No. 17-1135, 17-1136, & 17-1137
(Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGTH CIRCUIT

OGLALA SIOUX TRIBE and **ROSEBUD SIOUX TRIBE**, as parens patriae, to protect the rights of their tribal members; **MADONNA PAPPAN**, and **LISA YOUNG**, individually, and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

v.

MARK VARGO, in his official capacity; **LISA FLEMING** and **LYNNE A. VALENTI**, in their official capacities; **HONORABLE CRAIG PFEIFLE**, in his official capacity,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION
HON. JEFFREY L. VIKEN, CHIEF JUDGE

APPELLEES' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs are non-corporate parties. Thus, there is no parent corporation. Plaintiffs are two federally recognized Indian Tribes in South Dakota (the Oglala Sioux Tribe and the Rosebud Sioux Tribe), as well as two individual plaintiffs, Lisa Young and Madonna Pappan, who bring this action on their own behalf and on behalf of a class of all other persons who reside in Pennington County, South Dakota, and are members of federally recognized Indian tribes and have minor children living with them in Pennington County.

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STATEMENT OF ISSUES

1. Based on the uncontroverted evidence, did the District Court correctly hold that Defendants had violated for many years and were still violating Plaintiffs' rights under the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.*?

2. Based on the uncontroverted evidence, did the District Court correctly hold that Defendants had violated for many years and were still violating Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment?

3. Given that the District Court found, based on the uncontroverted evidence, that Defendants had violated for many years and were still violating Plaintiffs' rights under the Indian Child Welfare Act and the Due Process Clause, did the District Court enter appropriate remedies to ensure that those violations will cease?

STATEMENT OF THE CASE

The four Appellants ("Defendants") filed three appeals, which have been consolidated. Appellees ("Plaintiffs") submit this consolidated brief in response to Defendants' three respective briefs.

Defendants' Statements of the Case are self-serving and skewed. With surgical precision, Defendants omit from their briefs virtually every damaging fact. Defendants do not deny the facts; they simply ignore them.

A reliable summary of the facts already exists: the district court's December 15, 2016 ruling on remedies ("Remedies Decision"), Docket 302 (a copy of which is provided in the Appendix of Appellants Lisa Fleming and Lynne Valenti (hereinafter "DSS-App.") at 321-47 (the Appendix that Plaintiffs have selected to use for their references). These facts are *undisputed*:

> On March 21, 2013, plaintiffs filed this civil rights action pursuant to 42 U.S.C. § 1983 asserting defendants' policies, practices and procedures relating to the removal of Native American children from their homes during state court 48–hour hearings[1] violate the Indian Child Welfare Act ("ICWA")[2] and the Due Process Clause of the Fourteenth Amendment. (Docket 1). Defendants denied plaintiffs' claims. (Dockets 76, 80 & 81).

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[1] SDCL § 26–7A–14 directs "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 ...." These proceedings are commonly referred to as a "48–hour hearing."

[2] 25 U.S.C. § 1901 et seq.

On July 11, 2014, plaintiffs filed two separate motions for partial summary judgment. (Dockets 108 & 110). Those motions will be identified as the "Section 1922 Claims" (Docket 110) and the "Due Process Claims" (Docket 108). Following extensive submissions by the parties, on March 30, 2015, the court entered an order granting plaintiffs' motions ("2015 order"). (Docket 150 at p. 44). By the 2015 order, the court reserved ruling on plaintiffs' request for declaratory and injunctive relief. *Id*. On August 17, 2016, a hearing was held to address plaintiffs' prayer for relief ("remedies hearing"). (Docket 277).

. . . Plaintiffs Oglala Sioux Tribe and Rosebud Sioux Tribe are Indian tribes officially recognized by the United States with reservations located within the State of South Dakota. (Docket 150 at p. 11). Both tribes have treaties with the federal government. *Id*. The court granted parens patriae status to both tribes. (Docket 69 at p. 17).

Plaintiffs Madonna Pappan and Lisa Young reside in Pennington County, South Dakota, and are members of the Oglala Sioux Tribe and the Standing Rock Sioux Tribe, respectively. (Docket 150 at p. 11). The court certified these individual plaintiffs as class representatives for all similarly situated Indian parents. (Docket 70 at pp. 14–15). The class of plaintiffs includes "all other members of federally recognized Indian tribes who reside in Pennington County, South Dakota, and who, like plaintiffs, are parents or custodians of Indian children." *Id*. at p. 14.

Defendant Lynne A. Valenti is the Secretary of the South Dakota Department of Social Services ("DSS").[3] *Id*. Defendant Lisa Fleming is the person in charge of DSS Child Protection Services ("CPS") for Pennington County, South Dakota.[4] . . . .

[3] Pursuant to Fed. R. Civ. P. 25(d), Ms. Valenti was substituted as a proper party in her official capacity effective February 24, 2014. (Docket 150 at p. 11 n. 12).

[4] Pursuant to Fed. R. Civ. P. 25(d), Ms. Fleming was substituted as a proper party in her official capacity effective March 7, 2016. See Dockets 221 & 226.

Defendant Mark Vargo is the duly elected States Attorney for Pennington County. (Docket 150 at p. 11). A Deputy States Attorney under States Attorney Vargo's supervision prepares the petitions for temporary custody for all ICWA cases. (Docket 217 at p. 6). 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.[5]

Since January 2010, approximately one hundred 48–hour hearings involving Indian children[6] are held each year in Pennington County. (Docket 150 at p. 12).[7] In March 2015, the court found that despite "the clear intent of ICWA, the [Department of the Interior] Guidelines[8] and the SD Guidelines,[9] all of which contemplate evidence will be presented on the record in open court, Judge

[5] 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.

[6] Unless otherwise indicated, all references to "child(ren)," "parent(s)," and "custodian(s)" will mean Indians as that term is defined by 25 U.S.C. § 1903(3).

[7] The undisputed testimony at the remedies hearing indicates this figure remained constant for 2015 and the 2016 figure will be approximately the same.

[8] The Department of Interior Guidelines for State Courts; Indian Child Custody Proceedings ("DOI Guidelines") were promulgated to aid in the interpretation of ICWA's provisions. 44 Fed. Reg. 67584–67595 (Nov. 26, 1979). The DOI Guidelines were revised on February 19, 2015 ("DOI Revised Guidelines"). (Docket 150 at p. 29). The DOI Regulations were updated December 12, 2016. See 81 Fed. Reg. 38778–38876 (June 14, 2016) and 25 CFR part 23.

[9] "South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases" were available as of March 30, 2015, at http://ujs.sd.gov/uploads/pubs/SDGuidelinesAandNProceedings.pdf. (Docket 150 at p. 32 n.29).

Davis[10] relied on the ICWA affidavit and petition for temporary custody which routinely are disclosed only to him and not to the Indian parents, their attorney or custodians." (Docket 150 at pp. 34–35). These undisclosed documents are not subject to cross-examination or challenge by the presentation of contradictory evidence. *Id*. at p. 35.

. . . In the March 2015 order, the court found the defendants violated plaintiffs' due process rights under the Fourteenth Amendment during the course of 48–hour hearings. (Docket 150 at pp. 36–42). The violations are summarized as follows: (1) failing to appoint counsel in advance of the 48–hour hearing; (2) failing to provide notice of the claims against Indian parents, the issues to be resolved and the state's burden of proof; (3) denial of the right to cross-examine adverse witnesses; (4) denying Indian parents or custodians the right to present evidence in their own defense; and (5) removing Indian children on grounds not based on evidence presented in the hearing. *Id*.

. . . [Deputy State's Attorney Roxanne] Erickson testified that since 2011 she has been the principal Deputy States Attorney assigned in Pennington County to handle 48–hour hearings. *Id*. at p. 73:5–7. . . . She estimated there are about one hundred 48–hour hearings involving Indian children each year and that approximately 50 percent of all 48–hour hearings in the county involve Indian children. *Id*. at p. 74: 1–13.

. . . Ms. Erickson testified Judge Gusinsky [who currently presides over the county's 48-hour hearings] does not allow any testimony during any 48–hour hearing and that for the past three years no Seventh Circuit Judge has permitted live testimony at any 48–hour hearing. *Id*. at p. 81:3–6. She testified Judge Gusinsky does not allow parents or their attorneys to cross-examine any witnesses until three or four months later at the adjudicatory hearing.[11] *Id*. at p. 85:8–17.

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[10] Judge Davis was the Presiding Judge of the Seventh Judicial Circuit and the judge presiding over most 48–hour hearings during the time frame of 2010 to 2013

[11] Under South Dakota law, at an adjudicatory hearing the circuit court judge "shall consider whether the allegations of the petition are supported by clear

DSS-App. at 322-26, 330-31, 332-33.

There are seven Judicial Circuits in South Dakota's judicial system. The Chief Justice of the South Dakota Supreme Court selects a Presiding Judge for each one. SDCL § 16-2-21. Each Presiding Judge determines which judge will hear child abuse and neglect ("A & N") cases for the circuit. SDCL § 16-2-21(7). In the Seventh Circuit, these are yearly assignments. *See* Pfeifle Brief at 29-30. In March 2013, when this federal suit was filed, Hon. Jeff Davis was the Presiding Judge of the Seventh Judicial Circuit. He appointed himself to hear all A & N cases in 2010, and Judge Ecklund in 2011, Judge Thorstensen in 2012, Judge Pfeifle in 2013, and Judge Mandel in 2014 and again in 2015. In May 2015, Judge Davis was replaced by Judge Pfeifle as Presiding Judge. Judge Pfeifle appointed Judge Gusinsky to hear all A & N cases in 2016 and the first half of 2017.

A & N cases in the Seventh Judicial Circuit are assigned docket numbers beginning with the letter "A" followed by the year of the case and the specific docket number. Thus, the first A & N case filed in 2010 would be A10-001, and first one in 2011 would be A11-001. If the judge assigned to hear cases for the year is unavailable on a particular day, another judge is selected. In this fashion, Judge Davis presided over some A & N cases in 2014 and Judge Pfeifle presided over

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and convincing evidence concerning an alleged abused or neglected child ...." SDCL § 26–7A–82.

some in 2015, filling in as a substitute. Tomorrow, then, Judges Davis or Pfeifle could preside over an A & N case if a substitute were needed. Judge Pfeifle is also free to assign himself or Judge Davis to hear A & N cases for all of 2018.

Defendants' briefs contain numerous exaggerations—and distortions—of the facts. For instance, the brief filed by Defendants Lisa Fleming and Lynne Valenti ("DSS Defendants" or "DSS") states: "[After the 48-hour hearing,] the second phase begins with scheduling the adjudicatory hearing, *which is usually held 30 days after the 48-hour hearing*, but never longer than 90 days, except in exceptional circumstances." *See* DSS Brief at 5 (emphasis added). That statement is false. DSS produced in discovery more than 100 custody cases, and in none of them did the adjudicatory hearing occur within 30 days of the 48-hour hearing. Indeed, the attorney who represented DSS in those cases, Roxanne Erickson, testified during the August 17, 2016 Remedies Hearing that adjudicatory hearings typically are held 90 days, and often 120 days, after the 48-hour hearing. *See* Remedies Hearing Tr. (ECF 286) at 80-81, 85.

In addition to distorting facts, Defendants omit virtually all of the damaging facts. For instance, as discussed in the next section of this brief, Congress passed the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* ("ICWA"), to drastically limit the discretion of state employees to remove Indian children from their homes and keep them for long periods of time in state custody. One provision

of ICWA, 25 U.S.C. § 1922, limits the state's discretion at the initial hearing, when state employees first seek permission from a state court to obtain legal custody of an Indian child. Each year, Defendants seek legal custody of more than two hundred Indian children in such initial ("48-hour") hearings. *See* DSS-App. at 258 (noting that in the four years between 2010 and 2013, 823 Indian children were involved in 48-hour hearings in Pennington County). Not one brief discloses the fact that Defendants argued at the outset of this case that § 1922—far from *limiting* their discretion—was a "statute of deferment" that authorized them to *continue to exercise* their discretion at 48-hour hearings by deferring ICWA's constraints until much later in their child removal process. It was not until the district court rejected that argument in January 2014, *see* DSS-App. at 274 ("Section 1922 is not a 'statute of deferment'") that Defendants finally abandoned this interpretation of § 1922. The reason why disclosing this fact is so important—and probably why Defendants seek to conceal it— is because it shows conclusively that Defendants were ignoring ICWA in their 48-hour hearings, exactly as the district court found. Defendants did not even attempt to comply with ICWA in their 48-hour hearings because they viewed § 1922 as a statute of deferment.

Also missing from Defendants' Statements is an accurate description of their 48-hour hearings. In the first place, these proceedings do not deserve to be called "hearings," given that parents were not allowed to be heard. Not a single

Defendant notes the following uncontroverted facts: during these hearings parents were not given a copy of the petition the State filed against them, not given a copy of the affidavit that the DSS caseworker filed against them, not appointed counsel, not allowed to testify, not allowed to call witnesses, and not allowed to question the caseworker who submitted that affidavit—in other words, parents were prevented from challenging the State's allegations *in any fashion*—and the judge then made a decision regarding whether to grant the State's petition for custody based entirely on the State's secret, *ex parte* evidence. Although Defendants wish to ignore them, those are the undisputed facts, and they are very damaging, clearly showing that Defendants' 48-hour hearings violated both the Due Process Clause and ICWA.

The district court's Remedies Decision contains the following heading in bold lettering: **"Defendants' Only Consistent Policy for Handling the ICWA and Due Process Rights of Indian Children, Parents, Custodians, and Tribes is Defendants' Violation of Those Rights."** *See* DSS-App. at 327. Most of the facts supporting that finding (all of them uncontroverted) are omitted from Defendants' briefs.[12]

[12] Defendants' briefs also do not address several issues of law they raised in the district court that the Defendants lost. Apparently, Defendants are not pursuing those issues on appeal, including (1) the standing of the plaintiff Tribes, (2) the decision to certify a class, (3) whether Plaintiffs may enforce their ICWA claims through a § 1983 lawsuit, and (4) certain discovery orders. Plaintiffs consider these issues to have been abandoned and are only briefing the issues addressed in Defendants' briefs.

INTRODUCTION

No rational person could imagine that officials within the United States, in the twenty-first century, would employ a child removal hearing process as unfair and lopsided as the one challenged here. Indeed, if someone wanted to create a hearing process to ensure that the State prevailed *every* time, they would be hard-pressed to find one more effective than Defendants'.

Whenever a child in South Dakota is removed from the home by state officials, such as a welfare worker, in an emergency situation, the Department of Social Services (DSS) must decide within 48 hours whether to return the child to the home or seek an order granting DSS legal custody as well as physical custody of the child. SDCL § 26-7A-14.[13] If DSS decides to seek such an order, a petition is filed in county court and a hearing must be held within those 48 hours—the "48-hour hearing." *Id.*

In the hearing process created by Defendants and challenged in his lawsuit, the State submitted its evidence to the judge *ex parte* in the form of an affidavit from a caseworker that accused the parents of abuse and neglect of their child; the parents were not appointed counsel; the parents were not allowed to see the affidavit; the parents were not allowed to testify; the parents were not allowed to

[13] Typically, DSS would already have physical custody as a result of the emergency. The issue at the 48-hour hearing is whether DSS should be given legal custody and allowed to retain physical custody of the child beyond the 48-hour hearing.

call witnesses; and the parents were not allowed to question the caseworker. The judge then made a ruling based entirely on the State's evidence. Because there was no testimony, these hearings were quickly over—some within 60 seconds—and the typical result was a court order that allowed DSS to retain legal and physical custody of the child for an additional 55-60 days until the next hearing.[14]

As the undisputed evidence shows, from 2010 through 2013, 48-hour hearings were held in Pennington County (Rapid City), South Dakota, exactly as just described involving more than 800 Indian children, and the State was granted continued custody 100 percent of the time. *See* DSS-App. at 258. In each hearing, as the District Court found, the parents were denied five tenants of due process:

1. Parents were not notified of the evidence against them or the standard of proof governing the hearing;

2. Parents were denied an opportunity to present evidence;

3. Parents were denied an opportunity to challenge the state's evidence;

4. Parents were denied the assistance of court-appointed counsel; and

5. The presiding judge's decision was based entirely on evidence submitted by the state *ex parte*.

Id. at 282-299.

[14] Attached to Plaintiffs' complaint as Exhibit 1 is the transcript of a Plaintiff's 48-hour hearing. (*See* Appellees' App. at 1-3 for a redacted version, attached to this brief.) As the transcript shows, both parents attended the hearing. Within 60 seconds, judging from the transcript's length, the judge granted the state's motion for continued removal of the children until the next hearing 56 days later.

The State won 100 percent of the time because it was impossible for the State to lose. Indeed, as Roxanne Erickson, the Deputy State's Attorney who represented the State in those hearings admitted during her testimony in the August 17, 2016 Remedies Hearing, these procedures were not only withheld from parents at the initial hearing but typically for months afterwards until the adjudicatory hearing. *See* Remedies Hearing Tr. at 80-81, 85 (admitting that even as of August 17, 2016, parents were not allowed to testify at 48-hour hearings, not allowed to challenge the State's evidence, and had no opportunity to cross-examine the caseworker "for some 90 to 120 days [until] the adjudicatory stage" of the case).

Defendants' inherently prejudicial hearings violated settled law in this Circuit. The Eighth Circuit has vigilantly and consistently protected the due process rights of parents in removal hearings. More than four decades ago, this Court held that parents facing the loss of their children at the hands of the state must be provided procedural safeguards consistent with the Due Process Clause, including notice that "'should include the date, time and place of the hearing; a clear statement of the purpose of the proceedings and the possible consequences to the subject thereof; the alleged factual basis for the proposed [loss of custody]; and a statement of the legal standard upon which [such removal] is authorized.'" *Alsager v. Dist. Ct. of Polk County*, 406 F. Supp. 10, 25 (S.D. Iowa 1975), *opinion adopted sub nom., Alsager v. Dist. Ct. of Polk County* , 545 F.2d 1137 (8th Cir.

1976) (quoting *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (three-judge court)). *See also K.D. v. County of Crow Wing*, 434 F.3d 1051, 1056 n.6 (8th Cir. 2006); *Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005); *Whisman v. Rinehart*, 119 F.3d 1303, 1309, 1310 (8th Cir. 1997) (recognizing that because "parents and children have a liberty interest in the care and companionship of each other, . . . [e]ven if defendants had a right to take temporary custody of [the child], defendants had a corresponding obligation to afford [the parents] an adequate post-deprivation hearing."); *Syrovatka v. Erlich*, 608 F.2d 307, 310 (8th Cir. 1979) (reaffirming the requirements of *Alsager*).

The plaintiffs in this lawsuit are two federally recognized Indian tribes, the Oglala Sioux Tribe and Rosebud Sioux Tribe, together with a certified class of all persons who are members of federally recognized Indian tribes and who also are parents of minor children residing in Pennington County, South Dakota. This case, therefore, intersects with ICWA, a law passed by Congress in 1978 to protect Indian children, their parents, and their tribes in precisely these types of off-reservation custody hearings.[15]

Congress passed ICWA after the House Subcommittee on Indian Affairs conducted hearings in the mid-1970s revealing the shocking fact that between one-

[15] ICWA leaves on-reservation custody issues to the exclusive jurisdiction of the tribe. *See* 25 U.S.C. § 1911(a).

quarter and one-third of all Indian children in the country were removed from their families by state child welfare agencies and state judicial officers and placed in foster or adoptive homes or residential institutions.[16] These percentages were far higher than those for white children. In one state, Indian children were eight times more likely than white children to be adopted through state court proceedings; in another, Indian children were thirteen times more likely than non-Indians to be placed in foster care. *See* "Indian Child Welfare Program Hearings before the Subcomm. on Indian Affairs," U.S. Senate, 93rd Cong., 2d Sess. 15 (Apr. 8, 1974), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531 (Statement of William Byler).

Studies also indicated that state social workers and state judges often lacked a basic knowledge of Indian culture regarding child-rearing, were prejudiced in their attitudes, and removed children from their homes primarily because the family was Indian and poor. *See* H.R. Rep. No. 1386, 95th Cong., 2d Sess. at 10 ("House Report"). Specifically, Congress found that "an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies;" that state officials "often failed to recognize the . . . cultural and social standards prevailing

[16] *See* Indian Child Welfare Act of 1978, Hearings Before the Subcomm. on Indian Affairs of the House Comm. On Interior and Insular Affairs, 95th Cong., 2d Sess. (1978); Indian Child Welfare Act of 1977: Hearing on S.1214 Before the Senate Select Comm. on Indian Affairs, 95th Cong., 1st Sess. (1977); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); Barbara Ann Atwood, *Children, Tribes, and States* (Durham, N.C., Carolina Academic Press 2010), 155-59; B.J. Jones, Mark Tilden, and Kelly Gaines-Stoner, *The Indian Child Welfare Act Handbook* (2008).

in Indian communities and families;" that a "high percentage of such children are placed in non-Indian foster and adoptive homes and institutions;" and that these removals threatened "the continued existence and integrity of Indian tribes." 25 U.S.C. §§ 1901 (3), (4) and (5). *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (noting that ICWA "was the product of rising concern in the mid–1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."); Barbara Ann Atwood, *Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children* 160 (2010) ("Testimony before Congress also indicated that state child welfare officials were insensitive to traditional Indian approaches to child rearing . . . [and applied] majoritarian middle-class values" in assessing whether to remove an Indian family from his or her home.).

The House Report characterized these removals as "perhaps the most tragic and destructive aspect of American Indian life today," resulting in a crisis "of massive proportions." House Report at 9. "These separations contributed to a number of problems, including the erosion of a generation of Indians from Tribal communities, loss of Indian traditions and culture, and long-term emotional effects of Indian children caused by the loss of their Indian identity." *See Indian Child*

Welfare Act Proceedings, 81 Fed. Reg. 38864 (June 14, 2016) ("BIA Final Rule") https://www.gpo.gov/fdsys/pkg/FR-2016-06-14/pdf/2016-13686.pdf at 38,780.

Congress passed ICWA to address these state-created problems. The purpose of the Act is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families . . . ." 25 U.S.C. § 1902. ICWA, then, has the twin goals of safeguarding Indian children and families while also protecting the survival of Indian tribes. *See Holyfield*, 490 U.S. at 52 (noting that Indian tribes have an interest in the custody of tribal children "'which is distinct from but on parity with the interest of the parents'" and which "'finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize.'" (quoting *In re adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986)). The practices challenged in this lawsuit, therefore, must be analyzed both with respect to the principles of fundamental fairness protected by the Due Process Clause as well as the remedial goals of ICWA.

ARGUMENT

I. ELEVENTH AMENDMENT IMMUNITY IS INAPPLICABLE HERE

Plaintiffs allege in their complaint that all four Defendants created policies and implemented practices that violated Plaintiffs' constitutional rights under the Due Process Clause of the Fourteenth Amendment, as well as their statutory rights under ICWA, and that these violations resulted in loss of custody of their children. *See* DSS-App. 1–39. Plaintiffs' complaint seeks prospective declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 against these officials in their official capacities. *Id.*

DSS Defendants Valenti and Fleming claim in their brief—and for the first time in this litigation—that the Eleventh Amendment requires the dismissal of Plaintiffs' complaint. According to DSS, South Dakota has a "special sovereignty interest . . . [in] the protection of children from imminent harm to their health, safety, and welfare" that bars Plaintiffs' lawsuit on Eleventh Amendment grounds. DSS Brief at 36. This contention, however, flies in the face of a century-old principle of law.

