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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	Case No. 5:13-cv-05020-JLV PLAINTIFFS' REPLY BRIEF RE: DEFENDANTS' VIOLATIONS OF DUE PROCESS

INTRODUCTION

Plaintiffs' Second Motion for Partial Summary Judgment (Docket 108) seeks summary judgment on five separate Due Process claims. The first paragraph in Defendants' response to those claims is highly revealing. Defendants ask the Court to scrutinize their actions using a flexible standard and avoid second-guessing their

decisions. Defendants remind the Court that there is wisdom in "leaving the States free to experiment with various remedies," *Santosky v. Kramer*, 455 U.S. 745, 771 (1982), and warn that it is "very easy to second guess decisions made in real time, with limited information available." *See* Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment Re: Due Process ("Defs.' DP Br.") (Docket 129) at 1.

In the first place, the five practices challenged here cannot survive even the most generous due process scrutiny. These practices are patently unconstitutional, including the practice of removing Indian children from their homes for sixty days without having given their parents an opportunity to present evidence or cross-examine witnesses. *See Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017, 1038 (D.S.D. 2014) (stating that a practice requiring parents "to wait 60 days or longer before being given the opportunity to present evidence and cross-examine witnesses" is unconstitutional).

Moreover, when Defendants warn against "second-guessing" their decisions and encroaching on their freedom to "experiment," they overlook the reasons that Congress passed the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* ("ICWA"). Until 1978, state officials had been left free to experiment with removing Indian children from their homes, and the consequences of that experiment were catastrophic and nationally embarrassing. As the Amicus Brief of the United States emphasized in this regard:

> In particular, Congress found "that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies," and that the states had "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."

Amicus Brief of the United States ("DOJ Br.") (Docket 122-1) at 2, quoting 25 U.S.C. § 1901(4), (5). Thus, any further experimentation that Defendants wish to engage in

regarding the removal of Indian children from their families must comport with the safeguards set forth in ICWA. Similarly, ICWA guides the determination of what process is due in this setting. *See* DOJ Br. at 14 ("As Congress found in enacting ICWA, the harm to Indian parents, children, and tribes from erroneous removal of Indian children is substantial *and calls for significant safeguards*.") (emphasis added).[1]

Attached to Plaintiffs' Complaint as "Exhibit 1" is the transcript of a 48-hour hearing. It took the judge who presided over that hearing (Hon. Wally Eklund) no more than sixty seconds to strip the Indian parents appearing before him of custody of their children until the next hearing sixty days hence. Consistent with Defendants' long-standing practices, no evidence was submitted against the parents during the hearing, they were not permitted to present evidence, and they were not permitted to cross-examine witnesses. On June 23, 2014, Defendant Hon. Judge Jeff Davis ("Judge Davis") followed an identical practice in Case No. A14-444, a 48-hour hearing nearly as short as Judge Eklund's.[2] No evidence was submitted against the mother during the hearing, and she was not permitted to present evidence or cross-examine witnesses. Yet, Judge Davis ruled against her based on evidence submitted by the state before the hearing that she was not permitted to see, much less contest.[3] That decision was patently unconstitutional for the reasons explained in Plaintiffs' opening brief and summarized below.

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[1] Nowhere in Defendants' brief is the Amicus Brief of the United States mentioned.

[2] All transcripts cited in this brief were filed with the Court in chronological order as Ex. 1 to the Decl. of Peter W. Beauchamp in Supp. of Pls.' Motions for Partial Summ. J. ("Beauchamp Decl.") (Docket 111).

[3] Defendants concede that Judge Davis bases all of his 48-hour decisions on documents filed by state employees *prior* to the hearing and that "no oral testimony is taken at the 48-hour hearing." *See* Defendants' Statement of Material Facts Re: 25 U.S.C. § 1922 (Docket 130) at 5. Ironically, Defendants warn that it is "very easy to second guess decisions made in real time, *with limited information available*." Defs.' DP Br. at 1 (emphasis added). Yet if Judge Davis would permit parents to provide testimony and cross-examine witnesses, he would have more information on which to base his decisions.

THE PARTIES AGREE ON CERTAIN DUE PROCESS STANDARDS

The parties are in agreement regarding many of the underlying due process standards that govern this case, but disagree as to their application. Both parties agree that "[t]he private interests of the parents in emergency custody proceedings are admittedly fundamental." Defs.' DP Br. at 17, citing *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Both parties also agree that the state has a legitimate interest in ensuring the health and welfare of every child within its jurisdiction, including the child's interest in remaining in the home absent adequate justification for removal. *See* Defs.' DP Br. at 17. Both parties further agree that this Court should employ the three-part balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in determining whether the practices challenged in this lawsuit deprive Plaintiffs of their rights under the Due Process Clause. *See* Defs.' DP Br. at 2. This three-part test focuses on the private interests affected by the proceeding; the risk of error created by the state's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. *See Mathews*, 424 U.S. at 335; *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C.*, 452 U.S. 18, 27 (1981). This Court cited all of these principles in its decision denying Defendants' motions to dismiss. *See Oglala Sioux Tribe* at 1036-38.

Plaintiffs also agree that they have "painted a draconian picture of Defendants' 48-hour hearings." *See* Defs.' DP Br. at 3. Indeed, the picture that Plaintiffs intend to paint is that Defendants' 48-hour hearings are a sham. Parents in these lightning proceedings receive inadequate notice; are prohibited from presenting evidence; are prohibited from cross-examining witnesses; are not offered appointed counsel to assist them with the hearing; and Judge Davis always renders a decision based on documents

submitted prior to the hearing by state employees. Thus, it is no wonder that the Department of Social Services ("DSS") enjoys a 100-percent victory rate in 48-hour hearings before Judge Davis.[4] If Judge Davis allowed only parents to file documents prior to the proceeding and not permit the state to present any evidence, and then base his decisions entirely on the parent's documents, parents might have a similar rate of success, but such a process would be equally as unlikely to gain a fair assessment of the situation.

There is one argument contained in Defendants' introductory comments, however, with which Plaintiffs strongly disagree. Defendants claim that the due process standards discussed above may be disregarded in 48-hour hearings. According to Defendants, because parents lack counsel at these proceedings, Defendants can refuse to provide them with due process safeguards, such as the right to present evidence. Indeed, Defendants would have us believe that they are doing parents a favor by forcing them to wait at least sixty days to receive these safeguards. *See* Defs.' DP Br. at 3 ("Judges cannot take testimony from unrepresented parents in 48-hour hearings without the parents waiving their right to remain silent, and right to consult with legal counsel, particularly when one or more of those parents may have criminal cases, some of which involve the incident that led law enforcements' removal of the child(ren) from the parents' custody, pending against them."). *See also id*. at 5 ("Indigent parents cannot protect both their right to counsel, and their right to remain silence [sic], in an evidentiary hearing that requires them to testify before they have had an opportunity to meet with an attorney.").

