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 BRIEF

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Summary of the Case

This is a § 1983 action challenging the procedures used by officials in Pennington County South Dakota for emergency removals of endangered Indian children. The district court granted the plaintiffs' motions for summary judgment, ruling, as a matter of law, that the removal procedures violate the Due Process Clause and the Indian Child Welfare Act. Because of the importance of protecting Indian children, while at the same time ensuring the rights of the children, their parents, and their Tribes, Judge Pfeifle respectfully requests that the Court grant twenty minutes of oral argument to each side.

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Jurisdictional Statement

The Tribes 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 pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

On January 28, 2014, the district court denied Judge Pfeifle's predecessor's Motion to Dismiss [Appendix, p. 1, *et seq.*]. On March 30, 2015, the district court granted the Tribes' motion for partial summary judgment on liability [Appendix, p. 44, *et seq.*]. On December 15, 2016, the district court entered an order on the interpretation of 25 U.S.C. § 1922 [Appendix, p. 111, *et seq.*], an order setting out the basis for its Declaratory Judgment and Permanent Injunction [Appendix, p. 118, *et seq.*], a Declaratory Judgment [Appendix, p. 145, *et seq.*], and a Permanent Injunction [Appendix, p. 153, *et seq.*].

Judge Pfeifle filed a timely appeal on January 13, 2017. This court's jurisdiction is based on 28 U.S.C. §§ 1291 and 1292(a) (1) as applied through *F.D.I.C. v. Bell*, 106 F.3d 258, 262 (8th Cir. 1997) (citing *Fogie v. THORN Americas, Inc.*, 95 F.3d 645, 648 (8th Cir.1996)),

because the Declaratory Judgment is a final order granting complete relief against Judge Pfeifle, and the district court issued orders against Judge Pfeifle that are "inextricably bound up with the injunction" entered against Judge Pfeifle's co-defendants. [Addendum, p. 153, *et seq.*]

Statement of Issues

DOES THE PRESIDING JUDGE OF THE SEVENTH JUDICIAL CIRCUIT COURT IN SOUTH DAKOTA HAVE FINAL POLICYMAKING AUTHORITY OVER THE SUBSTANTIVE AND DUE PROCESS REQUIREMENTS FOR 48-HOUR CHILD REMOVAL HEARINGS WITHIN THE JUDICIAL CIRCUIT?

- *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).
- *Soltesz v. Rushmore Plaza Civic Center*, 847 F.3d 941 (8th Cir. 2017).
- SDCL § 16-2-21.
- *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D., 69, 822 N.W.2d 62.

DOES THE DUE PROCESS CLAUSE REQUIRE THAT THE PROCEDURAL RIGHTS NECESSARY TO TERMINATE PARENTAL RIGHTS BE AFFORDED WITHIN 48-72 HOURS OF THE STATE TAKING EMERGENCY CUSTODY?

- *Swipies v. Kofka*, 419 F.3d 709 (8th Cir. 2005).
- *Lassiter v. Department of Social Serv's*, 452 U.S. 18 (1981).
- *Mathews v. Eldridge*, 424 U.S. 319 (1976).

DOES 25 U.S.C. § 1922 LIMIT EMERGENCY CUSTODY OF INDIAN CHILDREN TO RISKS OF BODILY INJURIES?

- 25 U.S.C. § 1922
- *Arkansas AFL-CIO v. F.C.C.*, 11 F.3d 1430 (8th Cir. 1993).

- 81 Fed. Reg. 38778 (June 14, 2016).

SHOULD THE DISTRICT COURT ABSTAIN FROM ENTERTAINING THIS ACTION UNDER YOUNGER V. HARRIS?

- *Younger v. Harris*, 401 U.S. 37 (1971).
- *Aaron v. Target Corp.*, 357 F.3d 768 (8th Cir.2004).
- *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584 (2013).
- *Moore v. Sims*, 442 U.S. 415, 423 (1979).

Statement of the Case

South Dakota law enforcement and Child Protection Services remove children from dangerous situations, and take temporary custody of them. South Dakota law says that "no child may be held in temporary custody longer than forty-eight hours . . . excluding Saturdays, Sundays, and court holidays, unless a . . . petition has been filed . . . and the court orders longer custody during a noticed hearing . . . ." SDCL § 26-7A-14. These proceedings are commonly referred to as "48-hour hearings." This case challenges the 48-hour hearing procedures used in Pennington County, South Dakota.

In 2012, the Cheyenne River Sioux Tribe applied to the South Dakota Supreme Court for a writ of mandamus or prohibition. *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62. The Cheyenne River Sioux Tribe sought a ruling that the Honorable Jeff Davis, then the presiding judge of the Seventh Judicial Circuit Court, was conducting 48-hour hearings in a manner that violated the Indian Child Welfare Act,[1] and the families' state and federal rights. On October 10, 2012, the South Dakota Supreme Court denied the

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

application for the writ. On November 26, 2012, the South Dakota Supreme Court denied rehearing. Cheyenne River did not seek United States Supreme Court review. On March 21, 2013, plaintiffs commenced this action under 42 U.S.C. § 1983 alleging that 48-hour hearings were conducted in a manner that violated the Indian Child Welfare Act, and the families' state and federal rights.

1. Parties

The plaintiffs and appellees are a certified class of all "members of federally recognized Indian tribes who reside in Pennington County, South Dakota, and who, like plaintiffs, are parents or custodians of Indian children." (Pfeifle Appendix, p. 242.) The class is represented in this action by the Oglala Sioux Tribe, the Rosebud Sioux Tribe, and parents of Indian children who had been subject to 48-Hour Hearings. (Collectively referred to as the "Tribes.")

Appellant, Honorable Craig Pfeifle, was substituted into this action after summary judgment was granted to the Tribes. The Tribes originally sued Judge Davis, as the presiding judge of the Seventh Judicial Circuit, alleging he was the policymaker for the Circuit Court.[2]

[2] South Dakota's circuit courts are its trial courts of general jurisdiction.

(Pfeifle Appendix , pp. 195-196, ¶¶ 11-12.) The district court subsequently substituted Judge Pfeifle when he became the presiding judge. (Appendix, pp. 244-45.)

2. The Child Protection Process

In South Dakota, the process of protected abused and neglected children ("A&Ns") has three phases: emergency removal, adjudication, and disposition. Each phase has its own hearings. The process begins when law enforcement takes a child into emergency protective custody. SDCL § 26-7A-14. That can happen without prior court approval, pursuant to SDCL § 26-7A-12. Or law enforcement can obtain prior approval by a circuit court judge or authorized intake officer, who may approve the child's out-of-home placement and issue a temporary custody directive. SDCL § 26-7A-13.

