UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *Parens patriae,* to protect the Rights of their tribal members; And ROCHELLE WALKING EAGLE, MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs, vs. LUANN VAN HUNNIK; MARK VARGO; HON. JEFF DAVIS; and KIM MALSAM-RYSDON, in their Official capacities, Defendants.	)	Civ. 13-5020-JLV **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JUDGE DAVIS'S MOTION TO DISMISS**

In the Complaint, Plaintiffs generally allege Defendants have been violating the requirements of the Indian Child Welfare Act ("ICWA"), and the Due Process Clause of the Fourteenth Amendment. Plaintiffs seek both a declaratory judgment and injunctive relief. Pursuant to Fed. R. Civ. P. 12(b), Defendant Hon. Jeff Davis now moves the Court to dismiss the action because: (1) Plaintiffs have failed to state a claim upon which relief can be granted; (2) Plaintiffs' ICWA claims cannot be vindicated under 42 U.S.C. § 1983; (3) the Court should not entertain this action under the *Younger* abstention doctrine; (4) Plaintiffs have failed to exhaust their state court remedies; and (5) the tribal plaintiffs lack standing, under *parens patriae*, to vicariously assert the claims of their members.

INTRODUCTION

Plaintiffs' Complaint seeks to challenge "three policies, practices, and customs" of the Defendants: (1) removing Indian children from their homes without affording them, their parents, or their tribe a timely and adequate hearing as required by the Due Process Clause, (2) removing Indian children from their homes without affording them, their parents, or their tribe a timely and adequate hearing as required by the Indian Child Welfare Act, and (3) removing Indian children from their homes without affording them, their parents, or their tribe a time and adequate hearing and then coercing the parents into waiving their rights under the Due Process Clause and the Indian Child Welfare Act to such a hearing." (ECF Doc. 1, p. 3.)

First, it bears noting that throughout the thirty-nine pages of the Complaint there is remarkably little discussion of the governing standard in child abuse and neglect ("A & N") cases: "the best interests of the child." South Dakota Codified Law ("SDCL") § 26-7A-5. Because the child's best interest is the overarching purpose of abuse and neglect proceedings, the Court must be vigilant of this overarching objective throughout this case. The purpose of this objective is simple but important. The state has the obligation to protect the children of this state because they cannot protect themselves. This is why both South Dakota statutes and ICWA are structured around this objective, particularly in emergency custody situations. *See* 25 U.S.C. § 1922; SDCL § 26-7A-13; SDCL § 26-7A-34; SDCL § 26-7A-6; *Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 833 N.W.2d 62.

Second, Judge Davis has no "policies, practices, and customs" of his own. Instead, as confirmed by the South Dakota Supreme Court, Judge Davis merely follows the procedures set by South Dakota state statute. *See Cheyenne River Sioux Tribe v. Davis*, 2012 S.D. 69, 822 N.W.2d 62. Although misidentified in Plaintiffs' Complaint, the 48-hour hearing transcript, labeled as "Exhibit 5," is the exact same transcript that was before the South Dakota Court in *Davis*. Therefore, the "policy" at issue in this case has been challenged and found to be

consistent with South Dakota law in *Davis*. 2012 S.D. 69, ¶¶ 3-4, 833 N.W.2d 62, 63. As a result, the Complaint is essentially a veiled appeal of the South Dakota Supreme Court's decision in *Davis*.

Despite Plaintiffs' representations to the contrary, the Cheyenne River Sioux Tribe specifically raised the exact federal questions of Due Process and 25 U.S.C. §§ 1912(d) and (e) in *Davis*. *Id.* 2012 S.D. 69, ¶ 8, 833 N.W.2d 62, 64 (stating "Tribe contends the lack of such a hearing violates its federal and state rights and it is irreparably harmed by the lack of any mechanism to contest the trial court's failure to fully follow ICWA at the temporary custody stage."). The South Dakota Supreme Court rejected the same arguments raised here, and held: (1) the full panoply of rights afforded to Indian tribes under the Indian Child Welfare Act ("ICWA") did not apply to a temporary custody proceeding, and (2) the police report and affidavit of a State Department of Social Services ("DSS") specialist provided sufficient evidence of the need for DSS to take temporary custody of children. *Id.* The South Dakota Supreme Court's resolution of the Due Process claims is implicit in its finding that the "process due" was provided. Although the South Dakota Supreme Court's holding on the first point is not binding on this Court, its holding on the second point is binding.

The *Davis* Court's holding is well-grounded in law and logic. Moreover, in *Davis*, as in here, the Applicant alleged that Judge Davis's compliance with state law violated 25 U.S.C. §§ 1912(d) (requiring a state's "active efforts" to prevent breakup in Indian family in child custody cases) and 1912(e) (requiring qualified expert testimony that continued custody by the parent of Indian custodian is likely to result in serious emotional or physical damage to the child). *Id.* The South Dakota Supreme Court directly rejected those *same* claims on this *same* record. *Id.* Consequently, the "policies, practices, customs" are not Judge Davis's as a policymaker, they are those proscribed by the South Dakota Codified Laws.

BACKGROUND

In South Dakota, the A & N process involves three phases: the emergency removal, the adjudication phase, and the dispositional phase. These phases involve a series of hearings. The A & N process begins when a child is taken into emergency protective custody by law enforcement. SDCL § 26-7A-14. This can be accomplished without prior court approval, pursuant to SDCL § 26-7A-12, or with prior court approval by a circuit court judge or an authorized intake officer, who may approve the child's out-of-home placement and issue a temporary custody directive, pursuant to SDCL § 26-7A-13. Within approximately 48 hours, a 48-hour or temporary custody hearing is held. SDCL § 26-7A-14. This is an informal proceeding to determine whether temporary custody should be continued. Although it is an informal hearing, attempts are made to notify the parents and the tribe if an Indian child[1] is involved of the time and place for the hearing. SDCL § 26-7A-15.

The next hearing is an advisory hearing which informs all interested parties (parents/child/Indian custodian[2]) of their rights, including the right to court appointed counsel, confront and cross-examine witnesses, and remain silent. SDCL § 26-7A-54. It is at this point that the parties are advised of the allegations of abuse and neglect in the petition, the applicable burden of proof, and the respective statutory and constitutional rights of the parties. *Id.* Neither of these initial hearings is conducted according to the South Dakota Rules of Civil Procedure, or the Rules of Evidence. SDCL § 26-7A-34.

Then, the second phase begins with scheduling the adjudicatory hearing, which is usually held 30 days after the 48-hour hearing, but never longer than 90 days, except in exception circumstances. The adjudicatory hearing determines by clear and convincing evidence whether the child was an abused or neglected child as defined in SDCL § 26-8A-2. The adjudicatory

[1] All references to "Indian child" refer to the definition provided in 25 USC 1903 (4).
[2] As defined in 25 USC 1903(6).

hearing is a full evidentiary hearing which follows the rules of evidence and procedure. SDCL §§ 26-7A-56; 26-7A-83. After an adjudication, the parties may petition for an intermediate appeal to the South Dakota Supreme Court. SDCL §26-7A-87. Review hearings are held approximately every 45 days after an adjudication to monitor the necessity for continued custody.

