No. 17-1135
(Consolidated with Nos. 17-1136 & 17-1137)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

Plaintiffs-Appellees,

v.

MARK VARGO in his official capacity,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION

VARGO'S REPLY BRIEF

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I. TESTIMONY FROM THE REMEDIES HEARING IS NOT RELEVANT TO THE APPEAL FROM SUMMARY JUDGMENT

The Tribes go to great lengths offering facts that are not relevant to the issues submitted for review. This is an appeal from summary judgments granted to the Tribes. The Tribes made two motions for partial summary judgment on July 11, 2014 identified as the "Section 1922 Claims" and the "Due Process Claims" by the district court. (DSS-App. 255.) The Tribes submitted undisputed material facts in support of their motions and contended they were entitled to judgment as a matter of law. The Government Officials resisted the motions, disputing the facts and arguing the law did not authorize judgment in the Tribes' favor. The District Court granted both partial motions for summary judgment on March 30, 2015, but reserved ruling on the Tribes' request for a declaratory judgment and permanent injunction until after it conducted a remedies hearing on August 17, 2016. (DSS-App. 322-23.)

Importantly, evidence presented at the remedies hearing was not the basis on which summary judgment was granted on the Section 1922 Claims and Due Process Claims more than a year earlier. The remedies hearing was to assist the court in fashioning a remedy *after* it already made its legal conclusions. The Tribes attempt to defend the summary judgments by citing testimony from the remedies hearing, but information that was not the basis for summary judgment is not relevant to an appeal from those summary judgments.

After the remedies hearing, the Tribes made a third motion for partial summary judgment regarding the interpretation of ICWA's § 1922 standard for when emergency removal must terminate. That motion was granted on December 15, 2016. (DSS-App. 314.) On that same day, the district court issued an Order granting the Tribes' request for declaratory and injunctive relief, a Declaratory Judgment, and a Permanent Injunction. (DSS-App. 321, 348, 356.)

The March 30, 2015 Order granting summary judgment on the Section 1922 Claims and Due Process Claims contains the

district court's legal analysis as to why it determined the Tribes were entitled to summary judgment. (DSS-App. 247.) The December 15, 2016 Order granting the Tribes' request for declaratory and injunctive relief contains the district court's analysis, based on the evidence and argument received at the remedies hearing, as to why the remedies of a declaratory judgment and permanent injunction should issue. The district court's analysis and decision regarding the remedies hearing are not the bases for its grant of any of the summary judgments. Most of the facts discussed by the Tribes in their brief are not relevant to the questions of law challenged in this appeal.

II. STATE'S ATTORNEY VARGO IS NOT A FINAL POLICYMAKER

A. The Policies Identified By The Tribes Were Not The Basis for Summary Judgment

To establish *Monell* liability, a plaintiff must identify a "policy" or "custom" that caused him injury. *Board of the County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 403 (1997). "Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its

duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." *Id.* (*citing Monell*, 436 U.S. at 694). The *only* policy identified by the district court as State's Attorney Vargo's is acquiescing to Judge Davis' policies. (DSS-App. 272.) In the March 30, 2015 Order granting summary judgment on the Section 1922 Claims and Due Process Claims, the district court identified six policies initiated by Judge Davis (DSS-App. 270) and determined State's Attorney Vargo acquiesced to Judge Davis' policies, thereby making Judge Davis' policies his own. (DSS-App. 272-73.)

> When these defendants did not challenge Judge Davis' policies for conducting 48-hour hearings, his policies became the official policy governing their own agencies. *Coleman v. Watt*, 40 F.3d 255, 262 (8th Cir. 1994). "[B]y acquiescence in a longstanding practice" of Judge Davis which constitutes the "standard operating procedure" of the Seventh Circuit Court, these defendants exposed themselves to lability. *Jett*, 491 U.S. at 737 (internal quotation marks omitted).

(Order granting summary judgment on the Section 1922 Claims and Due Process Claims) (DSS-App. 272-73.)