Plaintiffs' response to this argument is four-fold. First, this argument is inconsistent with Defendants' duties under ICWA. Each time Defendants remove an Indian

[4] Defendants have conceded that the state has enjoyed a 100 percent success rate in Judge Davis's 48-hour hearings since at least January 2010. *See* Defendants' Statement of Material Facts Re: 25 U.S.C. § 1922 (Docket 130) at 2.

child from the home, they "shall expeditiously initiate a child custody proceeding" in which they must show that the emergency that required the child's removal continues to exist and that returning the child to the home would risk "imminent physical damage or harm." 25 U.S.C. § 1922. *See Oglala Sioux Tribe* at 1035. Parents have an independent right to this hearing, independant from any right to counsel they may have. *See* DOJ Br. at 11 ("[S]tate courts have an independent obligation [under § 1922] to conduct an inquiry at the 48-hour hearing into whether the emergency removal remains necessary to prevent imminent harm to the child."). Therefore, Defendants cannot use their own failure to appoint counsel as an excuse to deny parents their rights under § 1922.

Second, in addition to § 1922, the Due Process Clause guarantees Plaintiffs the right to a prompt hearing, independent of any right to counsel they may have. Every court to consider the question, including this Court, has held that the Due Process Clause guarantees parents the right to a prompt evidentiary hearing following the state's removal of their children. *See Oglala Sioux Tribe* at 1038; *K.D. v. County of Crow Wing*, 434 F.3d 1051, 1056 n.6 (8th Cir. 2006) ("Once a child is removed from parental custody without a court order, the state bears the burden to initiate prompt judicial proceedings to provide a post deprivation hearing."); *Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998) ("[D]ue process guarantees prompt post-deprivation judicial review in child custody cases.") No case supports Defendants' claim that they can avoid providing procedural safeguards to parents who lack counsel.

Third, Defendants' argument rests on the false premise that parents in 48-hour hearings must choose between protecting their right to remain silent and their right to due process. Defendants can easily protect both sets of rights and need not skewer the Due

Process Clause. As explained in Plaintiffs' opening brief, Defendants are authorized by state and federal law to appoint counsel to represent indigent parents in the 48-hour hearing. Judge Davis need only ask if the parents would like to have counsel appointed to assist them with the 48-hour hearing, and then appoint counsel to any indigent parent who requests one.[5] Instead, Defendants have selected a practice guaranteed to save them money by refusing to appoint counsel, and then using the absence of counsel as justification for refusing to provide parents with procedural fairness.

Lastly, it is erroneous to claim, as Defendants do, that parents in Judge Davis's 48-hour hearings have a "right" to remain silent. Judge Davis gives them no choice *but* to remain silent. Judge Davis concedes in answer to a Request for Admission that "no oral testimony is taken at a 48-hour hearing." *See* Beauchamp Decl., Ex. 4. Even those parents in 48-hour hearings who are not facing criminal charges are forced to remain silent despite having no need to do so. This forfeiture of procedural safeguards in a hearing that may result in the loss of child custody violates the Due Process Clause.

Plaintiffs' opening brief explains that Defendants are violating the Due Process Clause in five respects in their 48-hour hearings. The opposition brief filed by Defendants contains further proof of those violations, as will now be demonstrated.

1. DEFENDANTS HAVE FAILED TO PROVIDE PARENTS WITH ADEQUATE NOTICE

Indian parents in 48-hour hearings face the loss of a constitutionally protected liberty interest: custody of their children. They therefore have a right under by the Due Process Clause to receive adequate notice. "One of the core purposes of the Due Process

[5] Defendants fail to give any reason in their brief why Judge Davis never makes this inquiry. As discussed below, Judge Davis *only* inquires whether parents want counsel appointed to assist them with later proceedings.

Clause is to provide individuals with notice of claims against them," including in custody determinations. *Oglala Sioux Tribe* at 1037. The Eighth Circuit has held that parents in this situation must receive notice that includes "a clear statement of the purpose of the proceedings and the possible consequences to the subject thereof; the alleged factual basis for the proposed [deprivation]; and a statement of the legal standard upon which [the deprivation] is authorized." *Syrovatka v. Erlich*, 608 F.2d 307, 310 (8th Cir. 1979) (citation omitted); *see also United States v. Lopez*, No. CR 11-50073-JLV, 2012 WL 6629595, at *3 (D.S.D. Dec. 19, 2012) (Viken, C.J.) (quoting this language from *Syrovatka*).

Defendants violate Plaintiffs' right to adequate notice in the following three respects, each one of which is a separate violation of the Due Process Clause.

1. Under South Dakota law, in order for a district court to convene a hearing following the removal of a child from the home, the State's Attorney must first file a petition for temporary custody ("PTC"). *See* S.D.C.L. § 26-7A-14. This Court has already concluded that the failure to provide parents in a 48-hour hearing with a copy of the PTC is a violation of the Due Process Clause because it keeps those parents "in the dark" regarding the legal claims against them and because "the risk of erroneous deprivation [is] high when Indian parents are not afforded the opportunity to know what the petition against them alleges." *Oglala Sioux Tribe* at 1037. In other words, Defendants' failure to provide the PTC to parents prior to the hearing denies them "a clear statement of the purpose of the proceedings and the possible consequences to the subject thereof." *See Syrovatka*, 608 F.2d at 310.

Defendants concede in their brief that although Defendant Vargo was duly filing PTCs with the district court, "Defendant Vargo [was] not providing PTCs to parents before May of 2014," *see* Defs.' DP Br. at 24, which is four months after this Court declared that parents have a right to receive the PTC. Consequently, the facts are not in dispute and Plaintiffs are entitled to judgment as a matter of law on their claim that Indian parents have been deprived of constitutionally adequate notice.[6]

Defendants obviously realize that the only way they can avoid a judgment against them on this claim is by convincing the Court to reverse its earlier ruling that parents in Defendants' 48-hour hearings have a constitutional right to receive the PTC prior to the hearing, and they now offer a different argument than the one they made in their motion to dismiss. Defendants now contend that Defendant Vargo's failure to provide Indian parents with the PTC did not violate the Due Process Clause because, they claim, all of the information contained in the PTC was provided to those parents through (a) information stated verbally by the judge during the hearing, and (b) the ICWA affidavit. *See* Defs.' DP Br. at 24-25. According to Defendants, "Plaintiffs cite to no evidence that would demonstrate that parents would gain any information, or even any information bearing on a due process analysis, if the PTCs were given to parents at the hearing." *Id.* at 25. *See also id*. at 26 (describing the failure to provide parents with the PTC prior to the 48-hour hearing as "harmless.").