If law enforcement or the South Dakota Department of Social Services ("DSS") determines the child is presently in danger, and that a Present Danger Plan cannot be implemented to manage that danger, law enforcement removes the child from the dangerous environment

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The Seventh Judicial Circuit Court has eight judges, and presides in southwestern South Dakota, and includes Pennington County.

and takes temporary custody of the child. Law enforcement then places the child in temporary emergency custody with Child Protective Services. When law enforcement has taken custody of a child, custody is transferred to DSS and a circuit 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.

Within about 48 hours of removal, the court holds a 48-hour hearing. SDCL § 26-7A-14. This is an informal proceeding to determine whether temporary custody should be continued. Although it is informal, the state attempts to notify the parents and any relevant tribe of the time and place for the hearing. SDCL § 26-7A-15. DSS obtains information pertaining to the need for emergency temporary custody, and provides that information to the court at the 48-hour hearing, in an Affidavit of the Department and ICWA Affidavit. (Examples attached to Pfeifle Appendix, pp. 257-258; and Pfeifle Appendix, pp. 246-247, respectively.)

If temporary custody is continued, the judge issues a Temporary Custody Order. If the judge who is presiding over the hearing deems it appropriate, he or she may authorize DSS to return the children without further court order when it determines that the risk to the children has abated. (Example attached as Pfeifle Appendix, pp. 254-255.)

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, to confront and cross-examine witnesses, and to remain silent. SDCL § 26-7A-54. The 48-hour hearing focuses just on the safety of the child, without attempting to affix blame. It is at the advisory hearing that the state advises the parties of any 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. 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 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.

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 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.

The district court granted summary judgment to the Tribes, ruling that, as a matter of law, the 48-hour hearings conducted in Pennington County violate ICWA and the Due Process Clause of the Fourteenth Amendment to the United States Constitution in several respects. The district court issued a declaratory judgment against Judge Pfeifle.

Summary of the Argument

Policymaker. The Tribes sued Judge Davis in his official capacity as the presiding judge of the Seventh Judicial Circuit Court, alleging that he established policies for 48-hour hearings that violated due process and ICWA. Judge Pfeifle was substituted for Judge Davis when he became presiding judge. Because this is an "official capacity" suit against the Seventh Judicial Circuit through its presiding judge, the Tribes must show that the presiding judge has the authority under state law to establish the policies that they claim are actionable. Because the Tribes never established that the presiding judge has authority to establish policy, the district court erred in denying the motion to dismiss the § 1983 claim against the presiding judge.

Due Process. The procedures employed at 48-hour hearings are sufficient to satisfy due process for that preliminary phase of the proceedings. The district court erred in requiring the defendants to apply the full range of rights required to permanently deprive parents of their children within the first 48 to 72 hours after the children are picked up.

Section 1922 Standard. The district court ruled that 25 U.S.C. § 1922 permits the state to retain custody of a child in emergency removal proceedings only when the child faces an imminent risk of physical damage or physical harm. In its final rules, the Department of the Interior declined to define "imminent risk of physical damage or harm." But the Department's responses to comments on a proposed definition demonstrate that the phrase is broad enough to encompass any danger to a child's health, safety, and welfare, and not merely risks of bodily harm.

Younger Abstention. The district court acknowledged the presence of ongoing 48-hour hearings, but ruled that its remedies would not interfere with those hearings. The Declaratory Judgment changes the nature and proceedings of 48-hour hearings in ways that are contrary to South Dakota statute and the rulings of the South Dakota Supreme Court.

Argument

1. Judge Pfeifle, as the presiding judge, is not the policymaker for determining the substantive and due process requirements for 48-Hour Hearings in the Seventh Judicial Circuit, and therefore is not a proper § 1983 defendant under *Monell*.

The Tribes brought this case as an "official capacity" suit against the presiding judge of South Dakota's Seventh Judicial Circuit Court. The Tribes alleged that the presiding judge, as the chief administrator for the court, was a policymaker regarding the substantive and due process rulings at all 48-hour hearings in the circuit.

When Judge Davis moved to dismiss the Complaint on the grounds that he was not a policymaker, the Tribes, while agreeing that a policymaker was a necessary element of their claims, shifted their evidence and argument to the rulings of Judge Davis in his own court. The district court adopted that rationale, drifting back and forth between whether Judge Davis, as presiding judge, was a policymaker for the Seventh Circuit, whether he was a policymaker in his own courtroom, or whether he was simply a judge who could be sued for his own rulings. But those distinctions make a difference. The suit against

the Seventh Judicial Circuit, through Judge Pfeifle as its presiding judge, should have been dismissed.

A. The standard of review is *de novo*.

"The identification of those officials whose decisions represent the official policy of the local government unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury." *Soltesz v. Rushmore Plaza Civic Center*, 847 F.3d 941 (8th Cir. 2017) (*quoting*, *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)). "On appeal, conclusions of law are given *de novo* review." *In re Spence*, 554 B.R. 467, 469 (B.A.P. 8th Cir. 2016).

B. Only the policymaker may be sued in "official capacity" suit.

The Tribes sued Judge Davis in his official capacity as the presiding judge of the Seventh Circuit.

> 11. *Defendant Jeff Davis is the presiding judge of the Seventh Judicial Circuit Court of the state of South Dakota, and in that capacity, is the chief administrator of said Court.* He and the other judges of the Seventh Judicial Circuit routinely consider Petitions for Temporary Custody filed by state officials involving members of the Plaintiff Tribes and members of the Plaintiff class, and routinely enter orders granting those petitions in a manner that violates federal law.

> 12. All of the acts set forth herein were undertaken by the Defendants under color of state law. All of the Defendants are sued in their official capacities only. *Each Defendant is a "policy maker" with respect to the policies challenged in this lawsuit*.

(Pfeifle Appendix, pp. 196-197, ¶¶ 11-12 (emphasis added).) A suit against an official in his official capacity is really a suit against the entity. *Monell v. Department of Social Services of City of New York*. 436 U.S. 658, 690 n. 55 (1978). So, as plead, the Tribes brought this action against the Seventh Judicial Circuit Court through its alleged policymaker, Presiding Judge Davis.

Because they brought this as an official capacity suit, the Tribes took on the responsibility of establishing that the presiding judge, then Judge Davis, established the official policy of the Seventh Judicial Circuit Court for each of the policies that the Tribes claim to be unconstitutional.