The Tribes assert in their brief that State's Attorney Vargo created two additional policies, the "no PTC" policy and the "no

ICWA PTC" policy, and that "the district court declared [them] unconstitutional". (Appellees' Brief at p. 59.) This is inaccurate—the district court did not identify either of these as policies by State's Attorney Vargo.

The Tribes attempt to demonstrate to this court that State's Attorney Vargo is a policymaker by giving examples of two alleged "policies" he created, but these were not policies the district court identified as Vargo's policies for *Monell* liability when it granted summary judgment on March 30, 2015. The alleged policy of not citing the ICWA standard in the petition for temporary custody did not even happen until *after* the district court granted summary judgment. Obviously a "policy" created after the district court granted summary judgment cannot be the basis for which summary judgment was granted.

The Tribes also cite to testimony from the remedies hearing in support of their argument. However, the remedies hearing is inapplicable to the district court's grant of summary judgment more than one year earlier. The evidence received at the remedies hearing on August 17, 2016 was not the basis for the district

court's legal conclusion State's Attorney Vargo was a final policymaker in its March 30, 2015 Order granting summary judgment.

The district court did not identify any policy by State's Attorney Vargo other than acquiescing to Judge Davis' alleged policies. The Tribes' entire argument (pages 59-68 and 72-74) attempting to show State's Attorney Vargo as a policymaker by identifying two alleged policies ("no PTC" and "no ICWA PTC" policies) and citations the remedies hearing is irrelevant to the policymaker issue.

The only relevant argument offered by the Tribes regarding State's Attorney Vargo as a policymaker concerns the acquiescence issue. The Tribes rely on *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994) for this issue and defer to the district court's conclusion that it "stands for the proposition that a separate, non-subordinate entity . . . may be held liable by adopting the policies of a judge." (Appellees' Brief at p. 74 (*citing* DSS-App. 307-08).)

Even if a "separate, non-subordinate entity" could be held liable by adopting the policies of another entity, the district court

did not determine that State's Attorney Vargo "adopted" Judge Davis' policies—it determined he "acquiesced" to them. Adoption of a policy requires deliberate and affirmative conduct by the policymaker. *Soltesz v. Rushmore Plaza Civic Center*, 847 F.3d 941 (8th Cir. 2017); *Gillette v. Delmore*, 979 F.2d 1342 (9th Cir. 1992). That did not happen here. The district court ruled the defendants "did not challenge Judge Davis' policies" and "acquiesce[ed] in a longstanding practice of Judge Davis". (DSS-App. 272-73). Moreover, acquiescence requires a subordinate and Judge Davis was not State's Attorney Vargo's subordinate. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). Accordingly, it was error to determine State's Attorney Vargo was liable under *Monell*.

B. The District Court Failed to Identify the Governmental Entity for Which State's Attorney Vargo was a Policymaker

The district court failed to identify whether State's Attorney Vargo was a final policymaker for Pennington County or the State or South Dakota. The Tribes label this argument as "frivolous" because State's Attorney Vargo identified himself as a county

official. (Appellees' Brief at p. 69.)[1] The Tribes overlook that even though an official may be deemed a "county" official, he may be a policymaker for the county or the state, depending on the function performed. *See e.g. McMillian v. Monroe County*, 520 U.S. 781 (1997) (analyzing whether the county sheriff was a policymaker for the county or the state when acting in a law enforcement capacity); *Goldstein v. City of Long Beach*, 715 F.3d 750 (9th Cir. 2013) (analyzing whether the district attorney was a policymaker for the county or the state when establishing administrative policies).

In *McMillian v. Monroe County*, 520 U.S. 781 (1997), the parties agreed the county sheriff was a final policymaker in the

[1] The Tribe is quick to dismiss the idea that State's Attorney Vargo could be a final policymaker for the state but refers to the State's Attorney's position as "the state's" position when questioning Deputy State's Attorney Roxanne Erickson at the remedies hearing. "Okay. So the state, your office, had changed its opinion as to interpreting the Davis case?" and "So now it is the official state's position that Section 1922 is the standard that must be used at 48-hour hearings involving Indian children?" (Remedies Transcript at 78-79) (emphasis added).

area of law enforcement, but disagreed as to whether the sheriff was a policymaker for the state or the county.