Defendants claim, in other words, that the PTC is superfluous and redundant, and therefore the Court erred in determining that Indian parents must receive a copy of it. However, in making this argument, Defendants only confirm that the Court must issue

[6] As discussed below, Defendant Vargo's sudden decision to provide parents with a copy of the PTC does not render moot Plaintiffs' request for injunctive relief.

injunctive relief against Defendant Vargo. Even today, Defendant Vargo continues to assert that Indian parents have no right to receive the PTC, despite this Court's ruling on the subject.

In the event the Court agrees to reconsider its decision, the result should be the same. The fatal flaw in Defendants' new argument is that it overlooks the importance of the *timing* of the notice. Even if Judge Davis reiterated during the hearing all of the information contained in the PTC, parents should not have to wait until the hearing before learning what the hearing is going to be about. The same type of argument that Defendants make here was rejected a half-century ago by the Supreme Court in *In re Gault*, 387 U.S. 1 (1967), and *Armstrong v. Manzo*, 380 U.S. 545 (1965). In *Gault*, the mother of a child facing juvenile court proceedings was "orally informed" about the general nature of those proceedings but did not receive particularized written notice prior to the hearing. *Id.*, 387 U.S. at 31. The Supreme Court found this procedure deficient: "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded…. [S]uch written notice [must] *be given at the earliest practicable time*, and in any event sufficiently in advance of the hearing to permit preparation." *Id.*, 387 U.S. at 33 (emphasis added). In reaching that conclusion, the Court relied on *Armstrong,* in which the Court held that a father facing the loss of custody of his child had a constitutional right to receive written notice at the earliest practicable time and certainly prior to the hearing setting forth "the purpose and scope" of the upcoming proceedings. *Gault*, 387 U.S. at 80-81 (describing the holding in *Armstrong*). *See also Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997) (holding that notice must be provided

sufficiently in advance of a welfare recoupment hearing to "permit adequate preparation") (internal marks omitted). Thus, Judge Davis cannot satisfy the Due Process Clause by waiting until the hearing to inform parents about the proceedings against them.

According to Defendants, Judge Davis would have given parents a copy of the PTC during the hearing had they asked for one. *See* Defs.' DP Br. at 24. Even assuming that is true (and there is nothing in the record to suggest it is), it is irrelevant, because by that time, the constitutional injury had already occurred. Judge Davis cannot "sit back and wait" for parents to request during the hearing what they have a constitutional right to receive prior to the hearing. *See Whisman v. Rinehart*, 119 F.3d 1303, 1311 (8th Cir. 1997) (condemning a similar "sit back and wait" practice in child custody proceedings).

Nor can Defendants rely on the ICWA affidavit to satisfy their due process obligations even if the affidavit is given to parents prior to the hearing.[7] Critical information is contained in the PTC that is *not* contained in the ICWA affidavit. Whereas the ICWA affidavit provides parents with the factual basis of the proceeding, the PTC provides them with the legal basis. It is the PTC (and not the ICWA affidavit) that (a) notifies parent that DSS is seeking temporary custody of their children, (b) notifies the parents of the number of days that DSS is seeking custody, and (c) notifies the parents of the state statutes under which the proceeding is occurring.

[7] In answer to an interrogatory, DSS admitted that it was not until January 2014 that DSS began to provide parents with a copy of the ICWA affidavit. See Defs.' DP Br. at 25 n.4. Plaintiffs repeated that date to the Court in their opening brief. Defendants now state that "2014" was a typographical error and the actual date was 2013. *See id*. This assertion is inconsistent with the record. In several 48-hour hearings held in 2013, tribal attorney Dana Hanna informed the presiding judge that the parents had not received the ICWA affidavit, and his statement was not disputed by the DSS representative in the courtroom. *See, e.g.*, Beauchamp Decl. Ex. 1, Case Nos. 13-30 (at 12); 13-49 (at 10); 13-104 (at 9). But this is immaterial anyway. For reasons explained next, even if parents received the ICWA affidavit, they were still denied adequate notice because they did not receive the PTC.

The burden to provide parents with a copy of the PTC "is inconsequential." *Oglala Sioux Tribe* at 1037. Yet, Defendants persist in arguing that they need not provide the PTC to parents prior to 48-hour hearings (or, in fact, at any time, given that its absence would be "harmless"). In determining whether Defendants should provide the PTC to Indian parents, this Court should take into account the purpose of ICWA, which is to ensure that Indian parents receive more safeguards and not less, *see* DOJ Br. at 14, and the fact that many parents in these proceedings are undereducated, a factor that also favors more safeguards and not less. *See Bliek*, 102 F.3d at 1476 (holding that welfare recipients, many of whom are undereducated, deserve to receive sufficient information so that they can readily understand the nature of the proceedings against them). *See also* DOJ Br. at 17 (noting that Indian parents need to receive particularized notice prior to 48-hour hearings because they "are unlikely to be familiar with the state's process or understand the consequences of the hearing."). This Court should therefore confirm its prior ruling that Indian parents have a constitutional right to receive a copy of the PTC at the earliest practicable time prior to the hearing.

In another effort to avoid a judgment against them, Defendants contend that Defendant Vargo's decision (four months after this Court's ruling) to provide parents with a copy of the PTC renders Plaintiffs' claim against him "moot." *See* Defs.' DP Br. at 26. As explained in Plaintiffs' opening brief, Plaintiffs' request for injunctive relief against Defendant Vargo is not moot. *See, e.g.*, *Ctr. for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 697 (8th Cir. 2012) (noting the "heavy burden" a defendant must meet to avoid injunctive relief where the defendant, as here, abandoned a long-standing, unconstitutional activity only after suit was filed and remains free to return to his or her

old ways). Indeed, Defendant Vargo's new argument only underscores the need for injunctive relief because he is contending that if tomorrow he returns to his old ways, the result would be "harmless." *See* Defs.' DP Br. at 26. Plaintiffs have already suffered years of due process violations at his hands and those of his predecessors, and are entitled to the protection that only an injunction affords against further violations.

2. Second, Defendants commit another clear violation of the Due Process Clause by failing to notify parents–even *during* the hearing–that they have a right to contest the State's PTC. Notably, Defendants responded "Undisputed" to Paragraph 25 of Plaintiffs' Statement of Undisputed Facts containing the following statement:

> From January 2010 to the present, in not one of the more than 120 hearings that were transcribed did Judge Davis or any other Seventh Circuit judge ever advise any parent or custodian of an Indian child *that they had a right to contest* the State's Petition for Temporary Custody during the 48-hour hearing.

See Defs.' Statement of Material Facts in Resp. to Pls.' Mot. for Summ. J. Re: Due Process Violations ("Defs.' DP SMF") (Docket 131) ¶ 25 (emphasis added). Judge Davis's failure to notify parents that they have a right to contest the PTC is a flagrant violation of due process, as it denied them notice of a critical aspect of their rights in this hearing. *See Syrovatka*, 608 F.2d at 310.

