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

APPELLANT'S BRIEF

Mr. J. Crisman Palmer
Ms. Rebecca L. Mann
GUNDERSON, PALMER, NELSON
& ASHMORE, LLP
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Attorneys for Defendant-Appellant Mark Vargo

SUMMARY OF THE CASE

This is a § 1983 action challenging the procedures used by officials in Pennington County, South Dakota for emergency removals of endangered Indian children, specifically how 48-hour hearings are conducted. The District Court granted the Appellees/Plaintiffs' motions for summary judgment, ruling, as a matter of law, that 48-hour hearing procedures violate the Due Process Clause and the Indian Child Welfare Act.

Appellant Mark Vargo respectfully requests 20 minutes for oral argument for each side.

CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, Mark Vargo has been sued in his official capacity as the Pennington County State's Attorney. No corporate disclosure statement is required for a governmental entity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTION

SECONDARY SOURCES

JURISDICTIONAL STATEMENT

Appellees brought suit pursuant to the Fourteenth Amendment of the Constitution and the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. § 1901 *et seq.* seeking relief under 42 U.S.C. § 1983. Appellees alleged Appellants created policies regarding the conduct of emergency child custody hearings that violated their rights under the due process clause of the 14th Amendment and ICWA. The District Court's jurisdiction was based on federal question jurisdiction pursuant to 28 U.S.C. § 1331.

On March 30, 2015, the District Court granted summary judgment determining as a matter of law Appellants had policies, practices and procedures that violated the Indian Child Welfare Act and the Due Process Clause of the 14th Amendment. (App. 165.) The District Court ordered that a separate injunction and declaratory judgment would issue after submission by the parties addressing appropriate remedies. (App. 141-142.) On December 15, 2016, the District Court granted Appellees' third motion for partial summary judgment interpreting the standard contained in

25 U.S.C. § 1922 (App. 165.). That same day, the District Court issued an Order granting declaratory and injunctive relief (App. 172), a Declaratory Judgment (App. 199.), and a Permanent Injunction (App. 199.).

Appellant Mark Vargo filed a timely notice of appeal on January 13, 2017. (App. 215.) The Eighth Circuit has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). This appeal is from final orders and a final judgment.

STANDARD OF REVIEW

The standard of review for all issues presented is *de novo*. Questions of subject matter jurisdiction are reviewed *de novo*. *Lemonds v. St. Louis County*, 222 F.3d 488, 492 (8th Cir. 2000). The grant of summary judgment is reviewed *de novo*, applying the same standards as the district court. *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 912 (8th Cir. 1999). Final policymaker identification is a legal question reviewed *de novo*. *Soltesz v. Rushmore Plaza Civic Center*, 847 F.3d 941 (8th Cir. 2017). Statutory interpretation is reviewed *de novo*. *United States v. Templeton*, 378 F.3d 845, 849 (8th Cir. 2004).

STATEMENT OF THE ISSUES

VII. WHETHER THE ROOKER-FELDMAN DOCTRINE DIVESTED THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION?

Lemonds v. St. Louis County, 222 F.3d 488 (8th Cir. 2000)

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)

VIII. WHETHER STATE'S ATTORNEY VARGO IS A FINAL POLICYMAKER?

Monell v. Dep't of Social Services of New York, 436 U.S. 658 (1978)

Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986)

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988)

Soltesz v. Rushmore Plaza Civic Center, 847 F.3d 941 (8th Cir. 2017)

IX. WHETHER A MUNICIPALITY CAN ADOPT A SEPARATE GOVERNMENTAL ENTITY'S CUSTOM THROUGH ACQUIESCENCE?

Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989)

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988)

Soltesz v. Rushmore Plaza Civic Center,
847 F.3d 941 (8th Cir. 2017)

X. WHETHER § 1922 OF THE INDIAN CHILD WELFARE ACT EXCLUDES IMMINENT NON-PHYSICAL DAMAGE OR HARM?

No apposite cases.

XI. WHETHER THE INDIAN CHILD WELFARE ACT REQUIRES FORMAL EVIDENCE PRESENTED AT TEMPORARY CUSTODY HEARINGS ?

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

Esther V. v. Marlene C., 248 P.3d 863 (N.M. 2011)

D.E.D. v. State of Alaska, 704 P.2d 774 (Alaska 1985)

XII. WHAT PROCEDURAL DUE PROCESS IS REQUIRED FOR EMERGENCY TEMPORARY CUSTODY HEARINGS?

Mathews v. Eldridge, 424 U.S. 319 (1976)

Swipies v. Kofka, 419 F.3d 709 (8th Cir. 2005)

Whisman v. Rinehart, 119 F.3d 1303 (8th Cir. 1997)

Syrovatka v. Erlich, 608 F.2d 307 (8th Cir. 1979)

STATEMENT OF THE CASE

I. Plaintiffs/Appellees – The "Tribes"

The Oglala Sioux Tribe and Rosebud Sioux Tribe are federally recognized Indian Tribes with reservations located within South Dakota granted *parens patriae* status in this matter. (App. 56.) Madonna Pappan and Lisa Young are residents of Pennington County and members of the Oglala Sioux Tribe and Standing Rock Sioux Tribe, respectively. Pappan and Young's children were the subject of abuse and neglect proceedings pursuant to South Dakota law and Pappan and Young were certified as class representatives for all similarly situated Indian parents. (App. 83.) The class of plaintiffs includes all members of federally recognized Indian Tribes who reside in Pennington County, South Dakota who are parents or custodians of Indian children. (App. 96.) Plaintiffs/Appellees are referred to as the "Tribes" throughout this brief for convenience.

II. Defendants/Appellants – The "Government Officials"

Lynne A. Valenti is the Secretary of the South Dakota Department of Social Services. Lisa Fleming is the person in

charge of DSS Child Protection Services for Pennington County, South Dakota.[1] Mark Vargo is the duly elected State's Attorney for Pennington County, South Dakota. The Pennington County State's Attorney's office is responsible for representing the State of South Dakota and DSS in child abuse and neglect proceedings in Pennington County. The Honorable Craig Pfeifle is the presiding judge of the Seventh Judicial Circuit Court of the State of South Dakota.[2]

All Defendants/Appellants were sued in their official capacity. Defendants/Appellants are referred to as the "Government Officials" throughout this brief for convenience.

