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

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Oglala Sioux Tribe, et al.,

Plaintiffs and Appellees,

vs.

Honorable Craig Pfeifle,

Defendant and Appellant.

Appeal from the United States District Court
for the District of South Dakota
The Honorable Jeffrey L. Viken, Presiding United States District Judge
(D.S.D. Civ. No. 13-5020-JLV)

APPELLANT'S REPLY BRIEF

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Argument

The Tribes devote many pages to proposing that the Indian Child Welfare Act is good, and that due process is important. No one disputes either of those propositions. But Judge Pfeifle is not a proper defendant to this § 1983 suit. And the Due Process Clause does not require the type of hearing ordered by the district court within the first 24 to 72 hours of all emergency removals of abused and neglected children.

1. § 1983 Policymaker Analysis. The district court erred in refusing to dismiss Judge Pfeifle because the presiding judge is not a policymaker for the rulings challenged by the Tribes.

A. Judge Pfeifle was substituted into this case pursuant to Fed. R. Civ. P. § 25(d) after he became presiding judge, therefore, he is sued only in his capacity as presiding judge.

The Tribes are running away from the fact that they sued Judge Pfeifle only in his capacity as presiding judge of the Seventh Judicial Circuit. They seek to avoid the consequences of having picked the wrong policymaker. The Tribes argue that Judge Davis was sued in two official capacities—his capacity as the presiding judge, and his capacity as a sitting circuit court judge. ((Appellees' Br., p. 92.) The Tribes argue that Judge Pfeifle was substituted in both capacities. That cannot be.

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The only reason that Judge Pfeifle is a defendant in this case is because he was substituted under Fed. R. Civ. P. 25(d). (Order of Substitution, Docket #226.) Rule 25(d) applies only when "a public officer who is a party in an official capacity" leaves office. "If [the official] leaves office during the interim, he leaves the case behind and his successor becomes the party." *Scott v. Lacy*, 811 F.2d 1153, 1153–54 (7th Cir. 1987). Judge Davis is still a circuit judge. He has not been deprived of that office at all, as required for substitution under Fed. R. Civ. P. 25(d).

If Judge Davis had been sued in his capacity as just one of the circuit court judges of the Seventh Judicial Circuit, then he would not have been substituted out of the case. The Order substituting Judge Pfeifle is clear, the rule upon which the Order rests is clear. Judge Davis is no longer a party, and Judge Pfeifle is sued only as the presiding judge.

The Tribes note that "[t]he vast majority of the district court's ruling focus on what Judge Davis did in his own courtroom as opposed to what Judge Davis did in fashioning policies for the other Seventh Circuit judges." (Appellees Br., p. 93.) That is quite true, and, perhaps,

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the Tribes could have pursued Judge Davis for his personal rulings in a *Pulliam*[1] type case. They did not. Instead, they substituted him out of the case when he ceased to be the presiding judge.

Judge Davis is no longer a party to this case. Judge Pfeifle was not made a party until after summary judgment was entered, when he assumed the office of presiding judge. The Court must decide whether the presiding judge is the final policymaker of the challenged conduct. If the presiding judge is not the final policymaker, then the Court should reverse the district court's denial of the Motion to Dismiss, and reverse with instructions to dismiss Judge Pfeifle.

Because Fed. R. Civ. P. 25(d) substitution applies only to officials who change during the pendency of the suit, Judge Pfeifle's substitution conclusively means that he is sued only in his capacity as presiding judge.

[1] *Pulliam v. Allen*, 466 U.S. 522 (1984).

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B. The Tribes may not change their claims to sue Judge Pfeifle as a sitting circuit judge because he was not given a chance to litigate those claims, and because he no longer presides over abuse and neglect cases.

In their Appellees Brief, the Tribes urge that there is evidence in the record that would have supported a direct action against Judge Pfeifle for his own rulings in 48-hour hearings. Judge Pfeifle was substituted as the presiding judge on the argument that the presiding judge is the final policymaker, the Tribes cannot change that fundamental position at this late date. *Hartman v. Workman*, 476 F.3d 633, 635 (8th Cir. 2007) ("Ordinarily, we will not consider an argument raised for the first time on appeal.")

Additionally, Judge Pfeifle was substituted into the case after the district court had already entered summary judgment against Judge Davis. That is not important for purposes of Rule 25(d) substitution because then Judge Pfeifle is not really the party, the office of presiding judge is the party. *Scott* 811 F.2d at 1153–54 ("As a practical matter, a public official who is a defendant in a suit seeking an injunction is not "on trial" at all. . . . If he leaves office during the interim, he leaves the case behind and his successor becomes the party."). But the Tribes have provided no support for the proposition that they may simply add a new

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defendant, without serving the defendant with process or moving to amend the Complaint, and make that defendant liable under a summary judgment entered before the party was ever added.

