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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' RESPONSE TO DFENDANT DAVIS' MOTION TO DISMISS

INTRODUCTION

Defendant Davis begins his brief by claiming that "Judge Davis has no 'policies, practices, and customs' of his own" that he employs in his temporary custody ("48-hour") hearings; instead, Judge Davis "merely follows the procedures set by South Dakota state statute." *See* Memorandum of Law In Support of Defendant Judge Davis's Motion to Dismiss (hereinafter "Davis Brief") at 2. *See also id*. at 3 ("Consequently, the 'policies, practices, customs' are not Judge Davis's as a policymaker, they are those [prescribed] by the South Dakota Codified Laws.")

Davis' contention is erroneous. Listed below are six policies, practices, and customs that Davis employs in his 48-hour hearings that are *not* prescribed by state law--Davis could change them tomorrow, completely on his own--and all of them violate either the Fourteenth Amendment or the Indian Child Welfare Act ("ICWA"). Each is sufficient to defeat Davis' motion to dismiss.

Davis cites the correct definition of "policymaker" for purposes of constitutional liability. In *Ware v. Jackson County, Missouri*, 150 F.3d 873 (8th Cir. 1998), the court explained: "Official policy involves 'a deliberate choice to follow a course of action made from among various alternatives' by an official who is determined by state law to have the final authority to establish governmental policy." *See* Davis Brief at 12, quoting *Ware*, 150 F.3d at 880. This definition, however, scuttles Davis' argument. As discussed more fully below, Davis has made the following six deliberate choices in his capacity as a governmental policymaker:

1. Davis has made a deliberate choice to withhold from parents in 48-hour hearings a copy of the petition for temporary custody. Nothing in state law requires

Davis to implement this policy, practice, and custom. By choosing that option, Davis violated the Due Process Clause.[1]

2. Davis has made a deliberate choice to withhold from parents in 48-hour hearings a copy of the ICWA affidavit. Nothing in state law requires this. By choosing that option, Davis violated the Due Process Clause.

3. If a child remains in state custody after the 48-hour hearing, "the court shall review the child's temporary custody placement at least once every sixty days." SDCL § 26-7A-19(2). Thus, Davis can convene a second and more meaningful hearing in, say, ten days. Yet Davis has established the practice of waiting sixty days regardless of the need for such a prolonged delay, in violation of the Due Process Clause.

4. Section 1922 of ICWA requires that at each 48-hour hearing, the state court "shall insure that the emergency removal or placement [of an Indian child] *terminates immediately* when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child." (emphasis added.) Yet Davis *never* orders the Department of Social Services (DSS) to immediately terminate custody when the child can safely be returned home, even though he can. This policy, practice, and custom violates ICWA.

5. Section 1912(d) of ICWA requires that before an Indian child may be placed in foster care, the state must prove "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proved unsuccessful." Davis has made the deliberate

[1] In his brief, Judge Davis claims that he "is compelled by oath to follow the procedures" challenged in this lawsuit. *See* Davis Brief at 12. Perhaps Davis will identify in his reply brief, for instance, the state statute he would violate if he opted to give Indian parents a copy of the emergency custody petition or changed any of the other six procedures listed here.

choice as a matter of policy, practice, and custom to place Indian children in foster care for a minimum of 60 days without receiving evidence on that subject, in violation of ICWA. (Indeed, Davis even makes a written "active efforts" finding at the conclusion of each hearing without having received any evidence on that subject.)

6. Section 1912(e) of ICWA prohibits state courts from placing an Indian child in foster care "in the absence of . . . testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Davis would violate no statute or oath if he allowed such evidence to be introduced at 48-hour hearings. Instead, Davis has made the deliberate choice as a matter of policy, practice, and custom to place Indian children in foster care for a minimum of 60 days without receiving any testimony from qualified expert witnesses, in violation of ICWA.

It has been settled law for decades that a state court judge who engages in a policy, practice, or custom that violates federal law can be sued in federal court for appropriate relief. *See Pulliam v. Allen*, 466 U.S. 522, 539 (1984) (authorizing the issuance of a federal injunction against a state magistrate when "in the opinion of a federal judge, that relief is constitutionally required and necessary to prevent irreparable harm."). Therefore, if Davis is violating federal law in the manner alleged in Plaintiffs' complaint, the Plaintiffs will be entitled to an appropriate remedy to prevent future violations.[2]

This Court may ultimately decide, of course, that none of the above six policies, practices, and customs violate federal law. But that is not the question at present. The

[2] As noted in Plaintiffs' complaint, Congress amended 42 U.S.C. § 1983 following the Supreme Court's decision in *Pulliam*. Today, a federal court must first issue a declaratory judgment against a state court judge who is violating federal law, and only if further violations occur may the court issue an injunction.

question at present is whether Davis "merely follows the procedures set by South Dakota state statute," as he claims, or whether he is making deliberate choices between alternative courses of action, as the Plaintiffs claim. The answer is clear.

Davis also claims in his Introduction that Plaintiffs' lawsuit "is essentially a veiled appeal of" *Cheyenne River Sioux Tribe v. Davis*, 822 N.W.2d 62 (S.D. 2012). However, none of the Plaintiffs in the instant case was a party in *Davis* and thus none of them had standing to appeal. This case is not a "veiled appeal" of anything.

Defendant Davis' motion to dismiss is unsupported by any affidavit or other evidence. Accordingly, the Court's ruling on his motion must be based on the pleadings. All facts in Plaintiffs' complaint must be presumed to be true and the Plaintiffs are entitled to all reasonable inferences from those allegations. *See Butler v. Bank of America, N.A.*, 690 F.3d 959, 961 (8th Cir. 2012); *Palmer v. Ill. Farmers Ins. Co.*, 666 F.3d 1081, 1083 (8th Cir. 2012); *U.S. v. Black Hills Tree Farm*, Civ. No. 09-5049, 2011 WL 1044376, at *3 (D.S.D March 17, 2011).

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Court held that complaints in federal court must set forth specific facts along with non-speculative injuries, and it must contain more than threadbare recitals and conclusory allegations. Here, Plaintiffs' detailed, 38-page complaint easily satisfies those requirements. Plaintiffs will now discuss Defendant Davis' arguments in the order in which they appear in his brief.