III. The Child Protection Process

South Dakota, like most states, has established laws to protect children from abuse and neglect. It allows for the emergency removal of children from dangerous situations, with and without a court order. SDCL §§ 26-7A-12 and -13. When a

---

[1] Pursuant to Fed. R. Civ. P. 25(d), Valenti and Fleming were substituted as the proper parties in their official capacities.
[2] Judge Pfeifle was substituted as a proper party in his official capacity pursuant to Fed. R. Civ. P. 25(d). The Honorable Jeff W. Davis was the presiding judge prior to Judge Pfeifle.

child is taken into temporary custody, South Dakota law provides, "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 or telephonic hearing." SDCL § 26-7A-14. These proceedings are commonly referred to as "48-hour hearings". This case challenges the 48-hour hearing procedures used in Pennington County, South Dakota.

There are three phases for abuse and neglect proceedings (commonly referred to as "A&Ns"): (1) emergency removal; (2) adjudication; and (3) dispositional. When a child is subject to emergency removal (either with or without a court order), law enforcement removes the child from the dangerous environment and places the child in "temporary care of the Department of Social Services, foster care, or a shelter as designated by the court to be the least restrictive alternative for the child." SDCL § 26-7A-14. Law enforcement must immediately notify the parents, if they can be located, of the temporary custody and "the right to a prompt hearing by the court to determine whether temporary

custody should be continued." SDCL § 26-7A-15. The states attorney then notifies the parents of the time and place of the 48-hour hearing. *Id.*

The 48-hour hearing is an informal hearing to determine whether temporary custody should continue. SDCL § 26-7A-18. The hearing can be held telephonically and is not subject to the rules of civil procedure or evidence. SDCL §§ 26-7A-18, -34, -56. DSS obtains the information pertaining to the need for continued custody and presents that information to the court at the 48-hour hearing in the form of affidavit and any applicable police reports. If the court determines temporary custody should continue, it will issue a temporary custody order. The court may authorize DSS to return the child without further court order when DSS determines that the risk to the child is no longer imminent.

The next hearing is the advisory hearing which informs the parents of their rights, including the right to court appointed counsel, right to confront and cross-examine witnesses, and the right to remain silent. SDCL § 26-7A-54. The advisory hearing also informs the parents of the abuse and neglect allegations

contained in the petition and the applicable burden of proof. *Id.* Like the 48-hour hearing, the advisory hearing is not subject to the rules of civil procedure or evidence. SDCL §§ 26-7A-34, -56.

The second phase is the adjudicatory hearing at which it is determined by clear and convincing evidence whether the child was abused or neglected. The adjudicatory hearing is a full evidentiary hearing at which the rules of civil procedure and evidence are applied. SDCL §§ 26-7A-56, -83. An adjudication is an intermediate order subject to intermediate appeal with permission of the court. SDCL § 26-7A-87. Review hearings are held approximately every 45 days to monitor the necessary for continued custody.

The third phase is the dispositional hearing at which the court determines the whether or not to terminate parental rights and the child's permanent placement goal (such as reunification, permanent foster care, guardianship or adoption). The dispositional hearing is not subject to the rules of civil procedure or evidence but, like 48-hour hearings, is "conducted and designed to inform the court fully of the exact status of the child and to

ascertain the history, environment and past and present physical, mental and moral condition of the child and of the child's parents, guardian, or custodian." SDCL § 26-7A-34(2). Dispositional decrees are final orders that can be appealed. SDCL § 26-7A-90.

IV. Procedural History

On March 21, 2013, the Tribes sued the Government Officials in their official capacities asserting that 48-hour hearings violated the Indian Child Welfare Act and Due Process Clause of the 14th Amendment. (App. 1.)

The Government Officials moved to dismiss pursuant to Rule 12(b) arguing lack of subject matter jurisdiction under the *Younger* abstention and Rooker-Feldman doctrines, lack of standing, and failure to exhaust state/administrative remedies. The Government Officials also contended the Tribes failed to state a claim upon which relief could be granted because, *inter alia*, the Government Officials were not final policymakers. On January 28, 2014, the District Court denied the motions to dismiss in their entirety. (App. 40.)

On July 11, 2014, the Tribes made two partial motions for summary judgment seeking judgment as a matter of law that the Government Officials' policies, practices and procedures concerning 48-hour hearings violated the Indian Child Welfare Act and the Due Process Clause of the 14th Amendment. On March 3, 2015, the District Court granted summary judgment on both motions. (App. 98.) The Government Officials' motions to reconsider were denied on February 19, 2016. (App. 143.)

The District Court did not immediately issue a declaratory judgment or permanent injunction, however, and reserved those orders until after conducting a "remedies" hearing on August 17, 2016 and reviewing submissions by the parties. (App. 141-142) (App. 164.)

Thereafter, the Tribes made a third motion for partial summary judgment regarding the interpretation of ICWA's § 1922 standard for when emergency removal must terminate. The District Court granted the Tribes' third motion for partial summary judgment on December 15, 2016 holding that the phrase

"imminent physical damage or harm" did not encompass non-physical harm. (App. 165.)

Also on December 15, 2016, the District Court issued an Order granting declaratory and injunctive relief (App. 172) and simultaneously issued a Declaratory Judgment (App. 199) and Permanent Injunction (App. 207) as separate orders. These orders set forth how 48-hour hearings must be conducted and what must be obtained in the petition for temporary custody. The District Court ordered 48-hour hearings to be conducted as full evidentiary hearings allowing the parents to: (1) contest the allegations in the petition; (2) require the State to present sworn testimony; (3) cross-examine the State's witnesses; and (4) subpoena and present witnesses and other evidence. The District Court determined parents must be appointed counsel and could continue the hearing for 24 hours to confer with counsel.

The Government Officials timely filed separate Notices of Appeal on January 13, 2017 appealing: the Order Granting [third] Partial Summary Judgment entered on December 15, 2016 (App. 165), the Order granting declaratory and injunctive relief

entered on December 15, 2016 (App. 172), and the Declaratory Judgment and Permanent Injunction entered on December 15, 2016 (App. 199-214).

The Government Officials also appealed portions of the orders, judgements, rulings, holdings, and decisions from the Order Denying Motion to Dismiss entered January 28, 2014 (App. 40), the Order Granting Partial Summary Judgment entered on March 30, 2015 (App. 98), and the Order denying motions to reconsider entered on February 19, 2016 (App. 143) that were inextricably bound up on the December 15, 2016 Orders, Declaratory Judgment and Permanent Injunction.