> In deciding this dispute, our inquiry is guided by two principles. First, the question is not whether Sheriff Tate acts for Alabama or Monroe County in some categorical, "all or nothing" manner. Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue. *See Jett*, 491 U.S. at 737 (court must identify "those officials who have the power to make official policy on a particular issue" (emphasis added)); *id.*, at 738 (question is whether school district superintendent "possessed final policymaking authority in the area of employee transfers" (emphasis added)); *St. Louis v. Praprotnik*, 485 U.S. 112, 123, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988) (plurality opinion) ("The challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business" (emphasis added)). Thus, we are not seeking to make a characterization of Alabama sheriffs that will hold true for every type of official action they engage in. We simply ask whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity.

McMillian, 520 U.S. 781 (1997) (emphasis added). *Goldstein* encountered a similar issue:

> Here, all parties agree that the district attorney is the relevant policymaker. Thus, the viability of Goldstein's claim turns on whether the Los Angeles District Attorney acted here as a policymaker for the state or for the county. This determination is made on a

> function-by-function approach by analyzing under state law the organizational structure and control over the district attorney. *McMillian v. Monroe County*, 520 U.S. 781, 785-86, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997).

Goldstein, 715 F.3d at 753 (emphasis added). *McMillian* and *Goldstein* instruct that county officials can be policymakers for the county or the state depending on the function performed. It is not an "all or nothing" approach and a county official could be a policymaker for the county while performing one function and a policymaker for the state while performing another. *See e.g. Goldstein*, 715 F.3d 750 (determining that district attorneys are policymakers for the state when conducting prosecutions but are policymakers for the county when establishing internal policies related to the use of jailhouse informants); *St. James v. City of Minneapolis*, 2006 U.S. Dist. LEXIS 68036, at *11-12 (D. Minn. June 12, 2006) ("Applying the *McMillian* framework to the facts of this case, the Court finds that the Hennepin County Attorney, when acting in its prosecutorial role, is a state actor and not a local government entity subject to § 1983 liability. The office of the

county attorney, although identified as a county office by statute, functions as an arm of the state when prosecuting felonies.")

The Tribes also argue State's Attorney Vargo is a policymaker for the county because state law identifies him as a county official. (Appellees' Brief at p. 69.) However, simply labeling an official as a county official is insufficient to establish policymaker liability for the county. *McMillian*, 520 U.S. at 786. "Though these structural provisions provide a helpful starting point for our analysis, the state's label of the district attorney as a county official informs but of course cannot determine the result of our functional inquiry." *Goldstein*, 715 F.3d at 755 (*citing McMillian*, 520 U.S. at 792 n.7 (finding "little merit" in the fact that the sheriff is indicated in the code among "county officials" or "county employees")).

The district court must analyze state law to determine if the governmental official is a *policymaker* for the local government, not simply determine that the governmental official is a county official. *Id.* (*citing Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989); *Pembaur v. Cincinnati*, 475 U.S. 469, 483

(1986)). The district court failed to do so in this case and failed to identify whether State's Attorney Vargo is a policymaker for the state or the county.

There is no dispute that State's Attorney Vargo is a county official. The question is whether he is a *final policymake*r for the state or the county when representing DSS and the State at 48-hour hearings. The district court did not analyze South Dakota law to ascertain whether State's Attorney Vargo is a final policymaker for Pennington County or the State of South Dakota. This determination is highly relevant because "victory" in an official-capacity suit "imposes liability on the entity that [the officer] represents". *McMillian*, 520 U.S. at 785, n.2 (*quoting Brandon v. Holt*, 469 U.S. 464, 471 (1985)).

This court held in *Soltesz* that "no legally sufficient evidentiary basis exists to impose liability on a municipality for the decisions of a final policymaker when the district court fails to identify that policymaker." 847 F.3d at 947. Similarly, there can be no legal basis to impose liability on a municipality for the

decisions of a final policymaker when the district court fails to identify the municipality for which the final policymaker is acting.