> [The Tribes] must prove more than that [their] constitutional rights were violated by the named individual defendant, for a governmental entity is liable under § 1983 only when the entity itself is a 'moving force' behind the violation. That is, the entity's 'policy or custom' must have 'caused' the constitutional violation; there must be an 'affirmative link' or a 'causal connection' between the policy and the particular constitutional violation alleged.

Clay v. Conlee, 815 F.2d 1164, 1170 (8th Cir. 1987). The Tribes must prove that the policies of the Seventh Circuit caused their injuries because liability for a government entity under 42 U.S.C. § 1983 can only exist where the challenged policy or practice is "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694.

Everyone agrees with that. The Tribes agree with that (Plaintiffs' Response to Defendant Davis' Motion to Dismiss (Pfeifle Appendix, pp. 248-250.), and the district court agrees with that. ("Liability . . . under 42 U.S.C. § 1983 can exist only where the challenged policy or practice is made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." (Addendum, p. 65, *quoting Oglala Sioux Tribe v. Van Hunnik*, 993 F.Supp. 2d 1017, 1029 (D. S.D. 2014) (*citing Monell*, 436 U.S. at 694). The question of who is the policymaker is a legal question for the district court. *Soltesz v. Rushmore Plaza Civic Center*, 847 F.3d 941, 946 (8th Cir. 2017). The district court has misidentified Judge Pfeifle as the policymaker.

C. A defendant is a policymaker only if he has the legal authority to establish the offending policy on behalf of the entity.

An "official policy" involves a deliberate choice to follow a course of action made from among various alternatives by an official who has the final authority to establish governmental policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). A policy maker is one who "speak[s] with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue," that is one with "the power to make official policy on a particular issue." *Jett*, 491 U.S. at 737. So, if someone can change or override the policy decisions of the defendant, then the defendant is not a policymaker.

Policymaking authority can be delegated, but the delegation must be complete. "A subordinate official possesses delegated final policymaking authority when that official acts (1) free of review and (2) without any constraints imposed as a matter of policy by the original policymaker." *Soltesz*, 847 F.3d at 946 (*citing City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)). And the issue is not whether superior authority actually does review and expressly approve or reject

the policies of the defendant, but just whether it could. "If the board retains the authority to review, even though it may not exercise such review or investigate the basis of the decision, delegation of final authority does not occur." *Soltesz*, 847 F.3d at 946-947.

> We are interested only in delegations of legal power, not in whether the board's actual exercise of its power of review was sufficiently aggressive. Simply going along with discretionary decisions made by one's subordinates is not a delegation to them of the authority to make policy.

Soltesz, 847 F.3d at 947.

D. The presiding judge is not the policymaker on substantive and due process rulings for 48-hour hearings in the Seventh Judicial Circuit.

Whether Judge Pfeifle, as the presiding judge, is a policymaker is determined under state law. *Jett*, 491 U.S. at 737 ("whether a particular official has 'final policymaking authority' is a question of state law"). "State law, including valid local ordinances and regulations, will always direct the courts to some official or body of officials that has policymaking authority in a given area of the municipality's business." *Soltesz,* 847 F.3d at 946 (citations omitted).

1. One must first identify the offending policies before one can identify who is responsible for them.

First, one must identify the policy at issue because an official may be the final authority on one policy, but not another. The district court ruled that Judge Davis had instituted six policies in his 48-hour hearings that violated either Due Process or ICWA:

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

(Ord. Denying Mot. to Dismiss, Addendum, pp. 20-21.) So the Tribes must show that South Dakota law empowers the presiding judge to finally establish each of those practices within the judicial circuit.

In granting summary judgment, the district court ruled that Judge Davis was the policymaker in his capacity as the presiding judge of the judicial circuit.

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

(Ord. Denying Mot. to Dismiss, Addendum, p. 45.) But the district court cited no authority to support that conclusion. Neither the Tribes nor the district court explained how South Dakota empowers the presiding judge of a judicial circuit to establish any of the policies about which the Tribes complain. And they cannot do so because no such power exists.

2. South Dakota law does not empower the presiding judge to establish any of those policies.

The duties of the presiding judge are purely administrative. The duties and powers are set out in a statute—SDCL § 16-2-21. The only one of any consequence to 48-hour hearings is that the presiding judge assigns which judge will handle abuse and neglect cases for the following year. *See*, SDCL § 16-2-21(7) ("Arranging for the orderly

disposition of specialized matters, including, but not limited to traffic, domestic relations, and proceedings under chapters 26-7A, 26-8A, 26-8B, and 26-8C"). *See also*, SDCL § 16-6-5.1 (providing small additional compensation to a presiding judge for his or her "administrative duties.")

The other circuit judges within the Seventh Judicial Circuit Court are elected constitutional judges, with full authority to enter and enforce their judgements and decrees.

> A judge of the circuit court is a judge of the circuit court in the State of South Dakota and in any circuit in which he acts as a judge. The orders, judgments, and decrees of a circuit judge acting in a county other than one in his own circuit shall be as effectual for all purposes as though made by a judge regularly elected and qualified therein; and such judge so acting, so long as he is a circuit judge, may thereafter enforce, amend, or vacate any order, decree, or judgment made by him, but in case of his separation from office or upon his request, the judge regularly elected for such circuit shall have such power and authority

SDCL § 16-6-29. *See also*, S.D. Const. art. V, § 5 ("The circuit courts and judges thereof have the power to issue, hear and determine all original and remedial writs."). A circuit judge has full authority to act within his or her circuit. See State v. Wilson, 2000 S.D. 133, ¶ 14, 618 N.W.2d 513, 519 (construing S.D. Const. art. V, § 5 as providing that a judge

properly elected, appointed or assigned to a circuit has the power to transact business within that circuit.); *Mar. v. Thursby*, 2011 S.D. 73, ¶ 16, 806 N.W.2d 239, 243 ("Circuit courts are courts of general jurisdiction, endowed by the constitution with general jurisdiction to hear all civil actions.").

At the remedies hearing, Asst. States Attorney Roxie Erickson testified that, not only does the law empower the judges to handle their hearings as they deem best, they actually do so. "Every time we switch to a new judge [for 48-hour hearings], something changes." (Pfeifle Appendix, p. 170; line 13.) Indeed, at least on the evidentiary policies, the Tribes concede the presiding judge is not a policymaker. "South Dakota law clearly assigns to each judge in a 48-hour hearing the authority to establish the rules of evidence for that proceeding." (Plaintiffs' Response to Defendants' Motions to Reconsider (Pfeifle Appendix, p. 251.)

3. If South Dakota law establishes a policymaker regarding substantive and due process rulings in South Dakota circuit courts, it is the South Dakota Supreme Court.