Last comes the dispositional phase and a final dispositional hearing is scheduled for not more than twelve months after the child was taken into custody. SDCL § 26-7A-90. At this hearing the court determines whether or not to terminate parental rights and the child's permanent placement goal (reunification, permanent foster care, guardianship, adoption). After a final dispositional order is entered the parties may appeal both the adjudication and final dispositional orders to the South Dakota Supreme Court.

LEGAL ANALYSIS

Plaintiffs' Complaint presents a knot of tribal rights, parental rights, and constitutional rights. In order to untangle the knot for analysis of Plaintiffs' individual claims, it is necessary to begin with the common thread, i.e. ICWA. Consequently, Plaintiffs' ICWA-based claims, as set forth in Count II, will be addressed first.

I. The Complaint Fails to State a Claim Upon Which Relief Can Be Granted

In 2009, the United States Supreme Court clarified the governing standard for motions to dismiss brought pursuant to Rule 12(b)(6). *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

> [U]nder Rule 12(b)(6), this court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts most favorably to the complainant. Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."

Minnesota Majority v. Mansky, 708 F.3d 1051, 1055-56 (8th Cir. 2013) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

The central allegation in Plaintiffs' Complaint is that plaintiff parents were denied a "meaningful" hearing at the 48-hour hearing. (ECF Doc. 1, ¶ 26.) A "meaningful" hearing is defined by Plaintiffs as the right to cross-examine witnesses, and present evidence at this initial custody stage. (ECF Doc. 1, ¶ 35.) Plaintiffs claim to be entitled to a full evidentiary hearing at this initial custody stage. (ECF Doc. 1, ¶ 34.) For purposes of Judge Davis's Motion to Dismiss, Plaintiffs' factual allegations, i.e. the 48-hour hearing was not conducted in accordance with the rules of evidence, will be accepted as true. However, Plaintiffs' legal contentions springing from these factual allegations are erroneous.

a. Count II -- 25 U.S.C. 1922

The principal issue presented by the Complaint is whether the state's statutory procedure meets the requirements of Due Process and ICWA. Plaintiffs challenge concerns only the "emergency custody procedures" used by Judge Davis, and other state court judges, when a child is alleged to be in imminent risk of harm. These "48-hour" proceedings are the product of state law. SDCL ch. 26-7A et seq. The fact that these procedures are purely creatures of state statute is confirmed by the South Dakota Supreme Court, in *Davis*. 2012 S.D. 69, ¶ 8, 833 N.W.2d 62, 64. Importantly, all of Plaintiffs' allegations pertaining to compliance with state law in emergency custody proceedings, including those set out in the South Dakota Unified Judicial System ("Guidelines") have been resolved by the South Dakota Supreme Court in *Cheyenne River Sioux v. Davis*, *supra*. Thus, it is only 25 U.S.C. § 1922, the emergency custody exception, which requires any additional analysis.

To avoid the *Davis* Court's opinion, Plaintiffs allege, without citation, that § 1922 provides both procedural and substantive rights that are different than those provided by South

Dakota state statute, and that those rights are being infringed. Plaintiffs' are incorrect on both counts. 25 U.S.C. § 1922 provides:

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

25 U.S.C. § 1922 (emphasis added). This section of ICWA defers emergency custody cases involving Indian children, as defined by 25 U.S.C § 1903(4), to the respective state law procedures. *Davis*, 2012 S.D. 69, 822 N.W.2d 62. In other words, it creates an exception to the important requirements of ICWA in these emergency situations to protect the best interests of the child. *Id.*

Six states with notably large tribal populations, including South Dakota, are uniform in their interpretation of § 1922 as a statute of deferment. *Davis*, 2012 S.D. 69, 822 N.W.2d 62; *State ex rel. Juvenile Dep't v. Charles,* 70 Or.App. 10, 688 P.2d 1354, 1358 (1984) (holding that emergency removal of a child is initially purely a state law matter not subject to all ICWA requirements); *D.E.D. v. State of Alaska,* 704 P.2d 774, 779 (Alaska 1985) (holding certain notice requirements under ICWA inapplicable to emergency custody proceedings or emergency hearings); *Matter of the Welfare of J.A.S.,* 488 N.W.2d 332, 335 (Minn.Ct.App.1992) (holding the testimony of a qualified Indian expert was not required at the initial detention hearing in the case since that hearing was an emergency removal); *In re S.B. v. Jeannie V.,* 130 Cal.App.4th 1148, 30 Cal.Rptr.3d 726, 734–36 (2005) (holding that not all provisions of ICWA apply to a detention/emergency removal hearing); *State ex rel. Children, Youth and Families Dep't v.*

Marlene C., 149 N.M. 315, 248 P.3d 863, 872–74 (2011) (holding that New Mexico's ex parte and custody hearing stages are emergency proceedings to which the full requirements of ICWA do not apply). Those states' holdings bear considerable weight in this case.

By contrast, no court has interpreted § 1922 as requiring the additional substantive and procedural rights to which Plaintiffs claim to be entitled under ICWA. (ECF Doc. 1, ¶¶ 92-98.) Tellingly, despite citing substantial case authority in their Complaint, Plaintiffs have cited to no court of any jurisdiction which has employed the analysis Plaintiffs assert as necessary. *Id.* This is because no court has made this finding. As a result, under § 1922 and under *Davis*, South Dakota statutory law is the source of the procedures governing emergency custody proceedings, not ICWA.

Assuming the court concurs with every other court's conclusion that §1922 is a statute of deferment, then Plaintiffs' claims are simply a challenge to the constitutionality of the South Dakota emergency procedures. This is an issue of state law already resolved by the South Dakota Supreme Court in *Cheyenne River Sioux v. Davis*. As a result, all the Court must do in this case is to defer to the state Supreme Court's interpretation of state law.

1. Both ICWA and South Dakota Codified Laws share the same standard for emergency removal.

The requirements of § 1922, and SDCL § 26-7A-13(1)(b) are virtually indistinguishable in terms of what findings are made in emergency custody cases. SDCL § 26-7A-13 provides that temporary custody may be ordered when upon

> application by a state's attorney, social worker of Department of Social Services, or law enforcement respecting an apparent, alleged, or adjudicated abused or neglected child stating good cause to believe . . . [t]here exists an *imminent danger to the child's life or safety* and immediate removal of the child from the child's parents, guardian, or custodian appears to be *necessary* for the protection of the child.