I. PLAINTIFFS STATE A CLAIM FOR RELIEF UNDER 25 U.S.C. § 1922

Davis contends that Plaintiffs' claim for relief under 25 U.S.C. § 1922 should be dismissed for failure to state a claim upon which relief can be granted. That argument lacks merit.

(a) Section 1922 imposes both procedural and substantive obligations

Section 1922 is one of the most important rights-creating provisions in ICWA. It answers a question not addressed anywhere else: What can state officials do when an Indian child must be removed from the home in an emergency, and what rights do Indian parents and Indian children have in that situation? The answer is set forth in § 1922's two sentences. The first sentence authorizes state officials to employ state procedures to obtain emergency custody of the child. The second sentence requires these officials, once custody has been obtained, to do two things for the protection of Indian parents and Indian children: insure that the emergency removal *"terminates immediately"* when the child can be returned home safely, and "*expeditiously initiate* a child custody proceeding." (Emphasis added.) Section 1922 states in whole as follows:

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

One reason why Davis continually violates Plaintiffs' rights under ICWA is that he acts as if § 1922 only contains the first sentence. According to Davis, § 1922 is a "statute of deferment." *See* Davis Brief at 7, 8. In other words, as Davis sees it, Congress created a host of rights in ICWA but decided to defer all of them until 60 days after Indian children are taken into custody, when Davis holds his second hearing.

It is inconceivable that Congress could have intended the interpretation that Davis suggests. Both the plain language of § 1922 and the legislative history of ICWA make it obvious that Davis' interpretation is erroneous.

Section 1922 is not a statute of deferment. Rather, Congress chose to authorize state officials *as part of the federal ICWA process* to employ state procedures when an emergency removal is necessary. Congress often incorporates state law or state procedure into a federal process.[3]

Further, Davis is violating § 1922 even if that statute "defers" the application of ICWA. Whatever deferral is authorized by the first sentence in § 1922 ends the *instant* an Indian child is removed from the home, according to the second sentence.

Paragraph 95 of Plaintiffs' complaint alleges as follows:

> Defendants routinely violate their substantive duties under § 1922. *Never* during Defendants' 48-hour hearings is there an inquiry into whether the cause of the removal has been rectified, nor does the court direct DSS to pursue that inquiry after the hearing. Yet, this is precisely what the 48-hour hearing must do in order to comply with ICWA. It is at the 48-hour hearing that the court must hear evidence as to whether removal of the child "is no longer necessary to prevent imminent physical damage or harm to the child." *Id.* If the state does not meet that burden of proof, the child must be returned to the family.

These allegations set forth a claim for relief under § 1922. If it is true that the Defendants are not complying with the second sentence of § 1922, as alleged here, the Plaintiffs will be entitled to relief.

This issue is easy to resolve at the pleading stage because the Defendants have staked out such an extreme position regarding § 1922. Davis asserts in his brief that 48-hour temporary custody procedures "are purely creatures of state law" and that only

[3] *See, e.g.*, 18 U.S.C. § 13 (incorporating certain state criminal laws into federal criminal enclave law). *See United States v. Sharpnack*, 355 U.S. 286 (1958); 18 U.S.C. § 1161 (incorporating state law into the federal liquor enforcement mechanism on Indian reservations).

"South Dakota statutory law is the source of the procedures governing [the 48 hour hearings], not ICWA." *See* Davis Brief at 6, 8. According to the Defendants, § 1922 makes ICWA wholly inapplicable to 48-hour hearings, as if Congress placed a "poison pill" in the statute that removes with one hand what Congress conferred with the other. Plaintiffs describe this position in paragraph 96 of their complaint:

> Attached as "Exhibit 6" is a decision issued in Plaintiff Lisa Young's case by a judge on Judge Davis' court, Judge Thorstenson (who left the bench in January 2013). As the decision reflects, rather than view § 1922 as imposing federal requirements in 48-hour hearings, the Defendants interpret § 1922 as authorizing state courts to *ignore* ICWA until much later in the process. *See id*. at 3 (citing § 1922 for the proposition that "48-hour hearings are conducted under state statute, . . . and ICWA, including its notice requirements, is not implicated at the 48-hour hearing."). As Judge Thorstenson stated when counsel for the Oglala Sioux Tribe sought compliance with ICWA during Ms. Young's 48-hour hearing: "you have brought this issue up on numerous occasions, [and the court has consistently held] that ICWA does not apply to emergency hearings." *Id.* at 11.

Thus, according to the Defendants, Section 1922, rather than conferring any protections upon Indian families, instead renders ICWA rights nonexistent at a hearing that determines whether the State can take legal and physical custody of Indian children from their parents for 60 days. Defendants are expanding the first sentence of § 1922 such that the word "emergency" does not end when the children are no safe in state custody, but rather, ends 60 days later at the next hearing. This expansion is illogical.

Moreover, ICWA's legislative history is wholly inconsistent with the notion that Congress would permit state officials and state courts to place Indian children in foster care or institutions for 60 days before ICWA had any application. An investigation conducted by Congress in the mid-1970s revealed that between 25 and 35 percent of all Indian children had been removed from their families by state welfare agencies and state

judicial procedures and placed in foster or adoptive homes or residential institutions.[4] These percentages were far higher than those for white children. In one state, the adoption rate for Indian children was eight times that of non-Indians; in another state, Indian children were thirteen times more likely than non-Indians to be placed in foster care by state courts. *See* "Indian Child Welfare Program Hearings before the Subcomm. on Indian Affairs," U.S. Senate, 93rd Cong., 2d Sess. 15 (Apr. 8, 1974), *reprinted in* 1978 U.S.C.C.A.N. 1530, 7531 (Statement of William Byler).

Studies also indicated that state social workers and state judges often lacked a basic knowledge of Indian culture regarding child-rearing, were prejudiced in their attitudes, and removed children from their homes primarily because the family was Indian and poor. *See* H.R. Rep. No. 1386, 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531-32. An alarmingly high percentage of Indian children were placed in foster care or adoptive homes, Congress found, because state officials "have often failed to recognize the . . . cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5).

Congress passed ICWA to address these state-created problems. The express purpose of the Act is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902; *see Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Congress recognized that nothing "is more vital to the continued existence and integrity of Indian tribes than their

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

children." 25 U.S.C. § 1901(3). "The wholesale separation of Indian children from their families," Congress concluded, "is perhaps the most tragic and destructive aspect of American Indian life today," resulting in a crisis "of massive proportions." H.R. Rep. No. 95-1386 p. 9 (1978).