The district court ruled that Judge Davis was a policymaker because his rulings at 48-hour hearings are not appealable. That is not

true. While they are interlocutory, and therefore not appealable as a matter of right, any alleged substantive or procedural error or deprivation is appealable as part of the final judgment. SDCL § 15-26A-7. And even though custody determinations from the 48-hour hearing might be moot at the time of direct appeal, it is still reviewable because it is an error that is capable of repetition yet evading review, and the same petitioner, or the intervenor Tribe, will be subject to the same action again. *Rapid City Journal v. Delaney*, 2011 S.D. 55, ¶ 8, 804 N.W.2d 388, 391.

The decisions are also subject to review by application for writ of mandamus or prohibition. The most obvious proof of that is *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62. The South Dakota Supreme Court reviewed the very same transcript of the very same hearing that the Tribes attached to the Complaint. In that case the "Tribe continues to request a new temporary custody hearing in this matter in which the full panoply of ICWA requirements and standards would be applied. Tribe contends the lack of such a hearing violates its federal and state rights and that it is irreparably harmed by the lack of any mechanism to contest the trial courts' failure to fully follow ICWA

at the temporary custody stage." *Cheyenne River Sioux Tribe*, at ¶ 8, 822 N.W.2d at 64. The South Dakota Supreme Court reviewed the issues and rejected them. So, the South Dakota Supreme Court not only can review and approve or disapprove they way circuit judge's handle 48-hour hearings, it has done so.

In its Order on the declaratory judgement and injunction, the district court seemed to express exasperation with the defendants' adherence to *Cheyenne River* even after the district court's grant of summary judgment to the Tribes. "The defendants continue to disregard this court's March 30, 2015, partial summary judgment order." (Addendum, p. 118.) The defendants did not "disregard" the order. Judge Gusinsky, who had the abuse and neglect docket, studied the matter considerably. (Pfeifle Appendix, pp. 171-172.) Rather, as the Supreme Court has made clear, "the views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law." *Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013). While the district court took issue with the defendants' reliance on *Cheyenne River*, they did so because the South

Dakota Supreme Court is the policymaker of law and due process in South Dakota courts.

The South Dakota Supreme Court has the final authority over the conduct of judicial proceedings in South Dakota courts. S.D. Const. art. V, § 2 ("The Supreme Court is the highest court of the state."). If there is a policymaker, it is that court.

E. The Tribes confused their official capacity suit against the presiding judge, with a direct suit against judicial officers for their own rulings.

Local officials may be sued under § 1983 for their own conduct that violates a plaintiff's federal rights. Two child removal cases out of this Court, *Whisman Through Whisman v. Rinehart*, 119 F.3d 1303 (8th Cir. 1997), and *Swipies v. Kofka*, 419 F.3d 709 (8th Cir. 2005), are both such cases. Judges may be sued for prospective equitable relief based on their own rulings. *See Pulliam v. Allen*, 466 U.S. 522 (1984) (judges are not immune from § 1983 suit seeking prospective equitable relief); and, *Tesmer v. Granholm*, 114 F.Supp.2d 603 (E.D. Mich. 2000) (establishing a certified class of defendant judges seeking prospective relief relating to appointment of counsel to prisoners). But the Tribes didn't do that.

The Tribes brought a *Monell* suit against Judge Davis, as the presiding judge of the Seventh Judicial Circuit because they alleged he was the policymaker for the Circuit Court. The district court subsequently substituted Judge Pfeifle when he became the presiding judge, naming him only in his official capacity as the presiding judge.

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

(Addendum, p. 121 n. 5.) The district court's only ruling regarding the policymaking authority of the presiding judge was the statement, "Defendant Craig Pfeifle is the presiding judge of the Seventh Judicial Circuit Court of the State of South Dakota *and is the chief administrator of the Seventh Judicial Circuit Court*." (Addendum, p. 121 n. 5 (emphasis added).)

To bring an official capacity, policymaker suit against the presiding judge, the Tribes must prove that the presiding judge is a policymaker. Failing that, the case must be dismissed.

F. The district court cannot order the presiding judge to become a policymaker.

The district court seems to have realized the policymaker problem at the end of the case. In an attempt to workaround Judge Pfeifle's lack of policymaking authority, the district court ordered him to bootstrap his authority to appoint judges to the abuse and neglect docket into authority to dictate how those judges resolve due process and ICWA issues that come before them.

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

(Addendum, p. 140, ¶ 6.) Essentially, the district court ordered Judge Pfeifle to become a policymaker. The law does not support that. As previously noted, the district court's ruling must limit itself to where state law grants the authority to make policy. *Soltesz,* 847 F.3d at 946. State law does not give the presiding judge of the circuit such authority.

The district court's proposal also proves too much. If the power to make policy rests in the power to appoint judges to certain tasks, then it does not stop with the presiding judge of the circuit. The Chief Justice of the South Dakota Supreme Court has the power to appoint presiding judges. SDCL § 16-2-21. If the appointment power may be exercised to change substantive rulings, then the final authority to use that power rests with Chief Justice.

The district court ruled, "The due process rights and ICWA rights of Indian children, parents, custodians and tribes cannot be left to the personal preferences of each circuit court judge." But, under South Dakota law, that is exactly who rules upon the substantive and due process rights of litigants who appear before the court, subject to the parties' right to appeal. That is the point. Because Judge Pfeifle is not a policymaker with the authority to dictate those terms, then he is not a proper defendant at all. It is not a question of how to effect the remedy, but whether the case should be dismissed.

Judge Pfeifle was substituted for Judge Davis solely for the reason that he became the presiding judge. This case was pled and maintained as an official capacity/policymaker § 1983 lawsuit, alleging the

presiding judge is the policymaker for the Seventh Judicial Circuit. A necessary element of that claim is that the Tribes prove that the presiding judge is a policymaker who is responsible for the policies that offend their federal rights. They have failed to do so, and Judge Pfeifle should be dismissed.

2. Due Process does not require that the procedural rights necessary to terminate parental rights be afforded within 48 hours of taking emergency custody.

The district court ruled that 48-hour hearings in Pennington County violate the Due Process Clause, (Ord. Granting Sum. J., Appendix, pp. 79-85), and then entered an Order on what would be required (Ord. on Dec. J. and Inj., Appendix, pp. 118, *et seq.*) and Declaratory Judgment (Appendix, pp. 145, et seq.) imposing upon Judge Pfeifle, DSS, and the States Attorney, requirements for 48-hour hearings. The district court failed to consider the entire process for post-removal adjudication, and should be reversed.