SDCL § 26-7A-13 (emphasis added). Similarly, § 1922 permits emergency removal, under state statute, in order to prevent "imminent physical damage or harm to the child," and only as long as

it is "necessary" for the child's protection. 25 U.S.C. § 1922. Whether analyzed under state law or § 1922, the "imminent danger to the child" triggers the respective emergency custody statutes where it appears "necessary" to protect the child's best interest. The standards under § 1922 and South Dakota law are the same. Consequently, Plaintiffs' unique interpretation of § 1922 presents a distinction without a difference because South Dakota state statute requires the same finding. As a result, South Dakota statutes sufficiently protect the same rights that Plaintiffs claim under ICWA.

2. Public policy supports South Dakota's interpretation of § 1922.

There are compelling policy reasons for rejecting Plaintiffs' proposed interpretation of § 1922. As discussed by the New Mexico Supreme Court in *In re Esther V*, 248 P.3d 863 (N.M. 2011),

> ex parte and [emergency] custody hearings stages are ill-suited for making the § 1912(d) and (e) findings because they are emergency proceedings that do not provide sufficient due process protections . . . [they] are expedited emergency proceedings that enable the State to remove a child and take temporary custody in order to ensure the child's safety until a full hearing on the merits is held.

248 P.3d at 873.

> Additionally, the ex parte and custody hearing stages are unsatisfactory setting in which to make the § 1912(d) and (e) findings because the timing of those stages does not fit within the notice timeline provided by § 1912 and because they require a lesser standard of proof than that required by ICWA.

Id. The New Mexico Supreme Court concluded that the notice and timing requirements of § 1912(a), if strictly construed as Plaintiffs' suggest, would preclude the emergency removal of an Indian child regardless of the degree of imminent danger presented. *Id.* Because ICWA cannot logically be construed to create such an absurd and dangerous result, the New Mexico Supreme Court concluded, that the panoply of ICWA does not come to bear until the adjudicatory hearing.

This reasoning warrants strong consideration here, particularly when ICWA provides Plaintiffs with the means to curtail any perceived deficiencies in the state's emergency custody

statutes. Specifically, the tribal plaintiffs request and accept transfer in such cases. 25 U.S.C. § 1911(b). ICWA bestows upon each Plaintiff the right to transfer these cases involving Indian children, immediately, to the tribal court, where Congress presumed that the Native American cultural considerations would be given their proper weight. 25 U.S.C. § 1901(5).

However, in emergency custody situations, these cultural considerations must yield to protect the child, whether Indian or non-Indian, from imminent physical, mental, or emotional danger, and the court is compelled to identify and assess such imminent danger. Indeed, ICWA's legislative history underscores this point, and explains that § 1922 was intended to "permit, under applicable state law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of [ICWA]." *In re Esther V.*, 248 P.3d 863, 873 (N.M. 2011) (citing H.R.Rep. No. 95–1386, at 25 (1978), 1978 U.S.C.C.A.N. 7530, 7548.). "The ICWA Guidelines confirm that although 'emergency action must be taken without the careful advance deliberation normally require,' the 'court shall be required to comply with the requirements of [ICWA] and reach a decision within 90 days unless there are extraordinary circumstances that make additional delay unavoidable.'" *Id.* (citing 44 Fed.Reg. at 67,590).

As in New Mexico, South Dakota's adjudicatory hearings are the appropriate forum for consideration of each of ICWA's important requirements. Such hearings are almost always conducted 30 days *before* the period set forth in the ICWA Guidelines. SDCL § 26-7A-19(2). In fact, Plaintiffs do not contend that they are held beyond the 90 days prescribed in the ICWA guidelines. (ECF Doc. 1, ¶ 65.) As such, Judge Davis's "policy" is consistent with both state law, as explained in *Cheyenne River Sioux Tribe v. Davis*, and the ICWA guidelines set forth by the Bureau of Indian Affairs ("BIA"). 44 Fed. Reg. at 76,590. There is no *additional* process that must be afforded.

b. ICWA provides a comprehensive remedial framework which does not permit "deficiencies" to be "vindicated" through 42 U.S.C. § 1983.

Even if the Court were to accept Plaintiffs' ICWA-based claims, Plaintiffs cannot vindicate those rights through an action brought pursuant to 42 U.S.C. § 1983. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20, 101 S. Ct. 2615, 2626, 69 L. Ed. 2d 435 (1981). Although the Eighth Circuit has yet to weigh in on the issue, other courts confronted with § 1983 claims based on alleged ICWA violations have found that the sole remedy Congress intended to create in enacting ICWA was provided in § 1914, which specifically allows a cause of action for invalidation of the underlying proceedings based on violations of §§ 1911, 1912, and 1913. *See Doe v. Mann*, 285 F.Supp.2d 1229, 1240-41 (N.D.Cal.2003).

In *Doe v. Mann*, the Northern District of California explained that, "[i]n specifically allowing plaintiffs to seek invalidation of a state court's actions based on sections 1911, 1912 and 1913, Congress showed it knew how to create a remedy and did so expressly." *Id.*, 285 F.Supp.2d at 1240-41. It continued, "Congress intended to provide a cause of action only for violations of [these] three ICWA sections." *Id.* Such is the case here where ICWA provides a comprehensive remedial framework for redressing any perceived violation of the Act. However, vindication through a § 1983 action is not available as a remedy. *Id.* Although no court has determined whether § 1922 confers implied rights, as urged by Plaintiffs, it stands to reason that vindication of such an implied right would be sufficiently accomplished through transfer, or if necessary, invalidation.

When the common thread of ICWA is pulled from Plaintiffs' nebulous claims, the allegations in the Complaint unravel, and the Court is left with the only conclusion that can be drawn, which is that § 1922 is a statute of deferment. This case is, at its heart, a challenge to

South Dakota's A & N statutes, and not Judge Davis's interpretation or "policy" in enforcing those statutes. Moreover, even if the Court were to conclude that § 1922 creates additional implied rights or protections, Plaintiffs' cannot vindicate such rights through a 42 U.S.C. § 1983 action. For these reasons, the Court should dismiss Plaintiffs' Count II for failure to state a claim.

c. Count I -- Due Process

In Count I, Plaintiffs allege that Judge Davis's "practice" violates Plaintiffs' Due Process Rights, guaranteed by the Fourteenth Amendment. (ECF Doc. 1, ¶ 17.) Plaintiffs' allegation is ambiguous as to whether it is grounded upon substantive or procedural due process rights. Therefore, both will be addressed.

In order for the Court to sustain Plaintiffs' Due Process claims, Plaintiffs' must first make the threshold showing that Judge Davis is a "policymaker," which they cannot do. "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." *Ware v. Jackson Cnty., Mo.*, 150 F.3d 873, 880 (8th Cir. 1998) (citations omitted). In Count I, Plaintiffs claim that it is Judge Davis's "policy, practice, and custom" to deny parents a "meaningful hearing for purposes of the Due Process Clause" at the 48-hour hearing. (ECF Doc. 1, ¶ 62-65.) However, as discussed, the process involved in the 48-hour hearings is set by statute, and Judge Davis is compelled by oath to follow the procedures set forth in those statutes. *See Davis, supra*. He has no choice in the matter.