C. State's Attorney Vargo is Not a Final Policymaker Because the Attorney General has Supervisory Powers

Regardless of whether a state's attorney is a policymaker for the state or the county, he is not a "final" policymaker because it is the attorney general's duty "[t]o consult with, advise, and exercise supervision over the several state's attorneys of the state in matters pertaining to the duties of their office". SDCL § 1-11-1(5). The Tribes contend such "general, non-specific, and theoretical oversight is insufficient to destroy policymaker status" relying in part on *McMillian* and *Goldstein*. (Appellees' Brief at pp. 80-81.) However, *McMillian* and *Goldstein* did not analyze whether oversight precluded final policymaker status. The issue in those cases was whether the governmental official was a policymaker for the state or the county and thus which entity was liable. Supervision over the governmental official was a factor considered to determine for which entity the official was a policymaker. It

was not considered to ascertain whether the governmental official was a *final* policymaker.

McMillian analyzed the county's control over the sheriff and concluded that the county's discretion to deny funds to a sheriff's operations only allowed the county to "exert an attenuated and indirect influence over the sheriff's operations", and was not enough to conclude the sheriff was a policymaker for the county. *Id.* at 791-92.

Goldstein analyzed the attorney general's supervision over district attorneys and concluded that the attorney general's "limited" control of requiring district attorneys to make reports and ability to "call into conference the district attorneys" "for purposes of discussing the duties of their respective offices" was not enough to determine the district attorneys were policymakers for the state. *Goldstein*, 715 F.3d at 756.

In South Dakota, the attorney general not only has supervisory power over the state's attorney, he can prosecute and defend the State of South Dakota in any court for both civil and criminal matters, which would include abuse and neglect

proceedings. SDCL § 1-11-1(2). The attorney general also appears for the state in civil and criminal matters in the South Dakota Supreme Court, which includes abuse and neglect proceedings. SDCL § 1-11-1(1); *see e.g. In re A.K.A.-C.*, 2017 S.D. 38 (Assistant attorney general appearing on behalf of the Department of Social Services).

The duties of the attorney general are set forth by statute:

> General duties of attorney general. The duties of the attorney general shall be:
>
> (1) To appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the state shall be interested as a party;
>
> (2) When requested by the Governor or either branch of the Legislature, or whenever in his judgment the welfare of the state demands, to appear for the state and prosecute or defend, in any court or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested;
>
> (3) To attend to all civil cases remanded by the Supreme Court to the circuit court, in which the state shall be a party or interested;
>
> ***
>
> (5) To consult with, advise, and exercise supervision over the several state's attorneys of the state in matters pertaining to the duties of their office,

> and he shall be authorized and it is made his duty, whenever in his judgment any opinion written by him will be of general interest and value, to mail either written or printed copies of such opinion to the auditor-general and to every state's attorney and county auditor in the state;
>
> ***

SDCL § 1-11-1 (emphasis added).

The United States District Court for the District of South Dakota has recognized the attorney general's supervisory powers over state's attorneys in *Munson v. Janklow*, 421 F. Supp. 544, 548 (D.S.D. 1976). In *Munson*, a doctor alleged it was bad faith for the attorney general to criminally prosecute him when the state's attorney declined to do so.

> Plaintiff alleges that the State's Attorney for Pennington County investigated the incident in question and found no basis for criminal liability. The prosecution which Plaintiff now seeks to enjoin was brought by the South Dakota Attorney General after this investigation.
>
> The Attorney General has concurrent jurisdiction with the State's Attorneys [in all criminal proceedings] for the various counties in South Dakota. S.D.C.L. § 23-3-3. The Attorney General possesses a general supervisory power over State's Attorneys. S.D.C.L. § 1-11-1(5). In view of this supervisory power, the Attorney General certainly is authorized to review discretionary prosecutorial decisions made by State's Attorneys. The situation thus presented is simply one of differing judgments. The type of judgment involved

> in the decision whether to prosecute may well involve considerations over and above a factual basis for criminal charges. *See The President's Commission on Law Enforcement and Administration of Justice -- Task Force Report: The Courts*, 5-6 (1967). In the judgment of this Court, the fact that a subordinate prosecution judgment has been in effect reviewed by the Attorney General, who has such review powers, does not substantiate a general conclusory allegation of bad faith.