A. The standard of review is *de novo*.

"We review the district court's grant of summary judgment *de novo*, applying the same strict standard as the district court." *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1359 (8th Cir. 1993). "This Court reviews

constitutional questions *de novo*." *United States v. Corum*, 362 F.3d 489, 493 (8th Cir. 2004).

B. The district court ruled that all process due to adjudicate abuse or neglect are due at the 48-hour hearing.

The Due Process Clause of the Fourteenth Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law. U.S. Const. Amend. XIV. To prove their Due Process claim, the Tribes must show a protected interest, and show that the Seventh Judicial Circuit deprived them of that interest without due process. *Swipies*, 419 F.3d at 715. All parties agree that "parents have a liberty interest in the care, custody, and management of their children." *Swipies*, 419 F.3d at 713. The only issue is what process is due when the state takes custody of children for their protection.

What process is due is a flexible standard related to "time, place, and circumstances." *Lassiter v. Department of Social Serv's*, 452 U.S. 18, 24 (1981). When the state deprives an individual of a liberty interest, that individual must have "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*,

424 U.S. 319, 333, (1976). The Court determines whether the process that the government provides is "meaningful" by weighing three factors:

1. the private interest that will be affected by the initial action;

2. the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

3. the Government's interest, including the function involved and the fiscal administrative burden that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

1. The Interests of Parents and Children

All parties agree that the interests of parents and children in the care and companionship of one another is fundamental, vital, and profound. That is undisputed.

2. The risk of erroneous deprivation, and value of substitute procedures.

"In the context of child removal cases, the "meaningful time" and "meaningful manner" assurances impose a duty on the state to hold a hearing promptly after the removal." *Swipies*, 419 F.3d at 715. While a

prompt post-removal hearing is necessary, courts have rarely spoken to what that first hearing should look like. In previous cases, this Court has considered, not just one part of the post-removal process, but the entire system of post-removal procedures. *See In re Scott Cty. Master Docket*, 672 F. Supp. 1152, 1170 (D. Minn. 1987), aff'd sub nom. *Myers v. Scott Cty.*, 868 F.2d 1017 (8th Cir. 1989) (reviewing the procedures "*in toto*"). *See also*, Fitzgerald v. Williamson, 787 F.2d 403, 408 (8th Cir. 1986) ("law provides adequate protection . . ., as parents may petition the juvenile court for modification of custody orders at any time.") and *Bohn v. County of Dakota*, 772 F.2d 1433, 1435 (8th Cir.1985) cert. denied, 475 U.S. 1074, 106 S.Ct. 1192, 89 L.Ed.2d 307 (1986) (*ex-post* procedures are adequate). In all of those cases this Court ruled that the system of post-deprivation procedures was adequate.

But the district court looked only at the 48-hour hearing, and it concluded that a formal evidentiary hearing must take place at the 48-hour hearing. Parents must be allowed to present evidence, subpoena witnesses, cross-examine and confront witnesses, and all with the assistance of court-appointed counsel. (Declaratory Judgment, Appendix, pp. 145, *et seq.*) At such an early stage in the proceedings,

such requirements will be burdensome and do little to reduce the risk of any error.

First, we are not aware of any case in which a court has required a full-blown adversarial hearing in such a short time. Children who come into state care on a Sunday, have their 48-hour hearing on Monday afternoon. Children who come into care on a Wednesday, have their 48-hour hearing on Thursday morning. (Erickson Affidavit, Pfeifle Appendix, p. 181, ¶¶ 26 & 27.) The district court's Declaratory Judgment permits counsel for the parents to ask for no more than a 24-hour continuance. (Pfeifle Appendix, p. 149, ¶ d.) That is not a reasonable amount of time for a full evidentiary hearing, even if the parents already had counsel and everyone had all of the facts. But the parents typically are not represented until they appear at the 48-hour hearing. In over ninety-nine percent of the cases, parents, guardians, and custodians appeared pro se at the 48-hour hearing. (Of the 111 transcripts attached to Plaintiffs' submissions (See, Beauchamp Decl. (Pfeifle Appendix, p. 259-262), Transcript A12-302 contains the single case where counsel appeared. (cover sheet noting appearance, Pfeifle Appendix, p. 253).). So, in almost all cases, the hearing would take place

with a lawyer who would be coming in completely cold, to represent a client who might face criminal charges arising from the facts at the hearing. Simply the logistics of drafting subpoena's, effecting their service, and attempting to secure the attendance of witnesses on such short notice makes that requirement largely unworkable.

A 48-hour hearing is more in the nature of an initial appearance. It provides a neutral magistrate to review the DSS affidavit, any police reports, and, in cases of Indian children, the ICWA affidavit to determine whether the facts alleged would justify the removal of the children. While the parents might have a basic understanding of what led to their children's removal, they are hearing from the government for the first time.

Even in cases where courts have ruled that a hearing was untimely, they did not hold that the first hearing required all of the trappings of a trial. For example in *Swipies*, this Court held that 17 days was too long to wait before a hearing, but did not set out what that hearing must include. *Swipies*, 419 F.3d at 715.

One source of the problem with the district court's order is that it seems to be intended to piggyback off of South Dakota's statute

requiring a 48-hour hearing for continued custody. Rather than decide when due process requires an adversarial hearing, the district court required the very first contact with the family to include all of the elements necessary for final adjudication. But South Dakota's statutes do not establish the limits of Fourteenth Amendment Due Process. This Court has made clear that state law cannot reduce the requirements of due process, *Swipies*, 419 F.3d at 716, *citing Martinez v. California*, 444 U.S. 277, 284 & 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). The fact that South Dakota has a neutral magistrate review the reason for custody in the hours following removal does not mean that such a quick hearing is required by the Due Process Clause, or that all due process protections must be afforded at that early hearing.

The 48-hour hearing is similar to pretrial detention proceedings under 18 U.S.C. § 3142. The accused in criminal cases regularly lose their liberty while awaiting trial. Those deprivations are temporary, and they do not come with a full set of due process rights. The statute simply provides that

> The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . ., unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

18 U.S.C. § 3142(b). In such proceedings, where the accused liberty interests are unquestionably at stake, the district court or magistrate "has the discretion to allow the defendant to call such witnesses at a detention hearing," *United States v. Sanchez*, 457 F. Supp. 2d 90, 92 (D. Mass. 2006), which necessarily includes the discretion to disallow it. "[A] judicial officer can "... rely upon investigatory descriptions of evidence (and similar hearsay) where the judicial officer reasonably concludes that those descriptions, reports, and similar evidence, in the particular circumstances of the hearing, are reliable." *Id.* "[A] defendant has no absolute 'right' to subpoena adverse witnesses at a detention hearing. The matter is left to the discretion of the magistrate judge." *Id.* (internal citations omitted).