SUMMARY OF THE ARGUMENT

Issue I: Subject Matter Jurisdiction

The District Court lacked subject matter jurisdiction to hear this case pursuant to the Rooker-Feldman Doctrine. The South Dakota Supreme Court held in *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62 that the Indian Child Welfare Act does not fully apply to 48-hour hearings and declined to grant a writ of mandamus requiring the trial court to hold a 48-hour

hearing "in which the full panoply of ICWA requirements and standards would be applied." The South Dakota Supreme Court further held informal evidence such as the ICWA affidavit and police report were sufficient for the court to determine temporary custody should continue. The Tribes' federal claims are merely an attempt to indirectly void and nullify the South Dakota Supreme Court's decision in *Davis* and are barred by the Rooker-Feldman Doctrine.

Issues II and III: Policymaker Liability

The District Court committed reversible error by failing to analyze state law to identify whether State's Attorney Vargo was a final policymaker. Vargo is not a final policymaker because he represents the State of South Dakota in child abuse and neglect proceedings and South Dakota's Attorney General supervises state's attorney in their duties.

District Court further erred by holding, as a matter of law, that failing to challenge Judge Davis's practices in 48-hour hearings means Vargo adopted Judge Davis's practices as official policy or custom. One governmental entity does not adopt a

separate governmental entity's custom as its official policy or custom by mere acquiescence to the separate governmental entity's custom. Acquiescence creates municipal liability only when the final policymaker acquiesces to his subordinates. Vargo did not engage in deliberate conduct necessary to ratify or adopt Judge Davis's practices as official policy or custom.

Issues IV and V: Indian Child Welfare Act

ICWA's § 1922 standard requiring termination of emergency removal when it is no longer necessary to prevent "imminent physical damage or harm" to the child is not limited to physical damage or physical harm only. The Department of the Interior's Final Rule, Guidelines, and answers to frequently asked questions suggest the phrase includes psychological, emotional and other non-physical harms. The Department's guidance is that the phrase focuses on the health, safety, and welfare of the child and is not limited to just bodily injury or death. The District Court's interpretation of this standard is at odds with all the secondary authority on the issue (no party or the district court have been able to identify any case law interpreting the § 1922 standard)

and mandates returning children even though imminent psychological, emotional or other non-physical harm exists.

The South Dakota Supreme Court has joined with five other states in holding that ICWA does not fully apply to temporary custody hearings. The South Dakota Supreme Court has also determined that informal evidence such as affidavits and police reports present a sufficient basis for determining whether temporary custody should continue. Live testimony and the formal rules of evidence are not required at 48-hour hearings and the District Court erred in determining formal evidence must be presented at the 48-hour hearing on the issue of whether temporary custody should continue.

Issue VI: Procedural Due Process

48-hour hearings are not adjudicatory hearings and not termination of parenting rights hearings. The purpose of the 48-hour hearing is to determine whether temporary custody should continue. 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.

ARGUMENT

I. THE ROOKER-FELDMAN DOCTRINE DIVESTED THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION

The District Court had no subject matter jurisdiction and should have dismissed the case pursuant to the Rooker-Feldman Doctrine. "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." *Lemonds v. St. Louis County*, 222 F.3d 488, 492 (8th Cir. 2000) (citing *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)). It not only forecloses straightforward appeals but also more indirect attempts by plaintiffs to undermine state court decisions. *Id.* "Thus, a corollary to the basic rule against reviewing judgments prohibits federal district courts from exercising jurisdiction over general constitutional claims that are 'inextricably intertwined' with specific claims already adjudicated

in state court. *Lemonds*, 222 F.3d at 492-493 (citing *Feldman*, 460 U.S. at 482 n. 16; *Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031, 1034 (8th Cir. 1999); *Neal v. Wilson*, 112 F.3d 351, 356 (8th Cir. 1997)).

"A general federal claim is inextricably intertwined with a state court judgment 'if the federal claim succeeds only to the extent that the state court wrongly decided the issue before it.'" *Id.* (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring)). In those cases, "where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceedings as, in substance, anything other than a prohibited appeal of the state-court judgment." *Pennzoil Co.*, 481 U.S. at 25. The state and federal claims need not be identical for the doctrine to apply and the parties need not be the same.[3] *Lemonds*, 222 F.3d at 493

[3] The *Davis* petitioner was the Cheyenne River Sioux Tribe. The Plaintiffs in this case include the Oglala Sioux Tribe and Rosebud Sioux Tribe and a class of plaintiffs that includes "all other members of federally recognized Indian tribes who reside in Pennington County, South Dakota, who like plaintiffs, are parents or custodians of Indian children." (App. 096.) Dana Hanna was

(citing *In re Goetzman*, 91 F.3d 1173, 1177 (8th Cir. 1996)) and at 495.

"Deciding whether Rooker-Feldman controls this case 'requires determining exactly what the state court held' to ascertain whether granting the requested federal relief would either void the state court's judgment or effectively amount to a reversal of its holding." *Lemonds*, 222 F.3d at 493 (quoting *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995)).

In *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62, the South Dakota Supreme Court dismissed an application for writ of mandamus or prohibition sought by the Cheyenne River Sioux Tribe against the Honorable Jeff W. Davis.[4] Judge Davis presided over a 48-hour hearing in which the Tribe's request to present evidence at the 48-hour hearing was denied. The Tribe sought a writ from the South Dakota Supreme Court to compel a new 48-hour hearing "in which the full panoply of ICWA

---

the attorney for the Cheyenne River Sioux Tribe in *Davis* and also one of the attorneys for the Plaintiffs in this case.

[4] Judge Davis was the presiding judge of the 7th Judicial Circuit in 2012 and also in 2013 when this case was commenced. He was a Respondent/Defendant in both cases.

requirements and standards would be applied." *Id.* at ¶¶ 5 and 8. The Tribe contended the lack of such a hearing violated "federal and state rights". *Id.* at ¶ 8.

The South Dakota Supreme Court rejected the Tribe's contentions that ICWA fully applies at the stage of the temporary or emergency custody proceedings and joined with at least five other states holding the same. *Id.* at ¶ 9. "Based upon § 1922 and ICWA's inapplicability to temporary or emergency custody proceedings under state law, both trial courts here appropriately rejected Tribe's invocation of ICWA and requests for a new temporary custody hearing conducted in full accord with ICWA." *Id.* at ¶ 11 (emphasis added).