Finally, the Tribes' attempt to switch the focus of their claim from Judge Pfeifle's status of presiding judge to his status as simply one of the judges in the circuit would also create Eleventh Amendment immunity problems. *Ex Parte Young*, 2009 U.S. 123 (1908), would not apply to Judge Pfeifle as a sitting judge because he does not conduct 48-hour hearings.

> In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."

Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635, 645, (2002). Judge Pfeifle is not engaged in any "ongoing violation of federal law."

If the presiding judge of the judicial circuit is not the final policymaker of the challenged procedures, then the Court should reverse the district court, and order that Judge Pfeifle be dismissed.

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C. The presiding judge is not a policymaker for purposes of the legal rulings of the judges in the Seventh Judicial Circuit.

The Tribes agree that they must prove that "the defendant is the 'final policymaker' for the government with respect to the policy being challenged[.]" (Appellees Br., p. 65.) The presiding judge is not the final policymaker on any of the challenged rulings.

South Dakota law determines whether Judge Pfeifle, as the presiding judge, is the final policymaker for deciding how 48-hour hearings are conducted in the Seventh Circuit. *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) ("whether a particular official has 'final policymaking authority' is a question of state law").

The Tribes first seem to concede that the presiding judge is not the final policymaker because each circuit judge has the discretion to establish the procedures for 48-hour hearings in his or her own courtroom.

> Judges Davis and Pfeifle were authorized by South Dakota law to establish the rules by which 48-hour hearings would be conducted in their courtrooms. *See Cheyenne River*, 822 N.W.2d at 65-66 (citing SDCL 26-7A-56 for the principle that all initial juvenile custody proceedings, including 48-hour hearings, "are to be conducted under the rules prescribed by the court to inform it of the status of the child and to ascertain the child's history, environment and condition.");

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> see also SDCL § 16-6-29 (setting forth the general powers of the circuit court). Thus, Judges Davis and Pfeifle had the authority to set the rules; unfortunately, the rules they set violated the Due Process Clause and ICWA.

(Appellee Br., p. 96.) The Tribes then go on to argue that Judge Pfeifle is the final policymaker for three reasons:

"**First, Judge Pfeifle is a policymaker for purposes of § 1983 liability because he violated ICWA and the Due Process Clause in his 48-hour hearings**." (Appellee Br., p. 99.) While that is not true, let's assume that it was. The premise of the argument does not support its conclusion—being the wrongdoer does not answer whether one is a policymaker. Indeed, the argument misses the purpose of the policymaker requirement. The very reason that an official capacity suit requires the Tribes to prove that the presiding judge is the final policymaker is that the entity is not liable simply for the misdeeds of its agents.

> Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.

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Monell v. Department of Social Services of City of New York, 436 U.S. 658, 691 (1978). To say that Judge Pfeifle is a policymaker because he violated the Tribes' rights is a non sequitur.

"**Second, Judge Pfeifle is a policymaker subject to § 1983 liability because Judge Davis, the official he replaced, created policies in his official capacity that violated Plaintiffs' federal rights**." (Appellee Br., p. 100.) In other words, Judge Pfeifle is a policymaker because Judge Davis was a policymaker. That is simply circular. The question is whether the presiding judge is a policymaker, and neither of the Tribes first two arguments help answer that question.

"**Lastly, Judge Pfeifle is the Presiding Judge of South Dakota's Seventh Judicial Circuit, and one of his duties under state law is to assign a judge to preside over abuse and neglect cases. SDCL § 16-2-21**." (Appellee Br., p. 100.)

First, this argument is inconsistent with the Tribe's argument that each circuit judge is the final policymaker in his or her own courtroom. It simply cannot be that each circuit judge is the final policymaker in his or her courtroom, and the presiding judge is also the final policymaker. There can be only one **final** policymaker. "[L]iability

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attaches only where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered." *Soltesz v. Rushmore Plaza Civic Center*, 847 F.3d 941, 946 (8th Cir. 2017) (*quoting*, *Pembaur*, 475 U.S. at 481). Each office cannot be the final policymaker on the same policy.

Second, the Tribe's provide no authority for the proposition that the responsibility to appoint is the final policymaking power to control. Were the Tribes right, any person with hiring or firing authority would become the final policymaker for all actions that the employees perform.