Yet despite this remedial purpose of ICWA, Davis asserts that state officials in Pennington County may employ the policies that prompted Congress to enact ICWA, that is, they may take Indian children into custody entirely as a matter of state law and place those children wherever they wish. Both the plain language of § 1922 and ICWA's purpose contradict that assertion.

The cases cited in Davis' brief do not support Davis' argument on the issue raised here. Nearly all of those cases dealt with the first sentence of § 1922 and stand for the unremarkable principle that state procedures are used in the initial removal of an Indian child. To the extent that any of those cases considered the second sentence, all of them agree with the position of the Plaintiffs, to wit, that *some* provisions of ICWA *are* applicable to emergency removal hearings. In any event, none of those cases dealt with the issue presented here: whether § 1922 allows state officials to ignore ICWA until 60 days after a child has been removed from the home.

Section 1922 is not ambiguous. If there were any question as to what the words of this statute mean, the statute must be interpreted to favor more, not less, protection for Indian parents, children and tribes. Federal remedial statutes designed to protect Indian people and tribes must be construed liberally with all doubts resolved in favor of the Indians. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 392 (1976). Here, ICWA simply is not amenable to

Defendants' interpretation, which would defer every protection in ICWA for at least 60 days regardless of the serious harm that such separations entail. Accordingly, Davis' motion to dismiss Plaintiffs' § 1922 claim should be denied.

(b) ICWA can be enforced through 42 U.S.C. § 1983

The Supreme Court has repeatedly affirmed that rights-creating statutes, like ICWA, are enforceable against state actors through the vehicle of § 1983. *See Gonzaga Univ. v. Doe,* 536 U.S. 273, 284 (2002) ("Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983."); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005) (recognizing a "rebuttable presumption that the [statutory] right is enforceable under § 1983.") (internal citation omitted). A defendant may overcome this presumption of enforceability only by showing that "Congress shut the door to private enforcement either expressly . . . or 'impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Gonzaga*, 536 U.S. at 284 n.4 (2002) (quoting *Blessing v. Freestone,* 520 U.S. 329, 341 (1997)). Davis fails to meet this heavy burden of proof.

Nothing in ICWA expressly displaces § 1983 as a vehicle to vindicate the rights that ICWA creates. Section 1914 of ICWA established certain remedies that help tribes and families protect some of their rights, but courts have recognized that these remedies were not intended to eliminate the remedies available under § 1983, which protect the remaining ICWA rights. *See Native Village of Venetie v. Alaska*, 944 F.2d 548 (9th Cir.1991); *State, Dep't of Health & Soc. Servs. v. Native Village of Curyung*, 151 P.3d 388, 409-412 (Alaska 2006). Davis cites only *Doe v. Mann*, 285 F. Supp. 2d 1229, 1240-41 (N.D. Cal. 2003), in support of his argument, but on appeal from that decision, the

Ninth Circuit expressly reaffirmed *Venetie*'s holding "that Congress intended to create a federal private right of action in tribes and individuals to seek a determination of their ICWA rights and obligations in federal district court . . . ." *Doe v. Mann*, 415 F.3d 1038, 1045 (9th Cir. 2005). Davis does not cite the Ninth Circuit decision.

Like the Ninth Circuit, the Alaska Supreme Court rejected the same argument proffered here by Davis. *See Curyung*, 151 P.3d at 409-410. There, the court recognized that ICWA's § 1914 authorizes federal district courts to grant relief in situations where a § 1983 suit would likely be unavailable as a result of the *Rooker-Feldman* abstention doctrine. *Id*. This is strong evidence that Congress intended that §1914 would supplement § 1983, rather than replace it. *Id.*, 151 P.3d at 410 n. 121 (citing *Abrams,* 544 U.S. at 121). Using § 1914 to enforce some portions of ICWA and using § 1983 to enforce the remainder "would not undermine or even affect . . .§ 1914." *Curyung* at 412. Therefore, as every court to consider the question has held, the presence of remedies under § 1914 does not diminish the right of ICWA plaintiffs to seek remedies under § 1983 for those violations to which § 1914 is inapplicable, as in the instant case.

II. PLAINTIFFS STATE A CLAIM FOR RELIEF UNDER THE DUE PROCESS CLAUSE

Plaintiffs' complaint sets forth a "hornbook" due process claim: the complaint alleges that the Defendants are depriving the Plaintiffs of a protected liberty interest (the custody of their children) without adequate notice and hearing. *See* Dkt. 1 at 21-24.

"The due process clause ensures every individual subject to a deprivation 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005) (quoting *Mathews v. Eldridge*, 424 U.S. 319,

333 (1976)). These safeguards are time-honored protections against arbitrary and capricious state action. *See Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

The custody of Plaintiffs' children hangs in the balance during Defendants' 48-hour hearings. Yet according to Plaintiffs' complaint, Defendant Davis, at these hearings, does not permit Indian parents to see the petition filed against them; does not permit these parents to see the affidavit supporting that petition; does not permit these parents to cross-examine the person who signed the affidavit; does not permit these parents to present evidence. Moreover, at the conclusion of these one-sided proceedings, although no relevant evidence is in the record, Davis makes findings of fact adverse to the parents, including a finding that active efforts had been made by the state to reunite the family. *See* Compl. ¶ 42. In short, Plaintiffs' complaint describes hearings that are essentially meaningless. Nonetheless, Defendant Davis contends that the Plaintiffs have failed to state a due process claim.

"To set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake. Second, the plaintiff must prove that the defendant deprived him of such an interest without due process of law." *Gordon v. Hansen*, 168 F.3d 1109, 1114 (8th Cir. 1999) (citation omitted). *See also Swipies*, 419 F.3d at 715).

Clearly, Plaintiffs' complaint meets the first requirement—establishing that a protected liberty interest is at stake—and the Defendants do not argue otherwise. "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized" in our jurisprudence. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Instead, Davis contends that the policies, practices, and customs challenged in Plaintiffs' complaint do not deprive the Plaintiffs of due process. *See* Davis Brief at 13-14. Indeed, according to Davis, even if Plaintiffs' allegations are assumed to be true, not allowing Indian parents in 48-hour hearings to see the emergency custody petition or the affidavit in support of it, and entering findings based on no evidence in the record, do not offend the Due Process Clause.