> [A] judicial officer can rely on matters brought out at the hearing which would not be considered as "evidence" under traditional trial standards. Hence, merely because the information adduced at the hearing may be hearsay of the kind that would be inadmissible at a trial, does not

> necessarily mean that such information cannot form the basis for a pretrial detention determination.

United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985).

The risk of an error is no greater in a 48-hour hearing than in a pretrial detention hearing. And child custody hearings are adjudicated faster than required by the Speedy Trial Act.[3] Courts have ruled that the risk of error in pretrial detention proceedings does not necessitate the requirements that the district court imposed on 48-hour hearings.

3. The Government's Interest and Burden of Additional or Substitute Procedures

The state has an interest protecting children who are at risk. *See*, *In re Scott Cty Master Docket*, 672 F.Supp. at 1164 (necessity may compel the state to terminate parents' rights in the care and custody of their children), (*citing Ruffalo by Ruffalo v. Civiletti*, 702 F.2d 710, 715 (8th Cir.1983)). That interest is higher at the 48-hour hearing than it is later in the process both because the children are safe, and because more information is available to both DSS and the parents. *See*, *Alsager*

[3] Speedy trial time is 70 days, not including excluded time. 18 U.S.C. § 3161(c)(1). The district court found that 563 of 823 children who had 48-hour hearings were discharged from DSS custody in less than 60 days. (Order Granting Summary Judgment, Appendix, pp. 55-56.) The record did not indicate how many of the remaining children were adjudicated abused & neglected.

v. Dist. Court of Polk Cty., Iowa (Juvenile Div.), 406 F. Supp. 10, 22 (S.D. Iowa 1975), opinion adopted sub nom. *Alsager v. Dist. Court of Polk Cty., Iowa*, 545 F.2d 1137 (8th Cir. 1976) ("[T]ermination proceedings should be distinguished from immediate removal proceedings for purposes of substantive due process analysis. The state's interest in protecting a child from future harm at the hands of his or her parents is clearly less compelling in a situation where the state has already obtained temporary protective custody over the child then in those cases where the supposedly threatened child remains in the parents' home.")

The burdens imposed by the district court's Declaratory Judgement change the nature of the 48-hour hearing. Roxie Erickson's affidavit (Pfeifle Appendix, pp. 178, *et seq.*) lays out the typical process used when the state takes custody of a child in need of protection. At the 48-hour hearing, the judge asks DSS why they removed the children, and why they should not be returned. The district court has changed that initial review by a judge into an adversarial hearing at which DSS must prove that it is right.

For example, the district court ruled that the States Attorney must present "testimony showing the active efforts of DSS to reunify the family following the emergency removal or placement." (Addendum p. 151, ¶ 2). The district court also required that the court articulate "on the record and include specific findings as to whether DSS engaged in active efforts to reunify the family and any reason authorized by § 1922 that continued placement with DSS is necessary to prevent imminent physical damage or harm to the child." (Dec. J., Addendum p. 151, ¶ 3). That requirement is not workable.

The 48-hour hearing takes place between hours after the child is picked up. "Active efforts" is the standard for trying to rehabilitate a family for reunification, and ICWA does not impose the burden of determining active efforts until ordering foster-care placement or termination of parental rights at the conclusion of the adjudication stage. 25 C.F.R. § 23.120. Hearings for adjudication may not even begin until at least 10 days after the parents have received notice. 25 C.F.R. § 23.112(b).

The district court took the full range of hearing rights that must attend a permanent deprivation of parental rights, and ordered the

state to apply them within the first 48 to 72 hours after the children are picked up. The due process clause does not require that, and the Court should reverse the Declaratory Judgment.

3. The district court erred in prohibiting a judge in an emergency custody proceeding from considering the risk of non-bodily harms.

A. The standard of review is *de novo*.

The question is whether the district court erred in interpreting § 1922's standard, this Court reviews that issue *de novo*. *United States v. Templeton*, 378 F.3d 845, 849 (8th Cir. 2004) ("Because the issue before us involves a question of statutory interpretation, our review is de novo.").

B. 25 U.S.C. § 1922 permits the judge in an emergency custody proceeding to consider the risk of non-bodily harms when determining whether to continue custody.

States may take emergency custody of Indian children as provided in their state law "in order to prevent imminent physical damage or harm to the child." 25 U.S.C. § 1922. If the state takes emergency custody of an Indian child, § 1922 also requires the state terminate its custody "when the child no longer faces an imminent risk of physical damage or harm." Id.

The district court ruled that "physical damage or harm," does not "permit consideration of 'emotional damage or harm' in § 1922 emergency proceedings." (Ord. on § 1922, Addendum, p. 117.) Rather, the district court ruled that "imminent physical damage or harm" means "imminent physical damage" or "imminent physical harm." (Ord. on § 1922, Addendum, p. 116.) The district court's interpretation is contrary to the interpretation given by the Department of Interior. The Department of Interior's guidance on § 1922 authorizes a state to take and continue emergency custody of Indian children who face an imminent risk to their health, safety, and welfare.

> Section 1922 says,
>
> > Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child . . . 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[.]

25 U.S.C. § 1922. The issue on appeal is the meaning of "physical damage or harm." Judge Pfeifle respectfully submits that the district court's ruling that it is limited to physical harms is error.

1. The district court's interpretation would render the word "harm" meaningless.

First, the district court's interpretation would make "physical damage or harm" mean the same as "physical damage." The "harm" would become simply ineffective surplusage. Black's Law Dictionary defines "damage" as "loss or injury to person or property; esp., physical harm that is done to something or to part of someone's body." Black's Law Dictionary (10th ed. 2014). It defines "harm" as "injury, loss, damage." Id. Merriam Webster defines "harm" as "physical or mental damage."[4] It defines "damage" as "loss or harm resulting from injury to person, property, or reputation."[5] "[T]he starting point for the interpretation of a statute must be its plain language." *Arkansas AFL-CIO v. F.C.C.*, 11 F.3d 1430, 1440 (8th Cir. 1993), *citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). In looking at the language of the statute, the court "must avoid statutory interpretation that renders any section superfluous and does not give effect to all of the words used by Congress." *In re Windsor on the River*

[4] https://www.merriam-webster.com/dictionary/harm

[5] https://www.merriam-webster.com/dictionary/damage

Assocs., Ltd., 7 F.3d 127, 130 (8th Cir. 1993) *quoting In re Oxborrow*, 913 F.2d 751, 754 (9th Cir.1990).