Plaintiffs' failure to demonstrate any "policy" by Judge Davis, beyond that required by state statute, is fatal to their claims in Count I. "[I]n an official-capacity suit the entity's 'policy or custom' *must* have played a part in the violation of federal law." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n. 55, 98 S.Ct. 2018, 2035, n. 55, 56 L.Ed.2d 611 1978) (emphasis added); *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105, 87 L.

Ed. 2d 114 (1985); *see also Slaven v. Engstrom*, 710 F.3d 772 (affirming dismissal of claims against county officials who played no role in creating the allegedly deficient "policy."). As demonstrated by the South Dakota Supreme Court's Opinion in *Davis*, Judge Davis is merely following the emergency custody statutes established by the South Dakota legislature. He does not draft or enact those code provisions. He merely enforces those that are in effect, and contrary to Plaintiffs' assertions, Judge Davis is correctly following them. Accordingly, Count I of the Complaint fails to state a claim against Judge Davis upon which relief can be granted.

1. Substantive Due Process

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

> [D]ue process is not a technical conception with a fixed content unrelated to time, place and circumstances.... Rather, the phrase expresses the requirement of 'fundamental fairness'.... Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation.

Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18, 24–25 (1981). There are "three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Lassiter*, 452 U.S. at 27.

The private interests of the individual Plaintiffs at stake here are no doubt fundamental. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (stating, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); s*ee, also, Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1923); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The rights of the

Plaintiff Tribes to the interests set forth in the Complaint[3] are established by ICWA and not "fundamental", but statutory. However, even with fundamental rights, the right to the care, custody, and control of one's child is not absolute. *Manzano v. South Dakota Dept. of Social Serv's*, 60 F.3d 505, 510 (8th Cir. 1995); *see also*, *Thomason v. SCAN Volunteer Serv's, Inc.,* 85 F.3d 1365, 1371 (8th Cir. 1996).

Despite the fundamental interest at stake in child abuse and neglect cases, "the liberty interest in familial relations is limited by the compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." *Id.* (citing *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987). In other words, "the right to family integrity clearly does not include a constitutional right to be free from child abuse investigations." *Id.* Consequently, in analyzing these competing interests a balance must be struck, and the third factor becomes critical.

This factor is "the risk that the procedures used will lead to erroneous decisions." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). "In balancing the interests at stake, *Mathews* expressly directs courts to pay particular attention to the risk of an erroneous deprivation of liberty." *Slaven v. Engstrom*, 848 F. Supp. 2d 994, 1004 (D. Minn. 2012) aff'd, 710 F.3d 772 (8th Cir. 2013). On this issue, there are a multitude of considerations that the Court must make. The Court should consider not only the risk of erroneous separation, as urged by Plaintiffs, but also the risk of grave harm to the child if the child is hastily returned to a dangerous environment. The child's liberty interest to be free from abuse must also be considered.

The procedures established in South Dakota Codified Law are designed first to protect the best interests of the child, and second to ensure a fair process to ensure that this overarching goal is met. Abuse and neglect cases are, after all, adversarial in nature, and despite Plaintiffs'

[3] Defendant Judge Davis asserts that Plaintiff Tribes' attempt to claim standing as *parens patriae* here is flawed, as discussed in Section IV.

contestations to the contrary, 48-hour hearings are not evidentiary. SDCL § 26-7A-34. The procedures employed by South Dakota's legislature are designed to protect children first and foremost because the child is the most vulnerable party involved in A & N cases. SDCL§ 26-8A-1.

Ignoring this compelling consideration, Plaintiffs propose a truncated "fact-finding" hearing before either the parent's attorney, the child's attorney, or the state's attorney can fully and fairly investigate the fact and prepare their case. Plaintiffs' suggested process is not in the best interests of the child, nor, for that matter, is it necessarily in the best interests of the parents. The process requested by Plaintiffs is based on a strained reading of ICWA, which completely ignores § 1922. The suggestion in ¶¶ 110-12 of the Complaint that the 48-hour hearing should be held within ten days and conducted in accordance with the rules of evidence is a legal fiction, which is not required by either ICWA or South Dakota Codified Law. It is an arbitrary deadline for a type of hearing derived from no legal precedent or authority.

By way of analogy, South Dakota's emergency custody procedures, like many states, are similar to a probable cause hearing in the criminal context. As the District Court for the District of Minnesota succinctly analyzed in a similar case:

> 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. It was this concern with delay that motivated Congress to pass the Speedy Trial Act (the "Act") in 1974. Under the terms of the Act, a criminal defendant must be brought to trial no more than seventy days after the later of his or her indictment or the date the defendant appears before a judicial officer of the court in which the charge is pending, barring certain exceptions. 18 U.S.C. § 3161(c)(1). It is well established that the Act affords criminal defendants constitutionally sufficient process, despite requiring them to wait up to seventy days before they are able to fully challenge the veracity of the allegations against them and to have a full-blown trial on the merits of the claims against them. Likewise, in light of the Act and the *Mathews* factors, Minnesota's juvenile court procedures, which allow for up to a sixty-day delay before a parent may fully challenge the veracity of the allegations against them and have a full-blown trial on the merits, are constitutional. Just as it is lamentable that innocent criminal defendants must await trial in jail or on bail subject to intrusive monitoring and constrained liberty, it is lamentable that innocent parents and their children may have to wait sixty

> days in a tumultuous world of uncertainty, compromised liberty to interact with each other, and heightened scrutiny. Given no other reasonable alternatives, it is a necessary cost of the protection of children by the judicial system. The search of truth is aided by investigation some reasonable delay is beneficial and necessary to the search for truth, it allows facts to be gathered and issues to be refined. It is a delicate balance, but it is not a balance that has been set so as to violate due process and its demands of fundamental fairness here.

Slaven v. Engstrom, 848 F. Supp. 2d 994, 1005 (D. Minn. 2012) aff'd, 710 F.3d 772 (8th Cir. 2013). Just as in the criminal law, there is a brief but limited intrusion upon the constitutional freedoms of an accused parent that must occur in order to protect the alleged victim and the general public. Just as in the criminal law, an accused is not entitled to an evidentiary hearing at the initial custody stage. Just as in the criminal law, the process must begin somewhere. Neither the criminal justice system, nor the child protection system, could function if officials were compelled to proceed to trial in ten days. It is not feasible.

As demonstrated in Plaintiffs' Exhibit 5, Judge Davis does not take lightly the intrusion that abuse and neglect investigations and proceedings have on family bonds, and he is chiefly interested in reunification as soon as possible. (ECF Doc. 1, Exhibit 5, 3:9-16.) Nonetheless, the law of South Dakota, as set by the South Dakota legislature, dictates that sixty days is the minimum time required for a full and fair investigation into allegations of abuse and neglect.