As pointed out in Judge Pfeifle's opening brief, if there is a final policymaker under South Dakota law for the conduct of 48-hour hearings and ICWA procedures, it is the South Dakota Supreme Court. *See Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62 (affirming procedures used by Judge Davis at 48-hour hearings), and *People in interest of A.O.*, 2017 S.D. 30, _____ N.W.2d _____ (reversing the denial of a motion to transfer to the jurisdiction of the Oglala Sioux Tribe.)

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D. The All Writs Act cannot be used to avoid the jurisdictional prerequisite of a final policymaker.

In a footnote, the Tribes suggest that all of the policymaker arguments can be mooted by ignoring the policymaker requirement altogether, make whatever judge happens to have the abuse and neglect docket a policymaker, and then subject all circuit court judges to the district court's declaratory judgment. (Appellee Br., p. 102, n. 30.) But the All Writs Act does not create a way to avoid the jurisdictional requirement of a final policymaker.

The All Writs Act does not confer jurisdiction. *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 365 n. 6 (8th Cir. 2007) (*citing* 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3691 (3d ed.1998)). Rather, it is "to enable a federal court to protect its jurisdiction over *a matter properly before it*." 14A Fed. Prac. & Proc. Juris. § 3691 (4th ed.) (emphasis added). So, the All Writs Act is not a means to avoid the policymaker requirement.

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E. Remand for further determination is inappropriate because the district entered its order finding that the presiding judge is the final policymaker. The Court should simply reverse.

Citing *Soltesz*, the Tribes suggest that if the Court determines the presiding judge is not the final policymaker, then the case should be remanded for the district court to make a different determination. But this case is not like *Soltesz*. In *Soltesz*, the district court never made the determination, so the Court remanded with the instructions that the district court make that determination. *Soltesz* 847 F.3d at 944 ("The district court failed to identify the final policymaker as a matter of state law. Because the Supreme Court demands a district court make such an identification, we reverse and remand.") Here the district court did make that determination. Judge Pfeifle respectfully urges that the district court's determination is erroneous, and the district court should have granted the presiding judge's Motion to Dismiss.

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2. Due Process. There is no authority for the proposition that all of the process due for child removal proceedings is due within the first 48 hours.

A. There is no support for the district court's requirement that parents be provided a full adversarial hearing within 24 to 72 hours after emergency removal.

The issue on appeal is not whether parents whose children have been removed on entitled to present evidence, or cross-examine, or subpoena witnesses; South Dakota law has always provided those processes. The question is whether they are all due at the 48-hour hearing.

Whisman and *Swipies* do not support the Declaratory Judgment, except for the agreed upon proposition that due process requires a "prompt" post-deprivation hearing. *Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005). Both *Swipies* and *Whisman* involved deprivations without any hearing for 17 days, but neither case identifies what type of hearing is required, or when it must be held.

In *Swipies*, the plaintiff claimed his due process rights were violated, but he was demanding procedures that were not as meaningful as those provided at 48-hour hearings in Pennington County, South

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Dakota. Swipies was only asking that a judge be orally notified that the child had been removed.

> The heart of Mr. Swipies's procedural due process claim is that he was deprived of a post-removal hearing because Deputy Kofka did not follow the procedures outlined in Iowa Code § 232.79. That statute requires a police officer who removes a child to inform the juvenile court of the emergency removal immediately so that the court can make arrangements for the child's welfare.

Swipies 419 F.3d at 713. Iowa Code § 232.79 does not provide any of the due process that the district court in this case held are constitutionally required.

The Iowa provisions at issue in *Swipies* merely required that the department of human services orally notify the court of the removal, after which the "court shall authorize the department of human services or the juvenile probation department to cause a child thus removed or kept to be returned if it concludes there is not an imminent risk to the child's life and health in so doing." Iowa Code § 232.79(4)(b). If the department receives information "which could affect the court's decision regarding the child's return," it must orally notify the court, "in accordance with court established procedures." Id. Thereafter, it "shall provide to the court written documentation of the oral information." Id.

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The court can then issue an order for temporary custody, "[i]f deemed appropriate by the court, upon being informed that there has been an emergency removal or keeping of a child without a court order." Iowa Code § 232.79(4)(c). If the child is not returned, then the department must file a petition for temporary custody "within three days after the removal." Iowa Code § 232.79(4)(b).

The Iowa emergency removal process does not appear to require any hearing with the parents during this initial stage. If the district court has properly set out the due process requirements for child removal, then Iowa Code § 232.79 is unconstitutional because it fails to afford Iowa parents an adversarial hearing, including subpoenaing witnesses and appointment of counsel, within 48-72 hours after a child is removed. Yet Swipies did not challenge the procedure—only that the oral notice was not given to the court.