So read, "physical damage" and "harm," must each add something to the meaning of the statute. The Department of Interior has advised that "harm" expands the phrase to non-physical harms.

2. The district court's interpretation is contrary to that of the Department of the Interior.

Following a comment period, the Department of Interior chose not to define "imminent physical damage or harm" because it "determined that statutory phrase is clear and understandable as written, such that no further elaboration is necessary." 81 Fed. Reg. 38778, 38793 (June 14, 2016). But the Department, by its responses to comments, did signal that it believed the "clear and understandable" phrase was broad enough to encompass non-physical harms.

As part of its rulemaking, the Department originally proposed limiting the term "imminent physical damage or harm" to only physical risks. Specifically, the Department proposed the definition, "present or

impending risk of serious bodily injury or death."[6] In response to that definition, some commenters objected because, for example,

> • The proposed definition is too narrow in omitting neglect and emotional or mental (psychological) harm and would preclude emergency measures to protect a child from these types of harms;
>
> • By requiring "serious" bodily injury, the proposed definition would exclude physical harm such as domestic violence that does not rise to a major injury and exclude threatened physical harm (e.g., present or impending sexual abuse, child labor exploitation, or misdemeanor assaults);
>
> • The proposed definition would result in equal protection violations denying Indian children the same level of protections as non-Indian children because research shows that exposure to domestic violence produces significant and long-lasting harm to the child psychologically, even when the child does not himself experience physical injury.

81 Fed. Reg. 38778, 38794 (June 14, 2016).

In response to the comments, the Department elected to withdraw its definition because it "is too constrained and does not capture circumstances that Congress would have considered as presenting 'imminent physical damage or harm." 81 Fed. Reg. at 38793. The Department found that the statutory language was intended to cover any "endangerment of the child's health, safety, and welfare, not just bodily injury or death[.]" 81 Fed. Reg. at 38794. "The Department

[6] 80 Fed. Reg. 14880, 14885 (March 20, 2015).

agrees with commenters that the phrase focuses on the child's health, safety, and welfare, and would include, for example, situations of sexual abuse, domestic violence, or child labor exploitation." 81 Fed. Reg. at 38794.

3. The Department of Interior's interpretation is consistent with the overall framework of ICWA.

Before the district court, the Tribes argued that it would undermine ICWA's purpose if emergency removals were not limited to physical dangers. But the Department's interpretation of § 1922 recognizes the urgencies of emergency removals, as well as the practical limitations on law enforcement and child protection staff trying to make ICWA determinations in the field, even while trying to ascertain whether ICWA even applied to the children in distress.

All parties agree that ICWA is designed to protect Indian children from the unique harms that Indian children suffer from separation from their culture, the unique harm that Tribe's suffered from the loss of their children, and the unique cultural issues that caused state child protection services to misjudge the fitness of Indian parents. 25 U.S.C. §§ 1901 & 1902. But those factors are addressed later—at the adjudication stage when the court decides whether the child is abused

or neglected, and the placement stage when the court decides who should care for the child. See 25 U.S.C. § 1912(d), (e), & (f) (requiring efforts to rehabilitate the family to keep it together, and expert determinations that the family cannot stay together without harming the child). Emergency removals are expressly 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 damage or harm to the child."). *In re Esther V.*, 2011-NMSC-005, 248 P.3d 863, 872 (N.M. 2011) (full ICWA protections are provided "at the adjudicatory hearing because the adjudicatory hearing is the procedural phase that affords the Indian parent and tribe the most procedural due process protection and best accommodates the requirements of § 1912.").

Judge Pfeifle understands the purpose and goals of ICWA. But, like the Department of Interior, he recognizes emergency removals are different.

> Recognizing that emergency removal and placements are sometimes required to protect an Indian child's safety and welfare, the final rule clarifies the distinction between the requirements for emergency proceedings and other child-

> custody proceedings involving Indian children and includes provisions that help to ensure that emergency removal and placements are as short as possible, and that, when necessary, proceedings subject to the full suite of ICWA protections are promptly initiated.

81 Fed. Reg. at 38779.

The phrase "physical damage or harm" in 25 U.S.C. § 1922 encompasses more risks than bodily harm. The Court should reverse the district court's Order (Regarding ICWA § 1922) (Appendix, p. 111, *et seq.*)

4. The district court should have dismissed the case under the *Younger* Abstention Doctrine because its rulings necessarily interfere in pending 48-hour hearings.

Judge Davis moved to dismiss the Tribes' Complaint under the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). The district court determined that the tests for abstention were not met, and denied the motion to dismiss. This Court reviews "a district court's decision to abstain for abuse of discretion, with underlying legal determinations receiving plenary review." *Hudson v. Campbell*, 663 F.3d 985, 986 (8th Cir. 2011), *citing Aaron v. Target Corp.*, 357 F.3d 768, 774 (8th Cir.2004).

"Under *Younger v. Harris*, . . . federal courts should abstain from exercising jurisdiction in cases where equitable relief would interfere with pending state proceedings in a way that offends principles of comity and federalism." *Aaron*, 357 F.3d at 774. "The motivating force behind *Younger* abstention is the promotion of comity between state and federal judicial bodies. *Id.*

Whether *Younger* abstention applies rests on four factors:

1. Is the state judicial proceeding one of the three exceptional cases to which *Younger* abstention can apply? *Sprint Communications, Inc. v. Jacobs*, 134 S.Ct. 584 (2013).

2. Are the proceedings ongoing? *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

3. Do the proceedings implicate important state interests? *Id.*

4. Do the proceedings provide an adequate opportunity for the plaintiff to raise constitutional challenges? *Id.* .

The district court rejected Judge Davis's *Younger* argument for a few reasons, each of which will be addressed. But the primary reason was that the district court did not believe *Younger* applied to cases addressing only prospective relief. Because the prospective relief would

apply to scheduled 48-hour hearings for members of the certified class who were already in DSS custody, *Younger* applies, and the district court should have dismissed the action.

A. Child removal proceedings are subject to *Younger*.

One basis upon which the district court denied Judge Davis's motion is that 48-hour hearings are not the type of exceptional case to which *Younger* applies. Only three types of cases qualify for *Younger* abstention: "'state criminal prosecutions,' 'civil enforcement proceedings,' and 'civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Sprint Communications,* 134 S.Ct. at 588. The district court ruled that this case did not qualify as exceptional under *Sprint Communications*.

Child removal proceedings fit the second category of case—civil enforcement proceedings. In 1979, the Supreme Court specifically held that a proceeding for "temporary removal of a child in a child-abuse context" is exactly the type of exceptional case to which *Younger* applies.