3. Defendants' third constitutional error regarding notice is that at no time are Indian parents informed of the legal standard governing the 48-hour hearing. Parents in 48-hour hearings have a right to receive "a statement of the legal standard upon which [the deprivation] is authorized." *See Syrovatka*, 608 F.2d at 310. As the transcripts conclusively show, Defendants inform parents about the legal standards applicable to future proceedings, but never about the standard governing the 48-hour hearing.

Section 1922 of the Indian Child Welfare Act imposes a specific burden of proof in all emergency custody hearings: to wit, that continued custody of the child by the state is "necessary to prevent imminent physical damage or harm to the child." 25 U.S.C. § 1922. The 48-hour hearing is governed by that standard. *See Oglala Sioux Tribe* at 1035. Meeting that standard requires the state to conduct an evidentiary hearing to determine whether the emergency has ceased to exist. *Id*. *See also* DOJ Br. at 11 ("[S]tate courts have an independent obligation [under § 1922] to conduct an inquiry at the 48-hour hearing into whether the emergency removal remains necessary to prevent imminent harm to the child.").

The transcripts conclusively show that not once has Judge Davis (or any other judge on the Seventh Judicial Circuit) notified parents in a 48-hour hearing that the state has any burden of proof with respect to that hearing whatsoever, and certainly not the § 1922 standard. Defendants' brief includes a "recitation" that, according to Defendants, Judge Davis generally gives to Indian parents during 48-hour hearings. *See* Defs.' DP Br. at 7-8. Notably, there is nothing in this recitation that notifies parents of *any* of the rights listed above regarding the 48-hour hearing. This is a constitutional deficiency.[8]

In sum, in order to provide Indian parents with adequate notice, Defendants must inform them at the earliest practicable time that (a) the 48-hour hearing is an evidentiary hearing in which parents may contest the allegations against them, (b) they have a right to

[8] In ¶ 34 of Plaintiffs' Statement of Undisputed Facts Re: Defendants' Due Process Violations, Plaintiffs assert that Defendants fail to notify parents of the standard governing the state's burden of proof with respect to the 48-hour hearing. Defendants dispute that statement by asserting that parents are always told that the burden applicable to the 48-hour hearing is "the best interests of the child." *See* Defs.' DP SMF ¶ 34. Frankly, in the vast majority of hearings, parents are not told of any standard that governs the 48-hour hearing, but even assuming Defendants are correct, their statement concedes a violation of due process. Indian parents must be notified of the § 1922 standard, which is a much different (and higher) standard than "best interests." Of course, Judge Davis's decision to use the state standard and not the ICWA standard comports with his erroneous view that ICWA is inapplicable to his 48-hour hearings.

present evidence and cross-examine witnesses, and (c) they will be allowed to take their children home at the conclusion of the hearing unless the state proves that doing so would place those children at risk of imminent damage or harm.[9]

Defendants' failure to inform Indian parents of any (and all) of those rights in 48-hour hearings prevents those parents from receiving notice of "the purpose of the proceedings" and "a statement of the legal standard" governing those proceedings. *See Syrovatka*, 608 F.2d at 310. Plaintiffs are therefore entitled to summary judgment on their claim that Defendants are violating Plaintiffs' rights to adequate notice as mandated by the Due Process Clause.

2. DEFENDANTS HAVE FAILED TO PROVIDE PLAINTIFFS WITH AN ADEQUATE OPPORTUNITY TO PRESENT EVIDENCE

A fundamental purpose of the due process clause is to allow "the aggrieved party the opportunity to present his case and have its merits fully judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). A 48-hour hearing can result in the loss of child custody, and therefore each parent in such a hearing must be afforded an opportunity to present evidence. *See Mathews*, 424 U.S. at 335 (recognizing that denying an aggrieved party the opportunity to present evidence creates the "risk of an erroneous deprivation") (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)); *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974) ("Ordinarily, the right to present evidence is basic to a fair hearing."); *Doe v. Staples*, 706 F.2d 985, 990 (6th Cir. 1983) (holding that in a hearing to determine whether the state may remove a child from the home, "[t]he parents

[9] As discussed *infra*, Defendants must also notify these parents that they have a right to receive the assistance of counsel to help them in the 48-hour hearing.

[must] be given a full opportunity at the hearing to present witnesses and evidence on their behalf").

This Court held that due process would be violated if "Indian parents are required to wait 60 days or longer before being given the opportunity to present evidence and cross-examine witnesses in an effort to return their children to their care or the care of an Indian custodian." *Oglala Sioux Tribe* at 1038. The Court also noted that allowing parents to present evidence at the 48-hour hearing would not "impose[ ] an undue administrative or financial burden on defendants." *Id.*

The law is clear, and the facts are not in genuine dispute. In answer to a Request for Admission, Judge Davis stated under oath that "no oral testimony is taken at a 48-hour hearing." *See* Beauchamp Decl. Ex. 4. Defendants recently confirmed this fact. *See* Defs.' DP SMF ¶ 21 (admitting that "no oral testimony is taken at a 48-hour hearing"). *See also id.* ¶ 19 (stating that it is "[u]ndisputed that Judge Davis does not advise parents that they have a right to testify in the 48-hour hearing").

Oddly, Defendants' opposition brief includes this assertion: "At the 48-hour hearings, parents are not prevented by Judge Davis from offering evidence or testifying." *See* Defs.' DP Br. at 29. That unsworn statement contradicts Judge Davis's prior testimony, and is contradicted by the record: no one has ever testified at a 48-hour hearing or been informed by Judge Davis that they could testify. Surely Judge Davis cannot now be permitted to undermine Plaintiffs' motion for summary judgment by contradicting his own testimony and manufacturing a dispute.

Once more, Defendants ask this Court to reverse itself. This Court held in its earlier ruling that parents in 48-hour hearings must be given an opportunity to present

evidence. Defendants now challenge that holding. According to Defendants, because the parents in these proceedings typically lack counsel, Defendants need not–in fact, *must* not–offer them the opportunity to present evidence. The absence of counsel, Defendants argue, places Judge Davis in "a dilemma" in which he must "balance the parents' constitutional right to counsel, and right to remain silence [sic]," with their rights under the Due Process Clause. *See* Defs.' DP Br. at 29. Judge Davis, Defendants explain, has resolved this "dilemma" by refusing to permit parents to present evidence until they appear with counsel at a proceeding he schedules for sixty days hence.

As Plaintiffs explained *supra* at 5-7, no "dilemma" exists. Both 25 U.S.C. § 1922 and the Due Process Clause require Judge Davis to conduct an evidentiary hearing and, as part of that hearing, allow parents to present evidence. He can (and for reasons explained *infra*, he must) appoint counsel; but whether these parents have counsel or not, they do not forfeit their rights under the Due Process Clause and § 1922 to present evidence.

