.S.C. §1983 claim if a public entity "policy or custom" caused a plaintiff to be deprived of a federal right. *Los Angeles County v. Humphries*, 131 S. Ct. 447, 450 (2010); *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 694 (1978). 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. *Jane Doe A by and through Jane Doe B v. Special School Dist. of St. Louis Cnty.*, 901 F.2d 642, 645 (8th Cir. 1990). See also, *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999).

To establish the existence of a governmental custom, a plaintiff must prove: 1) the existence of a continuing, widespread, persistent pattern of constitutional misconduct by the governmental entity's employees; 2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policy-making officials after notice to the officials of that misconduct; and 3) that plaintiff was

injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation. *Jane Doe A by and through Jane Doe B v. Special School Dist. of St. Louis Cnty.*, 901 F.2d 642, 646 (8th Cir. 1990).

The District Court first erroneously determined that Fleming and Valenti were final policymakers. They are not. Each is a state official sued in their official capacities as DSS Region 1 Manager and Secretary of the Department of Social Services. They are not final policymakers.

The Court concluded Fleming and Valenti were final policymakers based merely upon conclusory allegations made by the Plaintiffs in the Complaint and the conclusion carried through in the Court's summary judgment decision. The Court did not address or analyze the two sources to identify a final policymaker[14]: (1) state and positive local law and (2) state and local custom or usage having the force of law. *Soltesz v. Rushmore Plaza Civic Center*, 847 F.3d 941, 946 (8th Cir. 2017).

ii. Ms. Fleming and Ms. Valenti Could Not Be Liable By Acquiescence to Presiding Judge Davis.

The Plaintiffs and the District Court also failed to provide evidence or address evidence of the existence any unconstitutional governmental policies,

[14] The District Court also incorrectly determined that Presiding Judge Davis was a final policymaker for the same reasons.

practices or customs of Fleming and Valenti, or that each of them possessed final authority over the subject matter at issue and used that authority in an unconstitutional manner. Instead, the Court found that Judge Davis was a final policymaker as a Judge and he had instituted the following policies, practices, and customs:

- 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 breakup 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.

The Court then made the legal conclusion that because Fleming and Valenti did not challenge Judge Davis' policies for conducting 48-hour hearings, his policies became the official policies of Fleming and Valenti by acquiescence, relying upon *Coleman v. Watt*, 40 F.3d 255, 262 (8th Cir. 1994). And by alleged acquiescence, Fleming and Valenti exposed themselves to liability. Contrary to the

District Court's ruling, this Court in *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994) created no such legal liability in Fleming and Valenti.

Mr. Coleman alleged that Municipal Court Judge Watt issued an order to City police officers to impound any vehicle stopped for violating various state statutes. The order mandated that the impounded vehicles remain impounded until the owner paid fees, fines, and costs related to licensing of the vehicle. *Coleman v. Watt*, 40 F.3d 255, 257 (8th Cir. 1994). Mr. Coleman's vehicle was stopped by City police. Although he had all the necessary paperwork, the state agency records were apparently not updated and did not reflect that Mr. Coleman's vehicle was properly registered. As a result, his vehicle was seized and impounded. A week after his vehicle was impounded, Mr. Coleman was able to appear before Judge Watt. Nonetheless, it took a total of three hearings for him to obtain the return of his vehicle. *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994).

Mr. Coleman filed suit alleging he was deprived of a prompt post-deprivation hearing. Judge Watt was determined to be immune for damages and then this Court focused upon the City of Little Rock to determine whether it could be liable under 42 U.S.C. §1983 under *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), which provides that municipalities are "persons" under § 1983 for their own unconstitutional or illegal policies. *Coleman v. Watt*, 40 F.3d 255, 261 (8th Cir. 1994).

This Court declined to decide whether a Municipal Court Judge acts as an official policymaker for the City. This Court noted that because Mr. Coleman had "alleged" that both the City and the City Police Chief had "adopted" Judge Watt's general order as an official policy governing the conduct of the City Police Department, and because the City Police Chief was "alleged" to be an "official policymaker for the City of Little Rock," Mr. Coleman's damage claims[15] against the City could not be dismissed under *Monell*. *Coleman v. Watt*, 40 F.3d 255, 262 (8th Cir. 1994).

Coleman v. Watt, 40 F.3d 255 (8th Cir. 1994) does not support the District Court's decision regarding Fleming and Valenti being liable for acquiescence to Judge Davis' alleged policies, practices, and customs. First of all, this Court remanded Mr. Coleman's case because of *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), which applies to local governmental entities and not state officials like Fleming and Valenti. Secondly, contrary to the District Court's ruling that *Coleman v. Watt*, 40 F.3d 255, 262 (8th Cir. 1994) stood for the proposition of acquiescence, it did not. The "allegation" by Mr. Coleman was that the City and City Police Chief, who was alleged to be an "official policymaker for the City of

[15] This Court also noted the burden of proof that Mr. Coleman faced: He must prove that the Chief of Police or some other official policymaker adopted Judge Watt's order as an official policy, and that execution of that policy in fact caused his asserted injury. *Coleman v. Watt*, 40 F.3d 255, 262 (8th Cir. 1994).