> That policy was first articulated with reference to state criminal proceedings, but as we recognized in *Huffman v.*

> *Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), the basic concern—the threat to our federal system posed by displacement of state courts by those of the National Government—is also fully applicable to civil proceedings in which important state interests are involved. As was the case in *Huffman*, the State here was a party to the state proceedings, and the temporary removal of a child in a child-abuse context is, like the public nuisance statute involved in *Huffman*, "in aid of and closely related to criminal statutes."

Moore v. Sims, 442 U.S. 415, 423 (1979). Indeed, the *Sprint Communications* Court cited *Moore* and child removal proceedings as the type of civil enforcement proceedings to which *Younger* applies.

> Our decisions applying *Younger* to instances of civil enforcement have generally concerned state proceedings "akin to a criminal prosecution" in "important respects." *Huffman*, 420 U.S., at 604, 95 S.Ct. 1200. . . . *Moore v. Sims*, 442 U.S. 415, 419-420, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979) (state-initiated proceeding to gain custody of children allegedly abused by their parents)[.]

Sprint Communications, 134 S.Ct. at 592.

The error of the district court's analysis is that, rather than consider the nature of the proceeding, it looked at whether its ruling would apply to a present proceeding. Because the Tribes sought only prospective relief, the district court reasoned that 48-Hour Hearings are not civil enforcement proceedings. (Ord. Denying Mot. to Dismiss, Addendum, pp. 6-7.) But that is not what *Sprint Communications* held.

Whether there are ongoing proceedings that would be affected by the district court's ruling is one of *Middlesex* factors, which is a different part of the analysis. *Sprint Communications*, 134 S.Ct. at 593 ("The three *Middlesex* conditions . . . [are] additional factors."). It is not unimportant; it simply doesn't apply to the question of whether a 48-hour hearing is the type of case subject to the *Younger* abstention. It is.

When turning to the *Middlesex* factors, the district court granted that the second one applied—emergency child custody proceedings implicate an important state interest (Ord. Denying Mot. to Dismiss Addendum, p. 11), and that there were ongoing state judicial proceedings (Addendum, p. 10). But, the district court ruled that its orders would not interfere in those proceedings, and that the Tribes could not adequately vindicate their constitutional claims in state court.

B. The district court erred in determining that its declaratory judgment and injunction would not interfere with state judicial proceedings.

The first Middlesex factor is "the existence of an ongoing state judicial proceeding." *Aaron*, 357 F.3d at 774. The district court agreed with defendants "that 48-hour hearings involving Indian children will continue to occur during the pendency of this litigation." (Addendum, p.

10.) "[H]owever, the question presented under the first prong of the *Younger* inquiry is not simply whether there are ongoing state judicial proceedings, but whether the federal proceedings at issue will interfere with such state proceedings." (Ord. Denying Mot. to Dismiss, Addendum, p. 10.) The district court held that the first *Middlesex* condition is not met because its changes to these 48-hour hearings would be helpful to, rather than interfering with the proceedings.

> The court concludes the relief requested by plaintiffs will not interfere with ongoing state court proceedings. As set out in the complaint, plaintiffs allege defendants' failures include removing Indian children from their homes without affording them, their parents, or their Tribe a timely and adequate hearing and coercing the parents into waiving their rights under the Due Process Clause and the Indian Child Welfare Act. (Docket 1 at p. 3).
>
> If these claims are proven, an order by this court remedying such failures would not interfere with ongoing 48-hour hearings involving Indian children. Plaintiffs are not seeking to enjoin any state proceedings nor are they seeking to enjoin defendants from enforcing state law. Rather, the relief sought by plaintiffs would support the state's interest involving the protection of Indian children in abuse and neglect cases.

(Addendum, p. 10.) Judge Pfeifle has found no authority for the proposition that interference is determined by whether one sees the federal intervention has a help or a hindrance.

The issue is not whether the district court finds the equitable relief helpful. "The motivating force behind *Younger* abstention is the promotion of comity between state and federal judicial bodies." *Aaron*, 357 F.3d at 774. As the Supreme Court said, abstention rests primarily on consideration of comity, which "includes a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 364 (1989).

As the district court recognized, there are ongoing proceedings involving class members. The declaratory judgment is a specific list of what the state court must say to the participants in those proceedings, what the court must provide to the participates, the specific time frames for any continuance, and standards to be applied, and the express findings to be made, and the evidence upon which those findings must be based. The district court's requirements for evidence and cross-examination are contrary to South Dakota statutes, SDCL § 26-7A-34,

and specific holdings of the state's highest court. *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62.

The declaratory judgment interferes with the conduct of 48-hour hearings.

C. The district court erred in concluding that the Tribes could not adjudicate their rights in state court.

The Tribes bear the burden of demonstrating that the state courts do not afford an adequate opportunity to present their claims. *Plouffe v. Ligon*, 606 F.3d 890, 893 (8th Cir. 2010). The district court determined that the Tribes could not present their claims because not all of the plaintiffs had pending actions, so they didn't have a forum. But the Oglala Sioux Tribe and the Rosebud Sioux Tribe do participate in the ongoing 48-Hour Hearings, and may challenge how they are conducted. At least as to Judge Davis, we know that the Tribes could present their claims in state court because the Cheyenne River Sioux Tribe did so in *Cheyenne River Sioux Tribe v. Davis*.

"As the Supreme Court has noted, 'when a litigant has not attempted to present [her] federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy." *Night Clubs, Inc. v. City of Fort Smith,*

Ark., 163 F.3d 475, 481 (8th Cir. 1998) (*quoting Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15, (1987)). Not only can the parties obtain review of their constitutional claims in state court, one a similarly situated party has actually done so.

A state's emergency child custody proceedings are subjection to *Younger* consideration, and all of the *Middlesex* conditions are met. The Court should reverse the district court's denial of Judge Davis's Motion to Dismiss [Ord. Denying Mot. to Dismiss, Appendix, p. 1, *et seq.*].

Joinder with Consolidated Appellants

Pursuant Fed. R. App. P. 28(i), Judge Pfeifle joins in the issues and arguments of the Appellants in the consolidated appeals.

Conclusion

The Court should reverse the judgment of the district court, and remand with instructions that the district court dismiss the claims against Judge Pfeifle.

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12095 words, without excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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.

3. The electronic version of the brief and addendum have been scanned for viruses, and are virus-free.

4. The electronic version of the brief has been printed to PDF format directly from the original word processing file.

Dated March 29, 2017.

/s/ Jeffrey G. Hurd
Jeffrey G. Hurd

Certificate of Service

I hereby certify that on March 29, 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

Addendum Contents

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