There is no "dilemma" under state law, either. The Guidelines issued by the South Dakota Unified Judicial Process expressly state that "[t]o ensure careful and informed judicial decisions, the Court should make it possible for witnesses to testify" during a 48-hour hearing, and the hearing can be continued "if additional information or witnesses are needed." *See* South Dakota Unified Judicial System "South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases" (2014) at 45, 36 ("Guidelines") (*available at http://ujs.sd.gov/uploads/pubs/SDGuidelinesAandNProceedings.pdf*). Thus, there is no justification for Judge Davis's practice of refusing to allow parents who are facing the

loss of custody of their children from presenting testimonial evidence at the 48-hour hearing.

Plaintiffs wish to highlight the exact language that Defendants use in this portion of their brief. Defendants' brief states that Judge Davis offers at 48-hour hearings "to appoint counsel for indigent parents immediately." Defs.' DP Br. at 28. That statement is misleading. Equally as misleading is the following statement in Defendants' brief: "As a matter of course, Judge Davis asks parents if they would like an attorney appointed, and if they indicate that they do, one is appointed." *Id*. at 27. Both of these statements beg clarification because Judge Davis has *never* offered to provide counsel to parents to help them with the 48-hour hearing, but only to help them with subsequent proceedings, the earliest of which was scheduled for sixty days later. Defendants concede this point in their Statement of Material Facts. *See* Defs.' DP SMF ¶ 32 (admitting that counsel is never appointed "until after the [48-hour] hearing's conclusion."). Notably, the recitation contained in Defendants' brief of what Judge Davis typically provides to parents in his 48-hour hearings includes no offer to appoint counsel to assist with that hearing. Thus, although Judge Davis may "immediately" offer to appoint counsel, his offer applies only to later proceedings and not to the 48-hour hearing.

As discussed in Plaintiffs' opening brief, in order to comply with the Due Process Clause, Judge Davis must offer to appoint counsel to assist parents with the 48-hour hearing. If the parents decline (or if they do not qualify for appointed counsel), Judge Davis must then permit them to present testimony and to cross-examine witnesses without the benefit of counsel. If the parents accept the offer and are eligible for appointed counsel, Judge Davis has the option of postponing the hearing for a few hours

or a few days and reconvene with counsel present. The only thing that Judge Davis may not do is what he does now: he fails to offer counsel to assist parents in the 48-hour hearing and then uses the lack of counsel as an excuse to deny fundamental fairness. Defendants' practice of denying Indian parents an opportunity to present evidence during the 48-hour hearing (counsel or no counsel) violates the Due Process Clause.

One additional point must be addressed in connection with this issue. As noted above, this Court held that parents who are facing the loss of custody of their children for sixty days or longer have a right to present evidence in Defendants' 48-hour hearings. At the time Plaintiffs filed this lawsuit, Judge Davis *always* granted custody to DSS for sixty days at the conclusion of his 48-hour hearings. It appears, however, that Judge Davis has changed his practice. In a 48-hour hearing held on June 30, 2014, Judge Davis ordered that the next hearing (the advisory hearing) would be held thirty days later rather than sixty. *See* Affidavit of Robert L. Morris in Support of Defendants' Response to Plaintiffs' Motions for Partial Summary Judgment ("Morris Aff.") (Docket 132), Ex. 27, Case No. 14-443 at 6. A thirty-day delay, however, is just as unconstitutional as sixty. *See Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005) (holding that "a parent should not have to wait seventeen days after his or her child has been removed for a hearing" that meets constitutional standards). *See also Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994) (holding that state officials who impound an automobile must provide the owner with a meaningful hearing within seven days). Therefore, even if Judge Davis has suddenly modified his long-standing practice, his new practice is also unconstitutional.

Defendants' brief discusses an agreement between Dana Hanna and various state officials in August 2013. *See* Defs' DP Br. at 10-11, 30-31. Defendants accurately

describe the agreement in one part of their discussion and inaccurately describe it in another. Defendants first suggest (erroneously) that fifteen days after the 48-hour hearing, a second hearing is held in which due process safeguards are afforded, *see id*. at 10-11, but correctly state later that this fifteen-day hearing only reviews the "temporary custody status" of the child, that is, the child's *placement*. As Judge Davis's June 30, 2014 transcript establishes, Judge Davis continues to wait thirty days after the 48-hour hearing to provide parents with their hearing on the petition (the advisory hearing), but even at that hearing, parents are not permitted to present evidence and cross-examine witnesses, something that is not permitted until the adjudicatory hearing thirty days after that.[10] Attached to the affidavit submitted by Robert Morris is the transcript of a 48-hour hearing conducted on July 31, 2014 by Judge Robert Mandel. During that hearing, Deputy State's Attorney Roxanne Erickson requested that in fifteen days "we *review the placement and the status of the child* at that time." *See* Morris Aff., Ex. 27 (Case No. A-14-527) (emphasis added). Also attached to the Morris Affidavit is the affidavit of Defendant Van Hunnik, in which she confirms that the fifteen-day hearing allows the parties to be "made aware of what efforts were being made to return the children home and the status of the ICWA placement preferences." *See* Morris Aff. Ex. 1, Affidavit of LuAnn Van Hunnik ¶ 83. As these document prove, the 15-day hearing does not afford the opportunity to contest the petition but, rather, to provide information on the child's placement.

[10] As discussed in Plaintiffs' complaint, parents are not permitted *even at the advisory hearing* to present evidence or cross-examine witnesses and must wait until the adjudicatory hearing thirty days later to do those things. But this Court need not concern itself with that question for purposes of deciding the issues presented here. What is critical here (and what no one disputes) is that parents are not permitted to exercise these procedural safeguards at the 48-hour hearing, even though child custody hangs in the balance, and the earliest opportunity to do so it at least thirty days away.

Thus, Judge Davis may have shortened the length of time between the 48-hour hearing and the advisory hearing, but parents are today still unable to present evidence until the adjudicatory hearing sixty days after their children have been removed from the home. That opportunity is *not provided at the fifteen-day hearing*. Any suggestion to the contrary in Defendants' brief is contradicted by the evidence.

As discussed later in this brief, the Court should issue an effective remedy that requires Defendants to forever abandon the long-standing practices challenged in Plaintiffs' summary judgment motions, including their practice of not notifying parents that they have a right to contest the PTC at the 48-hour hearing, and not allowing them to present evidence at the 48-hour hearing. Defendants should be required to submit a remedial plan. Plaintiffs will then comment on the plan if permitted to do so by the Court. Defendants can at that time seek to defend any changes they have made, or any they propose to make, from their previous practices. *See Lewis v. Casey*, 518 U.S. 343, 362-63 (1996) (employing this type of process to remedy constitutional violations in prison litigation).