The Eleventh Amendment bars suits against states for money damages in federal court, *see Hans v. Louisiana*, 134 U.S. 1, 20–21 (1890), but under the doctrine established in *Ex parte Young*, 209 U.S. 123 (1908), that immunity does

not extend to a suit (as here) filed against state officials in their official capacities seeking only prospective relief. As Justice Scalia explained for the Court in 2011:

> In *Ex parte Young*, 209 U.S. 123, we established an important limit on the sovereign-immunity principle. . . .We explained that because an unconstitutional legislative enactment is "void," a state official who enforces that law "comes into conflict with the superior authority of [the] Constitution," and therefore is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

Virginia Office for Protection and Advocacy v. Stewart, 563 U.S. 247, 254 (2011) quoting *Ex parte Young*, 209 U.S. at 159–160; *see also Hafer v. Melo*, 502 U.S. 21, 30–31 (1991).

The *Ex parte Young* exception to Eleventh Amendment immunity "has existed alongside our sovereign-immunity jurisprudence for more than a century," *Virginia Office*, 563 U.S. at 254–255, and is "accepted as necessary to 'permit the federal courts to vindicate federal rights.'" *Id*. at 248 (quoting *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)). "It rests on the premise—less delicately called a 'fiction,'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Virginia Office*, 563 U.S. at 255 (quoting *Pennhurst*, 465 U.S. at 114 n.25).

"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. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, Scalia, Thomas, JJ., concurring)). *See also 281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011) (recognizing that the *Ex parte Young* analysis involves this "'straightforward inquiry'") (quoting *Verizon Maryland*, 535 U.S. at 645); *Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 897 (8th Cir. 2000) ("Under *Young*, a party may sue a state officer for prospective relief in order to stop an ongoing violation of a federal right.") (citing *Coeur d'Alene*, 521 U.S. at 269).

The only official-capacity suits not covered by the *Ex parte Young* doctrine are those in which "'the state is the real, substantial party in interest.'" *Pennhurst*, 465 U.S. at 101 (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945). In those situations, the state has a "special sovereignty interest" not overcome by *Ex parte Young*. *See Coeur d'Alene*, 521 U.S. at 282.

To distinguish between those two categories of lawsuits, courts must look to "the *effect* of the relief sought." *Pennhurst*, 465 U.S. at 107 (emphasis in original). If the effect would be to prospectively enjoin unconstitutional acts by state

officials, *Ex parte Young* applies, but if the effect would be to obtain a remedy solely from the state itself, such as requiring the state to pay money from its treasury, *see Edelman v. Jordan*, 415 U.S. 651, 666 (1974), or eliminate the state's control over, or ownership of, its land or resources, *see Coeur d'Alene Tribe*, 521 U.S. at 282–83, then the *Young* exception does not apply, as the real party in interest is not the state official being sued but rather the state itself.

Several Eighth Circuit cases are directly on point; tellingly, they are not cited in the DSS brief. In *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999), an Indian tribe sought prospective relief against state officials and, as here, the defendants claimed Eleventh Amendment immunity. The Court rejected that defense because the purpose of Plaintiffs' lawsuit was "*to bring the State's regulatory scheme into compliance with federal law* . . . [and not] to *eliminate altogether* the State's regulatory power." 124 F.3d at 914 (emphasis in original) (quoting *Coeur d'Alene*, 521 U.S. at 289) (O'Connor, Scalia, Thomas, JJ., concurring)). *Accord*: *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 256–57 (8th Cir. 1995) (reaching a similar conclusion in another case brought by an Indian tribe seeking prospective relief against state officials); *Dakota, Minnesota & Eastern RR Corp. v. South Dakota*, 362 F.3d 512, 517 (8th Cir. 2004) (rejecting an Eleventh Amendment defense by South Dakota officials similar to the one made here).

Here, the purpose of Plaintiffs' lawsuit is not to eliminate the state's regulatory power over child welfare but only to bring that regulation into compliance with federal law. Plaintiffs' complaint seeks prospective relief against state officials in their official capacities. This lawsuit, therefore, is not barred by the Eleventh Amendment. *See Ex parte Young*, 209 U.S. at 159-60.

II. THE DISTRICT COURT WAS CORRECT IN NOT ABSTAINING

Defendants Vargo and Pfeifle argue that even though Plaintiffs' complaint seeks only prospective relief from alleged violations of federal law, the district court should have abstained from exercising its jurisdiction under the *Rooker-Feldman* and *Younger* abstention doctrines. These Defendants made identical claims below, and the district court correctly rejected those claims.

The Supreme Court has taken pains in recent years to narrowly confine both *Rooker-Feldman* and *Younger*. As a unanimous Court confirmed in 2013 in narrowing *Younger*, federal courts have a "'virtually unflagging'" obligation to exercise the jurisdiction that Congress has bestowed on them. *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). "Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint*, 134 S. Ct. at 590 (citing *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821)).

Similarly, two recent Supreme Court decisions narrowed *Rooker-Feldman*. *See Lance v. Dennis*, 546 U.S. 459, 464 (2006), and *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005). In *Lance*, the Court explained: "In *Exxon Mobil*, decided last Term, we warned that the lower courts have at times extended *Rooker-Feldman* 'far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U.S.C. § 1738. . . . *Rooker-Feldman*, we explained, is a narrow doctrine . . . ." *Lance*, 546 U.S. at 464 (quoting *Exxon Mobil*, 544 U.S. at 283).

The Eighth Circuit has recognized that these recent Supreme Court cases alter the landscape. In fact, the case on which Defendant Vargo primarily relies, *Lemonds v. St. Louis County*, 222 F.3d 488 (8th Cir. 2000), "has been superseded" by these cases. *See Shelby County Health Care Corp. v. S. Farm Bureau Cas. Ins. Co.*, No. 15-3765, 2017 WL 1521505 at *2 (8th Cir. Apr. 28, 2017).

A. *Rooker-Feldman* is inapplicable here.

Defendant Vargo argues that as a result of *Rooker-Feldman*, the district court should have abstained from deciding whether, as Plaintiffs' complaint alleged, he had created policies and was implementing practices that violated

Plaintiffs' federal rights. Mr. Vargo's argument mischaracterizes Eighth Circuit and Supreme Court case law on *Rooker-Feldman*.

The *Rooker-Feldman* doctrine recognizes that, with the exception of habeas corpus petitions, lower federal courts lack subject matter jurisdiction over challenges to state court judgments. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). Generally, only the United States Supreme Court may conduct that review. *See* 28 U.S.C. § 1257; *Feldman*, 460 U.S. at 486. *Rooker-Feldman* forecloses not only straightforward appeals of state court judgments but also indirect attacks that are "inextricably intertwined" with specific claims already adjudicated in state court. *Feldman*, 460 U.S. at 482 n.16.

Determining whether claims in the federal case are intertwined with claims adjudicated in the state court proceeding "requires determining exactly what the state court held." *Charchenko v. City of Stillwater*, 47 F. 3d 981, 983 (8th Cir. 1995). There is no intertwinement unless the federal case would need to declare the state judgment erroneously decided. *See Feldman*, 460 U.S. at 482-86.

As the Supreme Court recently clarified, *Rooker–Feldman* "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review

and rejection of those judgments." *Exxon Mobil*, 544 U.S. at 284. *See Karsjens v. Piper*, 845 F.3d 394, 406 (8th Cir. 2017) ("The *Rooker-Feldman* doctrine is narrow; it applies only to 'cases brought by state court losers . . . .") (internal citations omitted).

Mr. Vargo's *Rooker-Feldman* argument is flawed for two reasons. First, Plaintiffs' federal action was *not* brought by the parties who lost *Cheyenne River Sioux Tribe v. Davis*, 822 N.W.2d 62 (S.D. 2012), the case that Mr. Vargo contends has preclusive effect. Second, the relief sought in Plaintiffs' federal action would *not* nullify the judgment rendered in that case. We begin our analysis with determining "exactly what the state court held" in *Cheyenne River*. *See Charchenko*, 47 F. 3d at 983.

Cheyenne River was "an original proceeding for a writ of mandamus or prohibition" involving one particular child removal case. *Cheyenne River*, 822 N.W.2d at 63. The lone plaintiff was the Cheyenne River Sioux Tribe. The relief sought was case-specific: "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 court's failure to fully follow ICWA at the temporary custody stage." *Id*. at 64 (emphasis added). Notably, in *Cheyenne River*

no prospective relief was sought, no policies were challenged on their face, and no polices were challenged under the Due Process Clause.

1. *The federal plaintiffs here did not lose* Cheyenne River.

The plaintiffs in the federal case at bar are the Oglala Sioux Indian Tribe and the Rosebud Sioux Indian Tribe, together with two parents of Indian children who are suing on their own behalf and on behalf of all other such parents who reside in Pennington County, South Dakota.[17] In an Order dated January 28, 2014, the district court certified the plaintiff class as follows: "Rochelle Walking Eagle, Madonna Pappan and Lisa Young and all other members of federally recognized Indian tribes who reside in Pennington County, South Dakota, and who, like plaintiffs, are parents or custodians of Indian children." *See* DSS-App. at 83–97.

The plaintiffs in this federal action have no connection to the plaintiff in *Cheyenne River*, were not involved in the removal case at issue there, and did not lose that case. Stated differently: no plaintiff in this federal case had standing to appeal *Cheyenne River* to the United States Supreme Court. Accordingly, *Rooker-Feldman* cannot bar them from bringing their constitutional claims in federal court. *See Lance*, 546 U.S. at 465; *Exxon Mobil*, 544 U.S. at 284; *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994) (finding *Rooker-Feldman* "inapt here" because the

[17] Originally, there were three parents but one of them, Rochelle Walking Eagle, died and was therefore removed as a party plaintiff.

plaintiff in the federal case was not a party in the state case and thus "was in no position" to seek Supreme Court review of the state court decision).

Mr. Vargo cites *Lemonds* for the proposition that *Rooker-Feldman* can apply to a lawsuit brought in federal court by parties, as here, who did not lose the state court litigation. Vargo Brief at 28-29. That portion of *Lemonds* is no longer tenable, however. *See Shelby County*, 2017 WL 1521505 at *2 (recognizing that *Rooker-Feldman* applies only to claims brought by "state-court losers" and that this portion of *Lemonds* has been superseded) (quoting *Exxon Mobil*, 544 U.S. at 284). The plaintiffs here did not lose *Cheyenne River*. Therefore, *Rooker-Feldman* is inapplicable for that reason alone.

2. *Granting relief in this federal case does not require a finding that the judgment in* Cheyenne River *was incorrect.*

The relief sought in *Cheyenne River* was retrospective: the Tribe requested a writ of prohibition or mandamus that would reopen one particular custody case to allow for further proceedings. This federal action, in contrast, seeks only prospective relief. It does not request the reopening of any removal case (not even Plaintiffs' own cases), and it does not seek a finding that any removal case was wrongly decided. Most importantly, it does not require a finding that the South Dakota Supreme Court erred in *Cheyenne River* in not issuing a writ of prohibition or mandamus to the plaintiff in that case. Instead, this federal action challenges

policies that apply to all removal cases generally, and contends that those policies violate the Due Process Clause and/or the Indian Child Welfare Act.

Cases are unanimous in holding that *Rooker-Feldman* does not apply where the state case involved an *application* of a policy and the federal case challenges that policy *generally*, that is, on its face. In that instance, the federal suit (even if brought by the same party who lost in state court) is seeking a wholly different remedy than the one requested in the state action, and thus the two cases are not intertwined. This critical distinction was made in *Feldman*. The plaintiffs in that case, Mr. Feldman and Mr. Hickey, raised two claims in their federal complaint. One claim challenged state court decisions denying them admission to the court's bar. The second claim challenged on constitutional grounds the rules generally applied to all applicants for bar admission, including them. The Supreme Court held that the plaintiffs could not relitigate in federal court the (retrospective) application of the rules to them but could proceed with their general (prospective) constitutional challenge. *See Feldman*, 460 U.S. at 482–83, 485 ("To the extent that Hickey and Feldman mounted a general challenge to the constitutionality of [bar admission rules], however, the District Court did have subject matter jurisdiction over their complaints. . . .[This reflects] the distinction between general challenges to state bar admission rules and claims that a state court has unlawfully denied a particular applicant admission.") *See also Karsjens*, 845 F.3d at 406

(holding that *Rooker-Feldman* was inapplicable because "the class plaintiffs are not seeking review and rejection of state court judgments . . . [but] are seeking prospective injunctive relief"); *Silverman v. Silverman*, 338 F.3d 886, 895 (8th Cir. 2003) (*en banc*) (same); *Heartland Academy Community Church v. Waddle*, 335 F.3d 684, 687 (8th Cir. 2003) (holding that *Rooker-Feldman* is inapplicable where, as here, the federal action challenges the procedures used in taking children into state custody and not the merits of a particular removal).

In short, as *Feldman*, *Karsjens*, *Silverman*, and *Heartland* make clear: there is no intertwinement where the federal suit seeks prospective relief not sought in the state case, precisely the situation here. Thus, there is no intertwinement between the case at bar and *Cheyenne River*, and *Rooker-Feldman* is inapplicable for that reason alone.

Given that *Rooker-Feldman* is inapplicable, it is unnecessary to decide whether, as Mr. Vargo claims in his brief at 31–32, the court in *Cheyenne River* held that § 1922 is *not* the standard to employ in 48-hour hearings involving Indian children, whereas the court below held that it is. Even if it were true that the two courts reached conflicting decisions on that question, *Rooker-Feldman* still would not bar this action because the plaintiffs in the two cases are different, and so is the relief sought. Nevertheless, Mr. Vargo's contention cannot go unanswered because it concerns a critical aspect of Plaintiffs' claims under ICWA.

Here is what Mr. Vargo neglects to mention: his Deputy, Roxanne Erickson, acting on his behalf, nearly a year ago informed the judge presiding over 48-hour hearings in Pennington County that Mr. Vargo now *agrees* that there is no conflict between the two decisions and, moreover, the district court was correct: § 1922 is the standard that controls Defendants' 48-hour hearings involving Indian children and nothing in *Cheyenne River* is to the contrary. *See* Remedies Hearing Tr. at 78, 79 ("So, yes, I essentially stated [to the judge that our] position had changed. . . . I think we all kind of came to the same conclusion that 1922 is the applicable standard for the 48-hour hearings."). The district court commented on this change in Mr. Vargo's position in its December 2016 ruling. *See* DSS-App. at 331. It is thus unclear why Mr. Vargo is pressing an interpretation of § 1922 in this Court contrary to the one he accepted in state court more than a year ago.

Section 1922 states in whole as follows:

> Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official or agency involved *shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child* and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

25 U.S.C. § 1922 (emphasis added). The reason why there is no conflict between *Cheyenne River* and the decision below is because the court in *Cheyenne River* construed only the first sentence in § 1922 and the district court construed the second. The district court explained this difference when it denied Defendants' motion to reconsider: "*Cheyenne River Sioux Tribe* is not state court precedent governing the factual or legal issues presented for summary judgment in this case. The South Dakota Supreme Court in *Cheyenne River Sioux Tribe* focused on the first sentence of 25 U.S.C. § 1922 while the issues before [this] court require application of the second sentence." DSS-App. 301. In short, there is no conflict between the two cases even if that were a valid *Rooker-Feldman* factor to consider, which it is not, and Mr. Vargo's claim lacks merit.[18]

Plaintiffs in this federal action are not the state court losers of *Cheyenne River* and, moreover, they are not seeking in their federal action "what in substance would be appellate review of [*Cheyenne River*]." *See Johnson v. De Grandy*, 512 U.S. at 1005–06. The district court therefore was correct in not abstaining based on *Rooker-Feldman.*

[18] The first sentence of § 1922 would appear to limit the application of § 1922 to those Indian children who reside *on* the reservation and who are temporarily off the reservation when the emergency occurred that brought them into state custody. Every court to consider the question, however, has recognized that § 1922 was intended to cover, and does cover, the present situation: the state seeks custody of Indian children who reside *off*-reservation. *See In re H.T.*, 343 P.3d 159, 166 n.3 (Mont. 2015) (listing cases). As the court below noted, the first and second sentences of § 1922 cover different, although overlapping, subjects. *See* DSS-App. at 69-72.

B. *Younger* is inapplicable here.

Defendant Hon. Craig Pfeifle argues that the district court should have abstained from addressing Plaintiffs' constitutional and ICWA claims due to the *Younger* abstention doctrine. That contention lacks merit, and the district court correctly determined that abstention under *Younger* was unwarranted.

Federal courts, as noted earlier, have a "'virtually unflagging'" obligation to exercise their congressionally conferred jurisdiction. *Sprint*, 134 S. Ct. at 591 (quoting *Colorado River*, 424 U.S. at 817). Indeed, even if the same plaintiff files two cases, the first in state court and the second in federal, raising identical claims, that alone does not warrant federal abstention under *Younger*. *Sprint* at 588 (citing *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 373 (1989) ("*NOPSI*") ("Abstention is not in order simply because a pending state-court proceeding involves the same subject matter."); *see also Colorado River*, 424 U.S. at 817 ("the pendency of an action in [a] state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.").

Federal courts have a duty to exercise their jurisdiction over constitutional claims regardless of whether doing so would interfere with a state court proceeding, except in narrow circumstances. This duty was clarified in *Sprint*, in which the Court noted that some lower courts were misinterpreting *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423 (1982), as holding

that where a parallel state action is pending, the federal court should abstain absent a showing that the state court was unwilling or unable to protect the plaintiff's federal rights. *Sprint*, at 593. Applying *Middlesex* in that fashion, however, would extend *Younger* "to virtually all parallel state and federal proceedings," an outcome that would be "irreconcilable" with the overarching principle "that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Sprint*, at 593 *(quoting Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984)).

The *Younger* doctrine permits abstention in only three narrow situations: "Circumstances fitting within the *Younger* doctrine, we have stressed, are 'exceptional'; they include, as catalogued in *NOPSI*, 'state criminal prosecutions,' 'civil enforcement proceedings,' and 'civil proceedings involving certain orders that are uniquely in furtherance on the state courts' ability to perform their judicial functions.'" *Sprint*, at 588 (quoting *NOPSI*, at 367–68); *see also Banks v. Slay*, 789 F.3d 919, 923 (8th Cir. 2015).

Younger asks whether the remedy requested by the federal plaintiff would interfere with an *on-going* state proceeding, not whether that remedy might require changes in a future proceeding. Indeed, the more a state proceeding violates federal law, the more disruptive a prospective federal court order is likely to be. Thus, as discussed below, the fact that the injunction issued by the district court on

December 15, 2016, required Defendants to make substantial changes in their 48-hour hearings from that day forward does not raise *Younger* concerns, and Judge Pfeifle's argument to the contrary lacks merit.

Similarly, the issue is not, as Judge Pfeifle contends, whether the federal plaintiffs might have been able to raise their constitutional challenges during their previously-held 48-hour hearings. That circumstance is not one of the three narrow exceptions noted in *Sprint* and *NOPSI*. A party is free to raise federal claims in a federal court rather than in a state tribunal. *See Pulliam v. Allen*, 466 U.S. 522, 525 (1984) (affirming the issuance of prospective injunctive relief under § 1983 on behalf of persons who could have raised their constitutional challenges during state criminal proceedings that were now closed); *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975) (holding that *Younger* was inapplicable where plaintiffs sought only prospective relief from unconstitutional actions of state prosecutors and state courts); *Banks v. Slay*, 789 F.3d at 923 ("Here, there was no pending state proceeding. The Missouri Court of Appeals had issued its decision in [plaintiffs' case] and plaintiffs have not petitioned for mandamus in the state supreme court. Since nothing related to this federal action is pending in state court, abstention is not warranted."); *Charchenko*, 47 F.3d at 984 ("Charchenko had two alternate forums available: state or federal" and he was free to choose the federal forum).

Defendant Pfeifle concedes that the first and third *Younger* exceptions have no application here, and he discusses only the second. The first exception is plainly inapplicable because these federal plaintiffs were not seeking to enjoin or interfere with a pending criminal proceeding, and so is the third, which applies to situations in which the federal plaintiff is seeking a federal order that would prevent a state court from enforcing a state court decree. *See Sprint*, at 588.

The second *Younger* exception applies to those civil enforcement proceedings "that are akin to criminal prosecutions, *see Huffman v. Pursue, Ltd*., 420 U.S. 592 (1975)." *Sprint*, at 588. In *Huffman*, the federal plaintiff requested an injunction to halt an *on-going* state nuisance abatement action *against him*. Here, in contrast, there was no civil proceeding pending against any plaintiff at the time this suit was filed or when the district court ruled on Defendants' motion to abstain. This second exception is thus inapplicable.

Defendant Pfeifle relies on *Moore v. Sims*, 442 U.S. 415 (1979), but that case is just as distinguishable as *Huffman*. In *Moore*, a husband and wife sought a federal injunction halting an on-going child abuse and neglect proceeding against them. Here, Plaintiffs seek only prospective relief and are not seeking to halt any proceeding. Indeed, the Court in *Moore* compared the retrospective relief sought in that case to the prospective relief sought in *Gerstein.* In *Gerstein*, the Court found *Younger* to be inapplicable "because the injunction was not addressed to a state

proceeding and therefore would not interfere with the criminal prosecutions themselves." *Moore*, 442 U.S. at 431. Clearly, the instant case is a *Gerstein* case, not *Moore*.

Judge Pfeifle contends the district court's order will impact "what the state court must say to the participants" in 48-hour hearings, "what the court must provide to the participants, . . . and standards to be applied" in those proceedings. *See* Pfeifle Brief at 62. Totally true, and not a day too soon.

Indeed, as hundreds of federal decisions illustrate, including *Brown v. Board of Education*, 347 U.S. 483 (1954), the issue is not whether a federal decree will require vast changes in state practices but whether those changes are necessary in order for the state to comply with federal law. Here, the record plainly shows that Defendants have been systematically and repeatedly violating federal law for years now. The district court had a duty to halt those violations, as discussed in the final section of this brief, as otherwise Defendants would be free to continue violating Plaintiffs' federal rights.

Next, Defendant Pfeifle makes a highly strained argument that has no basis in fact. He claims that because this case is a class action, the district court should have realized in January 2014 when it decided the *Younger* claim that a class plaintiff might be in the midst of a 48-hour hearing at the precise moment years hence when the district court issued its (at that point potential) injunction. *See*

Pfeifle Brief at 57-58 ("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 [in 2014].") In the first place, if this type of speculation were permitted to defeat a federal claim on abstention grounds, then *Pulliam* and *Gerstein* would have been decided the other way because injunctions were issued in both of those cases halting unconstitutional conduct in hearings that conceivably might have been occurring at the precise moment the injunction was published. *See also Goldberg v. Kelly*, 397 U.S. 254 (1970) (affirming classwide injunctive relief compelling state officials to provide due process safeguards to persons facing the loss of welfare benefits without considering if a member of the class could be in the midst of a state court challenge at the time the injunction is published); *Brian A. v. Sundquist*, 149 F. Supp. 2d 941, 957 (M.D. Tenn. 2000) (declining to abstain under *Younger* a class action challenge to policies impacting juveniles in state custody, stating that "Plaintiffs' federal constitutional claims herein represent, as did the claims in *Hanna [v. Toner*, 630 F.2d 442, 446 (6th Cir. 1980)], 'the exact sort of disputes over citizens' rights with which the federal courts were created to deal.'") Defendant Pfeifle cites no authority in support of his argument because none exists.[19]

[19] Judge Pfeifle's contention is also inconsistent with the facts. There is no evidence that a 48-

Even if the remedial orders did apply to a 48-hour hearing then in session—and there is no evidence it did—those orders would not halt the hearing but only require that certain procedural safeguards be employed *during* the hearing. Interference is attenuated when states remain free to conduct their proceedings. *See Gerstein*, 420 U.S. at 860 n.9 (holding that *Younger* was inapplicable to a case where the injunction being sought by the plaintiffs "was not directed at the state prosecutions as such" but to procedures involved in those prosecutions); *L.H. v. Jamieson*, 643 F.2d 1351, 1354 (9th Cir. 1981) (finding *Younger* inapplicable because the plaintiffs, a class of juveniles adjudged to be dependent and neglected, "are not seeking to enjoin any state proceeding"); *Olivia Y. v. Barbour*, 351 F. Supp. 2d 543, 565–70 (S.D. Miss. 2004) (rejecting a motion to dismiss under *Younger* in a case similar to the one at bar).