In *Whisman*, the Missouri officials provided no hearing of any kind for 17 days. Indeed, the opinion does not reflect that the courts were even notified of the removal before the first hearing. The day of the first hearing, the child was restored to his family. *Whisman Through Whisman v. Rinehart*, 119 F.3d 1303, 1307-308 (1997).

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Whisman does not support the district court's conclusions about the requirements of due process in emergency removals.

While the Tribes do not say so, one supposes that the district court chose the 48-hour threshold simply because South Dakota has a 48-hour hearing. But that state procedure neither expands nor contracts the limits of Fourteenth Amendment due process. State law cannot reduce the requirements of due process, *Swipies*, 419 F.3d at 716, *citing Martinez v. California*, 444 U.S. 277, 284 n. 8 (1980), or create "procedural due process rights [that] spring from the state statute." *Swipies*, 419 F.3d at 716, *citing Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540–41 (1985).

While there is plenty of law to support the district court's conclusion that the state cannot take permanent custody of children from their parents without the substantial due process rights of proper adversarial hearings, there is no law to support the conclusion that it must be provided at the 48-hour hearing.

B. Bond hearings are an analogous proceeding.

The Tribes argue that Judge Pfeifle should have analyzed each part of the Declaratory Judgment under *Mathews v. Eldridge*, 424 U.S.

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319 (1976). Judge Pfeifle submits that is unnecessary because the analysis of each provision is the same as the others. For example, the district court declared that, where a state takes emergency custody of an abused or neglected child, the United States Constitution guarantees the parents the right to subpoena witnesses, and compel those witnesses to testify within 48 hours of the child's removal.

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

(Pfeifle Addendum, p. 150.) The parents also have the right to cross-examine any person who provided information for the reports.

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

(Pfeifle Addendum, p. 150.) Those parts of the Declaratory Judgment effectively preclude the use of reports or other documentary evidence unless the state produces the author, and anyone else providing information that is included in the documents. South Dakota permits

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the court to consider hearsay evidence in the form of reports from police and affidavits from DSS. *Cheyenne River Sioux Tribe*, 2012 S.D. at ¶ 12, 822 N.W.2d at 65 ("While these documents might not constitute evidence within the normal bounds of the Rules of Evidence, those rules are not applicable at a temporary custody hearing. See SDCL 26–7A–34.").

However, the district court held that constitutional due process requires the authors be presented for cross-examination at the 48-hour hearing. The Tribes do not explain what authority requires that. The Tribes do not explain why that is required in emergency removal proceedings, but not in criminal bond hearings, where a person is detained in jail. *United States v. Sanchez*, 457 F. Supp. 2d 90, 92 (D. Mass. 2006) (whether to permit testimony is in the magistrate's discretion); *United States v. Fortna*, 769 F.2d 243, 250 (5th Cir. 1985) (A magistrate may rely upon hearsay in documents to determine pretrial detention.). The Tribes never explain why an initial proceeding in the nature of bond hearing is different than a 48 hour hearing. Both involve undeniable liberty interests. Both separate parents from children and Tribes from their members.

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No one disputes that parents and children are entitled to post-deprivations hearings. No one disputes the right to present evidence and cross-examine exists prior to final determinations. The question is whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the state to provide all of the rights outlined by the district court within 48 hours of the emergency removal of an abused or neglected child. No law supports that conclusion.

3. ICWA. Section 1922 permits emergency removal to protect a child from imminent harm, as well as for imminent physical damage.

The parties agree that the § 1922[2] standard applies to 48-hour hearings. The Seventh Circuit judge who presides over abuse and neglect cases has applied § 1922's standard for emergency custody "in order to prevent imminent physical damage or harm to the child" since before the Declaratory Judgment was entered.

Rather, the question is what the standard means. Specifically, in the phrase "imminent physical damage or harm," does the word "harm" add risks not included in the words "physical damage"?

[2] 25 U.S.C. § 1922.

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A. Looking at the language of the statute, "harm" must have independent meaning from "damage."

The Tribes never did explain how physical damage is different than physical harm, or why their reading of the statute does not otherwise render the "harm" meaningless surplusage.

The Tribes argue that Judge Pfeifle seeks to insert the word "emotional" in front of the word "harm." That is not quite right. Judge Pfeifle urges that the Department of Interior has properly determined that the word "harm" is broader than simply "physical harm."

For example, the Department of Interior found agreed that witnessing domestic abuse can constitute "harm." The Tribes urge that the Department meant to include being the victim of domestic abuse, but that would be peculiar because the list is intended to show examples of harms that would not constitute bodily damage. Similarly, it is true that sexual abuse or child labor *could* cause physical damage, but the Department did not use them as examples of that because they were attempted to explain why the definition should not be limited merely to physical damage.