More importantly, just as the sixty-day delay in *Slaven* did not violate due process, so too were Plaintiffs' substantive due process rights preserved. Merely because the state did not meet its burden in Ms. Walking Eagle's adjudicatory hearing does not mean that her substantive rights were infringed. S*ee Gibson v. Merced County Dept. of Human Serv's*, 799 F.2d 582 (9th Cir. 1986) (stating "As it turned out, the Department's decision to remove [the child] from the … home was infelicitous. However, hindsight alone is not sufficient to establish a constitutional violation."). In fact, this example is evidence that the system was working properly, and that courts are not "rubber stamping" the state's allegations of abuse and neglect. Because the South Dakota child custody statutes, as followed by Judge Davis, sufficiently protect the fundamental

rights of all parents in South Dakota, Judge Davis has preserved the substantive due process rights of Plaintiffs. Therefore, Plaintiffs' substantive due process claims do not state a claim upon which relief can be granted.

2. Procedural Due Process

The next issue to be addressed is Plaintiffs' Procedural Due Process claim. In resolving these claims the Court must: (1) determine whether plaintiffs have identified a protectable interest, and (2) examine the established procedures to determine whether they satisfy constitutional standards. *Bohn v. Dakota County*, 772 F.2d 1433, 1435 (8th Cir. 1985). Plaintiffs' claims fail on the second showing.

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. In fact, they ignore both to bring their claims. Instead, Plaintiffs seek to relitigate the state law procedure approved by the South Dakota Supreme Court in *Davis*. In *Davis*, the South Dakota Supreme Court specifically rejected the assertion that the 48-hour hearing requires cross-examination, or the introduction of evidence. *Davis*, 2012 S.D. 69, ¶ 12, 822 N.W.2d 62, 65-66. The *Davis* Court explained that

> the temporary custody hearing proceeded on State's petition for temporary custody and the accompanying police report and ICWA affidavit from a DSS specialist. The report and affidavit set forth facts concerning the need for temporary custody. While these documents might not constitute evidence within the normal bounds of the Rules of Evidence, those rules are not applicable at a temporary custody hearing. *See* SDCL 26–7A–34 (stating that the Rules of Civil Procedure apply to adjudicatory hearings, but that all other juvenile hearings are to be conducted to inform the court of the status of the child and to ascertain the child's history, environment, and condition); SDCL 26–7A–56 (stating that the Rules of Evidence apply to adjudicatory hearings, but that all other juvenile hearings are to be conducted under rules prescribed by the court to inform it of the status of the child and to ascertain the child's history, environment and condition). Therefore, the police report and affidavit provided sufficient evidence of a need for temporary custody to permit the trial courts to proceed here.

Cheyenne River Sioux Tribe v. Davis, 2012 S.D. 69, 822 N.W.2d 62, 65-66, reh'g denied (Nov. 26, 2012). Because Plaintiffs challenged the same transcript, and therefore, the same procedure

challenged and approved in *Davis* is the same as that challenged by Plaintiffs in this case. As such, there is no basis to conclude that Judge Davis is not following the laws he is sworn to uphold.

Moreover, the South Dakota emergency custody procedures are consistent with those of other states. For example, in Minnesota, at these emergency custody hearings the judge considers whether the children are in imminent threat of harm by considering only the Petition and whether it states a prima facie case. *Id.* Minnesota courts are also not required to allow the parents to cross-examine witnesses, submit evidence, or otherwise challenge the veracity of the allegations in the Petition. *Id.* at 1007. Just as in South Dakota, this process is comparable to a probable cause hearing, and just as in South Dakota, they are sufficient to protect the due process rights of parents and children in Minnesota. *See Slaven v. Engstrom*, 848 F. Supp. 2d 994, 1005 (D. Minn. 2012) aff'd, 710 F.3d 772 (8th Cir. 2013).

Additionally, New Mexico's emergency custody procedures also do not apply the rules of evidence to these emergency custody hearings. *See* Rule 11-1101.[4] As in South Dakota and Minnesota, New Mexico's emergency custody procedures are treated like probable cause hearings. *See* NMSA 32A-4-16(A) - 18(C). They are not intended to be "fact-finding" hearings, as urged by Plaintiffs because the time constraints and severity of the accusations inherent in emergency custody situations make these hearings ill-suited for the necessary preparation and evaluation to determine the relative safety of a child's environment. *In re Esther V.*, 248 P.3d 863, 873 (N.M. 2011).

However, the procedures of New Mexico, Minnesota, and South Dakota do not violate due process merely because parents are not permitted to cross-examine witnesses or present evidence at these early stages. Similarly, criminal defendants are not permitted to cross examine

[4] New Mexico has since modified the text of Rule 11-1101, but the substantive provisions remain unchanged. See Rule 11-1101(f)(g), as amended by Supreme Court Order No. 13-8300-003, effective May 5, 2013 (stating that the rules of evidence to not apply to either the ex parte custody order, or post deprivation custody hearings.).

witness or present evidence at an initial appearance; such a cumbersome requirement would slow the entire criminal justice system to an unmanageable pace. Rather, A & N procedures are tailored to protect the best interests of the children, first and foremost, and allow the parents and the state to conduct a full and fair investigation of the facts in order to prepare their best cases for the full evidentiary hearing occurring within 90 days, at a minimum.

Critically, 48-hour hearing is *not* expected to be an evidentiary hearing. *Cf.* Complaint, (ECF Doc. 1, ¶ 34.) This is a perfect misstatement of the *Davis* Court's holding and the law of South Dakota. *Davis*, 822 N.W.2d at 65-66; SDCL § 26–7A–56 (stating that the Rules of Evidence apply to adjudicatory hearings, but that all other juvenile hearings are to be conducted under rules prescribed by the court to inform it of the status of the child and to ascertain the child's history, environment and condition). This erroneous contention runs throughout the Complaint, and it merits emphasizing how fundamentally incorrect this assertion is.

Throughout the Complaint, Plaintiffs' rely heavily on *Swipies v. Kofka*, 419 F.3d 709 (8th Cir. 2005), and *Whisman v. Rinehart*, 119 F.3d 1303 (8th Cir 1997). Those decisions are inapposite with the facts presented here. Both *Swipies* and *Whisman* involved law enforcement or juvenile officers who, without prior court approval, and without *any* judicial oversight, initiated an emergency removal. *Swipies*, 419 F.3d at 773; *Whisman*, 119 F.3d at 1307. This is not the process involved here; nor is it alleged to be the process involved here.

In this case, Judge Davis, or whoever the presiding judge may be, reviews either a "Pick-up-and-Place" Order, pursuant to SDCL § 26-7A-13(1)(b), or reviews the police report and ICWA affidavit, if the removal is done without prior court approval, pursuant to SDCL § 26-7A-12(4). There is no dispute that the police report and ICWA affidavit are sufficient evidence for a trial court to order continued custody. *See Davis*, 822 N.W.2d at 65-66. This process has already been judicially determined compliant with South Dakota law. *Id.* As such, Plaintiffs'

reliance on *Swipies* and *Whisman* is clearly misplaced under the circumstances alleged in the Complaint. The present case is an entirely different procedural and factual scenario.