In evaluating a procedural due process challenge like the ones set forth in the instant case, courts must consider the three *Mathews v. Eldridge* factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976). Plaintiffs will now review those factors with reference to the allegations in Plaintiffs' complaint.

First, the private interest at stake (the custody of Plaintiffs' children) is significant. *See Troxel*, 530 U.S. at 65; *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981).

Second, the risk of an erroneous deprivation is unnecessarily high when parents are kept in the dark and receive neither adequate notice (that is, a copy of the petition and a copy of the ICWA affidavit) nor an opportunity to challenge the evidence and present evidence in a timely manner. The very premise of the Due Process Clause is that providing people with notice of the claims against them and a timely opportunity to be heard reduces the likelihood of an erroneous deprivation. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Williams v. Nix*, 1 F.3d 712, 716 (8th Cir. 1993). Davis' argument that Indian parents are not entitled to even rudimentary forms of

procedural fairness when they are at risk of losing custody of their children for weeks or months has no basis in law.

Third, the fiscal and administrative burden of providing Indian parents with a copy of the petition and affidavit at their 48-hour hearing is slight—so slight that one has to wonder why the Defendants refuse to photocopy these documents (less than 10 pages) until the second hearing. *See Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997) (noting that where the state can provide meaningful notice "with little cost," it should be provided).

As for providing parents with an opportunity to present evidence and cross examine the state's witnesses, while this may be burdensome, it is the same burden that the Defendants shoulder later in the process.[5] Therefore, providing these safeguards sooner is not an *undue* burden. As the Eighth Circuit stated in a related context, "[g]iven that a [meaningful] hearing must be provided in any event, the additional administrative and financial burden imposed by a prompt and expeditious hearing will be small." *Coleman v. Watt*, 40 F.3d 255, 261 (8th Cir. 1994).

Defendants' 48-hour hearings cannot possibly comply with the Due Process Clause if it is true, as the Court must presume at this stage, that Indian parents are not permitted to see the petition for temporary custody and the supporting affidavit prior to or during their 48-hour hearing. The Supreme Court has made clear that, while the form of notice may vary with the circumstances, it must *always* be adequate to "reasonably convey the required information. . . .[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Central Hanover Bank and Trust*, 339 U.S.

[5] Plaintiffs allege in their complaint that at most there would a slight additional burden if the state provided, say, in ten days the hearing they hold much later. *See* Dkt. 1at ¶¶ 65, 70. This allegation must be accepted as true at the pleading stage.

306, 314 (1950) (citations omitted); *see also Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (holding that public school teachers who allege they were fired without adequate notice and a timely hearing set forth a viable claim under the Due Process Clause). Moreover, the form of notice, and the type of hearing, "must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970); *see also Mathews*, 424 U.S. at 349. Thus, the allegations in Plaintiffs' complaint, which accuse the Defendants of refusing to provide Indian parents with the petition or affidavit on which DSS is seeking to have their children removed from the home, clearly sets forth a claim for relief under the Due Process Clause based on lack of adequate notice. *See Bliek v. Palmer*, 102 F.3d 1472, 1473 (8th Cir. 1997) (holding that notice must "'apprise the affected individual of, and permit adequate preparation for, an impending hearing,'" because without adequate notice, a hearing 'has little reality or worth.'") (citations omitted).

Similarly, if it is true, as alleged in the complaint, that the Defendants do not afford Indian parents the opportunity to present evidence or cross-examine the state's witnesses until months after the deprivation of liberty has occurred, then Defendants' procedures cannot possibly comply with the Due Process Clause. *See Mullane*, 339 U.S. at 314-15; *Loudermill*, 470 U.S. at 546-47; *Swipies*, 419 F.3d at 715; *Coleman*, 40 F.3d at 260-61; *Rivera v. Marcus*, 696 F.2d 1016, 1027-28 (2d Cir. 1972) (commenting that where, as here, parents are provided with no opportunity at an early stage to explain their fitness and contest allegations of having neglected their children, the risk of an erroneous deprivation is unacceptably high); *Johnson v. City of New York*, 2003 WL 1826122 at

*13 (S.D.N.Y. 2003) (similar). Thus, Plaintiffs have adequately alleged a violation of the Due Process Clause based on the lack of an adequate and timely hearing.

The injury to Plaintiffs' due process rights that occurs at every 48-hour hearing is not cured sixty days or ninety days later when the Defendants finally provide the procedural protections guaranteed by the Due Process Clause. Irreparable injury has already occurred. In the much lower-stakes arena of automobile impoundment, the Eighth Circuit has recognized that "a more expeditious hearing would significantly reduce the harm suffered by owners wrongly deprived of the use of their vehicles," such that a seven-day delay in providing a meaningful hearing violated due process. *Coleman*, 40 F.3d at 261. Applying *Coleman* to the emergency-removal-of-children context, the Eighth Circuit has concluded that "if seven days is too long for a car owner to wait for a post-deprivation hearing after his or her car has been towed and impounded, as a matter of law, a parent should not have to wait seventeen days after his or her child has been removed for a hearing." *Swipies*, 419 F.3d at 715 (internal citation omitted). Thus, sixty days is clearly too long for Plaintiffs to wait for a meaningful hearing. *See Whisman ex rel. Whisman v. Rinehart*, 119 F.3d 1303, 1311 (8th Cir. 1997) ("When the state deprives parents and children of their right to familial integrity, even in an emergency situation, without a prior due process hearing, the state has the burden to initiate prompt judicial proceedings to provide a post deprivation hearing.") (citation omitted.).

Defendant Davis relies on *Slaven v. Engstrom*, 848 F. Supp.2d 994 (D. Minn. 2012), *aff'd*, 710 F.3d 772 (8th Cir. 2013), *see* Davis Brief at 16-18, but that reliance is misplaced. The only similarity between the facts in *Slaven* and those in the instant case is that both cases involved the emergency removal of children from their homes. The

critical—and dispositive—difference between *Slaven* and the instant case is that, in *Slaven*, the county officials who were named as defendants had *no discretion* in the procedures challenged by the plaintiffs. Each procedure challenged in *Slaven* was mandated by state law, and therefore these county officials were not the proper defendants. *See Slaven*, 848 F. Supp. 2d at 1006-07; 710 F.3d at 780-81. Just the opposite is true here: Davis is not obligated by state law to follow a single one of the six procedures listed above.