The Department found that the statutory language was intended to cover any "endangerment of the child's health, safety, and welfare,

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not just bodily injury or death[.]" 81 Fed. Reg. 38778, 38794 (June 14, 2016). The Department went on to note that, "[w]hile ICWA and this rule provide objective standards, however, judges may appropriately consider the particular circumstances of individual children and protect the best interests of those children as envisioned by Congress." Id. at 38797.

The district court's interpretation of the scope of § 1922 is contrary to the Department's interpretation, and does not give meaning the word "harm."

B. Use of the word "emotional" in other parts is simply a recognition of the difference between emergency removals, and long term placements.

The fact that the word "emotional" appears at other places in ICWA, but not in § 1922, does not limit the word "harm" to merely physical harms. Rather, as the Department made clear that the § 1922 standard is intended to cover any "endangerment of the child's health, safety, and welfare," 81 Fed. Reg. at 38794, permit judges to "consider the particular circumstances of individual children and protect the best interests of those children as envisioned by Congress." Id. at 38797.

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ICWA "treats emergency proceedings differently from other child-custody proceedings." Id. at 38794. The Tribes and Amicus correctly note that the primary policy advanced by ICWA is maintaining Indian children in their families, tribes, and culture. So at the termination and placement stages, the harms threatening the child must be more specific and establish with higher levels of proof. Judge Pfeifle does not dispute that. But, Similarly, emergency removals, because of the imminent nature of the harm, require the flexibility described by the Department.

The Tribes' concern that any inconsequential, emotional harm might be used as a pretext to seize Indian children is unsupported in this record. It also overstates the case. If DSS workers were actually looking for reasons to take custody of more children, limiting the reasons to physical damage would not cause a great impediment. Children regularly scrape their elbows, bruise their shins, and catch viruses. If any physical harm could serve as a pretext for emergency removal, and if the state were looking to exploit those pretexts, the definition would be less important. The question is not whether non-physical harms would permit malevolent state systems to take children.

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The question is whether Indian children are excluded from the same emergency protections extended to non-Indian children.

C. Amicus Curia does not raise arguments that are not otherwise addressed.

After reviewing the history of ICWA, the Amicus Brief notes that the § 1922 standard is "addressed at length in the principal briefs." Amicus Br., p. 17. The parties agree that the § 1922 standard applies to emergency removal proceedings. The issue in dispute is what the § 1922 standard means, and Amicus does not address that question.

Amicus notes that "Multiple states in the Eighth Circuit have state ICWA laws, to guarantee the state laws interact smoothly with ICWA's federal requirements." Amicus Br., p. 18. Upon that point Judge Pfeifle expresses no opinion. As the presiding judge of the Seventh Judicial Circuit, promulgating and adopting state statutes is beyond his control. But, it should be noted that this case deals only with emergency removal proceedings, which ICWA provides are conducted according to state law. 25 U.S.C. § 1922 ("Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child . . . under applicable State law, in order to prevent imminent physical

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damage or harm to the child."). Judge Pfeifle is therefore bound to follow South Dakota's emergency removal laws.

The district court erred in concluding that § 1922's standard of "imminent physical damage or harm," limits state courts to considering only physical damage and physical harm. Judge Pfeifle respectfully requests that the court reverse the district court's Order (Docket #301), prohibiting state courts from considering non-physical harms.

Conclusion

The district court substituted Judge Pfeifle for Judge Davis in his capacity of presiding judge of the Seventh Judicial Circuit. The presiding judge is not the final policymaker of any of the rulings the Tribes challenge. The Court should reverse the district court's denial of the Motion to Dismiss, and remand with instructions that the district court dismiss Judge Pfeifle from the case.

The Due Process Clause does not mandate saddling the child protection system with adversarial hearings in the first 48 hours following the emergency removal of an abused or neglected child. The Court should reverse the Declaratory Judgment of the district court.

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The Department of Interior has interpreted the Indian Child Welfare Act to authorize state courts to protect Indian children from the risk of imminent harm to their health, safety, and welfare, even those harms that do not rise to the level of physical damage. The Court should reverse the district court's Order limiting emergency removal to physical damage.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 5459 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because, excluding the cover-page, it has been prepared in a proportionally spaced typeface using Century 14 pt. in Microsoft® Word 2010.

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Dated June 30, 2017.

/s/ Jeffrey G. Hurd
Jeffrey G. Hurd

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Certificate of Service

I hereby certify that on June 30, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by 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.

/s/ Jeffrey G. Hurd
Jeffrey G. Hurd

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