Accordingly, because the South Dakota Supreme Court has unanimously affirmed the procedure employed by Judge Davis in this case, and because those procedures are consistent with the requirements of the Due Process Clause, Plaintiffs' Procedural Due Process allegation fails to state a claim.[5] As such, Count I of Plaintiffs' Complaint should be dismissed.

3. Count III -- Coercion

Count III of the Complaint alleges that Judge Davis has a custom of "coercing Indian parents into waiving" their due process and ICWA rights through the recitation of rights, which includes the right to proceeding informally. (ECF Doc. 1, ¶¶ 114-17.) Plaintiffs ignore that South Dakota law allows for this "informal" process, SDCL § 26-7A-19(2), and therefore, it is an option that parents may choose to exercise. Plaintiffs allege that "the entire process is inherently coercive because the parents have already been deprived of their children." *Id.* at ¶ 116. This is an unavailing argument because even if Plaintiffs' suggested process were employed, the parents would still be deprived of the custody of their children at the outset of the hearing. There is no difference under either state law or the new procedure proposed by Plaintiffs because in either case parents are deprived of custody of their children at the outset of the emergency custody proceeding. Thus, Plaintiffs' suggestion that the parents' deprivation of custody is inherently coercive is erroneous.

[5] Ordinarily, issues of legal interpretation challenged under 42 U.S.C. § 1983 are resolved by the doctrine of judicial immunity. Judges are immune from suit, including suits brought under 42 U.S.C. 1983 for alleged deprivation of civil rights, with two narrow exceptions. *Schottel v. Young*, 687 F.3d 370, 373 (8th Cir. 2012); *Mireles v. Waco*, 502 U.S. 9, 11-12, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). Those two narrow exceptions are: "First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles*, 11-12. There is no question that neither of the exceptions govern this suit. Nonetheless, because of Plaintiffs' artful pleading, the doctrine does not apply here, *Pulliam v. Allen*, 466 U.S. 522 (1970), even though the underlying policy warrants consideration.

Plaintiffs did not provide the transcript from Plaintiff Young's hearing as they claimed to have done in their Complaint.[6] (ECF Doc. 1, ¶ 114.) However, the process reflected in this transcript more than adequately apprises parents of their rights, including the right to an attorney, and the right to proceed informally. Even a cursory review of the transcript reveals that there is nothing coercive about the process.

Harkening back to criminal law, courts are required to advise people who stand accused of unlawful conduct of their rights. *See e.g. Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Though the advisement of rights in the A & N context is different than in criminal cases for various reasons, such as the absence of a right to a jury trial, there is nothing coercive about a trial court's advisement of rights. Indeed, the law could not function as intended if it were otherwise.

As set out in the Young transcript, an accused parent is thoroughly advised of her rights, including her right to demand that the state file a petition and proceed formally, and her right to an attorney. Consequently, parents are not coerced into waiving their rights because nothing is waived. Parents, and *her* attorney, still have the right to demand the petition for temporary custody be "formally" filed at any time. Nothing is waived. Moreover, the attorney for the parent, not the tribe's attorney, can and should decide which process is in the best interest of his or her client.

Again returning to the criminal context, the United States Supreme Court requires a similar recitation of rights for an accused in custody by law enforcement. *Miranda v. Arizona*, 384 U.S. 436 (1966). Decades ago the Supreme Court understood that these types of custodial interrogations can be inherently coercive, and therefore, unreliable as a means of gathering

[6] Due to the privacy concerns of the parents involved in A & N cases, Judge Davis has not attached the Young transcript or the Walking Eagle transcript; however, he would encourage the Court to invite Plaintiffs to disclose them. They contain some critical information about the propriety of Plaintiffs' claims. However, in order to effectively defend against Plaintiffs' allegations, Judge Davis will generally discuss the process reflected in the Young transcript.

evidence. *Miranda*, 384 U.S at 445-458 (noting that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion.) To combat this, the Supreme Court required an advisement of rights before an accused's interrogation. *Id.* It stands to reason that if an advisement of rights to an accused before custodial interrogation by law enforcement guards against the sometimes inherently coercive environment of custodial interrogation, then an advisement by a judge in a neutral environment cannot, as a matter of law, be inherently coercive. A parent cannot be coerced by merely receiving the advisement of rights. Accordingly, Count III of the Complaint fails to state a claim upon which relief can be granted.

II. The Court Should Not Entertain This Action Under the Younger Abstention Doctrine

In *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed.2d 669 (1971), the United States Supreme Court held, "federal courts should abstain from exercising jurisdiction in cases where equitable relief would interfere with pending state proceedings in a way that offends principles of comity and federalism." *Aaron v. Target Corp.*, 357 F.3d 768, 774 (8th Cir. 2004). This principle applies to civil actions as well as criminal actions. *See Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521, 73 L. Ed.2d 116 (1982). The United States Supreme Court has additionally held the policy of abstention set forth in *Younger* regarding the issuance of injunctive relief should be applied equally to the issuance of declaratory relief. *See Samuels v. Mackell*, 401 U.S. 65, 73, 91 S. Ct. 764, 768, 27 L. Ed.2d 688 (1971) (holding "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.").

In determining whether the *Younger* abstention doctrine should apply in an action, the Court is to consider three factors: "(1) the existence of an ongoing state judicial proceeding, (2) which implicates important state interests, and (3) which provides an adequate opportunity to raise constitutional challenges." *Aaron*, 357 F.3d at 774 (citing *Middlesex*, 457 U.S. at 432, 102 S. Ct. 2515). When reviewing these factors, the Court must proceed without any presumption the state courts are unwilling or unable to protect a plaintiff's constitutional rights. *See Middlesex*, 457 U.S. at 431, 102 S.Ct. at 2521 (stating "[m]inimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.").

The first factor asks the Court to determine if there are ongoing state proceedings. *See Aaron*, 357 F.3d at 774. Here, there are ongoing state proceedings. In fact, the state case involving Ms. Walking Eagle is still active and it is anticipated it will be for the foreseeable future.[7] Moreover, there is no question regarding the existence of ongoing state proceedings involving the temporary care and custody of Indian children in Pennington County and that there will continue to be such proceedings commenced even after the instigation of this litigation. The Eighth Circuit has noted that "[t]here is no fixed requirement in the law that a state judicial proceeding must have been initiated before the federal case was filed for abstention to be appropriate. . . ." *Aaron*, 357 F.3d at 775 (citing C. Wright & A. Miller, 17A Federal Practice & Procedure § 4523 (2d ed. 1988). *See also Hicks v. Miranda*, 422 U.S. 332, 348-50, 95 S. Ct. 2281, 2291-2292, 45 L.Ed.2d 223 (1975) (holding the *Younger* abstention doctrine applied even though the federal action commenced prior to the state action). Here, however, there are state proceedings that were commenced prior to the initiation of this action as well as state

[7] It is Judge Davis's understanding that there was a noticed hearing in Ms. Walking Eagle's case which took place on May 6, 2013. The results of that hearing are confidential, but Judge Davis would again encourage the Court to invite Plaintiffs to disclose such information in order to fairly evaluate Plaintiffs' claims.

proceedings which will undoubtedly commence during this litigation; therefore, the first factor of the *Middlesex* test is met.