Prior to *Sprint*, the Eighth Circuit's *Younger* analysis centered on the three-part test set forth in *Middlesex County*, 457 U.S. at 432–37. *Middlesex* identified three factors that should be weighed in the *Younger* analysis: (1) the existence of an ongoing state judicial proceeding, (2) which implicates important state interests, and (3) in which the plaintiff is provided with an adequate opportunity to raise constitutional challenges. *Middlesex*, 457 U.S. at 432. In *Sprint*, however, the

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hour hearing was actually impacted mid-course by the district court's injunction. The ECF shows that the clerk posted the December 15, 2016 remedial orders after 5 p.m. Mountain time when the state court was likely closed. Judge Pfeifle filed no motion asking the district court to take judicial notice that those orders disrupted a 48-hour hearing on that date.

Supreme Court clarified that these three factors are "not dispositive; they [are] instead, *additional* factors appropriately considered by the federal court before invoking *Younger*." *Sprint*, 134 S.Ct. at 593 (emphasis in original).

The court below considered these three additional factors and found that on balance they weighed in Plaintiffs' favor and against abstention. The first factor favored the Plaintiffs because there were no on-going state judicial proceedings that would be impacted by the prospective remedy sought in the federal action.

The second factor weighed in favor of the Defendants because the state has a vested interest in protecting children from abuse and neglect. The third factor, however, again weighed in Plaintiffs' favor because Defendants' 48-hour hearings do not afford parents with an adequate opportunity to raise the broad constitutional challenges raised in this federal action. In Defendants' 48-hour hearings, parents were essentially kept in the dark and gagged: they were not informed of the allegations against them, they were prevented from testifying, they were prevented from confronting that state's witness(es), and they were not appointed counsel to assist them in that hearing. Those parents did not have a fair opportunity to raise the constitutional and ICWA challenges included in this federal action. *See LaShawn A. v. Kelly*, 990 F.2d 1319, 1323 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994) (rejecting *Younger* abstention because a state child custody hearing was an inappropriate forum "for this multi-faceted class-action challenge" to a

foster care system); *People United for Children, Inc. v. City of New York*, 108 F. Supp. 2d 275, 290–92 (S.D.N.Y. 2000) (rejecting *Younger* abstention because state custody proceedings would "not provide these plaintiffs with an adequate opportunity to raise their constitutional claims."). Besides, as explained earlier, the plaintiff normally has the right to choose the forum, and these Plaintiffs chose the federal forum.

Furthermore, abstention is not justified where the state policy or practice being challenged is "flagrantly and patently violative of express constitutional prohibitions" or where "danger of irreparable loss is both great and immediate." *See Younger*, 401 U.S. at 53 (citations omitted); *see also Trainor v. Hernandez*, 431 U.S. 434, 447 (1977); *Plouffe v. Ligon*, 606 F.3d 890, 893 (8th Cir. 2010) (citing *Younger* and *Trainor* for the proposition that abstention is not required where the state procedure being challenged is patently unconstitutional). That situation certainly exists here: it is difficult to imagine a hearing process more flagrantly unconstitutional and more injurious than Defendants'.

According to Defendant Pfeifle, this Court's decision in *Night Clubs, Inc. v. City of Fort Smith*, 163 F.3d 475 (8th Cir. 1998), stands for the proposition that because the two tribal plaintiffs conceivably could have raised their federal claims in a state court proceeding similar to *Cheyenne River*, their federal case should be dismissed. *See* Pfeifle Brief at 63–64. In the first place, *Night Clubs* is distinguish-

able because in that case the plaintiff had initially raised the same federal claims in a state court, only to dismiss them and refile those claims in federal court. *See id.*, 163 F.3d at 481 ("This move makes clear that [the plaintiff] made a conscious decision not to bring a section 1983 claim in its state action.") Here, Plaintiffs did no such thing.

More importantly, however, recent Supreme Court and Eighth Circuit cases eliminate this consideration as a factor in the *Younger* analysis. Under current analysis, the tribal plaintiffs were free to bring their claims in federal court and, in fact, could have filed simultaneous actions in both state and federal court. Therefore, even if the Tribes could have raised their constitutional and ICWA claims in one of their 48-hour hearings, they were under no obligation to do so and cannot be penalized for selecting a federal forum. That fact is not relevant in current *Younger* analysis. *See Sprint*, at 588–590; *see also Banks v. Slay*, 789 F.3d at 923. In short, *Younger* abstention was inapplicable and the district court properly rejected it.

Before leaving this subject, Plaintiffs are constrained to point out two distortions in Judge Pfeifle's brief. First, the Brief states: "Because the Tribes sought only prospective relief, the district court reasoned that 48-Hour Hearings are not civil enforcement proceedings." *See* Pfeifle Brief at 59. *Nowhere* did the district court hold that a 48-hour hearing is not a civil enforcement proceeding.

What the court held—and correctly so—is that because the Plaintiffs were seeking only prospective relief, it makes no difference if 48-hour hearings are civil enforcement proceedings. *See* DSS-App. at 46 (concluding that the civil enforcement proceeding exception "is not applicable in this case" because "plaintiffs are only seeking prospective relief and, as such, any order by the court would not impact an ongoing state proceeding.").

Second, the Pfeifle Brief states: "The district court ruled . . . that the Tribes could not adequately vindicate their constitutional claims in state court." *Id*. at 60. Here again, the district court did no such thing. What the district court held—and correctly so—is that the Tribes were free to select a federal forum. The question was never whether a state court could be trusted to decide federal claims, as Judge Pfeifle implies, but whether the *Younger* doctrine bars the Tribes from selecting a federal forum, and it plainly does not.

The district court had a duty to consider Plaintiffs' substantial constitutional and ICWA claims. The court appropriately decided not to abstain.

III. ALL FOUR DEFENDANTS ARE POLICYMAKERS

The district court found that all four Defendants are policymakers for purposes of liability under 42 U.S.C. § 1983. Defendants challenge that conclusion. Their challenges lack merit.

The following two policies created by Defendant Mark Vargo, both of which the district court declared unconstitutional and enjoined, illustrate the "policymaker" issue. Mr. Vargo maintained the first policy from the time he took office in January 2013 until May 2014. Under state law, when a child is removed from the home on an emergency basis and the State wishes to retain custody, a hearing must be held within approximately 48-hours, and it is precipitated by the filing of a Petition for Temporary Custody ("PTC"). *See* SDCL §-26-7A-14. Mr. Vargo's policy was to withhold from parents the PTC he filed with the court. Parents went through the entire hearing without being able to see the PTC.[20]

This federal action was filed two months after Mr. Vargo took office. Plaintiffs' complaint challenged Mr. Vargo's "no PTC" policy on due process grounds. Mr. Vargo filed a motion to dismiss, claiming that Plaintiffs' complaint failed to state a claim. In January 2014, the district court denied Mr. Vargo's

[20] In discovery, Plaintiffs obtained the basic case file (the PTC, the ICWA Affidavit, the hearing transcript, and the Temporary Custody Order) of every third A & N case involving Indian children in Pennington County beginning January 1, 2010. This method secured a representative sample of hearings conducted by all of the judges who presided over cases during that period of time and shows what policies Mr. Vargo pursued as well.

motion and informed him that parents have a right under the Fourteenth Amendment to receive the PTC prior to or at the commencement of the 48-hour hearing. *See* DSS-App. at 78. Mr. Vargo nevertheless refused to provide the PTC to parents for another four months until May 2014. *See* DSS-App. at 259.

When he began giving the PTC to parents, Mr. Vargo created the second policy: the PTC that Mr. Vargo gave to Indian parents failed to notify them that their cases would be determined by the standard required by ICWA, which is a much tougher standard than the state standard.[21] Even though notified in March 2015 that his PTCs must switch to the ICWA standard, Mr. Vargo refused to make that switch. In fact, ICWA was not cited anywhere in Mr. Vargo's PTCs. Included in the record on appeal are two PTCs given to Indian parents, one dated March 14, 2016, and the other March 24, 2016 (Docket 239-4 and 239-5). Copies were shown to Mr. Vargo during the August 17, 2016, Remedies Hearing. Mr. Vargo admitted after reviewing them that they "do not contain the ICWA language or a citation to ICWA." *See* Remedies Hearing Tr. at 47.

[21] As discussed more fully below, the standard used in removal hearings in virtually every state, as in South Dakota, is "best interests of the child." *See* SDCL § 26-7A-18. Congress deliberately sought to change that standard in ICWA because, Congress found, it wrongly encouraged state welfare workers to remove Indian children from impoverished homes and place them in more affluent non-Indian homes. Section 1922 of ICWA requires proof that keeping the child at home will cause "imminent physical damage or harm to the child." Thus, under a "best interests" standard, the State can prevail at the initial hearing merely by showing that the child would be better off someplace else, whereas under the § 1922 standard, the State can prevail only by showing that the child would suffer imminent physical injury by remaining at home. The difference in standards changes the entire focus of the hearing.

As early as 1976, the Eighth Circuit held that parents facing the loss of custody of their children at the hands of the state have a right guaranteed by the Fourteenth Amendment's Due Process Clause to notice that "'should include the date, time and place of the hearing; a clear statement of the purpose of the proceedings and the possible consequences to the subject thereof; the alleged factual basis for the proposed [removal]; and a statement of the legal standard upon which [such removal] is authorized.'" *Alsager*, 406 F. Supp. at 25, *opinion adopted sub nom., Alsager v. Dist. Ct. of Polk County, Iowa*, 545 F.2d 1137 (8th Cir. 1976) (quoting *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (three judge court)). In reaching that conclusion, the Court relied on *In re Gault*, 387 U.S. 1 (1967), which held that parents whose children are facing juvenile delinquency proceedings, and the children themselves, have a constitutional right to adequate notice of the accusations, and that this information must be provided prior to court proceedings. The *Alsager* court stated, quoting *In re Gault*:

> "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity'. . . . (P)arents (must) be notified, in writing, of the specific charge or factual allegations [against them]. . . ."

Alsager, 406 F. Supp. at 24-25 (quoting *In re Gault*, 387 U.S. at 33). In the decades that followed, and as discussed above, the Eighth Circuit vigilantly protected the

right of parents in removal proceedings to procedural due process, including the right to meaningful notice at a meaningful time.

Thus, Mr. Vargo was on notice when he took office in January 2013 that parents facing the loss of child custody at the hands of the State must receive, among other things, "a statement of the legal standard upon which [removal] is authorized," *Alsager*, 406 F. Supp. at 24–25, and that they must receive it "sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded." *Id*. (quoting *In re Gault*, 387 U.S. at 33). Mr. Vargo's PTCs, however, failed to provide that information. Thus, Mr. Vargo switched from one unconstitutional policy (his "no PTC" policy) to another unconstitutional policy (his "no ICWA PTC" policy).

The facts regarding these two policies are uncontroverted and were reviewed with Mr. Vargo during his testimony at the Remedies Hearing. As the district court summarized the evidence, citing the hearing transcript (Docket 286, a copy of which is included in the record on appeal):

1. "Mr. Vargo acknowledged having read plaintiffs' March 21, 2013, complaint sometime after it was served. (Docket 286 at p. 33:22-24). The complaint specifically alleged that at 48-hour hearings: Indian parents were [] not allowed to see the petitions [for temporary custody] . . . ." DSS-App. at 327.

2. Rather than correct a defect that violated clearly established law, Mr. Vargo filed a motion to dismiss. The district court denied that motion in January 2014, noting that Plaintiffs' complaint alleged that "Indian parents are left in the dark not knowing the allegations against them while suffering the consequence of losing custody of a child for 60 to 90 days," allegations which, if true, constitute a violation of the Due Process Clause. *Id*. at 77-78.

3. Yet, Mr. Vargo waited until May 2014 before giving parents at 48-hour hearings a copy of the PTC, which was "14 months after the complaint was filed and 4 months after the 2014 order." *Id*. at 328.

4. During discovery, Plaintiffs learned that Mr. Vargo started providing Indian parents with the PTC in May 2014, but unfortunately, the PTC he gave them was constitutionally flawed: it failed to notify them of the legal standard—the mandatory ICWA standard—that governed their hearing. Plaintiffs filed a motion for partial summary judgment on that issue, attached to which were numerous PTCs, none of them citing the ICWA standard. The district court reviewed those PTCs and on March 31, 2015, held that Mr. Vargo's PTCs were constitutionally defective in that regard. *Id*. at 283-84.

5. Once more, Mr. Vargo ignored the district court's ruling. Seventeen months later, Mr. Vargo admitted during the August 2016 Remedies Hearing that his PTCs *still* made no reference to the ICWA standard. *Id*. at 329.

6. Mr. Vargo made a sudden decision during the Remedies Hearing: when he resumed testifying after the lunch recess, he reported that he had just instructed his Deputy, Roxanne Erickson, to include in their PTCs the ICWA standard. As the district court noted: "During the remedies hearing on August 17, 2016, Mr. Vargo instructed Ms. Erickson to change the petition for temporary custody to include [the] ICWA language." *Id.*

7. When asked during the Remedies Hearing why he had failed to comply with the March 2015 decision in the first place, Mr. Vargo said that there was no need for him to cite the ICWA standard in his PTCs because the county court notifies parents of the correct legal standard during the hearing. As the district court stated: "Yet even at the remedies hearing Mr. Vargo testified Indian parents have no constitutional right to the petition for temporary custody in advance of a 48-hour hearing so long as they are informed about the content of the petition [during the hearing]. *Id*. at p. 43:24-25." *Id*. at 328-29. But Mr. Vargo's excuse is insufficient for three reasons. First, notice must be given at the earliest practicable time to give parents as much opportunity to prepare as possible, and thus waiting until mid-hearing violates the Due Process Clause. *See Alsager*, 406 F. Supp. at 25; *In re Gault*, 381 U.S. at 33. Second, Mr. Vargo could never be certain that proper notice was going to be given during the hearing, and therefore his decision to withhold that information was irresponsible. Lastly, Mr. Vargo knew after reading

the district court's March 2015 ruling that the state court was using the *wrong* standard in 48-hour hearings involving Indian children—a "best interest of the child" standard rather than ICWA's "imminent physical damage or harm" standard—and therefore Mr. Vargo's decision not to inform them of the correct standard was misguided in any event. He allowed Indian parents to be misinformed when he easily could have provided the correct standard in his PTCs.

One overarching fact deserves special emphasis: with respect to both of his policies, Mr. Vargo chose between alternatives. He could have provided the PTC to parents prior to May 2014, but *chose* not to do so. In May 2014, he could have included the ICWA standard in his PTCs, but he *chose* not to do so, and it was only seventeen months later that he chose to instruct his Deputy to include that language. Those choices have constitutional significance.

What must be proven in all § 1983 official-capacity lawsuits such as this one is that the defendant is the "final policymaker" for the government with respect to the policy being challenged, and that he or she had a choice. "[Governmental] liability under § 1983 attaches where . . . *a deliberate choice to follow a course of action is made from among various alternatives* by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnatti*, 475 U.S. at 469, 483 (1986) (emphasis added). *See also Soltesz v. Rushmore Plaza Civic Center*, 847 F.3d 941, 946 (8th

Cir. 2017) (quoting *Pembaur* for this principle); *Malone v Hinman*, 847 F.3d 949, 955 (8th Cir. 2017) (recognizing that a "policy" for purposes of governmental liability "'is an official policy, *a deliberate choice or a guiding principle or procedure* made by the municipal official who has final authority regarding such matters.'") (emphasis added) (quoting *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999)). This official must be one who "speak[s] with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). The decision maker's policy must be a "'moving force' behind the violation", and there must be an "'affirmative link'" between that policy and the constitutional injury. *Clay v. Conley*, 815 F.2d 1164, 1170 (8th Cir. 1987) (quoting *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985).

The challenged policy need not be written to create liability. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 694 (1978) (holding that the challenged policy must be "made by its lawmakers or by those whose edicts *or acts* may fairly be said to represent official policy.") (emphasis added); *see also Pembaur*, 475 U.S. at 480–81 (holding that an "official policy" for purposes of § 1983 liability "refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time."). A single

decision by a policymaker can subject the government to § 1983 liability. *Id.* at 480–81; *see also Soltesz*, 847 F.3d at 946 ("Thus a single decision by a municipal official can constitute official policy.").

"[W]hether an official had final policymaking authority is a question of state law." *Pembaur*, at 483. "District courts should consult two sources to identify the final policymaker: '(1) state and local positive law,' and (2) state and local 'custom or usage having the force of law.'" *Soltesz*, 847 F.3d at 946 (citing *Atkinson v. City of Mountain View*, 709 F.3d 1201, 1215 (8th Cir. 2013) (quoting *Jett*, 491 U.S. at 737). Determining the policymaker is a question of law for the district court to decide. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125 (1988); *Soltesz*, 847 F.3d at 947 ("The district court must identify the final policymaker as a matter of law").

A. Defendant Vargo created three unconstitutional "official policies."

In his brief, Defendant Vargo denies that he created any unconstitutional official policies. But, conveniently, Mr. Vargo ignores the two policies just discussed: his "no PTC" policy from January 2013 until May 2014, and his "no ICWA PTC" policy after May 2014, under which Indian parents at 48-hour hearings were not notified of the correct legal standard governing their hearing. Both policies deprived hundreds of Indian families of due process. Mr. Vargo was the "moving force" behind all of those injuries, *see Clay v. Conley*, 815 F.2d at 1170, injuries he easily could have prevented had he made different choices.

Defendant Vargo's procedural violations were particularly injurious because of their timing: the 48-hour hearing is the first stage of the process, when DSS has the opportunity to return Indian children to the homes within hours after their removal. Congress focused its attention to this stage for obvious reasons. *See* BIA Final Rule at 38,816 (recognizing that § 1922 "imposed strict limitations on [the state's] emergency authority" and requires "that State officials 'insure' that Indian children are returned home [or transferred to the Tribe's jurisdiction] as soon as the threat of imminent physical damage or harm has ended.") Thus, Mr. Vargo's procedural defaults struck at the heart of Congress's plan, virtually guaranteeing that Indian children would *remain* in state custody for a prolonged period of time, as in fact they invariably did. *See* DSS-App. at 258 (finding that DSS prevailed 100 percent of the time, resulting in these children remaining in state custody for additional weeks until the next hearing).

The district court correctly identified Mr. Vargo as the official who created these two policies, DSS-App. at 328–29, but that fact was never in dispute: *Mr. Vargo does not deny that he created both policies*. He claims instead that the district court failed to identify whether Mr. Vargo "[was] a final policymaker for Pennington County or the State of South Dakota." Vargo Brief at 35. Mr. Vargo made a similar claim in his motion to reconsider, a claim the district court characterized as "frivolous at best." DSS-App. at 309.

There are two reasons why Mr. Vargo's claim is frivolous at best. First, Mr. Vargo identified himself during the litigation as a county employee and, indeed, indicated he spoke *for* Pennington County. When the Plaintiffs filed a brief asking the district court to order Mr. Vargo to begin citing the § 1922 standard in his PTCs, Mr. Vargo replied: "Plaintiffs request an order requiring Vargo to specifically mention Section 1922 in [his PTCs]. While *Pennington County* does not waive any of its arguments, that is not necessarily impractical.") (emphasis added).[22] Surely, Mr. Vargo is not permitted to suddenly disavow a representative capacity he acknowledged in open court.

The second reason why Mr. Vargo's claim is frivolous at best is because South Dakota law clearly identifies the State's Attorney as a county official. First, the South Dakota Constitution contains a list of state executive officers, and the post of State's Attorney is not on that list. *See* S.D. Const. art. IV, § 7. This fact has considerable significance. *See Dean v. County of Gage, Neb.*, 807 F.3d 931, 942 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 2490 (2016) (holding that a county sheriff was a state policymaker in part because the state constitution listed sheriffs as members of the executive branch of state government). Second, state statutes indicate that State's Attorneys are county officers. *See* SDCL §§ 7-7-12 and 7-16-

[22] During the Remedies Hearing, counsel for Plaintiffs quoted that sentence to Mr. Vargo and then asked him: "If it wasn't impractical, why weren't you doing it?" Notably, Mr. Vargo did not challenge the premise that he spoke for Pennington County. Instead, he claimed that he might not have read that portion of the court's decision carefully enough to know what the court had determined. *See* Remedies Hearing Tr. at 53-54.

1. In *Little Thunder v. State of South Dakota*, 578 F.2d 1253, 1257 (8th Cir. 1967), the Court cited § 7-16-1 as evidence that a State's Attorney "conducts the legal affairs of the county, both civil and criminal, including such actions as those to compel child support." Third, the State's Attorney is elected by voters of the county. SDCL § 7-16-1. Fourth, the State's Attorney's salary is set by the board of county commissioners. SDCL § 7-7-12. Fifth, a State's Attorney need never appear beyond the county's geographic limits unless there is a change of venue in a particular case. SDCL §§ 7-16-9 and 7-16-15. Sixth, South Dakota law authorizes each county "to consolidate the office of state's attorney with any other county or counties to create an office of regional prosecutor," and the decision to create such an office is left entirely to the discretion of the county commissioners and needs no state approval. SDCL § 7-16-24. Similarly, extending the contract of any such prosecutor is a county decision. SDCL § 7-16-30.

Moreover, the South Dakota Supreme Court on at least two occasions has identified State's Attorneys as county officials performing county functions. *See Simpson v. Tobin*, 367 N.W.2d 757, 763, 768 (S.D. 1985) (characterizing the State's Attorney as "the legal consultant for the county" and describing a part-time State's Attorney as "a public official of the county"); *Northwest South Dakota Production Credit Ass'n v. Dale*, 361 N.W.2d 275, 277 (S.D. 1985) (noting that

"the Attorney General [had acted] on behalf of the State of South Dakota, and the Corson County State's Attorney [had acted] on behalf of that county").

It is inconsequential in this context that South Dakota law requires each State's Attorney to represent DSS in their child removal cases. *See* SDCL Ch. 26-7A and SDCL § 26-7A-9 ("The state's attorney shall also represent the Department of Social Services in any proceedings brought under this chapter.") That assignment does not morph the State's Attorney into a state employee. Mr. Vargo introduced no evidence, for instance, that he is paid by the state for providing those services or is viewed by anyone in county or state government as a state employee. No attorney morphs into the client's status merely by representing that client.[23]

Mr. Vargo gave the district court no reason to believe he could be anything other than a Pennington County official. Understandably, the district court exhibited consternation when Mr. Vargo pretended at the last minute that he might be something other than who he identified himself as being, and who he plainly is under state law.