Munson, 421 F. Supp. at 548 (emphasis added). *See also State v. Becker*, 3 S.D. 29, 34, 51 N.W. 1018, 1020 (1892) ("The attorney general is in the same department of service as the state's attorney, but having a larger jurisdiction, and is in a sense a superior and supervising officer.") State's Attorney Vargo is not a *final* policymaker because the attorney general has the power to supervise state's attorneys, review their decisions, and prosecute *any* civil matter in *any* court "whenever in his judgment the welfare of the state demands" it. SDCL § 1-11-1(2).

Absolutely no analysis was conducted by the district court as to whether the attorney general's supervision over State's Attorney Vargo is "general, non-specific, and theoretical" and the Tribes failed to present evidence of the same. The Tribes attempt to shift the burden by arguing *State's Attorney Vargo* failed to

introduce evidence that his alleged policies were subject to review or had been reviewed by the attorney general. (Appellees' Brief at p. 80.) However, this is an appeal from summary judgment, and the district court concluded as a matter of law State's Attorney Vargo was a final policymaker without conducting the required analysis recently reiterated in *Soltesz v. Rushmore Plaza Civic Center*, 847 F.3d 941 (8th Cir. 2017). As the moving party, the Tribes, not Vargo, have the burden of demonstrating they are entitled to judgment as a matter of law. There can be no legal determination that State's Attorney Vargo is a final policymaker without the appropriate analysis.

III. THE SECTION 1922 STANDARD

A. Imminent Physical Damage or Harm

The Tribes argue the phrase "imminent physical damage or harm" means only physical harm because (1) the phrase does not expressly use the term "emotional"; (2) other sections of ICWA do contain the term "emotional"; (3) consideration of emotional harm at the emergency hearing is contrary to the purpose of ICWA; and

(4) consideration of emotional harm violates the Due Process Clause. (Appellees' Brief at p. 109.)

These arguments fail to take into account that the Department of Interior has determined the phrase to include "endangerment of the child's health, safety, and welfare, not just bodily injury or death" and *rejected* the proposed definition "present or impending risk of serious bodily injury or death" because that definition excluded "neglect and emotional or mental (psychological) harm". Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38793-94 (June 14, 2016) (to be codified at 25 C.F.R. part 23) (emphasis added) (hereinafter "Executive Summary").

The Department's Guidelines for Implementing the Indian Child Welfare Act also refer to "harm", "safety" and "threat" when discussing the § 1922 standard, as does the Bureau of Indian Affairs' answers to frequently asked questions. The BIA explains that "imminent physical damage or harm" reflects any "endangerment of the child's health, safety, and welfare, not just bodily injury or death." (Frequently Asked Questions Bureau of

Indian Affairs Final Rule: Indian Child Welfare Act (ICWA) Proceedings (June 17, 2016) (emphasis added).

B. Section 1922 Applied to 48-Hour Hearings

The Tribes claim that State's Attorney Vargo has argued that § 1922 is not the standard applied to 48-hour hearings and that he has advocated for an interpretation of § 1922 contrary to what he has previously accepted in state court because he cited *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 698, 22 N.W.2d 62. (Appellees' Brief at p. 45-46.) State's Attorney Vargo did not cite *Davis* for the proposition that § 1922 did not apply to 48-hour hearings. State's Attorney Vargo cited *Davis* to show that the South Dakota Supreme Court joined with "at least five different states [that] have considered and rejected the argument that ICWA fully applies at the stage of the temporary or emergency custody proceeding." *Davis*, 2012 S.D. 69 at ¶ 9.