The South Dakota Supreme Court further rejected the Tribe's assertion that the 48-hour hearing violated state law based upon an alleged lack of evidence of a need for temporary custody. *Id.* at ¶ 12. In *Davis*, the 48-hour hearing proceeded based upon the State's petition for temporary custody, the accompanying police report and ICWA affidavit. *Id.* No formal testimony was presented at the hearing. The South Dakota Supreme Court

deemed the police report and ICWA affidavit sufficient to set forth the facts concerning the need for continued temporary custody:

> While these documents might not constitute evidence within the normal bounds of the Rules of Evidence, those rules are not applicable at the temporary custody hearing. *See* SDCL 26-7A-34 (stating that the Rules of Civil Procedure apply to adjudicatory hearings, but that all other juvenile hearings are to be conducted to inform the court of the status of the child and to ascertain the child's history, environment, and condition); SDCL 26-7A-56 (stating that the Rules of Evidence apply to adjudicatory hearings, but that all other juvenile 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).

Davis, 2012 S.D. 69 at ¶ 12 (emphasis added).

The South Dakota Supreme Court held the Tribe failed to show it had "a clear legal right" to the performance of the trial courts' alleged duty to follow ICWA at the 48-hour hearing or that the trial court had a "definite legal obligation to perform that duty". *Id.* at ¶¶ 13-14. On November 26, 2012, the South Dakota Supreme Court denied rehearing. Cheyenne River did not seek an appeal to the United States Supreme Court. A few months later, the Tribes asked a federal court to declare that ICWA *does* apply to 48-hour hearings and that evidence beyond the ICWA affidavit

and accompanying police report *must* be introduced at the 48-hour hearing.

Like *Lemonds*, the relief sought in this federal case—declaratory and injunctive relief that failing to hold a full-blown evidentiary 48-hour hearing violates the Due Process Clause of the 14th Amendment and the Indian Child Welfare Act—"would, as a practical matter, directly nullify" the South Dakota Supreme Court's decision that the full panoply of ICWA does not apply to 48-hour hearings. "This fact alone may be sufficient to decide the case." *Lemonds*, 222 F.3d at 493. But, even if the Tribes did not directly ask the District Court to overturn the South Dakota Supreme Court's decision, "the federal claims they state so closely implicate the decision of the state court that the federal suit should be barred anyway." *Id.* (citing *Feldman*, 460 U.S. at 482, n. 16). The District Court's grant of the requested federal relief essentially voids the South Dakota Supreme Court's decision and effectively amounts to a reversal of its holding in *Davis*. This is precisely what the Rooker-Feldman Doctrine prohibits. *Lemonds*, 222 F.3d at 493. As such, the District Court had no subject matter

jurisdiction to decide this matter and it should be dismissed pursuant to the Rooker-Feldman Doctrine.

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

A. The District Court Failed to Analyze South Dakota Law to Identify a Final Policymaker

It is well-settled that municipal liability pursuant to § 1983 requires an unconstitutional policy or custom created by a final policymaker. *Monell v. Dep't of Social Services of New York*, 436 U.S. 658, 690-91 (1978). "[M]unicipal 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 Cincinnati*, 475 U.S. 469, 483 (1986). "Thus a single decision by a municipal official can constitute official policy." *Soltesz v. Rushmore Plaza Civic Center*, 847 F.3d 941 (8th Cir. 2017) (*citing Bolderson v. City of Wentzville*, 840 F.3d 982, 985 (8th Cir. 2016)). However, "liability attaches only where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered."

Pembaur, 475 U.S. at 481 (emphasis added). The District Court judge must identify the official "whose decision represent the official policy of the local government unit". *Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989).

In *Soltesz*, the Eighth Circuit recently reiterated the process for identifying the final policymaker:

> 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.'" *Id.* (quoting *Jett*, 491 U.S. at 737). State law, including valid local ordinances and regulations, will always direct the courts to some official or body of officials that has policymaking authority in a given area of the municipality's business. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988). Federal courts are not justified "in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Id.* at 126.

Soltesz, 847 F.3d 941. The District Court failed to conduct this analysis and simply concluded that Vargo was a final policymaker. (App. 160.) Failure to analyze state law to determine who is a final policymaker constitutes reversible error. *See generally Soltesz*, 847 F.3d 941. Furthermore, the District Court did not identify the governmental entity for which Vargo was a final

policymaker. In response to Vargo's motion to reconsider on this issue, the District Court said, "The court specifically identified States Attorney Vargo as 'the elected States Attorney for Pennington County, South Dakota . . . . [and that] Mr. Vargo controls the policies and procedures followed his staff attorneys.'" (App. 160.) This still does not identify whether the District Court determined State's Attorney Vargo as a final policymaker for Pennington County or the State of South Dakota.

B. State's Attorney Vargo is Not a Final Policymaker

A proper analysis of South Dakota law reveals Vargo is not a final policymaker for how 48-hour hearings are conducted. An individual might be a final policymaker in respect to one function, but not another. *Pembaur*, 475 U.S. at 483, n. 12. Vargo, as the duly elected State's Attorney for Pennington County, "shall appear in all courts of his county and prosecute and defend on behalf of the state or his county all actions or proceedings, civil or criminal, in which the state or county is interested or a party." SDCL § 7-16-9 (emphasis added). South Dakota, not Pennington County, is the interested party for child abuse and neglect proceedings.

> The state's attorney shall represent the state in all proceedings brought under this chapter and chapter 26-8A, 26-8B, or 26-8C. The state's attorney shall also represent the Department of Social Services in any proceedings brought under this chapter or chapter 26-8A unless the Department of Social Services has selected a separate attorney and has so informed the concerned state's attorney and the court.

SDCL § 26-7A-9 (emphasis added). Thus, State's Attorney Vargo is representing the State of South Dakota and the Department of Social Services at 48-hour hearings.[5] He is not representing Pennington County. Vargo is not a *final* policymaker when he represents the state or Department of Social Services because the South Dakota Attorney General exercises supervision over state's attorneys. "The duties of the attorney general shall be . . . [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 District Court erred in

[5] A suit against an official in his official capacity is actually a suit against his office. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (*citing Brandon v. Holt*, 469 U.S. 464, 471 (1985). State officials acting in their official capacities are not "persons" under Section 1983 unless sued for injunctive relief. *Will*, 491 U.S. at 71, n. 10 (citations omitted). Thus, to the extent State's Attorney Vargo may be an official of the State of South Dakota, he is not extended 11th Amendment immunity from the Appellees' request for prospective declaratory and injunctive relief.

"assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Praprotnik*, 485 U.S. at 126. "Even if an official has the final say on an issue, his decisions may not be final policy." *Soltesz*, 847 F.3d 941 (emphasis added). "That a particular agent is the apex of a bureaucracy makes the decision final but does not forge a link between finality and policy." *Gelen v. Housing Authority of New Orleans*, 456 F.3d 525, 530 (5th Cir. 2006) (quoted with approval in *Soltesz*). Even assuming Vargo made any decision as to how to conduct 48-hour hearings, such a decision is not final and does not create a link between finality and policy because South Dakota law provides that the Attorney General exercises supervision over state's attorneys in manners pertaining to the duties of their office. A duty of Vargo's office is to represent the State of South Dakota in child abuse and neglect proceedings. Vargo is not a final policymaker for the State of South Dakota as to how 48-hour hearings are to be conducted in Pennington County and the District Court's determination of the same is erroneous.

III. ACQUIESCENCE TO A SEPARATE GOVERNMENTAL ENTITY'S CUSTOM DOES NOT CREATE *MONELL* LIABILITY

A. *Monell* Liability Requires an Official Policy or Longstanding Custom

A municipality may be held liable under section 1983 for if a policy or custom caused a violation of a constitutional right. *Davison v. City of Minneapolis*, 490 F.3d 648, 659 (8th Cir. 2007) (citing *Monell*, 436 U.S. at 690-91). Municipal liability will attach when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690-91 (emphasis added). "Less formal governmental actions may also result in liability if 'practices of state officials [are] so permanent and well settled as to constitute a 'custom or usage' with the force of law.'" *Williams v. Butler*, 863 F.2d 1398, 1400 (8th Cir. 1988) (quoting *Monell*, 436 U.S. at 691); *accord Jett v. Dallas Independent School District*, 491 U.S. 701, 737 (1989) (municipal liability may attach if a final policymaker "acquiesce[s] in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local

governmental entity.") Policies must be "officially adopted and promulgated by the [municipality]" and practices must be "so permanent and well-settled so as to constitute a custom". *Davison*, 490 F.3d at 659 (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988)).

The District Court did not find that State's Attorney Vargo adopted any official policy. Instead, the District Court determined that *Judge Davis* had a longstanding practice which constituted the standard operating procedure of the *Seventh Circuit Court* and that Vargo acquiesced to Judge Davis's longstanding practice. "'[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 liability." (App. 124.) (citing *Jett*, 491 U.S. at 737). The District Court misapplied *Jett* and erroneously determined that Vargo's acquiescence to a separate entity's custom somehow is an adoption of that custom for the state. There is no such liability that exists pursuant to § 1983.

B. Acquiescence Requires a Subordinate

There is no § 1983 liability for acquiescence to another municipality's policy or custom. Liability under § 1983 for acquiescence refers to the acquiescence of a subordinate. *See e.g. Praprotnik*, 485 U.S. at 127 ("If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final."); *Soltesz*, 847 F.3d 941 ("In addition to creating municipal liability for their own actions, final policymakers can also create this liability by either delegating policymaking authority to a subordinate or ratifying the actions of a subordinate.")

The District Court acknowledged that Judge Davis was not a subordinate to State's Attorney Vargo (App. 158) but nonetheless concluded, "*Coleman v. Watt* stands for the proposition that a separate, non-subordinate entity, such as the Department of Social Services, may be held liable by adopting the policies of a judge." (App. 158) (citing *Coleman v. Watt*, 80 F.3d 255 (8th Cir. 1994)). This conclusion is erroneous because *Coleman* did not

involve separate entities and does not stand for the proposition acquiescence to a separate entity's custom is an adoption of that custom for the acquiescing entity.

In *Coleman*, the Eighth Circuit determined the case should not be dismissed for failure to allege an official policy because the complaint alleged sufficient information to withstand a 12(b)(6) motion to dismiss. The complaint alleged the city police chief "adopted" a city judge's general order as an official policy of the city and alleged that the police chief was a final policymaker. 40 F.3d at 262. *Coleman* does not stand for the proposition that, at summary judgment, a governmental entity is liable as a matter of law under *Monell* when one if its agents—even one with final policymaking authority—fails to challenge a separate entity's practices.

No authority—including *Jett*—suggests that the final policymaker of a municipality can create an official municipal policy through inaction by acquiescing to the policy of a separate entity. But the District Court concluded that Judge Davis's practices became a policy of the State through Vargo's inaction, or failure to

challenge Judge Davis's alleged policies. Inaction can only create an official policy when the original implementer of the practice is an employee, subordinate or otherwise a member of the same governmental entity as the policymaker—in this case, Vargo. *See generally*, George M. Weaver, *Ratification as an Exception to the § 1983 Causation Requirement: Plaintiff's Opportunity or Illusion?*, 89 NEB L. REV. (2010). State's Attorney Vargo and Judge Davis are not alleged to be part of the same governmental entity. The Tribes alleged:

> 10. Defendant Mark Vargo is the duly elected State's Attorney for Pennington County. In that capacity, said Defendant (and his subordinates) represent the state, including DSS in all abuse and neglect proceedings and in other proceedings to acquire temporary custody of children under state law.
>
> 11. Defendant Jeff Davis is the presiding judge of the Seventh Judicial Circuit Court of the state of South Dakota, and in that capacity, is the chief administrator of said Court.

(App. 6.) (emphasis added).

"Acquiescence" can create *Monell* liability under the *Jett* framework only through "subordinate" employees. *See Russell v. Hennepin County*, 420 F.3d 841, 846 (8th Cir. 2005) ("Before a

municipality can be held liable, however, there must be an unconstitutional act by a municipal employee."); *Patterson v. County of Oneida*, 375 F.3d 206, 226 (2nd Cir. 2004) ("It is sufficient to show, for example, that a discriminatory practice of municipal officials was so 'persistent or widespread' as to constitute 'a custom or usage with the force of law,' or that a discriminatory practice of subordinate employees was 'so manifest as to imply the constructive acquiescence of senior policy-making officials . . . .'") (internal citations omitted); *Speer v. City of Wynne*, 276 F.3d 980, 986 (8th Cir. 2002) ("concluding that a municipality may be held liable only if the conduct or its employees directly caused a violation of a plaintiff's constitutional rights") (citing *Trigalet v. City of Tulsa*, 239 F.3d 1150, 1156 (10th Cir. 2001)).

Jett contemplates that an entity's policymaker can—theoretically—create a policy through acquiescence to the standard operating procedure of the entity. It does not contemplate creation of a policy through acquiescence to a separate entity's standard operating procedure or a non-subordinate's standard operating procedure.