3. DEFENDANTS HAVE FAILED TO PROVIDE PARENTSS WITH AN ADEQUATE OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE ADVERSE WITNESSES

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269; *see also Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). "It is fundamental to a full and fair review required by the due process clause that a litigant have an opportunity to be confronted with all adverse evidence and to have the right to cross-examine available witnesses." *Nevels v. Hanlon*, 656 F.2d 372, 376 (8th Cir. 1981)

(citing *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)). *See also* DOJ Br. at 14 ("The risk of erroneous deprivation can be alleviated if parents are provided with the allegations against them and given a meaningful opportunity to present evidence and cross-examine witnesses about whether the emergency removal was, and continues to be, justified."). *See also id*. at 20 ("If parents are not allowed to challenge the evidence or cross-examine witnesses, the court cannot know whether the child can be safely returned – or whether the child was properly removed in the first place. Such a one-sided proceeding would not comport with the requirements of the Due Process Clause . . . .").

This Court has already concluded that it would violate due process if "Indian parents are required to wait 60 days or longer before being given the opportunity to . . . cross-examine witnesses," and that providing parents with this procedural safeguard would not "impose[] an undue administrative or financial burden on defendants." *Oglala Sioux Tribe* at 1038. Yet Defendants do not permit Indian parents to cross-examine witnesses in a 48-hour hearing. As the transcripts show, in not one 48-hour hearing conducted by Judge Davis since January 1, 2010 were parents afforded an opportunity to confront and cross-examine the person who signed the ICWA affidavit (or anyone else). Indeed, as noted earlier, parents are not even informed that they can contest the allegations against them in any fashion. *See also* Defs' DP SMF ¶ 28 ("It is undisputed that Judge Davis [does] not specifically ask parents if they wanted the opportunity to cross-examine the affiant of the ICWA affidavit.") Accordingly, Plaintiffs are entitled to judgment as a matter of law that Defendants' long-standing practice of failing to provide parents with an opportunity to cross-examine witnesses violates procedural due process.

4. DEFENDANTS HAVE FAILED TO PROVIDE PLAINTIFFS WITH MEANINGFUL ACCESS TO COUNSEL

Defendants' brief contains positive proof that counsel must be appointed to parents in 48-hour hearings. Indeed, Defendants are so convinced that parents are unable to protect their interests in 48-hour hearings without counsel that Defendants refuse to allow them to give testimony or cross-examine witnesses unless counsel is present. Defendants quote *Powell v. Alabama*, 287 U.S 45, 68-69 (1932): "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *See* Defs.' DP Br. at 5. Plaintiffs could not agree more with Defendants that counsel is indispensable in the 48-hour hearing.

Given that (a) Indian parents facing the loss of child custody have a right under both § 1922 and the Due Process Clause to a prompt evidentiary hearing that includes the opportunity to present testimony and cross-examine witnesses, and (b) these parents, as Defendants *concede*, cannot adequately exercise those rights without counsel, Defendants are constitutionally obligated to offer to appoint counsel to indigent parents to help in their defense at a 48-hour hearing. The Supreme Court held in *Lassiter* that parents did not have a *per se* right to appointed counsel in child custody proceedings but that counsel should be appointed where a case is complex and involves expert testimony "which few parents are equipped to understand and fewer still to confute," 452 U.S. at 30, which is indeed the situation in 48-hour hearings involving Indian families (as Defendants recognize).

Therefore, for the reasons explained in Plaintiffs' opening brief and in Defendants' response to it, Defendants must offer to appoint counsel to indigent parents in 48-hour hearings to assist them prepare for and participate in that hearing. Indeed,

SDCL 26-7A-31 provides that the court "shall" appoint counsel "in proceedings under this chapter" if the parent requests it, and 48-hour hearings are proceedings under Chapter 26. A similar right to counsel is guaranteed by ICWA as well. *See* 25 U.S.C. § 1912(b) ("In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding."). 25 U.S.C. § 1912(b). Accordingly, Plaintiffs are entitled to prevail on this claim as a matter of law.

5. JUDGE DAVIS HAS FAILED TO BASE HIS RULINGS ON EVIDENCE ADDUCED IN THE 48-HOUR HEARING

Judge Davis must render a decision at the conclusion of each 48-hour hearing based on evidence adduced in that hearing. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 793 n.22 (2005); *Goldberg*, 397 U.S. at 271 (citing *Ohio Bell Tel. Co. v. PUC,* 301 U.S. 292 (1937); *United States v. Abilene & S.R. Co.*, 265 U.S. 274, 288-89 (1924)). Judge Davis does not quarrel with that principle.

Judge Davis claims, however, that he is meeting this duty. According to Defendants' brief, "Judge Davis is using *the evidence available to him* to make his findings," and this satisfies due process. *See* Defs.' DP Br. at 33-34 (emphasis added). But, in truth, a great deal of evidence is "available" to Judge Davis that he deliberately excludes, such as testimony from the parents. The only evidence that Judge Davis considers are documents submitted by the state prior to the hearing that Indian parents are prevented from challenging. If this is all that due process requires, Judge Davis could prohibit both sides from submitting evidence, flip a coin, and claim (as he does now) that he complied with due process by using "the evidence available to him to make his findings."

"[A] hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it . . . . [T]o make an essential finding without supporting evidence is arbitrary action." *Chicago Junction Case*, 264 U.S. 258, 265 (1924). "It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . (And n)o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'" *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 170—172 (1951) *(*Frankfurter, J., concurring)). In order for a hearing to be meaningful, an aggrieved party must have "the right to introduce evidence and have judicial findings based upon it." *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 369 (1936) (citations omitted). *See also Ungar v. Seaman*, 4 F.2d 80, 82-83 (8th Cir. 1924) (noting that "[I]indispensable requisites of a fair hearing" include the right to present evidence and cross-examine witnesses, and "that the decision shall be governed by and based upon the evidence at the hearing."). Yet, parents in Judge Davis's 48-hour hearings have no opportunity to submit evidence. Therefore, Judge Davis's practice of basing his decisions exclusively on documents submitted by the state constitutes arbitrary action. *See also* DOJ Br. at 21 ("Given the important liberty interests at stake, state officials must provide adequate procedural protections to parents, . . . including notice of the claims against them, an opportunity to present evidence and cross-examine witnesses, and a decision that is based on the evidence presented.").

Defendants cite *Cheyenne River Sioux Tribe v. Davis*, 822 N.W.2d 62 (S.D. 2012), for the proposition that under state law, Judge Davis can continue his practice of

basing decisions in 48-hour hearings entirely on documents submitted pre-hearing by the state. *See* Defs' Br. at 33. Perhaps that practice comports with state law, but it violates the Due Process Clause for reasons just explained. Obviously, allowing evidence to be submitted by only one party unnecessarily and significantly increases the risk of an erroneous deprivation, and therefore Judge Davis's practice is unconstitutional.

Judge Davis violates the Due Process Clause for another reason as well. As detailed in Plaintiffs' opening brief, Judge Davis routinely makes factual findings in 48-hour hearings on matters wholly unaddressed even by the state, such as a finding that returning a child to the home would risk injury in cases where the ICWA affidavit provides no evidence to support any such conclusion. Notably, Defendants do not challenge a single one of the examples contained in Plaintiffs' opening brief.