Moreover, as revealed in the long quote from *Slaven* contained in Davis' brief, *Slaven* hurts Davis. The first sentence of the quote states: "In the criminal context, after arrest and arraignment, it is not uncommon for a defendant to wait months *before receiving a full trial on the merits*." *See* Davis Brief at 15, quoting *Slaven*, 848 F. Supp.2d at 1005 (emphasis added). But we are not talking here about the time it takes to receive a full trial on the merits. To continue with *Slaven*'s analogy to criminal procedure, we are talking here about the length of time it takes to receive a *probable cause hearing*, which is 48 hours. *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (holding that county officials must provide arrestees with a probable cause hearing within 48 hours of arrest despite the administrative burden necessary to meet that short deadline). The Eighth Circuit has already rejected the contention, which Davis makes here, that a judge has the option to wait months to provide a meaningful hearing after the state has removed a child from his or her home. *See Swipies*, 419 F.3d at 715.

Davis also asserts that South Dakota's emergency custody procedures are similar to those found in other states. *See* Davis Brief at 18. If that is true, then these other states are making the same constitutional errors Davis is. However, Davis' comparison of

South Dakota procedures with those used in other states is a red herring. The procedures he selects for comparison are not the procedures challenged in this lawsuit. For instance, there is nothing in the laws to which he refers that permit judges in other states to refuse to provide a copy of the emergency custody petition to the parent, or which permit judges to enter findings of fact based on no evidence in the record, as Davis does. Indeed, the cases that Davis cites help demonstrate the error of his ways. For example, the hearing at issue in *In re Esther V.*, 248 P.3d 863 (N.M. 2011), a case Davis cites, lasted thirty minutes. *See id.*, 248 P.3d at 866. Davis' hearings, in contrast, last only a few minutes at most because they never allow for any testimony, as will be shown when the Defendants produce their transcripts.[6] In any event, whether the procedures used in South Dakota are used elsewhere is not the issue; the issue is whether any of the six policies, practices, and customs listed above violates federal law.

III. DAVIS IS A "POLICYMAKER" UNDER § 1983

Contrary to Defendant Davis' argument (Dkt. 34, pp. 12-13), Davis is a final policymaker with respect to the six policies, practices, and customs listed earlier. He has the authority to change all of them tomorrow, all by himself.

Liability for a government entity under 42 U.S.C. § 1983 can only exist where the challenged policy or practice is "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). A policymaker 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

[6] For now, this is an allegation that must be accepted as true.

policy on a particular issue." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). *See also Ware*, 150 F.3d at 880 ("Official policy involves 'a deliberate choice to follow a course of action made from among various alternatives' by an official who is determined by state law to have the final authority to establish governmental policy." (citation omitted).

Certain procedures at 48-hour hearings are prescribed by South Dakota statute. This lawsuit does not challenge *any* of them. Instead, Davis alone could change the six procedures listed above, in a heartbeat. Davis is a policymaker.

IV. THE FOURTEENTH AMENDMENT TRUMPS STATE LAW

Davis states in his brief: "Plaintiffs do not rely on a specific state or federal statute to support their allegation that they have been denied their rights to Procedural Due Process." Davis Brief at 17. Davis is correct: Plaintiffs' due process claims are based on the Due Process Clause.

For this reason, Davis' many reassurances that his actions comply with state law is irrelevant even if true. *See Santosky v. Kramer*, 455 U.S. 745, 755 (1982) ("The minimum requirements of procedural due process being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.") (citation and internal marks omitted); *Swipies*, 419 F.3d at 716 ("[A] state statute cannot dictate what procedural protections must attend a liberty interest . . . as this is the sole province of federal law.")

Davis relies heavily on the South Dakota Supreme Court's decision in *Cheyenne River Sioux Tribe v. Davis*, 822 N.W.2d 62 (S.D. 2012), but his reliance is misguided.

Even if it is true, as Davis claims, that some of the six procedures listed above were addressed in *Cheyenne River*, any decision in that case on a matter of federal law is not binding on this Court. *See* U.S. Const. art. VI, cl. 2 (the Supremacy Clause); *Lawrence Cnty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985).[7]

V. PLAINTIFFS STATE A CLAIM FOR RELIEF THAT DEFENDANTS' COERCION OF PARENTS INTO WAIVING THEIR RIGHTS VIOLATES ICWA AND THE DUE PROCESS CLAUSE

Plaintiffs' complaint alleges that the Defendants have a policy, practice, and custom of coercing parents into waiving many of their rights secured by the Due Process Clause and ICWA. This coercion occurs when Davis presents Indian parents with the option of informally "working with" DSS without first adequately explaining the consequences of that decision to the parents. *See* Plaintiffs' Complaint (Dkt. 1) ¶¶ 113-129. In response to this allegation, Davis argues: "Plaintiffs ignore that South Dakota law allows for this 'informal' process, SDCL § 26-&A-19(2), and, therefore, it is an option that parents may choose to exercise." *See* Davis Brief at 20.

Plaintiffs are not ignoring the fact that South Dakota law permits this informal process. On the contrary, the Plaintiffs acknowledge and describe this option in their complaint. There is nothing inherently wrong with allowing this option. What is wrong is the *manner* in which Davis (and the other Defendants) offer and apply it.

In order for Indian parents to make an informed choice about "working with" DSS and waiving their rights to adequate notice and a timely and meaningful hearing, Davis should provide most, if not all, of the following information to parents at the time he

[7] At least several of the six procedures described above clearly were not reviewed in *Cheyenne River*. For instance, nothing in *Cheyenne River* addresses the question of whether Indian parents have a right to receive a copy of the emergency custody petition and the ICWA affidavit. In any event, the constitutionality of all six procedures will be reviewed in this Court *de novo*.

presents the option: (1) that DSS does not have enough staff to work with parents and therefore will be of little help in reuniting a family; (2) that DSS has not trained its staff to work effectively with Indian parents; (3) that the vast majority of these informal efforts fail, and formal Abuse and Neglect charges are likely to be filed anyway; (4) that children may be returned faster to their parents if the parents decline the option; (5) that DSS has a duty to work with parents even if they decline the informal resolution option, so parents lose nothing by turning the option down; and (6) that even if the parents accept the option, the court nonetheless plans to enter findings against them regarding the child's risk of injury in the home that will become a part of the permanent court record.