In *Soltesz*, this Court held that a district court must identify the policymaker who created the challenged policy. Here, the district court did just that: it was Mr.

[23] Surely, for instance, Robert Morris, the private attorney representing DSS in this litigation, does not consider himself a state employee merely because, like Mr. Vargo, he represents DSS.

Vargo. Mr. Vargo identified himself a Pennington County officer, and there is nothing in state law to suggest he could be anything else.

1. Mr. Vargo's first unconstitutional policy: Withholding the PTC from parents in 48-hour hearings.

Mr. Vargo acknowledged during the Remedies Hearing, as explained above, that he maintained a policy from January 2013 until May 2014 of withholding the PTC from parents in 48-hour hearings, and then changed his mind and decided they could have one.[24] Mr. Vargo created that policy prior to the filing of this lawsuit and he maintained that policy four months after the district court's January 2014 decision, in which the court informed him in response to his motion to dismiss that such a policy would violate the Due Process Clause.

Mr. Vargo made "a deliberate choice to follow a course of action . . . from among various alternatives" regarding whether to provide parents with the PTC. *See Pembaur*, 475 U.S. at 483; *Ware v. Jackson County, Mo.*, 150 F.3d 873, 880 (8th Cir. 1998). He had two options: give the PTC to parents, or not give it. Whichever choice he selected, that choice would become the "'guiding principle or procedure'" that determined whether parents in Pennington County would receive the PTC. *See Malone*, 847 F.3d at 955 (quoting *Mettler*, 165 F.3d at 1204)).

[24] Mr. Vargo acknowledged during the Remedies Hearing that in May 2014 "I directed that a copy of the petition be made available to the parents." *See* Remedies Hearing Tr. at 36. *See also id*. at 44 (explaining that in May 2014, he decided it was "appropriate" to give parents the PTC, "which is why I ultimately directed that we do so.")

Unfortunately, Mr. Vargo made the wrong choice—his "no PTC" policy was unconstitutional—an act for which he is liable in his official capacity.

Mr. Vargo does not deny making this policy, and he does not deny having the discretion to change it, a discretion he finally exercised in May 2014. Those facts are undisputed. Mr. Vargo's only defense is to claim that the district court failed to indicate whether he was a state employee or a county employee. That defense borders on the frivolous.

2. Mr. Vargo's second unconstitutional policy: Failing to notify Indian parents of the correct legal standard.

Mr. Vargo was informed by the district court in March 2015 that the correct legal standard to apply in 48-hour hearings involving Indian children is the one mandated by 25 U.S.C. § 1922, *see* DSS-App. at 274-81, and that he must notify parents of that standard at the earliest possible time. *Id*. at 283 (quoting *Syrovatka*, 608 F.2d at 310). Mr. Vargo nevertheless chose to *not* provide Indian parents with that information at their 48-hour hearings, a policy Mr. Vargo maintained for an additional seventeen months until he suddenly decided during a recess in the Remedies Hearing to change course. Once again, Mr. Vargo had two options: he could cite the ICWA standard in his PTCs, or he could withhold that information. And once again, he made the wrong choice, an act for which he is liable in his official capacity. *See Pembaur*, 475 U.S. at 483; *Jett*, 491 U.S. at 737; *Malone*, 847 F.3d at 955; *Mettler*, 165 F.3d at 1204. As a result of Mr. Vargo's malfeasance,

more than a hundred Indian families between March 2015 and August 2016 were denied due process.

Mr. Vargo does not deny that he created this policy. He also does not deny that he had the unilateral authority to change it instantly, an authority he exercised. His only defense is to argue that the district court neglected to identify him as a county employee. As the court below correctly determined: that defense borders on the frivolous.

3. Mr. Vargo's third unconstitutional policy: Acquiescing in long-standing practices that violated Plaintiffs' constitutional rights.

It has been settled law since 1989 that executive officers can be liable in their official capacities for "acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." *Jett*, 491 U.S. at 737 (quoting *Pembaur*, 475 U.S. at 485 (White, J, concurring)). And it has been settled law in the Eighth Circuit since 1994 that such liability can occur when executive officers adopt a practice or custom of a judge that is unconstitutional. *See Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994) (holding that a police chief who was alleged to have adopted an unconstitutional practice of a municipal judge can be liable for the decision to do so). *Coleman* "stands for the proposition that a separate, non-subordinate entity . . . may be held liable by adopting the policies of a judge." DSS-App. at 307–08.

After examining more than a thousand pages of court documents and transcripts of 48-hour hearings spanning some four years, the district court concluded that (1) Indian parents were systematically denied by the county court of five safeguards guaranteed by the Due Process Clause, and (2) Defendant Vargo acquiesced in all of those constitutional violations. Mr. Vargo contends, however, that if those violations occurred, he did not acquiesce in them. In essence, Mr. Vargo claims that if constitutional deprivations occurred in judicial proceedings he commenced and prosecuted, he bears no responsibility for them.

Mr. Vargo's description of himself as a helpless victim of circumstance is indefensible. In the first place, *he could have prevented* some of those violations, and he may have been able to prevent all of them had he tried. Yet, instead, he sat back and watched constitutional violations occur in proceedings he kept initiating.

Here, for instance, are five remedial efforts Mr. Vargo could easily have undertaken to protect the constitutional rights of the families whose children he was seeking to place in foster care and to fulfill his professional and ethical obligations. First, Mr. Vargo knew (or should have known) that the county court, despite forty years of Eighth Circuit precedent, was not providing parents with notice of the allegations against them in 48-hour hearings. Mr. Vargo could have rendered that a moot issue by giving parents (as he later began doing) a copy of the

ICWA Affidavit containing that information.[25] Instead, he acquiesced in the court's policy of keeping parents uninformed.

Second, Mr. Vargo knew from the March 2015 decision that the county court was not informing Indian parents in 48-hour hearings of the correct legal standard governing the removal of their children, relying on the "best interest of the child" standard rather that ICWA's "imminent physical damage or harm" standard. Mr. Vargo could have rendered that a moot issue by citing the ICWA standard in his PTCs and giving parents a copy. Instead, he acquiesced in the court's policy to withhold that information from parents, a policy that violated forty years of Eighth Circuit precedent. *See Syrovatka*, 608 F.2d at 310; *Alsager*, 406 F. Supp. at 24–25.

Third, as the district court explained, the Guidelines issued by the South Dakota Unified Judicial Process to guide county courts in conducting child removal proceedings "contemplate that a 48-hour hearing is an evidentiary hearing which may be extended when necessary" to permit witnesses to testify. DSS-App. at 279 (citing to the South Dakota Unified Judicial System "South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases" (2014)) at 45, 36 ("South Dakota Guidelines") (available at

[25] In 48-hour hearings involving Indian children, as discussed below, the factual allegations against the parents are set forth in an "ICWA Affidavit" prepared by DSS staff. It was not until sometime after May 2014 that Mr. Vargo and DSS began giving a copy of the ICWA Affidavit to parents at the 48-hour hearing.

http://ujs.sd.gov/uploads/pubs/SDGuidelinesAandNProceedings.pdf). Yet, Mr. Vargo never once sought the court's leave to call a caseworker to testify, preferring instead to acquiesce in the county court's policy of rendering child removal decisions without the benefit of witness testimony, including testimony from the parents themselves.

Fourth, parents in 48-hour hearings have a right to counsel under both state and federal law to assist them with that hearing. *See* DSS-App. at 285–86. Mr. Vargo knew the county court never appointed counsel for that hearing (and if he did not know this fact when he took office, he learned about it when he read Plaintiff's 2013 complaint, was reminded of it when he read the district court's 2014 decision, and reminded again when he read the 2015 decision). Yet, rather than urge the county court to appoint counsel (or, more appropriately, inform the court that the State believes that parents should have counsel at the 48-hour hearing), he instead acquiesced in the county court's policy of compelling parents to proceed without counsel.

Fifth, Mr. Vargo was aware that other South Dakota counties were already conducting 48-hour hearings that contained the procedural safeguards Plaintiffs were seeking in Pennington County. Rather than share that information with the judges in Pennington County, Mr. Vargo concealed that information from them. When asked during the Remedies Hearing why he withheld that information, Mr.

Vargo defended his decision by saying *he* had determined that circumstances in all those other counties were too dissimilar to those in Pennington County, apparently deciding not to allow these judges to make that determination for themselves. *See* Remedies Hearing Tr. at 69–70.

Mr. Vargo's decision to *not try* to change judicial policy on these five constitutional issues is particularly indefensible because Mr. Vargo knows that he can influence the manner in which 48-hour hearings are conducted in Pennington County. During the Remedies Hearing, he boasted about a process he convinced the judges to adopt in which, 15 days after each 48-hour hearing, a second hearing is held to ensure that the child had been placed in a proper setting. *See* Remedies Hearing Tr. at 59 ("[I]t was my initiative to create what is now essentially the 15-day hearing, where if DSS does not believe a placement is appropriate, they would then need to justify that to make sure we are held accountable for our placement. It was my decision to do that.") Mr. Vargo asked Judge Pfeifle to adopt that process, and the judge agreed. *Id*. at 142, 164.[26]

Perhaps Mr. Vargo preferred a process that guaranteed he would prevail with little effort, but in any event, as the district court found, "[t]here is no

[26]The 15-day hearing did not cure any constitutional defect that had occurred in the 48-hour hearing; for instance, parents still had no right to testify, and they could not cross-examine the caseworker. The sole purpose of the 15-day hearing was to consider if the child had been properly placed by DSS, as Mr. Vargo stated. *See also* testimony of Roxanne Erickson, Remedies Hearing Tr. at 87 (explaining that no testimony is permitted at the 15-day hearings).

evidence" that Mr. Vargo sought to change any of these unconstitutional policies and, by not doing so, he "created the appearance of regularity in a highly irregular process." DSS-App. at 272, 273. Mr. Vargo could have prevented hundreds of constitutional violations by, for instance, giving Indian parents the PTC. Instead he went along with the county court's practice of not requiring him to provide that notice. Mr. Vargo was not required by South Dakota law to withhold the PTC from parents; he simply chose to follow the county court's practice.[27]

In our judicial system, prosecutors are not only advocates for the state, they have a responsibility to the public. They have a duty to watch for "recurring constitutional violations" and are "ethically bound to know what [is constitutionally required] and to perform legal research when they are uncertain." *Connick v. Thompson*, 563 U.S. 51, 66–67 (2011).

If the facts of this case do not satisfy *Jett*'s admonition that "acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity," *Jett,* 491 U.S. at 737 (quoting *Pembaur,* 475 U.S. at 485 (White, J, concurring)), it is difficult to know what would suffice. Similarly, it is difficult to fathom a more compelling case of "adoption" under *Coleman* than this one, in which Mr. Vargo did absolutely

[27] Thus, this case is distinguishable from *Slaven v. Engstrom*, 710 F.3d 772 (8th Cir. 2013). In *Slaven*, this Court rejected municipal liability because the challenged policy was mandated by state law and, therefore, county officials were not the proper defendants. *See id.*, 710 F.3d at 781. Here, *none* of the challenged policies are mandated by state law.

nothing to change policies the federal court told him are unconstitutional in the hearings he kept initiating, some of which he could have fixed on his own. The district court's conclusion that Mr. Vargo acquiesced in the county court's unconstitutional policies is eminently correct.

One final subject needs to be addressed. Mr. Vargo claims that he cannot be a final policymaker because he, like all State's Attorneys in South Dakota, are under the general supervision of the South Dakota Attorney General. *See* Vargo Brief at 37. While such general supervision exists, the case law is abundantly clear that this type of general, non-specific, and theoretical oversight is insufficient to destroy policymaker status. *See Ware v. Jackson County, Mo.*, 150 F.3d 873, 885 (8th Cir. 1998) (finding that a jail director was a policymaker even though his decisions were theoretically reviewable by a commission, given that the jail director presented no evidence there was a proven method for such review). Here, for instance, Defendant Vargo introduced no evidence that his "no PTC" or "no ICWA PTC" policies were subject to review and had in fact been reviewed by the South Dakota Attorney General. Notably, Mr. Vargo changed his PTC policy during a recess in the Remedies Hearing. There is no evidence that he telephoned the Attorney General for permission to do that.

The issue is not whether some review is possible but whether the official making the decision is constrained by policies not of that official's making, and

review is meaningful rather than potential. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *McMillian v. Monroe County*, 520 U.S. 781, 792 (1997) (holding that "attenuated and indirect" supervisory review does not change policymaker status); *Ware*, 150 F.3d at 885. A review procedure "must be *meaningful*—as opposed to merely hypothetical—in order to strip an official of 'final policymaking' authority." *Randle v. City of Aurora*, 69 F.3d 441, 449 (10th Cir. 1995) (emphasis in original) (citing *Melton v. City of Oklahoma City*, 879 F.2d 706, 724 n.24 (10th Cir. 1989)); *see also Goldstein v. City of Long Beach*, 715 F.3d 750, 759–60 (9th Cir. 2013) (holding that an administrative policy created by a California district attorney subjected the county to § 1983 liability, even though district attorneys in California are generally under "the control and supervisory power of the Attorney General"). Here, the undisputed evidence shows that Defendant Vargo had "'virtually absolute sway'" over these policies—policies that he created and could change in a heartbeat—for which he is liable. *See Bigford v. Taylor*, 834 F.2d 1213, 1222 (5th Cir. 1988) (internal citation omitted).

In sum, Mr. Vargo ignored four decades of Eighth Circuit jurisprudence when he chose, first, to withhold the PTC from parents and, second, to give Indian parents a constitutionally defective PTC. Mr. Vargo is the final policymaker with respect to those unconstitutional policies and the district court correctly found him to be so. In addition, Mr. Vargo acquiesced in policies of Judges Davis and Peifle

that were clearly unconstitutional without making the slightest effort to change them or to prevent persons from being injured by them, even though he easily could have prevented many of those injuries. The district court was clearly correct in finding Mr. Vargo liable in his official capacity.

B. The DSS Defendants created three unconstitutional "official policies."

When this lawsuit was filed in 2013, Luann Van Hunnik was the Regional Manager of the Pennington County office of DSS and Kim Malsam-Rysdon was the State Secretary of DSS. They were sued in their official capacities. When they were replaced by Lisa Fleming and Lynne Valenti, respectively, those persons were automatically substituted as party defendants pursuant to Rule 25(d)(1) F.R.Civ.P. *See Kentucky v. Graham*, 473 U.S. 159, 166 n.11 (1985).

The DSS Defendants created three policies and practices in their official capacities that violated Plaintiffs' constitutional rights. Stated differently, the DSS Defendants were presented with three choices on matters within their final discretion, and in each instance they chose to inflict a constitutional injury rather than avoid one. These policies were the moving force that resulted in hundreds of Indian children and families losing their federal rights, for which these officials are liable in their official capacities. *See Pembaur*, 475 U.S. at 483; *Malone*, 847 F.3d at 955; *Mettler*, 165 F.3d at 1204; *Ware*, 150 F.3d at 880.

1. DSS Defendants' first unconstitutional policy: Failing to provide parents with a copy of the ICWA Affidavit at the 48-hour hearing.

The issue to be decided in every 48-hour hearing is whether to grant the State's motion (the PTC) for continued removal of the child or whether to return the child to the family. The burden of proof is on the State to justify the need for continued removal. *See* SDCL §§ 26-7A-15 through -19. Thus, although evidence concerning the initial incident is relevant, the purpose of the hearing is to determine if there exists a sufficient risk of *future* injury to warrant keeping the child in state custody. *See* SDCL § 26-7A-18 (stating that at the 48-hour hearing, the court "shall consider the evidence of the need for continued temporary custody of the child").

In emergency removals involving Indian children, information about future injury is placed by the caseworker in an "ICWA Affidavit." In 2005, the Division Director of Child Protection Services ("CPS"), the DSS sub-agency that handles child welfare matters, issued a Policy Memorandum describing the ICWA Affidavit, its purpose, and when it is supposed to be prepared. The Memorandum states:

> DSS social workers will complete an ICWA Affidavit and/or a court report, to be filed at the 48 hour hearing or as soon as possible thereafter, which shall include information regarding any efforts provided prior to removal, *the likelihood of serious emotional or physical harm if the child is returned*, and the efforts undertaken to locate a placement consistent with ICWA placement preferences.

See DSS-App. at 223 (emphasis added). Two examples of ICWA Affidavits filed in Pennington County cases can be found in DSS-App. at 98–100 and 219–221.

Given that the ICWA Affidavit contains the State's allegations against the parents as to why the State is seeking continued removal, parents must receive the Affidavit at the earliest possible time. Parents in these situations have a constitutional right to be informed of "the alleged factual basis for the proposed [removal] . . . sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity' . . . . (P)arents (must) be notified, in writing, of the specific charge or factual allegations [against them].'" *Alsager*, 406 F. Supp. at 24–25 (quoting *In re Gault*, 381 U.S. at 33). *See also Syrovatka v. Erlich*, 608 F.2d at 310.

Plaintiffs filed a motion seeking partial summary judgment against the DSS Defendants in their official capacities based on the fact that Indian parents in 48-hour hearings in Pennington County were not being given the ICWA Affidavit, neither before the hearing nor during it. As proof, Plaintiffs submitted into evidence more than 75 transcripts of 48-hour hearings. These transcripts revealed three facts. First, as the district court found, "[i]n a number of transcripts, . . . an Indian parent asked about the allegations against them" and stated or indicated they had received no information on that subject. DSS-App. at 259–60. The district

court's March 2015 decision provides examples of these requests, including one in which the county court responded by stating that the documents would be provided to the parents at the next hearing. *Id*. at 260. Second, not once "did a Deputy State's Attorney, DSS representative or the judge contradict the statements of the Indian parents" that this information had not been provided. *Id*. Lastly, the district court further found that there was no reference to an ICWA affidavit "in 77 out of 78" transcripts reviewed by the court, which the court listed by docket number. *Id.* at 260 n.17.

Glaringly, DSS filed not one affidavit from a DSS employee stating that he or she had provided an ICWA Affidavit to a parent at a 48-hour hearing (despite holding more than a hundred such hearings a year). Nor could DSS point to a hearing transcript that indicated a parent had received an ICWA Affidavit. Nor did anyone from the State's Attorney's office submit an affidavit stating that Indian parents were receiving the ICWA Affidavit at 48-hour hearings.

Instead, DSS submitted a Statement of Material Facts in which DSS *erroneously* claimed that "since June 2012 it has been DSS's written policy to provide the ICWA affidavit to parents attending a 48-hour hearing." DSS-App. at 259 **(**citing Docket 131 ¶ 8.) That statement relied on an affidavit submitted by Defendant Van Hunnik in which she claimed that DSS had such a written policy, which she identified as Defendants' Exhibit 15. (DSS included Ms. Van Hunnik's

affidavit and Exhibit 15 in their Appendix. *See* DSS-App. at 159–94, 224–25 respectively.)

Examination of Exhibit 15 proves that Ms. Van Hunnik's testimony is false. This policy states in whole as follows:

> The ICWA Affidavit: This affidavit should be completed by the Family Services Specialist on the case, **if possible, for the 48-hour hearing or for the next scheduled hearing.** The original should be filed with the court and copies provided to the parties. **Check with the State's Attorney for the process to be followed to do so.** See example in the Forms section at the end of this Chapter (a current copy is available in FACIS).

DSS-App. at 225 (emphasis added). Two things are evident on the face of this policy. First, the ICWA affidavit did not have to be given to parents at the 48-hour hearing; indeed, the Affidavit did not even need to be completed by then. Second, it was the State's Attorney (who represents DSS in all child custody matters) who determined when parents would receive it, and there is no deadline set in the policy. State's Attorney Mark Vargo, as we know, maintained a policy until May 2014 of not providing Indian parents with his PTC. DSS introduced no evidence that Mr. Vargo gave them the ICWA Affidavit, either. In short, the evidence was uncontroverted: the hearing transcripts showed that parents were not provided with the ICWA Affidavit at the 48-hour hearing, DSS had issued no written policy requiring that one be given, and DSS failed to introduce any evidence indicating that even one parent had received an ICWA Affidavit at a hearing. Ms. Van

Hunnik's affidavit was clearly fabricated. The district court noted: "During the remedies hearing, counsel argued the DSS defendants were in full compliance with their obligations under South Dakota state law and federal law *but offered no supporting evidence*." DSS-App. at 327 (emphasis added). The failure of the DSS Defendants to provide parents with the ICWA Affidavit constituted a patent violation of the Due Process Clause. *See In re Gault*, 381 U.S. at 33; *Syrovatka v. Erlich*, 608 F.2d at 310; *Alsager*, 406 F. Supp. at 24–25.

In their brief, the DSS Defendants criticize the district court for stating that the policy of withholding the ICWA Affidavit was created by "the Defendants" rather than "point to or identify any unconstitutional governmental policy or custom of the State of South Dakota that Ms. Fleming and/or Ms. Valenti were responsible for in their 'official capacities.'" DSS Brief at 30. That criticism is misguided. The truth is, each Defendant implemented this policy and each is equally responsible for it: (1) the DSS Defendants are culpable because they failed to issue a written policy requiring that parents be given the ICWA Affidavit at 48-hour hearings or train their staff to provide one; (2) Mr. Vargo is culpable because he failed to provide parents with a copy of the ICWA Affidavit until sometime after May 2014; and (3) Judges Davis and Pfeifle are culpable because in their own 48-hour hearings they failed to require DSS to provide parents with the ICWA Affidavit. Thus, individually *and* collectively the Defendants are liable for this

unconstitutional policy. Each Defendant had the power and the duty to ensure that Indian parents "[were] notified, in writing, of the specific charge or factual allegations [against them]," *see Alsager*, 406 F. Supp. at 24–25 (quoting *In re Gault*, 381 U.S. at 33), and each failed to satisfy that duty.

The DSS Defendants had a choice to make: either give parents the Affidavit, or withhold it. They made the wrong choice, an act for which they are liable in their official capacities. *See Pembaur*, 475 U.S. at 483; *Malone*, 847 F.3d at 955; *Mettler*, 165 F.3d at 1204. Their policy was the moving force behind hundreds of constitutional violations. The district court appropriately ruled against them on summary judgment.

2. DSS Defendants' second unconstitutional policy: Using the wrong legal standard in determining continued removal of Indian children.

According to Roxanne Erickson, and as explained above, by April 2016, everyone in Pennington County involved with 48-hour hearings concerning Indian children agreed that those hearings must be governed by the standard set forth in 25 U.S.C. § 1922 ("imminent physical damage or harm") and not the state standard set forth in SDCL § 26-7A-18 ("best interests of the child."). Given that ICWA was passed in 1978, that conclusion was a long time coming. Plaintiffs raised this issue in their 2013 complaint. Prior to April 2016, the position taken by all four Defendants, as reflected in their motions to dismiss, was that § 1922 was a "statute of deferment" that authorized them to ignore ICWA until later in the removal

process, a position the district court rejected in the court's first decision of January 2014. *See* DSS-App. at 30–31.

It is thus undisputed that from the time this lawsuit was filed in March 2013 until April 2016, the DSS Defendants (and their attorney, Mr. Vargo) employed the wrong standard in determining whether *to seek* continued removal of Indian children, and Judges Davis and Pfeifle employed the wrong standard in determining whether *to grant* continued removal. Indeed, the undisputed facts show that the DSS Defendants continued to train their staff to use the wrong standard long after the district court informed them in March 2015 of the correct standard. *See* DSS-App. at 327 (citing testimony of CPS officials acknowledging that after the 2015 decision, "CPS made a decision not to apply the § 1922 standard in training CPS staff" and still were not properly training their staff by the time of the August 2016 Remedies Hearing).