The second factor asks the Court to look at whether the issue implicates an important state interest. In concluding the federal courts should abstain from interfering with state abuse and neglect proceedings, the United States Supreme Court has held "[f]amily relations are a traditional area of state concern." *Moore v. Sims*, 442 U.S. 415, 435, 99 S.Ct. 2371, 2383, 60 L.Ed.2d 994 (1979). "The state [also] has a compelling interest in quickly and effectively removing the victims of child abuse and neglect from their parents and placing them in safe and suitable homes." *Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456, 524 (D.Neb. 2007). Therefore, the proceedings involving the protection of children implicate vital state interests and the second prong of the *Middlesex* test is satisfied.

The third factor for the Court to consider is whether the state proceedings provide an adequate opportunity to raise constitutional claims. As the United States Supreme Court stated, "[w]here vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.' '[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims...." *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521, 73 L. Ed.2d 116 (1982) (citations omitted). Plaintiffs bear the burden of demonstrating their claims cannot be adjudicated in state court. *See Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14-15, 107 S. Ct. 1519, 1527-28, (1987) (quoting *Moore v. Sims*, 442 U.S. at 432, 99 S.Ct. at 2382) (holding that "the burden on this point rests on the federal plaintiff to show 'that state procedural law barred presentation of [its] claims.'"). *See also Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) (requiring a "clear showing" that the state proceedings could not provide a remedy). Plaintiffs, however, cannot demonstrate their claims could not have been raised before the state courts.

In fact, as discussed, the South Dakota Supreme Court resolved these issues in *Davis*, 822 N.W.2d 62 (2012). In that case, the Cheyenne River Sioux Tribe sued alleging that the requirements and standards set forth in ICWA should be applicable to the 48-hour hearing. *See id.* The South Dakota Supreme Court held ICWA is not applicable at the temporary or emergency custody stage. *See id*. This is a clear demonstration of how Plaintiffs' constitutional claims may be presented to the state courts.

Furthermore, federal litigation will interfere with the state proceedings. Plaintiffs ask the court to

> issue preliminary and permanent injunctive relief pursuant to F.R.Civ.P. Rule 65 [sic], enjoining the Defendants and all persons in concert with them, and their successors in office from
>
> (a) failing and refusing to provide Indian parents and Indian tribes with ***adequate notice and a meaningful hearing at a meaning time*** following the removal of Indian children from their homes by state officials in a manner consistent with the Due Process Clause,
>
> (b) failing and refusing to provide Indian parents and Indian tribes with ***adequate notice and a meaningful hearing at a meaningful time*** following the removal of Indian children from their homes by state officials in a manner consistent with the Indian Child Welfare Act, and
>
> (c) from improperly ***coercing Indian parents into waiving their rights*** to adequate notice and a meaningful hearing at a meaningful time.

Complaint, pp. 38-39 (emphasis added).

First, Plaintiffs assert they are only seeking declaratory relief and not injunctive relief against Judge Davis pursuant 42 U.S.C. § 1983. Plaintiffs are, however, requesting this Court to mandate how state proceedings should be conducted. It is disingenuous to suggest injunctive relief levied against the other named defendants seeking to direct the manner in which state court proceedings are conducted would not equate to the grant of injunctive relief against Judge Davis or other state court judges. While the notice of the hearing may be provided by DSS and the state's attorney's office, the scheduling of the hearing and the manner in which the hearing is

conducted is under the control of the judge assigned to the case and set forth by state statute.[8] Reviewing Plaintiffs' prayer for relief, one can only draw the conclusion Plaintiffs seek the Court to order that a hearing be held within a specific time-frame and be conducted in a specific manner. The only way Plaintiffs obtain the relief they seek, therefore, is through injunctive relief directed at the state courts and at Judge Davis in particular. Injunctive relief is not available against Judge Davis. *See* 42 U.S.C. § 1983.

Additionally, it is important for the Court to consider how compliance would be achieved were the Court to grant the relief sought by Plaintiffs. In *O'Shea v. Littleton*, 414 U.S. 488, 501, 94 S. Ct. 669, 679, 38 L.Ed.2d 674 (1974), the United States Supreme Court noted, "the question arises of how compliance might be enforced if the beneficiaries of the injunction were to charge that it had been disobeyed." *O'Shea v. Littleton*, 414 U.S. 488, 501 (1974). The plaintiffs in *O'Shea*, like the plaintiffs in this matter, sought injunctive relief regarding how state court proceedings were conducted. *See id*. The Supreme Court noted if plaintiffs were granted the relief they sought, it "would require for its enforcement the continuous supervision by the federal court of the conduct of [Defendants] in the course of future . . . proceedings involving any of the members of the [plaintiffs'] broadly defined class." *Id.* Likewise, the same situation would arise in this matter should the court grant the relief sought by plaintiffs. It is for the purpose of avoiding these types of situations that the doctrine of abstention has been implemented.

The state courts provide the proper forum and opportunity for Plaintiffs to present their claims. Should the Court allow this case to proceed, it would not only interfere with ongoing state proceedings pertaining to the named Plaintiffs, but also with regard to the putative class members. Additionally, it presents issues regarding enforcement. As the United States Supreme

[8] As discussed, ICWA recognizes emergency removal proceedings are conducted in accordance with state law and are not subject to any additional requirements provided by ICWA. *See* 25 U.S.C. §1922. The 48-hour hearing is part of the state-mandated emergency removal proceeding and is not subject to ICWA.

Court noted, "[i]t would trivialize the principles of comity and federalism if federal courts failed to take into account that an adequate state forum for all relevant issues has clearly been demonstrated to be available prior to any proceedings on the merits in federal court." *Middlesex*, 457 U.S. at 437, 102 S.Ct. at 2524.

All three of the *Middlesex* factors are met in this matter. Therefore, the Court should abstain from entertaining this matter. The only exception is if there is a "showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate[.]" *Middlesex*, 457 U.S. at 435, 102 S.Ct. at 2523. The exceptions are to be narrowly construed and "only invoked in 'extraordinary circumstances.'" *Aaron*, 357 F.3d at 779 (quoting *Younger*, 401 U.S. at 53-54, 91 S. ct. 746). There is no evidence, however, Defendants have acted in bad faith, have engaged in harassment, or that some other extraordinary circumstance exists that would require the intervention and oversight by this Court in state court proceedings. *See Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245, 1254 (8th Cir. 2012) (discussing the exceptions to the *Younger* abstention doctrine). The absence of bad faith and harassment is further highlighted by the South Dakota Supreme Court's holding that ICWA is not applicable to the 48-hour hearing. *See Davis*, *supra*, at 64. Furthermore, as stated previously, a court "may not engage any presumption 'that the state courts will not safeguard federal constitutional rights.'" *Neal v Wilson*, 112 F.3d 351, 357 (8th Cir. 1997) (quoting *Middlesex*, 457 U.S. at 431, 102 S.Ct. at 2521)). As a result, the *Middlesex* factors are met. There are no exceptions rendering abstention inappropriate. Therefore, the Court should apply the *Younger* abstention doctrine and dismiss this action.