A waiver of constitutional rights is valid only if it is knowing and voluntary, that is, if the waiving party both "understand[s] the significance and consequences of a particular decision and [if] the decision is uncoerced." *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) (citation omitted). "Courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citation and internal marks omitted).

Plaintiffs' allegations of inadequate waiver and coercion set forth a claim upon which relief can be granted; that is, if at trial the Plaintiffs prove their allegations, they will be entitled to relief. *See Belinda K. v. Baldovinos*, Civ. No. 10-02507, 2012 WL 13571, *7 (N.D. Cal. Jan. 4, 2012) (finding plaintiff had stated a claim for ineffective assistance of counsel where she alleged that attorney had not adequately explained significance of waiver of ICWA rights); *In re Esther V.*, 248 P.3d 863, 876 (N.M. 2011) (holding in circumstances similar to those here that a purported waiver by a parent during an ICWA custody hearing was invalid); *see also Rivera v. Marcus*, 696 F.2d 1016, 1026

(2d Cir. 1982) (declining to find rights waived in absence of evidence in the record that foster parent had "intentionally and intelligently waived her due process rights").

At this stage of the proceeding, it does Davis no good to argue, as he does in his brief, that the Defendants do not coerce parents into waiving their rights. In ruling on Davis' motion to dismiss, this Court is "bound to accept as true, for purposes of a Rule 12(b)(6) motion, the facts alleged by the plaintiff." *Joyce v. Armstrong Teasdale, LLP*, 635 F.3d 364, 365 (8th Cir. 2011) (citation and internal marks omitted).

Davis castigates the Plaintiffs for not submitting the transcript of Lisa Young's 48-hour hearing. *See* Davis Brief at 20-21. If Davis thinks that this transcript will help him, he should attach it to his reply brief.[8] Attached to Plaintiffs' complaint as Exhibit 1 is the transcript of Plaintiff Pappan's 48-hour hearing. This transcript illustrates the dearth of information that Indian parents receive before waiving their right to a prompt hearing. Plaintiffs claim that the Pappan transcript illustrates the prevailing practice. Accordingly, Plaintiffs' complaint adequately sets forth a claim of coerced waiver.

VI. THE COURT SHOULD NOT ABSTAIN FROM HEARING THIS CASE

Next, Defendant Davis contends that *Younger v. Harris*, 401 U.S. 37 (1971), requires this Court to abstain from hearing Plaintiffs' case. To succeed on that contention, Davis must show the existence of three factors. If one is absent, abstention is not warranted: "(1) the existence of an ongoing state judicial proceeding, (2) which implicates important state interests, and (3) which provides an adequate opportunity to

[8] As Davis notes in his brief, Plaintiffs did not attach to their complaint a copy of Lisa Young's transcript. The exhibit that Plaintiffs identify as the Young transcript (Exhibit 5) is the transcript of a different hearing. This was inadvertent. However, Davis is free to submit the Young transcript under seal when he files his reply brief. As the Court will see, there is nothing in that transcript that would warrant a dismissal of this claim.

raise constitutional challenges." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Here, two factors are absent. An important principle underlies this subject: "federal courts have generally regarded vital questions of civil rights as the least likely candidates for abstention." *George v. Parratt*, 602 F.2d 818, 819 (8th Cir. 1979). That principle applies here with special relevance.

(a) The first *Younger* factor: there must be an ongoing state proceeding

Davis argues that the Court must abstain from deciding the claims submitted by the three Named Plaintiffs, and he points to a wholly unrelated case involving Plaintiff Walking Eagle. In fact, all three Named Plaintiffs mount this challenge based on custody cases that have already been dismissed. If Davis believes that Walking Eagle's recent case bears on the instant case, he should attach the relevant documents to his reply brief.

Davis goes on to argue that the Court must abstain from deciding the claims submitted by the class Plaintiffs because there are "ongoing state proceedings involving the temporary care and custody of Indian children in Pennington County and . . . there will continue to be such proceedings commenced even after the instigation of this litigation." Davis Brief at 23. Davis is partly correct: there will be 48-hour hearings conducted by the Defendants in the future. Indeed, that is why this lawsuit was filed.

Davis is incorrect, however, in contending that these future hearings require the Court to abstain from adjudicating Plaintiffs' federal claims. If that argument were viable, *Pulliam v. Allen*, 466 U.S. 522, 538 (1984), would have been decided the other way. In *Pulliam*, as here, citizens whose rights had been violated by a state court judge filed suit in federal court to halt future violations of those rights in other court hearings. *Id.* at 524-25. Those allegations were decided on the merits, just as the merits of the

instant case should be decided. *See also Olivia Y. v. Barbour*, 351 F. Supp. 2d 543, 565-70 (S.D. Miss. 2004) (rejecting a motion to dismiss under *Younger* in a case similar to the one at bar); *Kenny A. v. Perdue*, 218 F.R.D. 277, 286 (N.D. Ga. 2003) (finding abstention unwarranted where the cases of the named plaintiffs were completed, and they brought a constitutional challenge to defendants' policies); *Brian A. v. Sundquist*, 149 F. Supp. 2d 941, 957 (M.D. Tenn. 2000) (rejecting *Younger* abstention in a class action challenging policies impacting juveniles in state custody, stating that "Plaintiffs' federal constitutional claims herein represent, as did the claims in *Hanna [v. Toner*, 630 F.2d 442, 446 (6th Cir. 1980)], 'the exact sort of disputes over citizens' rights with which the federal courts were created to deal.'"); *see also L.H. v. Jamieson*, 643 F.2d 1351, 1354 (9th Cir. 1981) (finding *Younger* inapplicable because the plaintiffs, a class of juveniles adjudged to be dependent and neglected, "are not seeking to enjoin any state proceeding, nor are they seeking to enjoin state officials from enforcing any state law.").

Each case cited by Davis in support of *Younger* abstention involved an ongoing dispute in a state tribunal where the plaintiff was seeking to halt proceedings applicable to that plaintiff. Thus, the cases cited by Davis are inapposite.[9] Plaintiffs in the instant case are not seeking to enjoin any state proceeding. Davis fails the first test of *Younger*. Abstention would be inappropriate for this reason alone.