The decision of the DSS Defendants to ignore the March 2015 decision had devastating real-world consequences. As the district court noted, citing undisputed evidence from DSS staff and court records, had the DSS Defendants trained their staff to use the ICWA standard, some *three-quarters* of the Indian children whose continued removal was sought at 48-hour hearings might have been returned to their families instead, *see* DSS-App. at 315—a sobering statistic.

The DSS Defendants were faced with an alternative: use the ICWA standard or use the state standard. They made the wrong choice (and they stuck to that wrong choice until well into 2016, despite the district court's March 2015 ruling). The DSS Defendants are liable for that error in their official capacities. *See Pembaur*, 475 U.S. at 483; *Malone*, 847 F.3d at 955; *Mettler*, 165 F.3d at 1204. The district court correctly ruled in Plaintiffs' favor on this issue.

3. DSS Defendants' third unconstitutional policy: Acquiescence in the county court's decision to deny parents of adequate notice.

The district court ruled in Plaintiffs' favor essentially on alternative grounds regarding the two official policies just discussed. The court first concluded that the DSS Defendants created two unconstitutional policies: (1) a policy of withholding the ICWA Affidavit from Indian parents in 48-hour hearings, and (2) a policy of employing the "best interests" standard rather than the ICWA standard in determining whether to seek continued custody of Indian children at those hearings. The court also found that the DSS Defendants acquiesced in and adopted the trial court's longstanding policy of not ensuring that parents were given the ICWA Affidavit and of using the "best interests" standard to determine the hearing's outcome.

The district court could have enjoined those two DSS policies without also finding that DSS acquiesced in the county court's policies that had the same effect. But the district court had more than ample evidence of acquiescence. The DSS

Defendants had it within their power to provide the Affidavit to parents and to place the correct legal standard in that Affidavit, and to instruct their attorney, Mr. Vargo, to notify parents of the ICWA standard in his PTCs. Instead, they allowed hundreds of constitutional violations to occur. They acquiesced when they instead should have acted to prevent those injuries. The district court correctly found unconstitutional acquiescence. *See Jett*, 491 U.S. at 737; *Coleman*, 40 F.3d at 260-61.

C. Defendant Pfeifle created unconstitutional "official policies."

This lawsuit was filed in March 2013 when Hon. Jeff Davis was the Presiding Judge of the Seventh Judicial Circuit. DSS-App. at 248. He was removed from that post by the Chief Justice of the South Dakota Supreme Court on May 21, 2015, two months after the district court's summary judgment decision, which found that Judge Davis was responsible for five policies that violated the Due Process Clause and two policies that violated ICWA. He was replaced with Judge Craig Pfeifle, who was substituted for Judge Davis as a defendant in this litigation in his official capacity. *See* DSS-App. at 324 n.5.

With respect to the Due Process violations, the district court found that Judge Davis's 48-hour hearings denied parents of five Fourteenth Amendment rights: to be informed of the allegations against them and the legal standard governing removal, to present evidence, to cross-examine the state's witnesses, to

counsel, and to a decision based on evidence presented in open court. *See* DSS-App. at 282–88. Judge Pfeifle claims he is not responsible for any of those injuries and, therefore, "should be dismissed" as a defendant. Pfeifle Brief at 38.

Defendant Pfeifle makes two central arguments. First, he contends that he and Judge Davis were not policymakers for purposes of § 1983. Second, he contends that even if he and Judge Davis did create and implement all of the policies challenged in Plaintiffs' complaint, those policies were not unconstitutional, and thus Plaintiffs suffered no cognizable injury. In other words, Judge Pfeifle contends that parents in 48-hour hearings do not have a right to be informed of the allegations against them or the standard governing the removal proceeding, do not have a right to testify, do not have a right to counsel, do not have a right to cross-examine the state's witnesses, and that the judges who preside over 48-hour hearings, including he and Judge Davis, may render decisions based exclusively on evidence submitted by the state *ex parte*.

At the outset, we need to identify the "official capacity" in which Judge Davis was sued because Judge Pfeifle inherited that position when he took Judge Davis's place. Plaintiffs' complaint identifies Judge Davis as being both a judge on the Seventh Circuit and its chief administrator, and he was sued in both capacities. *See* DSS-App. at 6–7 ¶11. The district court consistently identified Judge Davis in both capacities. Indeed, the first paragraph of the March 2015 summary judgment

decision begins by stating: "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." DSS-App. at 248. The vast majority of the district court's rulings focus on what Judge Davis did in his courtroom as opposed to what Judge Davis did in fashioning policies for the other Seventh Circuit judges.

Defendant Pfeifle attacks the district court's decisions with demeaning criticism: "The district court . . . drift[s] 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." Pfeifle Brief at 22. In the first place, Judge Davis was not sued "for his own rulings," and this another of Defendant Pfeifle's distortions of the record. Plaintiffs did not challenge any of Judge Davis's rulings, and the district court did not overturn any of Judge Davis's rulings.

It is definitely true, however, that Judge Davis was sued for the unconstitutional policies he created as a presiding judge *and* for the unconstitutional policies he created in his own courtroom. But the district court did not "drift back and forth" between the two as if on some haphazard voyage. The court issued lengthy and detailed findings that leave no doubt but that Judge Davis created and implemented policies inconsistent with settled law in this Circuit.

Understandably, Judge Pfeifle tries to distance himself from the unconstitutional policies of his predecessor. There are two reasons he is unsuccessful. First, just because he replaced Judge Davis, this did not wipe the slate clean. This litigation is an *Ex parte Young* action against a state official seeking prospective relief from years of unconstitutional conduct. If the state could slip out of *Ex parte Young* cases as effortlessly as Judge Pfeifle thinks they can, state officials could avoid injunctive and declaratory relief just by replacing a bad actor. For reasons explained in more detail later, the district court properly entered remedial orders against Judge Pfeifle to ensure that that the unconstitutional policies that Judge Davis had implemented for many years—which caused hundreds of injuries—will be eradicated once and for all. *See Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404, 433 (8th Cir. 1985) ("Having found [violations of federal law by state and local officials], . . . the district court was responsible for devising a remedy that would correct the constitutional violations that it found.").

The second reason Judge Pfeifle cannot evade responsibility is because he has unclean hands. On numerous occasions, as the undisputed evidence shows, Judge Pfeifle employed in his courtroom the very same unconstitutional policies Judge Davis employed. The district court cited in its 2015 decision fourteen 48-hour hearings conducted by Judge Pfeifle in 2013 in which he employed those unconstitutional policies. *See* DSS-App. at 261 n.19 (identifying these fourteen

cases by docket number).[28] The district court made express findings regarding the fact that *all* Seventh Circuit judges conducted their 48-hour hearings the same way with respect to the policies at issue in this action. *See, e.g.*, DSS-App. at 264-65 ("Judge Davis and the other Seventh Circuit judges . . . never advised any Indian parent or custodian they had a right to contest the state's petition for temporary custody during the 48-hour hearing . . . [or] advised Indian parents they had a right to call witnesses . . . [or] required the State to present sworn testimony from a live witness.")

As the transcripts show, Judge Pfeifle was specifically informed in many of his hearings that the parents had not received the ICWA Affidavit or the PTC. *See, e.g.*, A13-20 (transcript at 10-11); A13-30 (transcript at 12); A13-49 (transcript at 10-11). In not one instance did Judge Pfeifle order that copies be provided to them prior to granting the State's motion for continued removal of the child. Moreover, Judge Pfeifle always used the "best interests of the child" standard rather than the ICWA standard. *See, e.g.*, A13-805 Tr. at 3 ("This is an informal proceeding. By that I mean that no evidence is taken in terms of testimony. I rely on the matters that have been presented to me for hearing consideration this morning and make [a] determination . . . [based on] the best interests of the child.") The district

[28] As explained earlier, Judge Davis assigned Judge Pfeifle to hear A & N cases in 2013, and Plaintiffs obtained the basic files in every third one. Therefore, the record in the district court includes many 48-hour hearings conducted by Defendant Pfeifle.

court's 2016 Remedies Decision cites to a 48-hour hearing over which Judge Pfeifle presided in May 2015—two months *after* the district court's summary judgment ruling—in which Judge Pfeifle continued to deny those parents of all of the procedural safeguards the district court had held are required by the Due Process Clause. *See* DSS-App. at 337. Notably, *Judge Pfeifle has never denied conducting all of his 48-hour hearings in the same fashion as did Judge Davis with respect to the procedures and the standards challenged in this lawsuit*.

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."); *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.

Judge Pfeifle apparently believes that merely because he has decided (for now) not to assign himself to handle 48-hour hearings, he is not responsible for all of the hearings he previously handled in which he deprived Indian children, their parents, and their tribes of their federal rights. He offers no authority for that view,

and none exists. This is an *Ex parte Young* action seeking a remedy from systemic and repeated violations of federal law. Those violations were committed by Judge Pfeifle no less than by Judge Davis. Plaintiffs are entitled to an effective remedy to guard against any recurrence, as explained in the last section of this brief.

Particularly revealing is a statement Judge Pfeifle made during his May 2015 hearing. The hearing involved an Indian child, and the attorney for child's tribe requested that Judge Pfeifle employ the § 1922 standard in determining whether to grant the state's motion for continued removal. Bear in mind that, as Roxanne Erickson testified in the Remedies Hearing, the judge who presently hears 48-hour hearings has determined that nothing in *Cheyenne River* prevents him from employing the § 1922 standard. Yet one year earlier, Judge Pfeifle reached the opposite conclusion and, in response to counsel's request, stated:

> Whether or not I agree with Judge Viken in my estimation is not relevant to the inquiry because the Supreme Court of South Dakota has very clearly determined for me in *Cheyenne River Sioux Tribe v. Davis* that 1922 does not apply to this particular hearing, and until a Court that has the capacity to advise me of the same enters a formal order, I simply cannot do anything further than rely on that representation, so I choose to do so at this particular point in time.

DSS-App. at 337 (citing Docket 239-1 at 12).

Notably, even if *Cheyenne River* had some bearing on the *ICWA* issues in 48-hour hearings—which it did not, for reasons previously discussed—it had no bearing on the *Fourteenth Amendment* issues. *Cheyenne River* did not address a

single due process issue. The words "due process" and "Fourteenth Amendment" do not appear in *Cheyenne River*. Judge Pfeifle, in other words, cannot use *Cheyenne River* as an excuse for denying parents in his own 48-hour hearings the rights the Eighth Circuit held decades ago are constitutionally required in that situation. Judge Pfeifle had alternatives: he could provide parents with the rights recognized in *Alsager*, *Syrovatka*, *Swipies*, *Whisman*, and *Heartland* or he could withhold those rights. He made the wrong choice.

Even if it is true, as Judge Pfeifle points out, *see* Pfeifle Brief at 33-34, that his policies to deny parents adequate notice, an opportunity to present evidence, and an opportunity to cross-examine adverse witnesses could have been appealed, the opportunity for an appeal does not negate the fact that Judge Pfeifle *created* those policies in the first place. Virtually every policy by a judicial, legislative, or executive official is subject to judicial review. No court has ever held that the availability of judicial review negates policymaker status of the person creating that policy, and Defendant Pfeifle cites no case in support of his claim. If his claim had merit, *Pulliam* would have been decided the other way because there, as here, lower court judges created policies that violated the Due Process Clause. Judge Davis made the identical claim in the district court as Judge Pfeifle makes here, and the court rejected that claim for sound reasons: "Were the court to adopt Judge Davis' rationale, the United States Supreme Court would be the only final policy

maker based on its authority to review a state court decision through a writ of certiorari." DSS-App. at 302. As the district court noted, "'Congress intended § 1983 to be an independent protection for federal rights.'" *Id.* at 303. The initial debates on § 1983 discloses that Congress was particularly interested in providing an avenue whereby victims of civil rights abuse at the hands of a state court could obtain an effective remedy in a federal court. *See Pulliam*, 466 U.S. at 540 (noting that an opportunity for federal relief "was considered necessary because 'state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.'" (quoting *Mitchum v. Foster*, 407 U.S. 225, 240 (1972). Thus, Judge Pfeifle's contention that he can violate the due process rights of Indian parents and their only recourse is to appeal his decisions to the South Dakota Supreme Court—and not challenge them in federal court under § 1983—lacks merit.

Judges Davis and Pfeifle are policymakers for purposes of liability under § 1983 for three reasons. The district court correctly identified them as such. Judge Pfeifle conveniently ignores two of those reasons, and mischaracterizes the third.

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. The fifteen transcripts of cases handled by Judge Pfeifle eliminate all doubt on that issue. In all

fifteen cases, Judge Pfeifle made "a deliberate choice to follow a course of action . . . from among various alternatives," and is liable in his official capacity for the wrong choices he made. *See Pembaur*, 475 U.S. at 483; *Soltesz*, 847 F.3d at 946.[29]

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. The replacement of Judge Davis by Judge Pfeifle did nothing to moot Plaintiffs' claims against Judge Davis. As discussed in the final section of this brief, the Plaintiffs are entitled to a federal remedy against Judge Pfeifle for the actions of the official he replaced. When Judge Pfeifle accepted Judge Davis's office, he inherited his liabilities as well.

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. Judge Pfeifle selects this judge, and in making that selection, Judge Pfeifle *must* take into account the need for those hearings to be operated consistent with the Due Process Clause and ICWA. This is not, as Judge Pfeifle suggests, controlling how cases are decided but, rather, how they are handled procedurally. As the Presiding Judge, Judge Pfeifle must

[29] The district court does not expressly base Judge Pfeifle's policymaker status on polices pursued by Judge Pfeifle during his own 48-hour hearings, although that finding is implicit in the court's remedial order, and is supported by the record. On appeal, this Court "can affirm the grant of summary judgment for any reason supported by the record, including a reason different from the one that the district court gave." *Bolderson v. City of Wentzville, Mo.*, 840 F.3d 982, 985 (8th Cir. 2016) (citing *Bishop v. Glazier*, 723 F.3d 957, 961 (8th Cir. 2013)).

appoint someone to hear these cases who will do so in a manner consistent with the federal rights of the parties who appear before the court. As the district court explained, "[t]he 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." DSS-App. at 343.

It is vitally important that all judges in the future who presides over 48-hour hearings incorporate the procedures enumerated in the district court's remedial orders. Otherwise, hundreds of Indian families could again suffer violations of their federal rights, and this lawsuit may have been for naught. If this Court is not convinced that Plaintiffs are entitled to a remedy against Judge Pfeifle on the grounds that he must appoint judges to hear abuse and neglect cases in a manner consistent with federal law, there is an option, similar to the one utilized in *Soltesz*, 847 F.3d at 947: the Court would remand this one portion of the district court's order to enable the district court to identify the judicial policymaker responsible for the unconstitutional policies at issue and to grant a remedy against that person expressly in his/her official capacity. (Those portions of the order directed at the other Defendants will not be subject to the remand.) On remand, the Plaintiffs will

seek to add all Seventh Circuit judges as defendants, precisely the alternative vehicle suggested in the district court Remedies Order. *See* DSS-App. at 24 ("Although the other judges of the Seventh Circuit are not parties to this action, their obligation to enforce the due process rights and ICWA rights of Indian children, parents, custodians and tribes is central to the effective resolution of plaintiffs' claims for relief. Should the judges fail to honor that obligation, the court will entertain plaintiffs' motion to individually add all the Seventh Judicial Circuit Judges to this action pursuant to Fed. R. Civ. P. 20(a)(2)(B).").[30]

A remand, however, is unnecessary. The undisputed record shows that Judge Davis *and* Judge Pfeifle created policies and implemented practices for which they are liable under § 1983 in their official capacities. Plaintiffs are therefore entitled to appropriate relief to ensure that those violations cannot recur. "Having found [that state and local officials violated federal law], the district court was

[30] Another option is for the district court to enter an order pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and order the judge currently presiding over 48-hour hearings *in his or her official capacity* to implement the court's remedial orders. (This way, the order will automatically apply to every other judge who presides over a 48-hour hearing.) The All Writs Act empowers federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id*. The All Writs Act provides authority to district courts to enjoin nonparties who "are in a position to frustrate the implement-tation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977); *Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 365 n. 6 (8th Cir. 2007) ("the All Writs Act has been held to give the federal courts the power to implement the orders they issue by compelling persons not parties to the action to act, or by ordering them not to act.") (citing 14A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3691 (3d ed. 1998)).

responsible for devising a remedy that would correct the constitutional violations that it found.") *Little Rock Sch. Dist.*, 778 F.2d at 433. The district court did exactly that. Moreover, as Presiding Judge, Defendant Pfeifle can be directed to appoint judges to A & N cases who will conduct their 48-hour hearings in a manner consistent with federal law.

All four Defendants are policymakers for purposes of liability under § 1983. Their arguments to the contrary lack merit.

IV. SECTION 1922 LIMITS THE COURT'S CONSIDERATION AT 48-HOUR HEARINGS TO EVIDENCE OF *IMMINENT PHYSICAL* DAMAGE OR HARM

ICWA contains three standards governing the removal of Indian children from their homes and, when they are removed, their placement outside the home, each applying in a different situation. Section 1922 of the Act applies when an Indian child is removed from the home in an emergency. In that situation, the state must return the child to the home as soon as "such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child." The word "emotional" is not included in that standard.

The second standard governs placement of the child in foster care. Section 1912(e) provides that an Indian child may not be placed in foster care "in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by

the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." In this situation, the court is permitted to consider emotional harm, but such evidence must include the testimony of a *qualified expert witness.*[31] Moreover, the damage or harm must be "serious," and the need for removal must be proven by clear and convincing evidence.

The third standard governs adoptions. Section 1912(f) provides that an Indian child may not be placed for adoption "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Once again, although the court may consider emotional harm, that evidence must be accompanied by qualified expert witness testimony, the damage or harm must be "serious," and the burden of proof is elevated to "beyond a reasonable doubt."

Until April 2016, the Defendants believed, as explained above, that the State's "best interests of the child" standard applied in their emergency 48-hour hearings involving Indian children and not the § 1922 standard of "imminent

[31] The term "qualified expert witness" is not defined in ICWA. The Department of the Interior issued a Guideline in 1979 that defines this term to mean: (1) a member of the child's tribe who is knowledgeable in tribal child-rearing customs; (2) a lay expert who has substantial experience in delivering family-care services to Indians and has knowledge of the tribe's cultural standards; or (3) someone specially trained in the area in which he or she is testifying (a child-care professional). BIA Guidelines, 44 Fed. Reg. 67598 at 67593(D.4(b)) (1979). The 2016 BIA Final Rule uses similar language. *See* BIA Final Rule, 81 FR at 38829-30. Testimony from a qualified expert will help ensure that removal and placement will not be based on "a white, middle-class standard." *Id*. at 38829 (quoting House Report at 24).

physical damage or harm." Judges Davis and Pfeifle conducted numerous 48-hour hearings and advised the Indian parents in all of them that continued removal of their children would be based on a "best interest of the child" standard.[32]

An ICWA Affidavit, prepared by a DSS caseworker, is filed in each 48-hour hearing involving an Indian child. An example of one is included in the DSS App. at 98-100. Paragraph 11 of that Affidavit requires the caseworker to inform the court why, in the caseworker's opinion, returning the child to the home would place that child "at serious risk of emotional or physical damage." That identical language was contained in all of the Temporary Custody Orders (TCOs) issued by the county court granting DSS's motion for continued removal. Plaintiffs filed more than fifty TCOs with the district court in support of their motion for partial summary judgment, and all of them contained that same finding.[33]

Thus, the facts are uncontroverted: whereas ICWA's § 1922 required state courts to base their emergency removal decisions on evidence of "*imminent physical*" damage or harm, Defendants instead employed a "best interests of the

[32] The district court's March 2015 decision provides an example of the opening statement Judge Davis gave in one 48-hour hearing and noted that similar language was used in "all" of his other hearings. DSS-App. at 261. In that statement, Judge Davis informed parents that the purpose of the hearing "is to determine what is in the best interest of the children." *Id*. at 262. Similarly, in all 15 cases cited by the district court in which Judge Pfeifle was presiding, he, too, used the "best interest" standard. *See, e.g.,* A13-20 (transcript at 3); A15-293 (transcript at 3: "The standard that I use in making that determination is whether I believe that the State's request for continued custody is in the best interests of the child.") (A copy of this transcript is on file with the Eighth Circuit as Docket 239-1R.)

[33] These TCOs were filed in the District Court attached to the Declaration of Peter Beauchamp (Docket 111) Ex. 2

child" standard. Under Defendants' standard, a court could grant continued removal based on a caseworker's belief—which parents were not allowed to challenge at the 48-hour hearing—that returning the child to the home would risk emotional harm.

Two other material facts were also undisputed. Defendant Van Hunnik admitted during her deposition, first, that continued removal of an Indian child could be based entirely on evidence of emotional harm, and second, that in three-fourths of the cases in which her office sought continued retention of an Indian child, the request was based entirely on evidence of emotional harm. *See* Docket 265, Ex. 3 (a copy of the relevant portion of Ms. Van Hunnik's testimony is contained in Appellees' App. at 4-6). Ms. Van Hunnik's testimony was stunning because it meant that had DSS employed the ICWA standard—which does *not* permit reliance on emotional damage—hundreds of Indian children who spent days, weeks, and sometimes months in foster care following the 48-hour hearing could instead have been reunited with their families at that hearing.

Given the absence of any dispute of fact on this issue, Plaintiffs filed a motion for partial summary judgment, which the district court granted. As the court noted in its separate order on this issue, "25 U.S.C. § 1922 does not permit consideration of 'emotional damage or harm' in § 1922 emergency proceedings." (DSS-App. at 320.) The district court commented that employing the proper

standard could result in a decrease by 75 percent in the number of Indian children whose continued removal would be sought by DSS in 48-hour hearings. DSS-App. at 315 (citing Docket 262 at 2-3). The Defendants have appealed from that ruling.

In the case at bar the Court must interpret five statutory words: "imminent physical damage or harm." Plaintiffs contend that the decision to retain custody of an Indian child at the 48-hour hearing must be based exclusively on evidence of *physical* injury, whereas the Defendants claim that removal can be based on evidence of physical *or emotional* injury. *See,* Pfeifle Brief at 56; Vargo brief at 47-54.

"As in any case of statutory construction," the Court's "analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). *See also Nebraska v. Cent. Interstate Low-Level Radioactive Waste Comm'n*, 207 F.3d 1021, 1023 (8th Cir. 2000) ("When the statutory language provides a clear answer [on statutory interpretation], the analysis ends.") (citing *Hughes Aircraft*, 525 U.S. at 438).

Congressional intent must prevail in statutory interpretation. A court "must 'give effect to the unambiguously expressed intent of Congress.'" *Pattison Sand Co. v. Fed. Mine Safety and Health Review Comm'n*, 688 F.3d 507, 512 (8th Cir.

2012) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). "'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency [assigned to enforce the statute], must give effect to the unambiguously expressed intent of Congress.'" *Greater Mo. Med. Care Providers, Inc. v. Perez*, 812 F.3d 1132, 1137 (8th Cir. 2015) (quoting *Chevron*, 467 U.S. at 842-43.). Thus, a plea for an interpretation inconsistent with a statute's plain language is one that should be made to Congress, not the courts.