III. Plaintiffs Failed to Exhaust Administrative Remedies

Should the Court find abstention inappropriate, Defendants also move for dismissal based on Plaintiffs' failure to exhaust their state law remedies. The Eighth Circuit has held "[u]nder federal law, a litigant asserting a deprivation of procedural due process must exhaust state

remedies before such an allegation states a claim under § 1983." *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000). The United States Supreme Court has reiterated the need for exhaustion before seeking equitable relief in federal court. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608, 95 S. Ct. 1200, 1211, 43 L.Ed.2d 482 (1975) (requiring exhaustion of state remedies before commencing an action in federal court). *See also Gibson v. Berryhill*, 411 U.S. 564, 573, 93 S.Ct. 1689, 1965, 36 L.Ed.2d 488 (1973) (stating "there is a doctrine, usually applicable when an injunction is sought, that a party must exhaust his available administrative remedies before invoking the equitable jurisdiction of a court.").

Here, Plaintiffs allege they were deprived of notice and a meaningful opportunity to be heard in a meaningful time. Under SDCL § 15-26A-3(6), an appeal may be made to the South Dakota Supreme Court from "[a]ny other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding[.]" The parties also may make an intermediate appeal regarding an order of adjudication with the permission of the court in accordance with the rules of appellate procedure. *See* SDCL § 26-7A-87. The parties further have the right to appeal after the final disposition of the matter. *See* SDCL § 26-7A-90. Moreover, a party may seek a writ of mandamus at any time. *See* SDCL §§ 21-29-1 and 21-29-3. *See also Davis*, 822 N.W.2d at 62.

Plaintiffs do not aver in their Complaint that they raised these objections before the circuit court.[9] Nor is there any suggestion Plaintiffs attempted to assert the alleged violations of their rights by appealing to the South Dakota Supreme Court or that they sought the review of

[9] In fact, it appears that only the Oglala Sioux Tribe raised any of these objections before the circuit court in the Young case. The Oglala Sioux Tribe, however, did not seek any further remedy after raising the objections. As a result, their claims have not been exhausted.

the United States Supreme Court. Furthermore, there is no indication that any of the Plaintiffs sought a writ of mandamus at any time during the proceedings.[10] Plaintiffs clearly had the opportunity to raise such concerns before the state court. Yet, Plaintiffs chose not to pursue their remedies. As a result, they cannot now be heard in *federal* court after denying the *state* court an opportunity to address their claims.

IV. Tribes Lack Standing to Assert Claims

The Tribe asserts that it "brings this action as *parens patriae* to vindicate rights afforded to their members by the Due Process Clause of the Fourteenth Amendment and by ICWA" (ECF Doc. 1, ¶ 3), and "its own rights under ICWA". (ECF Doc. 1, ¶4).

In order to bring suit, a plaintiff must have standing to vindicate the rights it claims to have been infringed. "The question of standing 'involves ... constitutional limitations on federal-court jurisdiction.' " *Bennett v. Spear*, 520 U.S. 154, 162 (1997). "To satisfy the case or controversy requirement of Article III, which is the irreducible constitutional minimum of standing, a plaintiff must, generally speaking, demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Id.* (internal quotations omitted).

The tribal plaintiffs attempt to vindicate their own sovereign rights under ICWA. (ECF Doc. 1, ¶ 4.) However, because the only section of ICWA which applies to emergency custody proceedings, § 1922, does not confer any discernible right to the tribes, the Oglala Sioux Tribe and the Rosebud Sioux Tribe cannot demonstrate any injury capable of redress under § 1922. Moreover, the Supreme Court has held that a tribe may not sue under § 1983 to vindicate a sovereign right, because it is not a "person" under the Act. *Inyo Cnty., Cal. v. Paiute-Shoshone*

[10] Plaintiffs' failure to exhaust their state remedies is further punctuated by the *Davis* case. In *Davis*, The Cheyenne River Sioux Tribe felt their rights were being violated by the proceedings and applied for a writ of mandamus, thus illustrating the availability of remedies to Plaintiffs within the state court. *See Davis*, 822 N.W.2d at 62.

Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 712 (2003). Such is the case here, and the tribal Plaintiffs lack standing to vindicate their sovereign rights through § 1983.

Consequently, the only way the tribal plaintiffs' to have standing is to vicariously assert the rights afforded to their members. The tribal plaintiffs' assert the doctrine of *parens patriae* to satisfy their own justiciability requirements. (ECF Doc. 1, ¶ 3.)

> *Parens patriae* means literally "parent of the country." The *parens patriae* action has its roots in the common-law concept of the "royal prerogative." The royal prerogative included the right or responsibility to take care of persons who "are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property." At a fairly early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative: "This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function ... often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves."

Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 600 (1982)(internal citations omitted).

However, a Tribe's claim of *parens patriae* is limited to those situations where the Tribe is representing *all* of its tribal members. The Eighth Circuit has specified:

> The doctrine of parens patriae allows a sovereign to bring an action on behalf of the interest of all of its citizens. However, this doctrine is reserved for actions which 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.

United States v. Santee Sioux Tribe of Nebraska, 154 F.3d 728, 734 (8th Cir. 2001) (citations omitted, emphasis in original). Here, the requested class is not *all* of each Plaintiff Tribe's members, but only those members who are parents and custodians of Indian children. The doctrine of *parens patriae* therefore does not confer standing on the Plaintiff Tribes to bring this action.

Tribes cannot step in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves; they must also have a real interest of its own to have standing under the *parens patriae* doctrine. *See Pennsylvania v. New Jersey*, 426 U.S. 660 (1976); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938); *Oklahoma v. Atchison, T. & S.F.R. Co.*, 220 U.S. 277 (1911). Here, there is no separate and distinguishable right of the tribal plaintiffs that is not being fully and fairly represented by the parent plaintiffs, especially because the plain language of § 1922 confers no right upon Tribes. As such, the tribal plaintiffs suffer no injury themselves in the 48-hour emergency custody process at issue in this case. Consequently, the Oglala Sioux Tribe and the Rosebud Sioux Tribe lack standing, both their own rights and under the doctrine of *parens patriae* to vicariously assert the rights of their members.

CONCLUSION

For the foregoing reasons, and pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, Defendant Judge Jeff Davis respectfully requests the Court grant his Motion to Dismiss.

Dated this 17th day of May, 2013.

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