(b) The second *Younger* factor: there must be an important state interest

[9] *See e.g., Aaron v. Target Corp.*, 357 F.3d 768 (8th Cir. 2004) (holding *Younger* abstention appropriate where eminent domain proceedings were ongoing and the plaintiff sought federal injunction to halt anticipated additional proceedings applicable to him); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (holding *Younger* abstention appropriate where the plaintiff sought a federal injunction to halt ongoing proceedings against him before a state ethics committee); *Samuels v. Mackell*, 401 U.S. 66 (1971) (holding *Younger* abstention appropriate where the plaintiff sought a declaration that an ongoing proceeding in state court was unconstitutional); *Hicks v. Miranda*, 422 U.S. 332 (1975) (holding *Younger* abstention doctrine applied even though the federal action commenced shortly before the state proceeding).

The second *Younger* factor is the only one that Davis meets. Plaintiffs certainly do not dispute that there is an important state interest in protecting children from abuse and neglect.

(c) The third *Younger* factor: there must be an adequate opportunity to raise the claim in state court

The third *Younger* factor considers whether the state forum "provides *an adequate* opportunity to raise constitutional challenges." *Middlesex*, 457 U.S. at 432 (emphasis added). In his brief, Davis focuses on the word "opportunity" and ignores the word "adequate."

Merely because a state forum is available does not mean the forum provides an adequate opportunity to (1) raise all the constitutional claims the plaintiff is raising in the federal suit, or (2) obtain a ruling in state court prior to suffering irreparable injury. The very case that established the modern abstention doctrine—*Younger*—confirmed the principle that a federal court should not abstain from deciding a case where the party seeking relief may "suffer irreparable damages" absent federal intervention. *Younger*, 401 U.S. at 43. Abstention is not warranted where the state process being challenged "is flagrantly and patently violative of express constitutional prohibitions" or where the "danger of irreparable loss is both great and immediate." *Id*., at 53, 45 (citations omitted); *see also Fenner v. Boykin*, 271 US 240, 243-244 (1926) (holding that a federal court may intervene in an ongoing state proceeding when "absolutely necessary for protection of constitutional rights . . . where the danger of irreparable loss is both great and immediate.")

Repeatedly in their complaint, the Plaintiffs explain that they are suffering significant and irreparable loss as a result of Defendants' 48-hour hearings. *See* Dkt. 1 at

¶¶ 6, 48, 73, 98 102, 112, 129. The result of these hearings is the separation of parents from their children, an action that has profound adverse consequences. Few things present a greater likelihood of irreparable injury than having a child involuntarily removed from the home by state employees, especially when the separation lasts for weeks or months.

Defendants can hardly contend that their 48-hour hearings provide Indian parents with an *adequate* opportunity to raise all of the constitutional and statutory claims that are included in this federal lawsuit. In the first place, it needs to be remembered that (1) these Indian parents are not represented by counsel at those hearings, (2) these parents are deliberately kept in the dark by the Defendants and not given the petition for emergency custody or the affidavit filed in support of it, and (3) the hearing is so truncated it ends within minutes, without any testimony. Do the Defendants really expect these parents to say, for instance: "Judge Davis, we ask that you order DSS to comply with Section 1922 of the Indian Child Welfare Act and terminate custody of my child when the emergency has ended."?[10] In truth, the Defendants have placed barriers in the path of these parents that make it highly unlikely that any of them will raise civil rights challenges in a 48-hour hearing, and thus irreparable injury is a virtual certainty. Consequently, abstention is manifestly inappropriate. *See Younger*, 401 U.S. at 45 (noting that a federal court should not abstain where the "danger of irreparable loss is both great and immediate.").

Davis cites *Neal v. Wilson*, 112 F.3d 351 (8th Cir. 1997), for the premise that a federal court "may not engage any presumption 'that the state courts will not safeguard federal constitutional rights.'" *Id*. at 357 (citation omitted). But that is not the concern

[10] It is no answer to this question, of course, to say that a parent can appeal. By then, irreparable harm has occurred.

here. The concern here is that the Plaintiffs do not have an adequate opportunity to *raise* their claims before suffering irreparable injury, not whether Judge Davis would adjudicate them if they were to be raised.

Further, even if a 48-hour hearing did provide Indian parents with a realistic opportunity to raise at least some of the civil rights issues included in the present federal lawsuit, it does not provide an opportunity to raise all of them. This, too, makes abstention inappropriate under *Younger*. For instance, the Plaintiffs claim in their federal lawsuit that Defendants Malsam-Rysdon and Van Hunnik have failed to properly train their staff. *See* Dkt. 1 ¶¶ 46, 48, 97. This is not a claim that can be addressed in Defendants' abuse and neglect proceedings. Thus, abstention is unwarranted. *See LaShawn A. v. Kelly*, 990 F.2d 1319, 1323 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994) (rejecting *Younger* abstention because, although a state court forum was available, it was an inappropriate forum "for this multi-faceted class-action challenge" to a foster care system); *People United for Children, Inc. v. City of New York*, 108 F. Supp. 2d 275, 290-92 (S.D.N.Y. 2000) (rejecting *Younger* abstention because state court child custody proceedings, although available, would "not provide these plaintiffs with an adequate opportunity to raise their constitutional claims.").

At this stage of the litigation, the Defendants are not entitled to a ruling as a matter of law that the Plaintiffs have an adequate opportunity to vindicate their rights in a state court prior to suffering great and immediate irreparable injury. Besides, there is no ongoing proceeding in which they can raise them. The Defendants fail both the first and third *Younger* factors and this Court should not abstain.

Citing *O'Shea v. Littleton*, 414 U.S. 488 (1974), Davis asks the Court to consider how compliance might be enforced if a judgment is issued against him. The answer to that question is contained in the text of 42 U.S.C. §1983, as amended by the Federal Courts Improvement Act ("FCIA"), which was passed in the wake of *Pulliam*. The FCIA amended § 1983 to bar injunctive relief against a judge until a declaratory judgment is first issued. Since then, courts have recognized that the FCIA did nothing to change the existing rule (confirmed in *Pulliam*) that effective relief may be issued against state magistrates who are violating federal law. *See Pucci v. Nineteenth Dist. Ct.*, 628 F.3d 752, 765 (9th Cir. 2010); *Tesmer v. Granholm*, 114 F. Supp. 2d 603 (E.D. Mich. 2000); *LeClerc v. Webb*, 270 F. Supp. 2d 779, 793 (E.D. La. 2003) ("Defendants can make no colorable argument that the FCIA did anything to alter the landscape with respect to declaratory relief. Declaratory relief against judges acting in their judicial capacities was well-established before the FCIA.").