C. Adoption of a Separate Governmental Entity's Custom Requires Deliberate and Affirmative Conduct

"The Ninth Circuit distinguishes between affirmative or deliberate conduct by a policymaker, which constitutes ratification, and mere acquiescence, which is insufficient to establish municipal liability by ratification." *Scheier v. City of Snohomish*, 2008 U.S. Dist. LEXIS 90919, at *40-45 (W.D. Wash. Nov. 4, 2008) (citing *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992)). In *Gillette*, a city manager's acquiescence to the plaintiff's termination was inaction on the part of the municipality that failed to establish ratification under *Pembaur* and *Praprotnik*. 979 F.2d at 1348.

> [Plaintiff's] evidence is not sufficient under *Pembaur* or *Praprotnik* to establish section 1983 liability based on the City Manager's alleged acquiescence in [plaintiff's] termination. *Pembaur* requires that an official policymaker make a deliberate choice from among various alternatives to follow a particular course of action. . . . Likewise, *Praprotnik* requires that a policymaker approve a subordinate's decision and the basis for it before the policymaker will be deemed to have ratified the subordinate's discretionary decision. . . .

Gillette, 979 F.2d at 1348 (citations omitted) (emphasis in original). As in *Gillette*, the Tribes ha[ve] produced no evidence of

affirmative or deliberate conduct by [State's Attorney Vargo] that may be said to have ratified [Judge Davis's] decision . . ." *Id.* (emphasis added).

The Eighth Circuit is in accord with *Gillette*: "A final policymaker ratifies the decision of a subordinate when he or she takes an affirmative act to approve both the decision and the basis for the decision." *Soltesz*, 847 F.3d 941 (citing *Proprotnik*, 485 U.S. at 127). "'Accordingly, ratification requires both knowledge of the alleged constitutional violation, and proof that the policymaker specifically approved of the subordinate's act.'" *Id.* (quoting *Lytle v. Carl*, 382 F.3d 978, 988, n.2 (9th Cir. 2004)). "A mere failure to overrule a subordinate's actions, without more, is insufficient to support a § 1983 claim." *Lytle*, 382 F.3d at 987 (citing *Proprotnik*, 485 U.S. at 127). "[M]unicipal liability under § 1983 attaches where—and only 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*, 475 U.S. at 483-84. Merely failing to challenge the way Judge Davis

conducted 48-hour hearings does not constitute a deliberate choice by State's Attorney Vargo.

In *Granda v. City of St. Louis*, 2006 U.S. Dist. LEXIS 23037; 2006 WL 1026978 (E.D. Mo. 2006), a plaintiff sued a municipality and its municipal judge for violations of her constitutional rights when the judge incarcerated her due to her daughter's truancy. The court determined that it was the judge's

> independent decision to incarcerate violators of the Truancy Ordinance. Other judges who knew of [judge's] conduct were no more policy makers than the [judge]. Although the Mayor and other judges allegedly knew of [judge's] conduct, mere awareness does not create a custom or policy on the part of the [municipality]. Indeed, no city official including the Mayor or other judges had control over [judge's] judicial acts; they did not have authority to stop [judge] from incarcerating persons who violated the Truancy Ordinance. Under such circumstances, it cannot be said that the Mayor and other judges were deliberately indifferent to or tacitly authorized [judge's] conduct in such a manner as to create a custom or policy.

Granda, 2006 U.S. Dist. LEXIS 23037 (citing *Russell v. Hennepin County*, 420 F.3d 841, 849 (8th Cir. 2005). Similarly, like in *Granda*, State's Attorney Vargo and his courtroom deputies have no authority to stop Judge Davis's conduct, regardless of whether or not it was in violation of the Tribes' constitutional rights.

Accordingly, the District Court's conclusion that *Monell* liability attaches to the State of South Dakota as a result of the Pennington County State's Attorney's Office's failure to seek "to change" the practices established by Judge Davis is an error of law.

IV. "IMMINENT PHYSICAL DAMAGE OR HARM" INCLUDES EMOTIONAL, PSYCHOLOGICAL AND OTHER NON-PHYSICAL HARM

The District Court ruled that 25 U.S.C. § 1922 does not permit consideration of "harm" that is not physical and granted the Tribes' final motion for partial summary judgment on that issue. (App. 165.) The District Court's interpretation of the § 1922 standard is contrary to the Department of the Interior's Final Rule, contrary to the Department's Guidelines, contrary to guidance provided by the Bureau of Indian Affairs, conflicts with South Dakota law and requires emergency proceedings to terminate even if it means children will be returned to imminent psychological, emotional or other non-physical harm.

Section 1922 permits "emergency removal of an Indian child . . . under applicable state law." 25 U.S.C. § 1922. However, 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". *Id.* (emphasis added).

The District Court ruled that "physical damage or harm" is limited to bodily injury—that is, excludes non-physical injury. But the Department of the Interior recently clarified the standard for emergency proceedings is not limited to a risk of "bodily injury or death." Executive Summary to its Final Rule contained in 25 C.F.R 23. The Executive Summary provides:

> 9. "Imminent Physical Damage or Harm"
>
> 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, such that no further elaboration is necessary. The Department has concluded that the definition it included in the proposed rule, "present or impending risk of serious bodily injury or death," is too constrained and does not capture circumstances that Congress would have considered as presenting "imminent physical damage or harm." Commenters noted that situations of sexual abuse, domestic violence, or child labor exploitation could arguably be excluded by the proposed definition. The Department did not, however, intend that such situations would fall outside the scope of "imminent physical damage or harm." Since the statutory phrase

> reflects endangerment of the child's health, safety, and welfare, not just bodily injury or death, the Department has decided not to use the proposed definition.

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 comments contained in the Executive Summary recognize there was opposition to the proposed definition of "present or impending risk of serious bodily injury or death" arguing "[t]he proposed definition is too narrow in omitting neglect and emotional or mental (psychological) harm and would preclude emergency measures to protect a child from these types of harms". *Id.* at 38794. The Department responded:

> The final rule does not use the proposed definition of "imminent physical damage or harm" ["present or impending risk of serious bodily injury or death"] because the Department has concluded that the statutory phrase encapsulates a broader set of harms than was reflected in the proposed definition. The Department agrees with commenters that the phrase focuses on the child's health, safety, and welfare, and would include, for example, situations of sexual abuse, domestic violence, or child labor exploitation.

Executive Summary, 81 Fed. Reg. at 38794 (emphasis added).

The Department *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". *Id.* The Department clarified the statutory phrase "imminent physical damage or harm" (the § 1922 standard) "focuses on the child's health, safety, and welfare" and that *Congress intended* the statutory phrase to include more than just "bodily injury or death". *Id.* The District Court's interpretation that the § 1922 standard *only* includes physical damage or physical harm is at odds with the Department's directive contained in the Executive Summary, and not what Congress intended for emergency proceedings.