When construing a statute, each clause must be interpreted consistently with the overall purpose of the legislation. It is the statute that is being interpreted, not a portion of it. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("Our duty, after all, is 'to construe statutes, not isolated provisions.'") (quoting *Graham County Soil and Water Conserv. Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)). "[W]hen deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King*, 135 S. Ct. at 2489 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

For four reasons, § 1922 must be interpreted to mean that continued removal of an Indian child at the 48-hour hearing must be based on evidence of *physical* injury and not emotional injury. Those reasons are: (1) the plain language of § 1922, (2) the fact that Congress separately permits reliance on emotional damage

later in the ICWA process, thus demonstrating Congress intentionally precluded such reliance at the emergency hearing stage, (3) allowing consideration of emotional damage at the emergency hearing stage would be contrary to the overall purpose of ICWA, and (4) Defendants' interpretation of § 1922 would violate the Due Process Clause.

1. *The plain language of § 1922.*

Section 1922 uses the words "imminent physical damage or harm." The word "emotional" is noticeably absent from that standard. A court must not impute a standard of removal different from the one Congress created.

As mentioned earlier, the BIA recently issued a Final Rule interpreting the Act, and the rule specifically discusses § 1922. This section of the Rule begins by stating: "The final rule does not provide a definition of 'imminent physical damage or harm.' The Department has determined that statutory phrase is clear and understandable as written, and that no further elaboration is necessary." *Id*. at 38793. Simply put: the words mean what they say. Otherwise, continued removal can be based on nothing more than a caseworker's personal judgment that a child might suffer emotional injury with his or her family—precisely the culture-based prognostications that Congress targeted for change, as discussed earlier.

Defendants' interpretation of § 1922 contradicts the principle that a statute must be construed so as not to render any portion of it redundant. *See U.S. v.*

Alaska, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'") (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995)); *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823–25 (8th Cir. 2009); 2A SUTHERLAND STATUTORY CONSTRUCTION §46:6 (5th ed. 1992) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.").

There are two modifiers that precede the words "damage or harm" in § 1922: "imminent" and "physical." According to the Defendants, those modifiers apply only to the word "damage" and not also to "harm." Such an interpretation, however, would render both of those modifiers redundant. If "harm" is not modified by "imminent" and "physical," then a court can receive evidence of all types of harm, both physical and emotional, imminent and speculative. There would be no need to rely on the higher standard of "imminent physical damage" if removal can be based on *any* type of harm. Thus, Defendants' construction makes no sense and is inconsistent with the plain language of § 1922.

Defendant Pfeifle points to statements in the BIA Final Rule that, he claims, prove Congress intended the words "imminent physical damage or harm" to permit evidence of *non*-physical harm, including emotional harm. But there is nothing in those statements to support his claim. Significantly, neither the words "emotional" nor "non-physical" appear in the Final Rule addressing § 1922. Granted, the Rule

permits evidence of "'situations of sexual abuse, domestic violence, or child labor exploitations.'" *See* Pfeifle Brief at 54 (quoting 81 Fed. Reg. at 38,794). But, all of those circumstances involve or threaten actual physical harm, and thus do not support a claim that emotional evidence is permissible.[34] Clearly, Congress knew how to include "emotional harm" in an ICWA standard when it wanted to, *see* 25 U.S.C. §§ 1912(e) and (f), and that term is conspicuously absent in § 1922. The plain language of § 1922, therefore, shows that only evidence of *imminent physical* harm can support continued removal of an Indian child at the 48-hour hearing.

2. *When a statute creates multiple standards, a court must give effect to each one.*

Defendants' construction of § 1922 contradicts the principle that when a statute contains different standards that are applicable in different situations, a court must assume that Congress knew what it was doing and wanted that result. *See Russello v. United States*, 464 U.S. 16, 23 (1983). As explained above, ICWA contains three standards applicable in three situations. In two of them (foster care and adoption), the court may consider evidence of emotional injury. In those situations, however, a qualified expert witness must testify and the burden of proof

[34] Defendant Pfeifle cites the fact that a draft of the Final Rule would have limited evidence at the initial stage to that of "bodily injury or death." Pfeifle Brief at 53. Merely because the BIA rejected that test hardly suggests that the BIA went to the other extreme and agreed that custody of an Indian child could be based on a caseworker's perception of emotional harm. Indeed, another portion of the Final Rule—not cited by Defendant Pfeifle—is that several commentators had recommended the use of a "best interest" test, which the BIA rejected. *See* Final Rule at 38,817.

is "clear and convincing evidence" for foster care and "beyond a reasonable doubt" for adoption. At the initial stage, in contrast, when there is no qualified expert witness and the court must rely on the subjective judgment of the caseworker, only evidence of *physical* injury will suffice.

The fact that the word "emotional" is present in sections 1912(e) and (f), but absent from § 1922, speaks volumes about congressional intent. "'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello*, 464 U.S. at 23 (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). *See also Ctr. for Special Needs Trust Admin. v. Olson*, 676 F.3d 688, 701-03 (8th Cir. 2012) (holding that where a statute creates two standards applicable in different situations, a court must give effect to that differentiation);[35] *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1014-15 (8th Cir. 2010) (same); *Chestnut v. Montgomery*, 307 F.3d 698, 701-02 (8th Cir. 2002) (same).

Here, ICWA contains three standards governing three situations. Two expressly allow for consideration of "emotional" harm and one, § 1922, does not.

[35] In reaching that conclusion, the Eighth Circuit relied on a decision of the South Dakota Supreme Court that applied that very same analysis. *See Ctr. for Special Needs*, 676 F.3d at 702-03 (citing *In re Pooled Advocate Trust*, 813 N.W.2d 130, 141-42 (S.D. 2012)).

It would be just as wrong to interpret sections 1912(e) and (f) as not allowing evidence of emotional harm as it would be to interpret § 1922 as allowing it.

3. *Allowing continued removal at 48-hour hearings to be based on emotional injury is inconsistent with the overarching purpose of ICWA.*

The overarching purpose of ICWA, as discussed earlier, is to eliminate the broad discretion caseworkers and state courts had to remove Indian children from their homes under a "best interest" standard, and to ensure that whenever a removal does occur, it ends as quickly as possible. Allowing state employees to seek continued removal of Indian children at 48-hour hearings based on a caseworker's personal judgment regarding the potential for emotional harm is inconsistent with that purpose. Emotional injury is a slippery and subjective standard. For obvious reasons, Congress decided to permit emotional injury to be considered only in conjunction with qualified expert witness testimony.

Congress deliberately "established a high bar" at the emergency hearing because Indian parents in those hearings do not receive "the full suite of protections" ICWA guarantees at subsequent hearings, such as "those in 25 U.S.C. § 1912." BIA Final Rule at 38,794. Defendants' construction of § 1922 would significantly lower that bar to where it was prior to the enactment of ICWA: allowing caseworkers to use their personal judgments on whether Indian children will be emotionally harmed living with their parents.

Section 1922 was § 112 in the bill that became ICWA. Notably, the House Report accompanying that bill stated:

> Section 112 would permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child *in order to prevent imminent physical harm to the child* notwithstanding the provisions of this title. Such emergency removal and/or placement is to continue only for a reasonable length of time and the committee expects that the appropriate State official or authority would take expeditious action to return the child to the parent or custodian; transfer jurisdiction to the appropriate tribe; or institute a proceeding subject to the provisions of this title.

H.R. REP. NO. 95-1386, at 25 (1978) at 25 (emphasis added). It is inconceivable that Congress, despite the clear remedial purpose of ICWA, would authorize caseworkers to remove Indian children from their families based on their own subjective, culture-driven assessment of emotional harm. *See* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L. J. 587, 644 (2002) (recognizing that a "best interest" standard "invite[s] state courts to engage in a highly discretionary and potentially biased analysis."). Defendants' interpretation of § 1922 defies logic.

Granted, confining the evidence at 48-hour hearings to imminent physical injury may mean that some children will return home and suffer emotional harm. But, that still does not permit a court to depart from the choice Congress made to prohibit the removal of Indian children based on some amorphous concept of

"harm." Congress was faced with a choice and it made the entirely reasonable decision to run the risk that a few Indian children might suffer emotional harm if returned home as opposed to keeping the *status quo* and allowing caseworkers to continue their penchant of removing many Indian children based on culture-based perceptions about whether an Indian child is suffering emotional injury.

Besides, the Defendants have the solution to that circumstance at their fingertips: they can *immediately* file a petition under § 1912(e) seeking a foster care placement, in which case they could then rely on emotional harm (provided they can find a qualified expert witness who agrees with them). The only thing they cannot do is employ § 1922 in a manner inconsistent with congressional intent.

4. *Defendants' interpretation would produce due process violations.*

Under Defendants' interpretation of § 1922, the continued removal of an Indian child can be based on *any* "harm." Thus, a mother berating her son for being lazy and selfish could lose custody if a state employee testified that those statements could cause emotional harm. Similarly, a state judge who believed that Indian children are harmed living with an alcoholic parent could remove those children on that ground alone.

"Harm" is an unconstitutional standard on which to base the removal of a child, and yet Defendants contend that Congress selected that standard in ICWA. It

is doubtful that any state permits a child's removal based merely on "harm," and the few courts that have addressed related issues have held that a removal cannot be based merely on "harm." *See In re Nicholson*, 181 F. Supp. 2d 182, 190 (E.D.N.Y. 2002) (holding that a state may not remove a child from the home "except in cases where the child is in such imminent danger to life or health that he or she must be removed"); *Roe v. Conn*, 417 F. Supp. 769, 779 (D. Ala. 1976) (invalidating an Alabama statute that allowed the state to terminate parental custody on a showing of "neglect" without having to show that the child was "being harmed in a real and substantial way").

Indeed, studies show that removal from the home often *causes* harm, and thus if this were the standard, the state would violate it with each removal. *See* Orly Rachmilovitz, *Achieving Due Process Through Comprehensive Care for Mentally Disabled Parents: A Less Restrictive Alternative to Family Separation*, 12 U. PA. J. CONST. L. 785, 829 (Mar. 2010); *cf. Santosky v. Kramer*, 455 U.S. 745, 765 n.15 (1982) ("Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare."). Social scientists therefore now generally agree that the state must show more than "harm" to justify placing a child in foster care. As a leading study concluded in 2000:

> A sense of urgency, missing from most neglect cases, has become a requirement for government intervention governed by statutory directives and definitions. While neglecting parents may be offered voluntary services for limited periods, *a coercive intervention*

> *requires a finding of imminent physical harm*. This standard is reflected in state child abuse legislation discussed below, and was adopted upon the recommendation of many prominent professionals in the field.

Janet Weinstein and Ricardo Weinstein, *Before It's Too Late: Neuropsychological Consequences of Child Neglect and Their Implications for Law and Social Policy*, 33 U. MICH. J. L. REFORM 561, 577-78 (2000) (footnotes omitted) (emphasis added).

In short, Defendants' interpretation of § 1922—which allows state judges to continue the removal of Indian children at the conclusion of the 48-hour hearing based on any "harm" the child could suffer at home—is inconsistent with the plain language of § 1922, the overarching purpose of ICWA, and creates a standard of removal violative of the Due Process Clause. No child should be subject to such unbridled state authority, and certainly no Indian child, given the remedial intent of ICWA. The district court's interpretation of § 1922 is manifestly correct.

V. DEFENDANTS' 48-HOUR HEARINGS VIOLATED THE DUE PROCEES CLAUSE

In *Whisman*, this Court held that when state officials remove a child from the home, they must provide the parents with a meaningful hearing at a meaningful time, and that a delay of seventeen days in affording such a hearing violated the Due Process Clause. *Id*., 119 F.3d at 1311. "[T]he right to familial integrity" is a

fundamental liberty interest, and therefore government officials have an affirmative duty to provide such a hearing and cannot "'sit back and wait'" for parents to request one. *Id*. (quoting *Duchesne v. Sugarman*, 566 F.2d 817, 828 (2d Cir. 1977)). In fact, the right to a meaningful hearing in that situation was so clearly established by 1995, the defendants were not entitled to qualified immunity when they deprived the parents of such a hearing. *Id*. at 1310-11.

In *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994), the Court applied those same principles in the context of a protected property interest: the right to possess an automobile. The Court held in *Coleman* that a seven-day delay in providing the owner of an automobile with a meaningful hearing following impoundment of his car was "clearly excessive" due to the importance of automobiles in the lives of most people and the "risk of an erroneous deprivation." *Id.*, at 260-61.

In *Swipies v. Kofka*, this Court relied on both *Whisman* and *Coleman* in a case that once again involved child custody. The Court held in *Swipies* that even a non-custodial parent, Mr. Swipies, must be afforded a prompt and meaningful hearing when the state interfered with his ability to visit his daughter, and that a seventeen-day delay was unconstitutional. *Id*., 419 F.3d at 715 ("To put the matter otherwise, if seven days is too long for a car owner to wait for a post-deprivation hearing after his or her car has been towed and impounded, *Coleman v. Watt*, 40

F.3d 255, 260–61 (8th Cir.1994), as a matter of law, a parent should not have to wait seventeen days after his or her child has been removed for a hearing.")

No principle is more entrenched in our legal system than the right to procedural due process. "[Fairness of procedure] is ingrained in our national traditions and is designed to maintain them. . . . [A] democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161, 170 (1951) (Frankfurter, J., concurring). Moreover, when a hearing is required, it "must be a real one, not a sham or a pretense." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). *See also Senty-Haugen v. Goodno,* 462 F.3d 876, 886 (8th Cir. 2006); *Parrish v. Mallinger*, 133 F.3d 612, 615 (8th Cir. 1998).

Defendants' 48-hour hearings were sham proceedings. Defendants prevailed 100 percent of the time because the deck was stacked. When this lawsuit was filed, as the undisputed evidence shows, parents in these proceedings were not given a copy of the PTC or the ICWA Affidavit, not allowed to confront the caseworker who submitted the Affidavit, not informed of the legal standard governing their hearing, not allowed to testify, not allowed to call witnesses, and the judge made a determination based on the evidence submitted *ex parte* by the State. In fact, as Deputy State's Attorney Roxanne Erickson admitted during the Remedies Hearing,

even as of August 17, 2016, the judge presiding over 48-hour hearings in the Seventh Judicial Circuit was not allowing testimony "at all," and no witness had testified in a 48-hour hearing for at least three years. *Id*. at 80-81. Ms. Erickson further stated that parents in most cases would be unable to testify, call witnesses, or confront the caseworker for at least 90 to 120 days after their children had been removed. *See* Hearing Tr. at 85 (agreeing that "typically they won't have that opportunity for some 90 to 120 days [until] the adjudicatory stage.").

To paraphrase what this Court held in *Swipies*, if seven days is too long for a car owner to wait for an adequate hearing following the impoundment of an automobile, *see Coleman*, 40 F.3d at 260-61, and seventeen days is too long for a non-custodial parent to wait for an adequate hearing following the loss of visitation rights, *see Swipies*, 419 F.3d at 715, 90 days is far too long to wait before custodial parents are afforded a hearing in which they can testify, call witnesses, cross-examine the caseworker who submitted the ICWA Affidavit, and challenge the State's motion for continued custody of their children. Frankly, the only thing more shocking than the practices challenged in Plaintiffs' complaint is that the Defendants are *defending* those practices in the Eighth Circuit, the very Court that

decided *Alsager*, *Syrovatka*, *Whisman*, *Coleman*, and *Swipies*, and apparently want this Court's *imprimatur* to return to their old ways.[36]

Five due process issues were presented to the district court on summary judgment. The court ruled in Plaintiffs' favor on all five. Based on the undisputed evidence, the district court found that:

1. Parents were denied adequate notice of the allegations against them and the legal standard governing the hearing.

2. Parents were denied their right to present evidence.

3. Parents were denied their right to confront and cross-examine adverse witnesses.

4. Indigent parents were denied their right to appointed counsel.

5. The county court, including Judges Davis and Pfeifle, rendered its decision based on *ex parte* evidence rather than on evidence submitted on the record in open court.

See DSS-App. at 282-88.

When Plaintiffs filed a motion for partial summary judgment on their Due Process claims, Judge Davis was the Presiding Judge of the Seventh Judicial Circuit. In support of their motion, Plaintiffs ultimately submitted into evidence

[36] Defendant Vargo asserted during the Remedies Hearing, for instance, that he believes parents have no right to receive a copy of the PTC at the 48-hour hearing, *see* Remedies Hearing Tr. at 42, and thus nothing stands in the way of his reverting back to withholding the PTC from parents if the decision below is reversed.

more than seventy transcripts of 48-hour hearings, 29 of which were presided over by Judge Davis. Many of these are discussed in the district court's March 2015 decision. In A10-1191, for instance, the transcript shows that both parents attended the 48-hour hearing. At the outset of the hearing, without asking the parents a single question, Judge Davis announced that "it's my intention to grant the petition for temporary custody." *See* Tr. of A10-1191 at 4. The father then asked: "I would just like to know what I did wrong that my son is not with me. That's all I'm asking." *Id*. at 5. Judge Davis replied: "That, sir, I honestly can't tell you at this point because nothing has been checked out and verified to come to me yet." *Id*. The hearing was concluded shortly thereafter, with Judge Davis granting the State's motion for continued removal. Obviously, Judge Davis saw nothing wrong with granting the State's motion even though "nothing" had been verified as yet and the parents had no opportunity to challenge (or even see) the ICWA Affidavit. It is no wonder the state prevailed every time. All DSS needed to do was submit a PTC and an ICWA Affidavit, and DSS would win. This process contradicts settled law. Yet, this is the process Defendants want this Court to approve.

A two-step analysis is required in every procedural due process case. "To set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake. Second, the plaintiff must prove that the defendant deprived him of such an interest without due process of law."

Gordon v. Hansen, 168 F.3d 1109, 1114 (8th Cir. 1999) (citing *Marler v. Mo. State Bd. of Optometry*, 102 F.3d 1453, 1456 (8th Cir.1996)). *See also Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976); *Swipes*, 419 F.3d at 715.

The first step in the Due Process analysis—proving the existence of a liberty or property interest—is always satisfied in child removal cases because parental custody over a child is a constitutionally protected liberty interest. *See Stanley v. Illinois*, 405 U.S. 645, 649-58 (1972). The parent-child relationship is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The bonds between a parent and child are sacrosanct. *Swipies*, 419 F.3d at 715; *see also Whisman*, 119 F.3d at 1309.

Given that Defendants' 48-hour hearings can result in the loss (or continued loss) of child custody, the State must provide parents in those hearings with the process to which they are due, and the state may not sit back and wait for the parents to request it. *See Swipies*, 419 F.3d at 713-15; *Whisman*, 119 F.3d at 1309-10. Child removal cases *always* require the state to afford the parents with a prompt and meaningful hearing:

> The due process clause ensures every individual subject to a deprivation "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The circumstances of the deprivation dictate what procedures are necessary to satisfy this guarantee. *Mathews*, 424 U.S. at 333–34. 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. *See Whisman v. Rinehart*, 119 F.3d 1303, 1310–11 (8th Cir.1997).

Swipies, 419 F.3d at 715.

Determining exactly what process is due (the second inquiry) in any given situation requires the three-step analysis set forth in *Mathews*, 424 U.S. at 335. Under this analysis, the following factors are balanced:

> First, the private interest that will be affected by the official action; second, 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 finally, the Government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335; *see also Santosky*, 455 U.S. at 758-59 (holding that the *Mathews* test applies to child removal proceedings); *Swipies*, 419 F.3d at 715 (holding that the *Mathews* test applies even to the loss of visitation rights of a non-custodial parent).

Plaintiffs will now conduct the *Mathews* analysis with respect to all five procedural safeguards found lacking by the district court in Defendants' 48-hour hearings. Two overarching points must be stressed at the outset.

First—tellingly—not a single Defendant conducted this analysis with respect to *any* of the five challenged procedures. The DSS Defendants do not discuss the five procedures at all, while Defendants Vargo and Pfeifle cite *Mathews* and make general comments about it, but noticeably, they fail to employ its test with respect

to any individual procedure. There is no discussion, for instance, as to whether affording parents with an opportunity to see the PTC, to see the ICWA Affidavit, to present testimony, or to cross-examine the caseworker will reduce the risk of an erroneous deprivation or is burdensome. Plaintiffs suspect that the reason the Defendants fail to conduct this analysis is because they know what the results would be, but in any event, the Defendants ignore the correct test.

The first factor to balance in the *Mathews* test is "the private interest that will be affected by the official action." *Mathews*, 424 U.S. at 335. With respect to all five procedural safeguards at issue here, the private interest is the same: child custody, a fundamental liberty interest. *Troxel*, 530 U.S. at 65; *Swipies*, 419 F.3d at 713-15. Moreover, because these procedures apply to the custody of Indian children, the private interests protected by ICWA are highly relevant as well. ICWA was intended to safeguard the interests of both Indian families and Indian tribes in minimizing the risk of unfair, mistaken, and unwarranted removals of Indian children from their families, as explained earlier. This strong federal interest weighs in favor of ensuring that Defendants' 48-hour hearings strictly comply with the Due Process Clause when Indian families are involved.

The U.S. Department of Justice filed an amicus brief in the district court in support of Plaintiffs. *See* Amicus Brief of the United States ("DOJ Br.") (Docket 122-1). The DOJ brief emphasized the need for Indian parents in state court

proceedings facing the loss of child custody to receive due process. *See id*. at 14-15 ("As Congress found in enacting ICWA, the harm to Indian parents, children, and tribes from erroneous removal of Indian children is substantial and calls for significant safeguards. . . .[E]ven a temporary deprivation of physical custody requires a prompt and meaningful hearing.")

The second point to emphasize is that—not only do the Defendants fail to conduct the required *Mathews* analysis with respect to any of the five procedural safeguards—but they exaggerate what the district court held. Defendants Vargo and Pfeifle accuse the court of requiring them to transform their 48-hour hearings into a "full blown adversarial hearing." *See* Vargo Brief at 42 ("First, we are not aware of any case in which a court has required a full-blown adversarial hearing in such a short time."); Pfeifle Brief at 26-27 ("The District Court erred in determining that the same procedural due process that would apply for adjudicatory hearings or parental right termination hearings applies to 48-hour hearings.")

The district court did no such thing. The court imposed no duty on the Defendants, for instance, to present testimony from a qualified expert witness, as adjudicatory hearings must do in ICWA cases. *See* 25 U.S.C. § 1912(e) (foster care) and § 1912(f) (adoption). At the 48-hour hearing, the State can rely entirely on the personal opinion of one case worker. In addition, formal rules of evidence do not apply in 48-hour hearings, as they do in adjudicatory hearings. *See* SDCL §

26-7A-56. Besides, accusing the district court of requiring a "full blown" hearing when, in truth, some procedural protections require nothing more from the Defendants than providing parents with a copy of the PTC and the ICWA Affidavit and notifying them of the legal standard that governs their 48-hour hearing.

More importantly, however, the issue is not whether 48-hour hearings will become "full-blown" or otherwise. The issue is what process is due to parents facing the loss of their children. Defendants ask the wrong question, which is why they reach the wrong answer.