Little Rock" both had "adopted" the general order as an official policy governing the conduct of the Police Department. The Plaintiffs put forth no evidence that Fleming and Valenti "adopted" Judge Davis' alleged policies, practices, and customs. And notably, there is no evidentiary or legal basis to find that Fleming and Valenti are "official policymakers" for the State of South Dakota so they could "adopt" Judge Davis' policies, practices, and customs to govern the conduct of the Department of Social Services.

Coleman aside, the District Court "acquiescence" legal conclusion arose by its reliance on *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989). Application of *Jett*, does not support this legal conclusion and the context of *Jett* is discovered by reviewing *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

One first has to assume Fleming and Valenti are policymakers. Liability for acquiescence or ratification, can only be done by a policymaker regarding a subordinate within that policymaker's entity. This conclusion is buttressed by the *Praprotnik* court recognizing that the U.S. Supreme Court, in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), recognized that the authority to make policy is necessary to the authority to make *final* policy. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). [emphasis in original]. *Praprotnik* further holds that a municipality can be liable for an isolated constitutional violation if the final

policymaker "ratified" a subordinate's action. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).

In the District Court's analysis, it erroneously determined that Presiding Judge Davis was a policymaker. The Court also erroneously determined that Fleming and Valenti were policymakers. The Court compounded its error finding acquiescence or ratification by Fleming and Valenti because Presiding Judge Davis is not a subordinate of Fleming or Valenti. Because Judge Davis is not a subordinate to Fleming and/or Valenti, Fleming and/or Valenti cannot "acquiesce" to or "ratify" his actions.

4. Neither the Plaintiffs nor the District Court Identified a State Policy or Custom, for Which Fleming and Valenti Are Responsible, That Caused a Constitutional Violation. As a Result, the District Court Violated *Ex Parte Young* When No Violation Was Identified That Would be a Continuing Violation Thereby Foreclosing Issuance of a Declaratory Judgment and Permanent Injunction.

a. Standard of Review

This Court reviews de novo a grant of summary judgment, viewing the record most favorably to the nonmoving party and drawing all reasonable inferences for that party." *Munroe v. Cont'l W. Ins. Co.*, 735 F.3d 783, 786 (8th Cir. 2013), citing *Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir. 2011).

b. Argument

The Eleventh Amendment blocks a suit against state officials when "the state is the real, substantial party in interest." *Ford Motor Co., v. Dept. of Treasury*, 323 U.S. 459, 464 (1945). On the other hand, the Eleventh Amendment, under *Ex Parte Young* does not prohibit "certain suits seeking declaratory and injunctive relief against state officers." *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 362 F.3d 512, 516 (8th Cir. 2004). State officials maybe sued in their official capacities for prospective injunctive relief when the plaintiff alleges that the officials are acting in violation of the constitution or federal law. *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1037 (8th Cir. 2002). The Eleventh Amendment is not a bar to "federal jurisdiction over a suit against a state official when the suit seeks only prospective injunctive relief in order to end a continuing violation of federal law. *Gibson v. Ark. Dept. of Corr.*, 265 F.3d 718, 720 (8th Cir. 2001).

Subsequent to the District Court's order granting the Plaintiffs partial summary judgment, the Court entered the following: Order following an August 17, 2016 "remedies hearing." (Appx. 321 - 347); Declaratory Judgment (Appx. 348 - 345); and Permanent Injunction (Appx. 356 - 363). In none of the orders leading up to the Declaratory Judgment and Permanent Injunction did the Court find any policies or customs of the State that violated the Plaintiffs' federal rights.

As such, it could not issue its declaratory judgment and prospective injunctive relief to end a "continuing" violation of federal law – as no violation has been identified. If a violation has not been identified, it cannot be continuing.

JOINDER WITH CONSOLIDATED APPELLANTS

Pursuant to Fed. R. App. P. 28(j), Ms. Fleming and Ms. Valenti join in the issues and arguments of the Appellants in the consolidated appeals.

CONCLUSION

Based upon the aforementioned, Ms. Fleming and Ms. Valenti respectfully request the Court of Appeals dismiss the case. In the alternative, that the Court of Appeals vacate the Orders, Declaratory Judgment, and Permanent Injunction, and remand to the District Court for proceedings consistent with the Court of Appeals' decision.

Dated: March 24, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions identified in Fed. R. App. P. 32(f), the brief contains 12,592 words. (The undersigned is relying on the word-count utility in Microsoft Word 2010, the word processing system used to prepare the brief, consistent with Fed. R. App. P. 32(g)(1).) Furthermore, the Brief and Addendum have been determined to be virus-free in compliance with Eighth Circuit Rule 28(A)(h)(2).

2. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional spaced typeface using Microsoft Word 2010 software in 14 point Times New Roman font.

By: */s/ Robert L. Morris*

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March 2017, I electronically filed **Brief of Appellants Lisa Fleming and Lynne A. Valenti** in this matter with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: */s/ Robert L. Morris*