State's Attorney Vargo agrees § 1922 applies to 48-hour hearings but § 1922 does not provide guidance as to how 48-hour hearings are to be conducted. It allows emergency removal of Indian children "under applicable State law" and requires the

emergency removal to end when it is "no longer necessary to prevent imminent physical damage or harm to the child". 25 U.S.C. § 1922. It does not require formal evidence to be presented on the issue of whether the emergency removal or placement is still necessary at 48-hour hearings.

Davis recognized that the rules of evidence and civil procedure are not applicable to 48-hour hearings. *Davis*, 2012 S.D. 69, at ¶ 12. Instead, 48-hour hearings are to be conducted under rules prescribed by the court to inform it of the status of the child and to ascertain the child's history, environment and condition. *Id.* (citing SDCL §§ 26-7A-34 and -56). Nothing in § 1922 requires live testimony or formal evidence.

IV. PROCEDURAL DUE PROCESS DOES NOT REQUIRE A FORMAL ADVERSARIAL EVIDENTIARY HEARING FOR 48-HOUR HEARINGS

The purpose of the 48-hour hearing is to determine if temporary custody should continue because a child may not be held in temporary custody longer than 48-hours without the filing of a petition for temporary custody and a noticed or telephonic hearing. SDCL §§ 26-7A-14 and -15. They are not "parental right

termination" hearings. The Tribes cite *Syrovatka v. Erlich*, 608 F.2d 307, 310 (8th Cir. 1979) and *Alsager v. District Court of Polk County*, 406 F. Supp. 10, 24-25 (S.D.Iowa 1975), but those are parental right termination hearings, not emergency custody hearings. *See e.g. Syrovatka*, 608 F.2d at 310 ("The procedural due process requirements for parental rights termination hearings were announced in *Alsager v. District Court of Polk County*, 406 F. Supp. 10, 24-25 (S.D.Iowa 1975)) (emphasis added). Likewise, *Swipies v. Kofka*, 419 F.3d 709 (8th Cir. 2005) and *Whisman v. Rinehart*, 119 F.3d 1303 (8th Cir. 1997) direct that the state has a duty to hold a hearing "promptly after removal" but do not indicate what process is due at an emergency custody hearing.

48-hour hearings are *emergency* hearings to determine if *temporary* custody should continue. In that respect, they are similar to ex-parte temporary protection or restraining orders. "[T]emporary restraining orders issued without notice to the adverse party have survived constitutional attack." *Long Prairie Packing Co. v. United National Bank*, 338 N.W.2d 838, 841 (S.D. 1983) (*citing United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982); *State*

v. B Bar Enterprises, *Inc.*, 649 P.2d 978 (Ariz. 1982); *State v. Marsh*, 626 S.W.2d 223 (Mo. 1982)).

The Tribes look to only one piece of the child removal process and claim Due Process violations without consideration of the entire process. The Tribes contend that all the protections afforded at adjudicatory hearings must be provided at the *emergency* 48-hour hearing that is only determining if *temporary* custody should continue.

CONCLUSION

The Court should reverse the summary judgments of the district court and remand with instructions to dismiss State's Attorney Vargo.

JOINDER WITH CONSOLIDATED APPELLANTS

Pursuant to Fed. R. App. P. 28(j), State's Attorney Vargo joins in the arguments contained in Appellants' Reply Briefs in the consolidated appeals.

Dated: June 30, 2017.

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CERTIFICATE OF COMPLIANCE

I certify this Reply Brief complies with the type-volume limitation provided for in Fed. R. App. P. 32(a)(7)(B)(ii) and 32(f). This Reply Brief contains 4,319 words. I have relied upon the word count of my word processing system that was used to prepare this Reply Brief. The original Reply Brief and all copies are in compliance with this rule.

I certify that the electronic version of this Reply Brief have been scanned for viruses and are virus-free. The electronic version of this Reply Brief has been printed to PDF format directly from the original word processing file.

By: */s/ Rebecca L. Mann*
Rebecca L. Mann

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: */s/ Rebecca L. Mann*
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