In conjunction with the Final Rule, the Department of the Interior issued Guidelines for Implementing the Indian Child Welfare Act. The Department's Guidelines regarding the

threshold for removal on an emergency basis and discussing the "imminent physical damage or harm" standard[6] provide:

> Courts have defined emergency circumstances as "circumstances in which the child is immediately threatened with harm," including when there is an immediate threat to the safety of the child, when a young child is left without care or adequate supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence. The same standards and protections apply when an Indian child is involved. And those standards and protections are reflected in section 1922 of ICWA, which addresses emergency proceedings involving Indian children.

Guideline C.2 (emphasis added). The Guidelines regarding the standards and process for emergency proceedings provide:

> **Termination of Emergency Removal.** If a child was removed from the home on an emergency basis because of a temporary threat to his or her safety, but the threat has been removed and the child is no longer at risk, the State should terminate the removal, either by returning the child to the parent or transferring the case to Tribal jurisdiction. This comports with standards that apply to all child-welfare cases, and protects the "fundamental liberty interest" that parents have in the care and custody of their children. If circumstances warrant, however, the State agency may instead initiate a child-custody proceeding to which the full set of ICWA protections would apply.

[6] The § 1922 standard for emergency removal is the same standard for when the emergency proceeding must terminate.

Guideline C.3 (emphasis added). The Department's Guidelines for Implementing the Indian Child Welfare Act refer to "harm", "safety" and "threat" when discussing the § 1922 standard, and do not limit this emergency proceedings standard to *only* physical damage or physical harm.

In addition to the Department's Executive Summary and Guidelines, the Bureau of Indian Affairs provided answers to frequently asked questions about the Final Rule. Frequently Asked Questions Bureau of Indian Affairs Final Rule: Indian Child Welfare Act (ICWA) Proceedings (June 17, 2016) (hereinafter "Frequently Asked Questions"). The Bureau's guidance provides:

> **What are the rule's requirements for emergency proceedings?**
>
> The rule reinforces that emergency removals and emergency placements should occur only in limited circumstances (when there is imminent physical damage or harm to the child). The rule does not further define "imminent physical damage or harm," as that statutory phrase is already clear and understandable as written. The BIA understands the phrase to reflect the endangerment of the child's health, safety and welfare, not just bodily injury or death.

Frequently Asked Questions at p. 6 (emphasis added). The Bureau of Indian Affairs explains that "imminent physical damage or harm" reflects any "endangerment of the child's health, safety, and welfare, not just bodily injury or death." *Id.* (emphasis added). The § 1922 standard includes more than just physical injury and this Court's ruling that the standard is solely physical damage or physical harm is incorrect. The Department's guidance and interpretation of the § 1922 standard suggests imminent emotional harm *is* a consideration for emergency proceedings.

Prohibiting the Government Officials from considering imminent emotional harm during emergency proceedings under § 1922 also conflicts with South Dakota law. South Dakota law allows continued temporary custody "in keeping with the best interests of the child." SDCL § 26-7A-18. DSS has interpreted this to include both emotional and physical damage to the child. Prohibiting the Government Officials from protecting Indian children from imminent emotional harm when state law allows them to protect non-Indian children from imminent emotional harm presents Equal Protection implications.

Another reason the Department rejected the proposed definition "present or impending risk of serious bodily injury or death" for "imminent physical damage or harm" is because, as commentators pointed out, "the proposed definition would result in equal protection violations denying Indian children the same level of protection as non-Indian children because research shows that exposure to domestic violence produces significant and long-lasting harm to the child psychologically, even when the child does not himself experience physical injury". Executive Summary, 81 Fed. Reg. at 38794.

The District Court's interpretation of the § 1922 standard allows—in fact *requires*—Indian children to be returned to imminent emotional, psychological or other non-physical harm. This interpretation is at odds with the Department of the Interior's guidance provided in its Executive Summary, the Department's Guidelines for Implementing the Indian Child Welfare Act, and the Bureau of Indian Affairs' answers to frequently asked questions. The District Court's statutory interpretation is incorrect.

V. THE INDIAN CHILD WELFARE ACT DOES NOT REQUIRE FORMAL EVIDENCE PRESENTED AT THE 48-HOUR HEARING

Section 1922 of the Indian Child Welfare Act allows emergency removal of Indian children "under applicable State law." The District Court determined, as a matter of law, that the Government Officials must present formal evidence on the issue of whether the emergency removal or placement is still necessary at 48-hour hearings. (App. 131.)

The District Court's determination conflicts with South Dakota law and is not required by ICWA. Evidence of the ongoing emergency *is received* at the 48-hour hearing and considered by the trial court, albeit not presented in accordance with the ordinary rules of evidence. *See Cheyenne River Sioux Tribe v. Davis*, 2012 SD 69, ¶ 12, 822 N.W.2d 62. The court reviews either a "Pick-up-and-Place" Order, pursuant to SDCL § 26-7A-13(1)(b), or the police report and ICWA affidavit, if the removal is done without prior court approval, pursuant to SDCL § 26-7A-12(4). In either case, the police report and ICWA affidavit are sufficient evidence for a trial court to order continued custody. *Davis*, 2012 SD 69 at ¶ 12.

Davis recognized that the rules of evidence and civil procedure are not applicable to 48-hour hearings. *Id.* 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 25 U.S.C. § 1922 requires live testimony or other evidence presented pursuant to the rules of evidence. On the contrary, § 1922 expressly provides that emergency removal or emergency placement may occur "under applicable State law". Applicable South Dakota law is SDCL § 26-7A-56 which allows less formal evidence for 48-hour hearings:

> Except as otherwise provided in this chapter and related chapters 26-8A, 26-8B, and 26-8C, the rules of civil procedure and the rules of evidence apply to adjudicatory hearings. All other hearings shall be conducted under rules prescribed by the court. The rules may be designed by the court to inform the court fully of the exact status of the child and to ascertain the history, environment, and the past and present physical, mental, and moral condition of the child and the child's parents, guardian, and custodian, as may be necessary or appropriate to enable the court to determine suitable disposition of the child according to the least restrictive alternative available in keeping with the child's best interests and with due regard for the rights and interests of the parents, guardian, custodian, the public, and the state.

SDCL § 26-7A-56.