Likewise, the issue is not, as these Defendants apparently believe, whether providing parents with the process due under federal law is also required by state law. *See, e.g.*, Vargo Brief at 55 (claiming that the procedures mandated by the federal district court "conflicts with South Dakota law"). In the first place, the Defendants have pointed to nothing in South Dakota law that prohibits the process the district court held is due in these situations. But more to the point, that is not the proper question, which explains why the Defendants reach the wrong answer. As the Eighth Circuit stated in precisely this context, "a state statute cannot dictate what procedural protections must attend a liberty interest—even a state created one—as this is the sole province of federal law." *Swipies*, 419 F.3d at 716. *See also Senty-Haugen*, 462 F.3d at 887 (citing *Swipies* for this principle). This is a Fourteenth Amendment case, and the question of what process is due must be

answered according to federal law. If federal law requires a "full blown" hearing (which is not the case), then that is the process Defendants must provide.

1. Defendants failed to provide constitutionally adequate notice.

Prior to any hearing in which a parent may lose custodial rights to a child, the parent has a Fourteenth Amendment right to receive adequate notice, which must:

> include the date, time and place of the hearing; a clear statement of the purpose of the proceedings and the possible consequences to the subject thereof; the alleged factual basis for the proposed [deprivation of custody]; and a statement of the legal standard upon which [deprivation of custody] is authorized.

Syrovatka, 608 F.2d at 310 (quoting *Alsager*, 406 F. Supp. at 25). *See also In re Gault*, 387 U.S. 1, 33 (1967) ("Notice, to comply with due process requirements . . . 'must set forth the alleged misconduct with particularity.'") (internal citation omitted); *Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997) (holding that in a welfare recoupment hearing, notice must be provided in sufficient detail and sufficiently in advance to "permit adequate preparation" by the welfare recipient) (internal citation omitted). Advance notice is particularly important for people who are unfamiliar with state judicial procedures, as many Indian parents are, or who may be undereducated, as some Indian parents are. *See Bliek*, 102 F.3d at 1476 (holding that welfare recipients, many of whom are undereducated, must receive information as soon as possible to enable them to prepare); DOJ Br. at 17 (noting

that Indian parents should be given notice of the allegations against them as soon as possible because they "are unlikely to be familiar with the state's process").

Here, then, Indian parents in a 48-hour hearing have a right guaranteed by the Due Process Clause to be informed at the earliest practicable time of the allegations against them, that the 48-hour hearing is an evidentiary hearing in which parents may contest those allegations, that they have a right to present evidence and cross-examine witnesses, and that the legal standard governing the hearing is the one set forth in § 1922. *See also* SDCL § 26-7A-30 (requiring that in 48-hour hearings, "[t]he court shall advise the child and the child's parents, guardian, or custodian . . . *of their constitutional and statutory rights*, including the right to be represented by an attorney, *at the first appearance of the parties before the court*.") (emphasis added).

The undisputed evidence regarding Defendants' 48-hour hearings, as discussed above, proves that (1) no Indian parent prior to May 2014 received the PTC setting forth the nature of the case and containing (what should have been) the governing legal standard, (2) no Indian parent until sometime after the filing of this lawsuit received the ICWA Affidavit, (3) no Indian parent was notified that he or she had a right to testify and contest the allegations against them, and to cross-examine the caseworker who submitted the ICWA Affidavit, and (4) until August 2016, no Indian parent was informed of the correct legal standard governing their

hearing; to the contrary, they were erroneously informed by Judges Davis and Pfeifle during the hearing that the legal standard was "best interest of the child" rather than the § 1922 standard of "imminent physical damage or harm."[37]

The district court conducted the *Mathews* test and found that "the risk of erroneous deprivation [is] high when Indian parents are not afforded the opportunity to know what the petition against them alleges." DSS-App. at 77. The court also found that the burden of supplying parents with copies of the same documents Defendants were filing with the county court "is inconsequential." *Id.* at 78. At no time did any Defendant claim that providing this information to Indian parents would be burdensome. (Indeed, as already explained, Defendant Vargo now provides all of this information.) Given that providing this notice is "simple, straightforward, and virtually costless," *see Kornblum v. St. Louis County*, 72 F.3d 661, 664 (8th Cir. 1995), and given that providing this notice has been required by the Eighth Circuit for more than forty years, *see Alsager*, 545 F.2d at 1137-38, it should not have taken this lawsuit to obtain it. The district court was eminently correct in ruling that the Defendants violated Plaintiffs' right to adequate notice.

[37] Judges Davis and Pfeifle violated the Due Process Clause, for reasons just explained, when they failed to inform parents in 48-hour hearings of the correct legal standard. But they did more than that: they then gave parents *incorrect* information as to what is the standard, a separate violation. *See Bohn v. Dakota County*, 772 F.2d 1433, 1442 (8th Cir. 1985) (noting that "serious misdirection by state officials" regarding a person's rights can itself violate the Due Process Clause).

2. Defendants failed to provide Plaintiffs with an adequate opportunity to present evidence.

Another procedural safeguard that must be afforded to each parent at Defendants' 48-hour hearings is an opportunity to present evidence. A fundamental purpose of the due process clause is to allow "the aggrieved party the opportunity to present his case and have its merits fully judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). "The most important mechanisms for ensuring that due process has been provided are 'notice of the factual basis' leading to a deprivation and 'a fair opportunity for rebuttal.'" *Senty-Haugen*, 462 F.3d at 888 (quoting *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005)). "Ordinarily, the right to present evidence is basic to a fair hearing." *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). "It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'" *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (quoting *Joint Anti-Fascist Refugee Committee*, 341 U.S. at 170-72 *(*Frankfurter, J., concurring)). Despite this admonition, Defendants' 48-hour hearings rely *primarily* on secret, one-sided evidence.

The right to present evidence in one's defense is particularly critical in the context of child custody determinations, due to the interests at stake. *See Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000) ("[A] child's right to be

nurtured by his parents cannot be denied without an opportunity to be heard in a meaningful way."); *Doe v. Staples*, 706 F.2d 985, 990 (6th Cir. 1983) (holding that in a hearing seeking removal of a child from the home, "[t]he parents [must] be given a full opportunity at the hearing to present witnesses and evidence on their behalf").

It is undisputed, as discussed earlier, that the Defendants do not permit any testimony at 48-hour hearings, even from parents. The district court concluded that allowing parents to testify during the hearing, rather than force them to wait another 90 to 120 days while their children remain in state custody, will reduce the risk of an erroneous deprivation. *See* DSS-App. at 79. The court also concluded that allowing such testimony would not result in any undue financial or administrative burden for the Defendants. *Id*. Defendants introduced no evidence to the contrary. The refusal of Judge Davis and Judge Pfeifle to allow parents to testify in 48-hour hearings over which they presided violated the rights of those parents, and the district court was correct in so concluding.

3. Defendants failed to provide Plaintiffs with an adequate opportunity to confront and cross-examine adverse witnesses.

"The Supreme Court has held, 'In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.'" *Business Communications, Inc. v. U.S. Dept. of Ed.*, 739 F.3d 374, 380 (8th Cir. 2013) (quoting *Goldberg*, 397 U.S. at

269-70). "It is fundamental to a full and fair review required by the due process clause that a litigant have an opportunity to be confronted with all adverse evidence and to have the right to cross-examine available witnesses." *Nevels v. Hanlon*, 656 F.2d 372, 376 (8th Cir. 1981) (citing *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)); *see also Smith v. Edmiston*, 431 F. Supp. 941, 945 (W.D. Tenn. 1977) (finding that where parents were not allowed to cross-examine witnesses in dependency and neglect proceedings, those proceedings "did not meet the minimal standards of due process").

South Dakota's Judicial Guidelines anticipate that witness testimony will occur in 48-hour hearings. *See* 2014 Guidelines at 45 ("To ensure careful and informed judicial decisions, the Court should make it possible for witnesses to testify.") Further, the Guidelines anticipate that 48-hour hearings will involve "substantial time and resources" and require "careful consideration," and courts are permitted to continue the hearing if additional time is needed:

> A Temporary Custody (48 Hour) Hearing *involves substantial time and resources.* At the conclusion of the hearing, the parties should leave with a decision from the Court concerning the placement of the child that is based on careful consideration of the circumstances of the case. Due to constraints of time, it might not be possible for the Court to conduct a complete initial custody hearing. In these circumstances, the Court should:
>
> a. Decide all issues that can be immediately resolved at the current 48 Hour Temporary Custody Hearing;

> b. Provide specific guidance as to the persons who must be present and the issues to be decided if hearing must be continued;
>
> c. Continue the Temporary Custody (48 Hour) Hearing and set the time, date and place of the continued hearing.

Id. at 41-42.[38]

The undisputed evidence shows that in all 48-hour hearings conducted by Judges Davis and Pfeifle since January 1, 2010 involving Indian children, a caseworker submitted an ICWA Affidavit but parents were not allowed to confront and cross-examine the caseworker. *See* DSS-App. at 286-88. Parents in those hearings were little more than spectators. They were not informed they could contest the State's evidence and they were not allowed to testify on their own behalf, clear violations of settled law.

Throughout their briefs, the Defendants cite *Cheyenne River Sioux Tribe v. Davis*, 822 N.W.2d 62 (S.D. 2012), and indicate that the South Dakota Supreme Court gave its blessing to the process Judge Davis was employing in his 48-hour hearings. That claim wildly mischaracterizes the holding in that case. *No due process claims* were raised in *Cheyenne River*. Thus, although *Cheyenne River* states that an ICWA Affidavit and a police report may be considered by the county court in reaching its determination, the issue was not even presented as to whether

[38] Defendants Vargo and Pfeifle make vague claims about the burden an "adversarial" hearing would create but they introduced *no* evidence to support those claims. As already noted, the South Dakota Guidelines anticipate the need for witness testimony, and other South Dakota counties hold 48-hour hearings with witness testimony. Therefore, Defendants' unsupported arguments cannot be taken seriously.

parents have a right to see those documents and to challenge the claims in those documents (and there is no reason to believe that the South Dakota Supreme Court would authorize such blatant due process deprivations). As the district court noted, there is nothing inconsistent between *Cheyenne River* and the district court's due process rulings because *Cheyenne River* did not address any due process issues. *See* DSS-App. at 301.

Defendants' refusal to permit confrontation and cross-examination by parents facing the loss of child custody created a significant danger of an arbitrary and unwarranted deprivation. *See Mathews*, 424 U.S. at 335 (citing *Goldberg*, 397 U.S. at 263-271); *Business Communications*, 739 F.3d at 381 (noting that "minimum due process" normally requires "the opportunity to confront adverse evidence and cross examine adverse witnesses"). The court below applied the *Mathews* test and concluded that the Defendants must provide this safeguard in their 48-hour hearings. *See* DSS-App. at 79, 284, 286-88. That conclusion is eminently correct.

4. Defendants failed to provide Plaintiffs with meaningful access to counsel.

Given what is at stake in a 48-hour hearing and the complex factual and legal issues that likely will arise in them, the Due Process Clause requires that counsel be appointed to indigent Indian parents to assist them with these hearings. Parents in these hearings have a Fourteenth Amendment right to be heard, and the

"'right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" *Goldberg*, 397 U.S. at 269-70 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

In *Lassiter v. Department of Social Services of Durham County, N. C.*, 452 U.S. 18, 32 (1981), the Court applied the *Mathews* analysis to determine whether due process required appointment of counsel in all hearings concerning termination of parental rights and found that the need for counsel should be determined on a case-by-case basis. The Court indicated, however, that counsel would likely be required in cases that were complex and involved expert testimony "which few parents are equipped to understand and fewer still to confute." *Id.* at 30.

The district court correctly concluded, using the *Lassiter/Mathews* analysis, that all indigent Indian parents should be offered the opportunity for counsel to assist them in Defendants' 48-hour hearings. For one thing, these 48-hour hearings often involve legal questions involving the interaction between state law and ICWA. Moreover, in every case involving an Indian child, the State submits an affidavit from a caseworker and many parents (Indian or non-Indian) would have difficulty cross-examining a trained caseworker, particularly one represented by the State's Attorney's office and likely highly familiar with court proceedings. *See Lassiter*, 452 U.S. at 46. Without counsel who can gather the facts, argue the law,

and cross-examine the state's expert, the risk of an erroneous deprivation is unnecessarily high.

Judges Davis and Pfeifle, as the transcripts of their 48-hour hearings show, never once offered to appoint counsel to represent an indigent Indian parent in a 48-hour hearing. Parents were only offered counsel for subsequent hearings. Their failure to make that offer even conflicted with South Dakota law:

> Court appointed attorney--Compensation. If the child or the child's parents, guardian, or other custodian requests an attorney *in proceedings under this chapter* or chapter 26-8A, 26-8B, or 26-8C and if the court finds the party to be without sufficient financial means to employ an attorney, the court *shall appoint an attorney for the party*.

SDCL § 26-7A-31 (emphasis added); *see also In re People ex rel. S. Dakota Dep't of Soc. Servs.*, 691 N.W.2d 586, 591 (S.D. 2004) (holding that a trial court erred in allowing an abuse and neglect adjudicatory hearing to continue without ensuring that the mother was appointed counsel pursuant to SDCL § 26–7A–31).

Section 26-7A-31 provides that the court "shall" appoint counsel "in proceedings under this chapter," and 48-hour hearings are proceedings under Chapter 26. This state-created property interest is protected against arbitrary loss by the Due Process Clause. *See Board of Pardons v. Allen*, 482 U.S. 369, 381 (1987) (holding that the presence in a statute of the word "shall" connotes the creation of a constitutionally protected interested to which due process safeguards would then attach). A right to counsel in 48-hour hearings is also guaranteed by

ICWA. *See* 25 U.S.C. § 1912(b) ("In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding."). Thus, the failure of Judges Davis and Pfeifle to offer counsel to indigent Indian parents in 48-hour hearings violated both state and federal law.

Once counsel is appointed, as the district court recognized, the county court should entertain a motion for a continuance of "a few hours or even a day to allow court-appointed counsel to confer with the Indian parents and become familiar with the critical documents upon which the 48-hour hearing is based," as this would "result in an 'equal contest of opposing interests.'" DSS-App. at 286 (quoting *Lassiter*, 452 U.S. at 28). In any event, counsel must be appointed given the nature of the claims, the degree of difficulty parents will have in these proceedings, and the risk of an erroneous deprivation if parents must proceed without counsel. The only burden to the state of appointing counsel is financial, and the Defendants introduced no evidence that appointing counsel in the few 48-hour hearings held each week would be unduly burdensome. The district court's decision to require the appointment of counsel should be affirmed.

5. Judges Davis and Pfeifle failed to base their decisions on evidence adduced in open court.

The Due Process Clause requires that judicial determinations normally must rest solely on evidence adduced in open court. *See Goldberg*, 397 U.S. at 271

(citing *Ohio Bell Tel. Co. v. PUC*, 301 U.S. 292 (1937); *United States v. Abilene & S.R. Co.*, 265 U.S. 274, 288-89 (1924)) (noting that due process generally requires that the decision maker base the decision on "evidence adduced at the hearing" and, to demonstrate compliance with that principle, the decision maker "should state the reasons for his determination and indicate the evidence he relied on"); *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 793 n.22 (2005). In order for a hearing to be meaningful, an aggrieved party must have "the right to introduce evidence and have judicial findings based upon it." *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 369 (1936) (citations omitted); *see also Ungar v. Seaman*, 4 F.2d 80, 82-83 (8th Cir. 1924) ("[I]ndispensable requisites of a fair hearing" include the right to present evidence and cross-examine witnesses, and "that the decision shall be governed by and based upon the evidence at the hearing."); *Doe v. Staples*, 706 F.2d 985, 990-91 (6th Cir. 1983). *See also* DOJ Br. at 21 ("Given the important liberty interests at stake, state officials must provide adequate procedural protections to parents, . . . including notice of the claims against them, an opportunity to present evidence and cross-examine witnesses, and a decision that is based on the evidence presented.").

The evidence is undisputed that Judges Davis and Pfeifle never based their decisions in 48-hour hearings on evidence submitted in open court. Rather, they allowed the state to submit evidence *ex parte* and then relied on that evidence in

reaching their decisions. The failure of these Judges to base their decisions "solely on the legal rules and evidence adduced at the [48-hour] hearing" and to then "state the reasons for [their] determination and indicate the evidence [they] relied on" deprived every Indian parent in those hearings of due process of law. *See Goldberg*, 397 U.S. at 271. The district court correctly ruled in Plaintiffs' favor on this constitutional claim.

Attached to Plaintiffs' complaint as Ex. 1 is the transcript of a 48-hour hearing, a redacted copy of which is included in Appellees' App. at 1-2 (attached to this brief). It took approximately sixty seconds for the presiding judge to grant the State's PTC. No evidence was submitted in that case in open court, the parents were not permitted to present evidence, they were not permitted to cross-examine witnesses, they were not told they had a right to contest the State's allegations nor afforded an opportunity to do so. No parent should ever be treated that way. Ever. The undisputed evidence shows that Judges Davis and Pfeifle conducted all of their 24-hour hearings in that fashion.

The Due Process Clause requires that Indian parents in Defendants' 48-hour hearings be afforded a meaningful hearing at a meaningful time. As demonstrated above, Plaintiffs' Fourteenth Amendment rights were systematically violated by the Defendants in five respects. The district court properly ruled in Plaintiffs' favor on all five issues.

VI. THE DISTRICT COURT ISSUED APPRORIATE REMEDIES

The Eighth Circuit has repeatedly recognized that parents whose children were removed from their custody by state officials without procedural due process are entitled to appropriate remedies. In at least four cases, this Court has affirmed an award of damages and/or declaratory or injunctive relief to parents in those situations or indicated that such relief can be awarded. *See Alsager*, 406 F. Supp. at 25-26, *opinion adopted sub nom., Alsager v. Dist. Ct. of Polk County*, 545 F.2d 1137 (8th Cir. 1976) (affirming the issuance of declaratory relief and $50,000 in damages to parents whose custodial rights were terminated in a manner violative of procedural and substantive due process); *Whisman*, 119 F.3d at 1311, 1313 (affirming the denial of qualified immunity to state officials who held a child in state custody for seventeen days before providing a due process hearing); *Swipies*, 419 F.3d at 715 (affirming an award of nominal damages to a non-custodial parent whose visitation rights were suspended for seventeen days by a deputy sheriff without a meaningful hearing); *Heartland Academy*, 427 F. 3d at 535-36 (affirming the issuance of injunctive relief against state officials, including a county prosecutor, to prevent them from again removing children from a private boarding school without providing the school with a prompt and meaningful hearing in which to challenge the removal).

The district court found, based on voluminous, undisputed evidence, that Defendants were violating Plaintiffs' rights under both the Due Process Clause and ICWA. The district court therefore had a duty to devise an effective remedy. *See Marbury v. Madison*, 1 Cranch 137, 147 (1803). As the Supreme Court confirmed more than a half-century ago:

> [I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the state to do. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Bell v. Hood, 327 U.S. 678, 684 (1946) (citations omitted); *see also Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976) ("Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'") (quoting *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)). Current constitutional violations must be brought "to an immediate halt." *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978). *See generally Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992) (explaining the history of this rule).

The Eighth Circuit has enforced this principle many times. A district court's duty to effectively remediate a violation of federal law "'has deep roots in our

jurisprudence.'" *Rodgers v. Magnet Cove Pub. Schs.*, 34 F.3d 642, 644 (8th Cir. 1994) (citing *Franklin*, 503 U.S. at 66-68). As this Court explained in remediating a civil rights violation:

> The starting point for our analysis is the principle enunciated by the Supreme Court in *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946), that where legal rights are invaded and a federal statute provides a right to sue for such invasion, federal courts may use any available remedy to make good the wrong. The existence of a statutory right implies the existence of all necessary and appropriate remedies. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239, 90 S.Ct. 400, 405, 24 L.Ed.2d 386 (1969).

Miener v. Missouri, 673 F.2d 969, 977 (8th Cir. 1982); *see also Maschka v. Genuine Parts Co.*, 122 F.3d 566, 572-73 (8th Cir. 1997) (holding that a district court must provide the victim of a civil rights violation with "the most complete relief possible") (internal quotation omitted); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404, 433 (8th Cir. 1985) ("Having found [violations of federal law by state and local officials], . . . the district court was responsible for devising a remedy that would correct the constitutional violations that it found."); *Fond du Lac*, 68 F.3d at 256 (granting injunctive relief to an Indian tribe and noting: "Where necessary to ensure compliance with federal law, the Supreme Court has approved broad injunctive relief aimed at state officials.) (citing *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695–96 (1979)).

Defendants adopted a very risky strategy in this appeal: they decided not to address the issue of remedies *at all*. Not one word in any of Defendants' three briefs discusses whether the specific remedies issued by the district court are inappropriate or excessive. Defendants have placed all of their eggs in one basket: they claim they did nothing wrong in the first place. As they see it, it was perfectly fine for the DSS Defendants to withhold the ICWA Affidavit from parents; perfectly fine for Defendant Vargo to withhold the PTC from parents and, later, give them a PTC containing the wrong legal standard; perfectly fine for Judges Davis and Pfeifle to remove Plaintiffs' children in hearings in which parents had no opportunity to present evidence and no opportunity to challenge the state's accusations; and perfectly fine for Judges Davis and Pfeifle to render decisions based on "secret, one-sided [presentations] of facts decisive of rights." *See Fuentes v. Shevin*, 407 U.S. at 81 (quoting *Joint Anti-Fascist Refugee Committee*, 341 U.S. at 170-72 *(*Frankfurter, J., concurring)). Indeed, Defendants' position is that they could reinstate all of those policies tomorrow without violating either the Fourteenth Amendment or ICWA.

Defendants followed this same strategy in the district court: they refused to discuss remedies. The district court's March 2015 summary judgment decision invited all parties to submit proposed remedies. *See* DSS-App. at 290-91. Plaintiffs submitted a list of specific remedies and extensive briefing on the subject, but

Defendants did not propose a single remedy. During the Remedies Hearing, the district court once again invited Defendants to recommend remedies. The court explained that Defendants "were in a better position [than the court] to know the nuances and the practicalities" of potential remedies, and thus it would be "extremely helpful" if Defendants would make recommendations. *Id*. at 64. The court assured Defendants they "could preserve all of their appeal rights" and that by proposing a remedy, Defendants would not be stipulating that a remedy was necessary. *Id*. at 167. In response, counsel for Defendant Vargo stated that Mr. Vargo had made a "strategic" decision not to submit proposed remedies. *Id*. at 65. The court then asked counsel for Defendant Pfeifle: "So, what if Judge Davis takes the [A & N] docket for these hearings next? I have got two-minute hearings [again]. . . . Are we just going to go back to an individual judge's sensibility of what the Constitution of the United States means as applied in these hearings?" *Id*. at 144-45. Counsel for Defendant Pfeile did not offer any remedies.[39]

Given that Defendants failed to offer remedies in the district court and, in this Court, refuse to address any of the specific remedies ordered by the district court, Plaintiffs see no need to defend any of those specific remedies. Plaintiffs will, however, make six general observations about the district court's remedies.

[39] Ironically, state officials typically complain when federal courts do not accept remedies they propose, *see Lewis v. Casey*, 518 U.S. 343, 362 (1976), and yet, here, Defendants took the opposite approach, compelling the district court to devise remedies without their input.

1. Plaintiffs are entitled to injunctive relief even as to those policies Defendants have changed or abandoned. For instance, Defendant Vargo abandoned his "no PTC" policy in May 2014. However, he stated during the Remedies Hearing that he continues to believe that parents have no right to receive the PTC at the 48-hour hearing. *See* Hearing Tr. at 42. Thus, without an injunction, Mr. Vargo is free to return to his old ways and he can once again violate the Due Process Clause.