A separate constitutional defect is the fact that Judge Davis does not identify the evidence in the record on which he is relying for his decisions. (Of course, one reason he might not be making this effort is that, in many instances, there is no such evidence.) It is settled that a judge must "state the reasons for his determination and indicate the evidence he relied on." *Goldberg*, 397 U.S. at 271. *See also Clark v. Alexander*, 85 F.3d 146, 150 (4th Cir. 1996); *Doe v. Staples*, 706 F.2d at 990-91 (holding that when children are removed from the home, "due process requires that the hearing officer conducting the removal hearing state in writing the decision reached and the reasons upon which the decision is based.").

In the future, then, Plaintiffs must be allowed to present evidence and Judge Davis must issue findings based upon and citing to evidence in the record. His current practice of accepting evidence only from the state and then routinely checking boxes on a form

that contain generic findings contravenes the Due Process Clause. Accordingly, Plaintiffs are entitled to summary judgment on this claim.

EACH NAMED DEFENDANT IS A "POLICY MAKER"

In May of this year, Defendant Mark Vargo changed a long-standing practice of the State's Attorney's office: he opted to permit parents in 48-hour hearings to obtain a copy of the PTC prior to the hearing. He possesses the authority under state law to make that decision in his official capacity, and he exercised that authority. He even chose not to make that change after this Court's decision in January, but waited until May.

Tomorrow, Judge Davis can begin permitting parents in 48-hour hearings to present evidence and cross-examine witnesses, and he can appoint counsel to assist them in doing so. Indeed, the Guidelines issued by the South Dakota Unified Judicial Process, as noted earlier, recognize that each judge has the discretion to allow for witnesses to testify in 48-hour hearings to continue the hearing for that purpose. Similarly, Judge Davis has it within his discretion to issue detailed and case-specific findings rather than routinely checking generic boxes at the conclusion of his 48-hour hearings. He can also begin holding advisory and adjudicatory hearings much sooner than he now does. All of those activities are within his control; he sets the policy for them in his courtroom.

Mark Vargo and Judge Davis are "policy makers" for purposes of liability under 42 U.S.C. § 1983 for the choices they have made that are challenged herein. *See Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). Each of these officials "is one who 'speak[s] with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue,'

that is one with 'the power to make official policy on a particular issue.'" *Oglala Sioux Tribe* at 1029 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)).

Defendants contend that these men lack "final" authority to make "official" policy. Defs' DP Br. at 19. That claim lacks merit. "An 'official policy' involves a deliberate choice to follow a course of action made from among various alternatives by an official who has the final authority to establish governmental policy." *Oglala Sioux Tribe* at 1029 (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)). As just noted, Defendants Davis and Vargo have created *all* of the practices for which they are being sued in this litigation, and recently changed a few of them.

Indeed, Defendants' brief contains an important admission in this regard. Defendants concede that Judge Davis was faced with a "dilemma" and that he resolved it by *selecting* the practices challenged in this lawsuit. That is not adjudicating; that is rule making, and judges can be sued like anyone else for rules they make that violate federal law. *See Pulliam v. Allen*, 466 U.S. 522 (1984).

For many years now, Judge Davis has steadfastly refused to permit parents in his 48-hour hearings to present evidence or cross-examine witness. Plaintiffs are entitled to sue him for those practices. "[A] longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity" and which violates a plaintiff's federal rights is actionable under § 1983. *Jett*, 491 U.S. at 737 (quoting *Pembaur*, 475 U.S. at 485 (1986) (White, J., concurring)). *See also Ware v. Jackson Cnty., Mo.*, 150 F.3d 873, 885 (8th Cir. 1998) (holding that official policy for purposes of § 1983 liability may arise "from actions that are so pervasive that they become 'custom or usage' with the force of law.").

Initially, Judge Davis told this Court that he was "compelled by oath" to follow each of the practices challenged in this lawsuit and, therefore, that Plaintiffs were suing the wrong person. *See Oglala Sioux Tribe* at 1029. However, the Court found that none of the practices challenged by Plaintiffs is compelled by state law. *Id*. Judge Davis has since abandoned that defense and, in its place, made two other arguments, one in his brief in opposition to Plaintiffs' § 1922 motion for summary judgment, and the other one here. In his § 1922 opposition brief, Judge Davis contended that although he is "an initial decision maker," he is not a "final policymaker" for purposes of liability under § 1983 because his decisions are subject to appellate review.[11] Here, instead, he contends that he is being sued "for adjudicatory acts," that is, for "interpreting the laws applicable to the cases before [him]." Defs' DP Br. at 22. Judge Davis argues that this is impermissible. *See id*. ("Federal District Courts lack jurisdiction over such claims, because there is no 'case or controversy' against the state court judge acting in their adjudicatory capacity.") This argument is devoid of merit.

Judge Davis's argument is undermined by the very cases cited in Defendants' opposition brief. Those cases confirm that there is a fundamental difference between adjudicating the merits of a case and creating a policy or practice employed in handling or administering cases. The former is adjudication, whereas the latter is rule making. When judges adjudicate an individual case, they enjoy judicial immunity from suit. But they have no immunity for the policies and practices they enact in handling or administering cases.

Defendants rely on the following three cases, each one of which fully supports Plaintiffs' position here: *Pulliam v. Allen*, 466 U.S. 522 (1984), *R.W.T. v. Dalton*, 712

[11] Judge Davis's § 1922 defense is addressed in Plaintiffs' § 1922 Reply Brief, filed today.

F.2d 1225 (8th Cir. 1983), *abrogated on other grounds in Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), and *In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982). The issue in *Pulliam* was whether a state magistrate's "*practice* to require bond for nonincarcerable offenses" was unconstitutional. *Id.*, 466 U.S. at 526 (emphasis added). The Court expressly held that state judges whose practices violate federal law may be sued as any other policy maker, noting that "every Member of Congress who spoke to the issue assumed that judges would be liable under § 1983." *Id*. at 540 (citation omitted). *See also Tesmer v. Granholm*, 114 F. Supp. 2d 603, 606 (E.D. Mich. 2000) (recognizing that state judges can be sued for engaging in the *practice* of "routinely deny[ing] the requests of indigent Defendants for the appointment of appellate counsel.").

Dalton and *In re Justices* were decided prior to *Pulliam*, and both are cited with approval in *Pulliam*, 466 U.S. at 528 n.6. In *Dalton*, the court held that state judges are not proper defendants in a suit that seeks to have a statute declared unconstitutional, because in that situation, judges are deciding cases on the merits and are *not* establishing practices for handling cases. As the Court noted in *Pulliam*, 466 U.S. at 528 n.6, the Eighth Circuit in *Dalton* expressly left open the question that *Pulliam* answered: whether state judges enjoy immunity when they create rules or practices. Similarly, *In re Justices* held that state judges enjoy judicial immunity only when they adjudicate the merits of cases, and do not enjoy immunity where (as here) they create rules or practices. *See In re Justices*, 695 F.2d at 22-23.[12]

[12] Defendants also cite *Bauer v. Texas*, 341 F.3d 352 (5th Cir. 2003), but their reliance on *Bauer* is misplaced. In *Bauer*, the plaintiff sued a judge in an effort to have a state statute declared unconstitutional. The plaintiff, in other words, was not challenging the judge's own policy or practice, as is the case here.