The South Dakota Supreme Court has held that ICWA does not fully apply at the state of a temporary or emergency custody proceeding. *Davis*, 2012 SD 69 at ¶ 9. In doing so, South Dakota joined with five other states that have held the same. *See State ex rel. Juvenile Department v. Charles*, 688 P.2d 1354, 1358 (Or. Ct. App. 1984) (holding that emergency removal of a child is initially purely a state law matter not subject to all ICWA requirements); *D.E.D. v. State of Alaska*, 704 P.2d 774, 779 (Alaska 1985) (holding certain notice requirements under ICWA inapplicable to emergency custody proceedings or emergency hearings); *Matter of the Welfare of J.A.S.*, 488 N.W.2d 332, 335 (Minn. Ct. App. 1992) (holding the testimony of a qualified Indian expert was not required at the initial detention hearing in the case since that hearing was an emergency removal); *In re S.B. v. Jeannie V.*, 30 Cal. Rptr .3d 726, 734-36, 130 Cal. App. 4th 1148 (Cal. Ct. App. 2005) (holding that not all provisions of ICWA apply to a detention/emergency removal hearing); *Esther V. v. Marlene C.*, 248 P.3d 863, 872-74 (N.M. 2011) (holding that New Mexico's ex parte and custody hearing stages are

emergency proceedings to which the full requirements of ICWA do not apply).

In *D.E.D. v. State of Alaska*, 704 P.2d 774 (Alaska 1985), the court concluded the notice requirement of 25 U.S.C. § 1912 did not apply to emergency custody hearings. Mother argued she was deprived her right to counsel at the emergency custody hearings because the state failed to provide notice of the hearing that would have notified her of her right to counsel. *D.E.D.*, 704 P.2d at 779. Mother did not attend either emergency hearing and counsel was not appointed for her at those hearings. *Id.* The court determined mother was not deprived her right to counsel under ICWA because the notice required pursuant to § 1912 did not apply to emergency proceedings. *Id.*

In determining that § 1912 (d) and (e) findings are not applicable to emergency custody hearings, the court in *Esther V. v. Marlene C.*, 248 P.3d 863, 872 (N.M. 2011) recognized that the "ex parte and custody hearing stages are expedited emergency proceedings that enable the State to remove a child and take temporary custody in order to ensure the child's safety until a full

hearing on the merits is held." (emphasis added). Similarly, South Dakota's 48-hour hearings are emergency custody hearings and not the time and place for a full hearing on the merits.

In *Davis*, the South Dakota Supreme Court noted that the 48-hour hearing "proceeded on State's petition for temporary custody and the accompanying police report and ICWA affidavit from a DSS specialist" and that this evidence was sufficient because "[t]he report and affidavit set forth facts concerning the need for temporary custody." 2012 S.D. 69 at ¶ 12. This satisfies § 1922's requirement to determine whether imminent physical damage or harm requires continued temporary custody.

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

The Due Process Clause of the Fourteenth Amendment provides that no state shall deprive any person of life, liberty or property without due process of law. U.S. Const. Amend. XIV. "This clause has two components: the procedural due process and the substantive due process components." *Singleton v. Cecil*, 176 F.3d 419, 424 (8th Cir. 1999).

"To establish a procedural due process violation, a plaintiff need not only show a protected interest, but must also show that he or she was deprived of that interest without sufficient process, i.e., without due process." *Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005) (citing *Clark* v. *Kansas City Mo. School District*, 375 F.3d 698, 701 (8th Cir. 2004)). The due process clause ensures that individuals subject to a deprivation have "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." *Swipies*, 419 F.3d at 715 (citing *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." *Id.* (citing *Whisman v. Rinehart*, 119 F.3d 1303, 1310-11 (8th Cir. 1997)). Thus the question becomes, what constitutes a "meaningful time" and "meaningful manner" in the context of emergency temporary custody hearings or, what procedural process is due?

The District Court concluded that a formal evidentiary hearing must take place at the 48-hour hearing and that parents must be allowed to present evidence, subpoena witnesses, cross-examine and confront witnesses, and have court-appointed counsel at the 48-hour hearing with the option of continuing the hearing for 24 hours to confer and prepare with counsel. In essence, the District Court ruled that all the protections afforded by ICWA and South Dakota law for adjudicatory hearings apply to a 48-hour hearing.

However, 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. It is not a "parental right termination" hearing requiring the "procedural due process requirements" recognized in *Syrovatka v. Erlich*, 608 F.2d 307, 310 (8th Cir. 1979) ("The procedural due process requirements for parental rights termination hearings" are "notice 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 commitment; and a statement of the legal standard upon which commitment is authorized.")

The District Court erred in determining that the same notice required for heightened parental right termination hearings applies to 48-hour hearings, at which no parental rights are terminated. (App. 134.)

Nor is the 48-hour hearing an adjudicatory hearing. The court is not adjudicating whether the child is abused or neglected at the 48-hour hearing. The court is only deciding whether temporary custody should continue:

> At the temporary custody hearing the court shall consider the evidence of the need for continued temporary custody of the child in keeping with the best interests of the child. The temporary custody hearing may be conducted telephonically when necessary as determined by the court.

SDCL § 26-7A-18. The full gamut of procedural due process protections ordered by the District Court are not applicable to the 48-hour hearing or emergency custody stage and instead are reserved for the adjudicatory phase.

CONCLUSION

The District Court lacked subject matter jurisdiction to hear the case. State's Attorney Vargo is not a final policymaker and cannot adopt Judge Davis's policy through acquiescence. The 8th Circuit should reverse and remand with instructions to dismiss.

JOINDER WITH CONSOLIDATED APPELLANTS

Pursuant to Fed. R. App. P. 28(j), Mark Vargo joins in the issues and arguments of the Appellants in the consolidated appeals.

Dated: March 24, 2017.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: */s/ Rebecca L. Mann*

J. Crisman Palmer
Rebecca L. Mann
Attorneys for Appellant Mark Vargo
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Telefax: (605) 342-0480
E-mail: cpalmer@gpna.com
rmann@gpna.com

CERTIFICATE OF COMPLIANCE

I certify Appellant's Brief complies with the type-volume limitation provided for in Fed. R. App. P. 32(a)(7)(C) and 32(f). Appellant's Brief contains 9,656 words. I have relied upon the word count of my word processing system that was used to prepare Appellant's Brief. The original Appellant's Brief and all copies are in compliance with this rule.

I certify that the electronic version of Appellant's Brief and addendum have been scanned for viruses and are virus-free. The electronic version of the 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 March 24, 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*
Rebecca L. Mann