Where, as here, a Defendant ceases unconstitutional conduct only after suit has been filed and remains free to return to his or her old ways, a district court must issue a permanent injunction to guard against a resumption of the misconduct. Cessation of unconstitutional behavior, the Supreme Court has held, can render moot a request for injunctive relief only when "(1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (internal citation omitted)); *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) ("The defendant must demonstrate that it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'") (quoting *United States v. Phosphate Expert Ass'n, Inc.*, 393 U.S. 199, 203 (1968)); *see also*

Strutton v. Meade, 668 F.3d 549, 556 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 124 (2012) ("Mere voluntary cessation of a challenged action does not moot a case. Rather a case becomes moot 'if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'") (quoting *Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (internal citations omitted).

The burden is on the defendant to prove "that there is no reasonable expectation that the wrong will be repeated." *W.T. Grant Co.*, 345 U.S. at 633 (internal quotations omitted); *see also Strutton*, 668 F.3d at 556 ("The burden of showing that the challenged conduct is unlikely to recur rests on the party asserting mootness."). This burden "is a heavy one." *W.T. Grant Co.*, 345 U.S. at 633; *see also Ctr. for Special Needs Trust Admin.*, 676 F.3d at 697 (rejecting a claim for mootness because state officials did "not meet the heavy burden to show mootness."). Here, for instance, Defendant Pfeifle cannot avoid a remedy for the unconstitutional policies he and Judge Davis pursued in their own 48-hour hearings unless he could prove that neither of them could reasonably be expected to once again preside over a 48-hour hearing. Glaringly, no such evidence (even in the form of an affidavit) was submitted to the district court.

If this lawsuit sought injunctive relief against an overcrowded jail and the defendants then constructed a much larger jail, plaintiffs' request for injunctive

relief would likely become moot due to the immutable nature of the improvement. *See Bell v. Wolfish*, 441 U.S. 520, 542 n.25 (1979). Here, the opposite is true. First, Defendants have not acknowledged that their policies were unconstitutional; to the contrary, they persist in defending all of their policies. Second, they submitted no evidence in the district court that the policies they changed will not be resurrected. Judge Pfeifle did not even submit an affidavit stating that he will not assign Judge Davis or himself to hear another 48-hour hearing. Thus, all of Plaintiffs rights can be violated tomorrow the same way they were violated hundreds of times in the past. Defendants have not proven with assurance that the injuries they caused will not recur, thereby necessitating equitable relief. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968); *see also Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 761 n.8 (8th Cir. 2008) (rejecting a claim of mootness where the absence of a permanent injunction would leave the defendant "free to return to his old ways"); *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006) (same). Plaintiffs have suffered years of constitutional violations. The district court correctly granted equitable relief halting those violations.

2. At various times in their appeal briefs, each Defendant indicated, in essence, that he or she was powerless to implement the changes set forth in the district court's March 2015 summary judgment decision because those changes are

barred by the South Dakota Supreme Court's decision in *Cheyenne River Sioux Tribe v. Davis*. That contention is erroneous for two reasons, both of which were previously discussed. First, *Cheyenne River* is not inconsistent with the district court's ruling. Indeed, *Cheyenne River* does not address any of the five due process claims addressed in the March 2015 ruling. Defendant Vargo, in other words, cannot rely on *Cheyenne River* to justify his "no PTC" policy, nor can he cite *Cheyenne River* as authority for his subsequent "no ICWA PTC" policy. Neither can the DSS Defendants use *Cheyenne River* as an excuse for their policy of not providing parents with a copy of the ICWA Affidavit. Similarly, Judges Davis and Pfeifle cannot rely on *Cheyenne River* for their policy of not allowing parents to testify at 48-hour hearings or to cross-examine the caseworker who signed the ICWA Affidavit. Not one of those policies was discussed in *Cheyenne River*.

Thus, *Cheyenne River* is being used by Defendants as a smokescreen. In truth, the policies challenged here were neither sanctioned by *Cheyenne River* nor by state statute. Instead, Defendants voluntarily created those policies on their own and were free to change or end them at any time, and unless this Court affirms the remedies issued by the district court, the Defendants are free to reinstate all of those policies.

Second, if any portion of *Cheyenne River* were inconsistent with federal law (which is not the case), then federal law would prevail. *See* U.S. Const. art. VI, cl. 2. This is true both with respect to Plaintiffs' constitutional rights, *see Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985), and ICWA rights. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (holding that "the state law must yield to the regulation of Congress" whenever the two conflict); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (" A state law . . . is pre-empted if it interferes with the methods by which [a] federal statute was designed to reach [its] goal."). *See generally Swipies*, 419 F.3d at 716 ("A state statute cannot dictate what procedural protections must attend a liberty interest—even a state created one—as this is the sole province of federal law.")

3. In fashioning appropriate remedies, the district court considered—appropriately so—ICWA's congressional purpose of substantially reducing the instances in which welfare workers and state judges may place Indian children in state custody and keep them there for prolonged periods of time. Congress enacted ICWA to ensure that "where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 32 (citing H. Rep. 95-1386 at 23). Accordingly, whenever the state takes custody of an Indian child on an emergency basis, the child's parents must be afforded a prompt hearing with all attendant due process safeguards. *See id*. at 36 (noting that ICWA contains "procedural and

substantive safeguards . . . [including] notice and appointment of counsel" to help implement the purpose of the Act). In addition, ICWA commands that as soon as the emergency ends, the out-of-home placement must end. *See* 25 U.S.C. § 1922.

The district court's remedies correlate with ICWA's purpose by ensuring that Indian children, their parents, and their tribes will finally receive a fair and meaningful hearing based on correct legal standards. True, affording these procedural safeguards will require time and resources. Defendants will no longer be able to retain Indian children in state custody in the manner to which they have grown accustomed: quickly and easily. As the district court acknowledged: "This [new] process undoubtedly will require additional time and more county and judicial resources but these concerns are not adequate reasons to forego rights mandated by ICWA and fundamental due process. 'A parent's interest in the accuracy and justice in the decision . . . is . . . a commanding one.'" DSS-App. at 286 (quoting *Lassiter*, 452 U.S. at 25).

4. The remedies ordered by the district court are appropriate and restrained. Plaintiffs urged the district court to appoint a Monitor, given (1) the many years in which Defendants' unconstitutional policies have existed, (2) Defendants' strenuous assertions that all of those policies were valid (and still are valid), and (3) Defendants' failure to voluntarily change their policies following the March

2015 summary judgment ruling. The district court denied Plaintiffs' request for a monitor. *See* DSS-App. at 323, 346-47.

Each remedy ordered by the district court addresses a specific policy of Defendants that violated the Due Process Clause or ICWA. Parents will now be assured of receiving the PTC and the ICWA Affidavit; the PTC must inform them that the outcome of their hearing will be based on the § 1922 standard; parents are now assured of an opportunity to present evidence and an opportunity to cross-examine the caseworker who signed the ICWA Affidavit; indigent parents will be afforded counsel; and the county court must base its decision on the evidence presented in open court. Not one remedy extends further than the facts of this case warrant, or addresses an injury not proven by undisputed evidence.

5. Because Judges Davis and Pfeifle are state court judges, Plaintiffs are entitled only to declaratory relief as to them, not injunctive relief, at this point in time. The Federal Courts Improvement Act of 1996, which amended 42 U.S.C. § 1983, prohibits federal courts from issuing injunctive relief against a state court judge unless declaratory relief has first been issued and proven ineffective. *See* § 1983 ("injunctive relief shall not be granted unless a declaratory decree was violated . . .").[40] The court below explained this issue. *See* DSS-App. at 339. Judge

[40] There are situations in which injunctive relief may still be issued against a state court judge, but those are limited to acts that are purely administrative and not judicial. *See Forrester v. White*, 484 219, 229-30 (1989); *Barrett v. Harrington*, 130 F.3d 246, 255 (6th Cir. 1997). The

Pfeifle, however, remains subject to declaratory relief, such as the Declaratory Judgment issued by the district court. *See Pucci v. Nineteenth Dist. Ct.*, 628 F.3d 752, 765 (9th Cir. 2010); *LeClerc v. Webb*, 270 F. Supp. 2d 779, 793 (E.D. La. 2003); *Tesmer v. Granhold*, 114 F. Supp. 2d 603, 617 (E.D. Mich. 2000), *rev'd on other grounds*, 333 F.3d 683 (6th Cir. 2003), *rev'd on standing grounds*, 543 U.S. 125 (2004). *See also Pulliam*, 466 U.S. at 540 (noting that when § 1983 was being considered for passage, "every Member of Congress who spoke to the issue assumed that judges would be liable under § 1983."). The district court's Declaratory Judgment ensures that if Judge Pfeifle exercises his option to preside over another 48-hour hearing, those hearings will comply with federal law.

6. Defendant Vargo, on the other hand, is fully subject to the district court's equitable authority in his official capacity. Prosecutorial immunity protects Mr. Vargo only from suits for damages. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). That immunity does not shield him from injunctive relief in his official capacity. *See Heartland Academy*, 427 F.3d at 531 (affirming issuance of injunctive relief against a county prosecutor to stop him from continuing to remove children from a boarding school in a manner that violated the Due Process Clause); *Simes v. Ark. Judicial Discipline & Disability Comm'n*, No. 4:10-CV-01047, 2012 WL 4469264, *7 (E.D. Ark. Sept. 27, 2012) ("Prosecutors are not immune from

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acts challenged here, such as refusing to allow testimony and basing decisions on *ex parte* evidence, are judicial acts.

claims for injunctive relief."); *Winters v. Palumbo* 512 F. Supp. 7, 10 (E.D. Mo. 1980) (holding that a prosecutor "enjoys no immunity from an action for equitable relief").

The district court's orders guarantee that Defendants' 48-hour hearings will be—for the first time—fully compliant with ICWA and the Fourteenth Amendment, and that they will remain that way. The remedies issued by the district court were entirely appropriate.

CONCLUSION

For the reasons set forth above, the decision of the district court should be affirmed in all respects. The time has come for South Dakota officials to provide to Indian families the due process safeguards the Eighth Circuit held were necessary in these circumstances forty years ago, and to incorporate the ICWA safeguards mandated by Congress in 1978.

Respectfully submitted this 1st day of June, 2017.

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CERTIFICATE OF COMPLIANCE

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

1. Exclusive of the exempted portions identified in Fed. R. App. P. 32(f), the brief contains 35,122 words. (The undersigned in relying on the word-count utility in Microsoft Word 2010, the word processing system used to prepare the brief, consistent with Fed. R. App. P. 32(g)(1).) Furthermore, the Brief and Addendum have been determined to be virus free in compliance with the Eighth Circuit Rule 28(A)(h)(2).

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

By: /s/ Stephen L. Pevar

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June 2017, I electronically filed **Brief of Appellees Oglala Sioux Tribe et al.** in this matter with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: /s/ Stephen L. Pevar

No. 17-1135, 17-1136, & 17-1137
(Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGTH CIRCUIT

OGLALA SIOUX TRIBE and **ROSEBUD SIOUX TRIBE**, as parens patriae, to protect the rights of their tribal members; **MADONNA PAPPAN**, and **LISA YOUNG**, individually, and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

v.

MARK VARGO, in his official capacity; **LISA FLEMING** and **LYNNE A. VALENTI**, in their official capacities; **HONORABLE CRAIG PFEIFLE**, in his official capacity,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION
HON. JEFFREY L. VIKEN, CHIEF JUDGE

ADDENDUM TO APPELLEES' BRIEF

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INDEX TO APPELLEES' ADDENDUM

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
JUVENILE DIVISION
SEVENTH JUDICIAL CIRCUIT

The People of the State of South Dakota in the Interest of,

Child(ren), and concerning

Respondent(s).

COURT FILE NO. A11-

BEFORE: THE HONORABLE WALLY EKLUND
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
October 20, 2011

APPEARANCES:

FOR THE STATE: MS. JENNIFER B. UTTER
Deputy State's Attorney
Pennington County
300 Kansas City Street
Rapid City, South Dakota 57701

COPY

EXHIBIT 1

KATHRYN DI MAIO *** RPR *** OFFICIAL REPORTER

*****P R O C E E D I N G S*****

MS. UTTER: Judge, the next matter for the court is in the matter of the children. I understand that parents are present here and the mother, , is here and sir, are you ?

RESPONDENT FATHER: Yeah.

MS. UTTER: And the father, , is here. I believe you are father to , is that correct?

RESPONDENT FATHER: Yep.

MS. UTTER: Both parents of are here, and in this case we're asking the court to also grant custody. The emergency temporary custody was taken when the parents were -- the father was arrested for DUI and the mother was intoxicated and unable to care for the child. The three-year-old child or approximately three-year-old child -- three-and-a-half-year-old child basically was in the car with them, so the Department of Social Services obtained emergency temporary custody based on that.

And yesterday we learned that there was an 11-year old son in the home. His father is unknown at this time but we'll find out, and so we're requesting the court also authorize temporary custody of the 11-year old,

THE COURT: You folks wish to be heard on this matter?

RESPONDENT FATHER: What can we say?

THE COURT: Well, I'm sure the department will be

working with you on this matter in an attempt to get the children back to you but in the meantime, until this is sorted out I'm going to grant the temporary custody as requested.

MS. UTTER: The next hearing would be December 12th at 1:45. That would be an advisory hearing, and the department will be working with the family to avoid formal charges.

Thank you.

(These proceedings concluded.)

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affidavit.
MR. PEVAR: Yeah. And, actually, this is something that we'll take up with the Court and not with your client.
MR. MORRIS: Okay.
MR. PEVAR: But, in fact, and this is part of our gripe, is that every single one of these TCOs, the temporary custody orders, finds that DSS made efforts to prevent the removal, whereas, DSS doesn't even claim to have engaged in those efforts. And the judges' orders are not based on any information in the record.
MR. MORRIS: Okay.
MR. PEVAR: And the reasons why the affidavits are silent on that issue is that the vast majority of the times they haven't had a chance to prevent the removal.
MR. MORRIS: Okay. That is your argument?
MR. PEVAR: Yeah.
MR. MORRIS: Okay.
MR. PEVAR: Yeah.
Q Handing you Exhibit 2.
MR. MORRIS: Can you, for the record, do the Bates Stamps? Nobody else is getting copies of these.

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MR. PEVAR: Maybe at the end. I'm not going to take the time to do it.
MR. MORRIS: Okay. That's fine.
Q All right. So I'm handing you Exhibit 2, which consists of two pages. And at the bottom it says, Cara Beers Training and then Bates Stamps 013566 and 67.
Do you happen to recall seeing these particular training materials before today?
A **Not as training materials, but as the court report guide book.**
Q Okay. Now, I'll direct your attention to paragraph 4 on the first page and I'll read the one sentence. That the court orders returning custody of the child to the parents or Indian custodian would likely result in serious emotional and/or physical damage to the minor children. And then in parentheses, it says, ICWA only.
Now, my understanding is that this was the same standard you used in non-ICWA cases also or is that not correct?
A **This number 4, you mean?**
Q Number 4.
A **That --**
Q Go ahead.

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A **That would -- okay. Let me explain. This is taken from a court report guide, which is just examples of possible recommendations that could be included in a court report. Not all of these recommendations are necessary in our court report. This is for an emergency custody hearing and rarely do we have court reports completed for emergency custody hearings.**
Q Let me rephrase the question. Help me understand what ICWA only means there.
A **That would be a recommendation that would only be used on ICWA cases.**
Q Why?
A **Because of the language that was required.**
Q By ICWA?
A **Yes.**
Q Okay. So in a non-ICWA case, you would use some different language?
A **That would not be a recommendation included.**
Q Okay. So apparently whoever wrote this -- and I guess you don't know who wrote it, is that correct?
A **Actually, I was involved in writing it --**
Q Oh.
A **-- along with some supervisors.**
Q Oh, okay. Well, then this is helpful.
So why did you think that paragraph 4 was

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required by ICWA?
A **It is the language that was taken out of ICWA. It was an expectation from our State's Attorney that we have that kind of a language in our court reports.**
Q Okay. And this is the standard for removing a child from the home?
A **Yes. But, as I said, this is for emergency custody hearings which, you know, we, basically, don't use court reports for those hearings.**
Q Okay. All right. So this then was the standard you would use in the 48-hour hearings?
A **Yes.**
Q Now, this says, serious emotional and/or physical damage.
So under this standard you could rely exclusively on evidence of physical damage, is that correct?
A **I'm sorry. Could you repeat that?**
Q Sure. The language emotional and/or physical indicates to me that you could rely exclusively on evidence of physical damage?
A **Yes.**
Q And, likewise, you could rely exclusively on evidence of emotional damage?
A **Yes.**
Q And, similarly, Exhibit 17, which is the one you were

VAN HUNNIK Deposition Ex. 3 - Vargo

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looking at just before, the model ICWA affidavit, paragraph 13 reiterates that same -- uses that same standard, is that right?

A **Yes.**

Q Is this the standard that you were using during the entire time you were their regional manager for 48-hour hearings, to the best of your recollection?

A **I don't recall.**

Q Or, approximately, when did you create this Exhibit 2, the language that is contained in that paragraph we were discussing?

A **Approximately five years ago maybe.**

Q Okay. How did it happen that you were involved in creating this language?

A **As I recall, it was language that our State's Attorney wanted us to be using in those situations.**

Q So you proposed it to the state office and they adopted it?

A **Yes. Eventually.**

Q Do you recall which State's Attorney it was at the time?

A **Probably -- probably Roxie. Roxie Erickson.**

Q Okay. A Deputy State's Attorney?

A **Yes.**

Q Now, the standard that you were using and that you

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helped draft says that the damage must be serious. Now, I can visualize serious physical damage. You know, a sexual assault or a violent assault of any kind.

But could you give me examples of what you meant by serious emotional damage? What kind of serious emotional damage would allow DSS to take custody of a child?

A **Children being present and involved in domestic violence.**

Q Okay. Anything else?

A **Being involved in situations where people could be passed out because of drugs or alcohol and not caring for the children.**

Q Okay. Can you give me one more example?

A **Children being left unsupervised for long periods of time. No caretakers.**

Q Okay. And each of the examples you gave are examples or illustrations of where DSS could take the children from the home based on serious emotional damage?

MR. MORRIS: I would object to the form of your question, take from the home. Go ahead.

A **Well, CPS doesn't have authority to remove children from their home.**

Q Okay. Well, the state is the 48-hour hearing. If

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that were -- if those -- I wanted to make sure that your answer was responsive to my question.

And my question was, what kinds of serious emotional damage would allow you with a 48-hour hearing to seek an order removing the child. And the examples that you gave, in your opinion, justify that?

MR. MORRIS: I'm going to object to the context of your question. This says returning custody. DSS already has custody.

MR. PEVAR: Physical custody, right.

MR. MORRIS: At the 48-hour hearing, we're talking about whether custody is going to be returned. So I think that needs to be the context of your question.

MR. PEVAR: Okay. Thank you.

MR. MORRIS: Because you're talking about removal from the home and returning custody. They're two different things.

MR. PEVAR: Okay. All right. A good clarification.

Q So we're at the 48-hour hearing. And the child has already been removed from the home. So that's not the issue. The issue is whether they'll be returned.

And the illustrations you just gave us are

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examples of where DSS would seek legal custody and would ask that the Court not return the child, is that correct?

A **No, not necessarily.**

Q Okay.

A **Not those situations, not in and of themselves.**

Q Then I do need to rephrase my question. Give me -- we've already established the fact that under the standard they can remove the child for either exclusively physical, exclusively emotional. We already went over physical. And I had asked you for examples of emotional just so that I understand what was in your mind or what you -- how you interpreted and applied this language. Let's start over.

Give me some examples of serious emotional damage that, in your opinion, would justify not returning the child.

A **Those situations, but we look at a lot of other surrounding sorts of circumstances, too, in terms of whether we're going to ask for continued custody. So children could be removed for those circumstances, but that -- you know, there would be other things that we would consider in terms of whether we ask for continued custody.**

Q Okay. I can appreciate that. But I also understand

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and I assume you do, too, that you want to instruct your staff and train your staff so that they can make the right decision. And they're the ones -- you know, they're the boots on the field there where they have to make these judgments.

What instructions did you give your staff so that they could distinguish between emotional damage that was serious and wasn't serious, for example? Let's start with emotional.

A **Are you talking about at the time custody is taken?**

Q Good question. Let's say -- let's say the 48-hour hearing. Because usually they're not involved when the -- at the time custody is taken. You know, the police officer comes to a domestic disturbance and they see the children there so they take the children.

But let's say the 48-hour hearing, just to make sure that your specialists are doing the right thing.

What instructions did you give the supervisors or the specialists on how they should distinguish between serious emotional damage and emotional damage that wasn't serious?

MR. MORRIS: Object to the form. And I'm assuming you're including the Child Protection Service Manual as an assumption in that context?

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MR. PEVAR: I'm not assuming anything. I'm asking her what training or instruction she gave her staff.

MR. MORRIS: Okay.

A **Well, our staff don't make -- our specialists don't make those decisions without consultation with the supervisor and the supervisor and they make that decision. But they would be looking at what the present danger is and whether there's a likelihood that the severe damage could continue, could happen again or whether they -- basically, whether they feel the child would be unsafe to return home. So the instances that I gave you were examples of why they may -- of what may be considered serious emotional damage that was caused at the time of the removal. To continue them into custody, we look at a lot of other circumstances.**

Q Let me ask you to give us another ballpark figure. And I won't hold you to an exact number, because it appears as though this statistic was never compiled. If it was, tell me what it was, what the answer is.

Roughly, during the time you were regional manager, what percentage of Indian cases at the 48-hour hearing you were seeking legal custody based on emotional damage rather than physical damage?

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A **I can't -- I can't answer that. I don't know.**

Q Okay. I haven't read nearly as many files as you have. My own sense is it was about 80 percent emotional. I've seen a few files where the child was sexually assaulted. One where the child was punched in the head. Some pretty bad, horrifying physical abuse cases. But the majority seem to be the situations where you were talking about, the police come, there's a domestic disturbance, and the kids are there. Or severe alcoholism and the kids are there. And the standard that you use allowed the specialist to say -- to seek custody or legal custody based on serious emotional and/or physical. I'm trying to get a ballpark idea of an approximate number of when it was emotional or when it was physical.

Can we at least safely say that it was more often emotional than physical?

A **Yes.**

MR. MORRIS: Objection to your form and foundation.

Q You can answer.

A **Yes.**

Q Okay. It would be safe to say that around three-quarters was where you sought legal custody

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based on emotional injury, not physical injury?

MR. MORRIS: Objection, form and foundation. Asked and answered.

A **Yes.**

Q Okay. Are you saying that there was a different standard that applied after the 48-hour hearing? Because you kind of qualified and said that this was the 48-hour standard. It was my understanding that this is the standard you used after the 48-hour hearing, also, to determine whether -- when it was safe to return the child?

A **The standard that we use in terms of returning children to the parents is based on a practice model.**

Q I don't know what you mean by that.

A **We -- if we're at a 48-hour hearing, we would base -- retain custody on the present danger situation.**

Q But you defined present danger to include both emotional and physical?

A **Yes.**

Q Okay. So it's essentially the same test? I'm not trying to put words in your mouth, but -- in other words, let's say a month later, at -- well, and we're going to look at IFAs in which a month later and reports to the Court where a month later after the 48-hour hearing you're using the identical standard.

CERTIFICATE OF SERVICE

I hereby certify on June 12, 2017 ten (10) true and correct paper copies of **Appellees' Brief with Addendum to Appellees' Brief** were filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by First Class Mail as follows:

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Eighth Circuit Court of Appeals
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