In short, if Judge Davis *interpreted a state statute* as forbidding parents in 48-hour hearings to present evidence and cross-examine witnesses, he would be immune from suit. But Judge Davis made those decisions on his own, in an effort to resolve a "dilemma." Judge Davis created these practices for his courtroom, and he is free to change all of them tomorrow, as the Guidelines indicate. That is not adjudication; that is rule making. Because these practices violate the Due Process Clause, he is liable under § 1983 as a policy maker. *See Oglala Sioux Tribe* at 1029; *Pulliam*, 466 U.S. at 526.

Similarly, as discussed in Plaintiffs' opening brief, Defendants Vargo, Van Hunnik, and Valenti are policy makers, and have acquiesced in Judge Davis's decision to deny parents fundamental fairness in 48-hour hearings. *See Coleman*, 40 F.3d at 261-62 (holding that where executive officials acquiesce in a practice initiated by a court, the practice becomes an official policy, practice, and custom of the executive branch for purposes of federal liability). Not one 48-hour hearing transcript indicates any effort by these Defendants or their subordinates to introduce testimony related to the state's burden of proof.

In their brief, Defendants state that parents in 48-hour hearings have "never asked . . . to present evidence." Defs.' DP Br. at 8. Defendants neglect to mention, however, that Judge Davis has a firm practice of not informing parents that they have a right to contest the accusations against them. It is therefore not surprising that few parents request an opportunity to defend themselves. Defendant Vargo, on the other hand, surely is aware that the 48-hour hearing is supposed to be an evidentiary hearing. Yet, *he* never seeks to present evidence during the hearing. This is acquiescence. At each 48-hour hearing, Defendant Vargo (or his designee) should call to the stand the child-care worker

who signed the ICWA affidavit and ask at least the following two questions: "Do you have any reason to believe that the emergency that existed at the time the child was removed continues to exist now? If so, on what evidence do you base that opinion?" Although Defendant Vargo has the authority to call witnesses to the stand in 48-hour hearings, he has made a deliberate choice not to do so.

Likewise, as discussed above, the ICWA affidavit should, but often does not, contain information as to whether the child would be placed at risk of imminent damage or harm if returned home. By not including that information in the affidavit, parents are deprived of the notice they need to help them prepare for the hearing. *See In re Gault*, 387 U.S. at 33-34; *Armstrong*, 380 U.S. at 550.

Thus, Defendants Vargo, Van Hunnik, and Valenti have "by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure'" of Judge Davis exposed themselves to liability along with him. *See Jett*, 491 U.S. at 737 (quoting *Pembaur,* 475 U.S. at 485 (White, J, concurring)). *See also Oglala Sioux Tribe* at 1031-32. Their policies, practices, and customs challenged herein render them liable under 42 U.S.C. § 1983 for the on-going violations of Plaintiffs' constitutional rights.

PLAINTIFFS ARE ENTITLED TO AN EFFECTIVE REMEDY

For reasons just explained, Defendants are violating Plaintiffs' rights under the Due Process Clause. Therefore, Plaintiffs are entitled to an effective remedy pursuant to 42 U.S.C. § 1983. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 n.10 (1989); *Brandon v. Holt*, 460 U.S. 464, 471-72 (1985); *Ex parte Young*, 209 U.S. 123 (1908); *Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 897 (8th Cir. 2000) ("Under

Young, a party may sue a state officer for prospective relief in order to stop an ongoing violation of a federal right."); *Fond du Lac Band of Chippewa Indians v. Carlson*, 68 F.3d 253, 255 (8th Cir. 1995) (upholding the right of an Indian tribe to seek prospective relief against state officials under § 1983 for violating the tribe's federal rights); *Miener v. State of Missouri*, 673 F.2d 969, 977 (8th Cir. 1982). Because Defendant Davis is a state judge, Plaintiffs are only entitled to declaratory relief as to him. *See* 42 U.S.C. § 1983; *Pucci v. Nineteenth Dist. Ct.*, 628 F.3d 752, 765 (9th Cir. 2010); *LeClerc v. Webb*, 270 F. Supp. 2d 779, 793 (E.D. La. 2003); *Tesmer*, 114 F. Supp. 2d at 619-20 (issuing declaratory relief against a state judge who was violating federal law).

Defendants make two arguments in an effort to avoid having this Court impose a remedy against them. First, Defendants seek to shift blame to the Oglala and Rosebud Sioux Tribes. Defendants suggest that if the Tribes acted more quickly to transfer custody cases to tribal court, Defendants would not be having these difficulties. According to Defendants, the Tribes have too often "failed to exercise [their] right" to transfer these cases, and this "stifles the State's ability to meet its duties under § 1922." *See* Defs.' DP Br. at 32.

Defendants have no one to blame but themselves. Defendants have a duty to comply with the Due Process Clause, and no amount of finger-pointing will change that fact. It should be remembered that these custody hearings are held within 48 hours after the child is taken into custody, that state officials often do not notify the child's tribe until just hours before the hearing, that the tribe must confirm that the child is enrolled or enrollable, and that the tribe must then decide whether to request a transfer. Sometimes all of those things cannot be accomplished in a few hours. In any event, the issue is not

whether Indian tribes should be expected to meet this deadline. Rather, the issue is whether state officials must comply with federal law when they take an Indian child into custody. Defendants' efforts to blame the Tribes for Defendants' defective practices only highlight the need for injunctive relief.

Next, Defendants contend that "Plaintiffs have, however, submitted no facts that establish that the matters they complain about are either violations (see discussion above) or on-going." Defs' DP Br. at 34. To the contrary, Plaintiffs have proven that, to this day, Defendants (1) fail to provide parents with adequate notice, including notice that they have a right to contest the allegations against them and that their children will be returned unless the state meets its burden of proof under 25 U.S.C. § 1922; (2) fail to permit parents to present testimony; (3) fail to permit parents to cross-examine witnesses; (4) fail to appoint counsel to assist parents in the 48-hour hearing; and (5) fail to base their custody decisions on evidence that both parties will be allowed to submit during the hearing. As shown above, all of these practices are on-going and all of them violate the Due Process Clause. Plaintiffs' claims are neither speculative nor moot.

CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request judgment in their favor on all five due process claims.

Respectfully submitted this 30th day of September, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2014, I electronically filed the foregoing Reply Brief with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel for Defendants:

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