In short, this Court can issue declaratory relief against Judge Davis in his official capacity. If Davis ignores the declaratory judgment, he should expect that his actions will result in the issuance of injunctive relief, exactly as contemplated by § 1983. It has always been the case that a recalcitrant party should expect "the use of stern measures to require respect for federal-court orders." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 (1979).

Additionally, the concerns expressed in *O'Shea* about federal interference with the proper functioning of a state judicial system have no application here. The policies, practices, and customs that would be enjoined are *not* required by state law. Rather, they are being implemented by the Defendants wholly as a matter of discretion. Therefore,

any injunction issued by this Court would not interfere with the operation of a state judicial system in the manner described in *O'Shea*.

VII. THERE WAS NO DUTY TO EXHAUST STATE ADMINISTRATIVE REMEDIES

Next, Davis moves for dismissal of Plaintiffs' lawsuit "based on Plaintiffs' failure to exhaust their state law remedies." *See* Davis Brief at 27. There is a short answer to this contention and a longer answer.

The short answer is this. All three of the Named Plaintiffs had their children returned home and their cases dismissed. There was nothing to appeal. Even if they wanted to challenge Defendants' refusal to provide a copy of the petition and ICWA affidavit, there was no place to do it.

The longer answer is this. Davis' argument is erroneous as a matter of law even if there *were* a state judicial or administrative remedy available to the Plaintiffs. "Section 1983 allows citizens to sue for violations of their federal civil rights. A 1983 plaintiff . . . is not required to exhaust state judicial or administrative remedies before proceeding in federal court." *Bressman v. Farrier*, 900 F.2d 1305, 1310 (8th Cir. 1990) (citing *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 500–07 (1982)). The Supreme Court has "on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies." *Patsy*, 457 U.S. at 500. *See also Felder v. Casey*, 487 U.S. 131, 148 (1988) (holding that a plaintiff need not submit a "notice of claim" under state law prior to seeking relief in federal court under § 1983); *McKenzie v. Crotty*, 738 F. Supp. 1287 (D.S.D. 1990) (applying *Felder* in an ACLU suit seeking to improve conditions in the Lawrence County jail).

Davis cites *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000), in support of his argument. However, as the Eighth Circuit made clear in at least four cases decided subsequent to *Wax 'n Works*, the exhaustion requirement discussed in *Wax 'n Works* applies *only* to lawsuits seeking redress for the loss of a property interest, not the loss of a liberty interest, which is the deprivation at issue here. *See Keating v. Nebraska Public Power Dist.*, 562 F.3d 923 (8th Cir. 2009); *Crooks v. Lynch*, 557 F.3d 846, 848 (8th Cir. 2009); *Sundae v. Anderson*, 103 Fed.Appx. 60 (8th Cir. 2004); *Booker v. City of St. Louis*, 309 F.3d 464, 468 (8th Cir. 2002).

It is well settled that "administrative exhaustion does not apply to civil rights claims unless specifically mandated by Congress." *Leclerc v. Webb*, 270 F.Supp.2d 779 n.12 (E.D. La. 2003) (citations omitted). Congress has not mandated any administrative exhaustion with respect to the claims raised in this lawsuit, and Davis' argument to the contrary lacks merit.

VIII. THE TWO TRIBES HAVE STANDING

Two of the plaintiffs in this litigation are federally recognized Indian tribes: the Oglala Sioux Tribe and the Rosebud Sioux Tribe. As alleged in ¶ 3 of their complaint:

> The Tribes bring this action as *parens patriae* to vindicate rights afforded to their members by the Due Process Clause of the Fourteenth Amendment and by ICWA. The Tribes and their members have a close affiliation, indeed kinship, with respect to the rights and interests at stake in this litigation. The future and well-being of the Tribes is inextricably linked to the health, welfare, and family integrity of their members.

Davis correctly cites in his brief the legal principle that determines when an Indian tribe may proceed *parens patriae*. However, Davis then fails to appropriately apply that principle to the facts of this case, ignores court decisions directly on point, and overlooks the reason why Congress enacted ICWA.

In order for an Indian tribe to have standing *parens patriae*, as Davis notes, the tribe must show that its claims "are asserted on behalf of *all* of the sovereign's citizens. The parens patriae doctrine cannot be used to confer standing on the Tribe to assert the rights of a dozen or so members of the tribe." *U.S. v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 734 (8th Cir. 2001) (citations omitted, emphasis in original). That requirement is easily met here.

As discussed earlier in this brief, ICWA was enacted in order to put a halt to rampant, ill-advised, and damaging removals of Indian children from their homes by state welfare officials and state courts. *See* "Indian Child Welfare Program Hearings before the Subcomm. on Indian Affairs," U.S. Senate, 93rd Cong., 2d Sess. 15 (Apr. 8, 1974), *reprinted in* 1978 U.S.C.C.A.N. 1530, 7531. Congress found that state officials "have often failed to recognize the . . . cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). The purpose of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. Sec. 1902; *see Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Congress recognized that nothing "is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3); *see In re Elias L.*, 767 N.W.2d 98, 103 (Neb. 2009) (noting that some tribes will "face extinction" unless the pace of Indian child removal is diminished). "The wholesale separation of Indian children from their families," Congress concluded, "is perhaps the most tragic and destructive aspect of American Indian life today," resulting in a crisis "of massive proportions." H.R. Rep. No. 95-1386 p. 9 (1978).

These two tribes filed this lawsuit because they are fighting for their survival, not just fighting for the families who appear in Defendants' 48-hour hearings. At least two courts have addressed the question of whether an Indian tribe has *parens patriae* standing

to bring the type of challenges raised here. Both of those decisions are cited in Plaintiffs' complaint but neither is cited in Davis' brief: *Dep't of Health and Social Services v. Native Village of Curyung*, 151 P.3d 388, 402 (Alaska 2006) (recognizing that Indian tribes have a right to bring suit "as *parens patriae* to prevent future violations" of ICWA); *Native Village of Venetie IRA Council v. Alaska*, 155 F.3d 1150, 1152 (9th Cir. 1998) (same).

Davis' argument that these tribes lack *parens patriae* standing is inconsistent with the very purpose of ICWA. As has now been explained, none of Davis' argument has merit, and his motion to dismiss should be denied.

Respectfully submitted this 6th day of June, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on June 6th, 2013, I electronically filed the foregoing 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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