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, v. LUANN VAN HUNNIK; MARK VARGO; HON. JEFF DAVIS; and KIM MALSAM-RYSDON, in their official capacities, Defendants.	)	Case No.: 13-5020 **DEFENDANT MARK VARGO'S BRIEF IN SUPPORT OF MOTION TO DISMISS IN LIEU OF ANSWER**

Defendant State's Attorney Mark Vargo, by and through his counsel Cris Palmer and Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, LLP, hereby moves to dismiss the Complaint in lieu of filing an Answer pursuant to Fed. R. Civ. P. 12(b).

Defendant Vargo joins in all arguments asserted by Defendant Honorable Jeff W. Davis' Motion to Dismiss, filed May 17, 2013. Defendant Vargo incorporates herein by this reference all arguments contained in Defendant Judge Davis' response brief.

In addition to those arguments, Defendant Vargo asserts the argument and authorities below.

1. **Plaintiffs' ICWA claims against Defendant Vargo cannot be vindicated under 42 U.S.C. § 1983.**

   a. **Policy, practice and custom.**

Plaintiffs make numerous allegations against Defendant Judge Davis and his manner of handling 48-hour hearings. The Complaint alleges far fewer facts regarding what Plaintiffs believe Defendant Vargo does or does not do, which allegedly violate Plaintiffs' rights.

Plaintiffs allege that there is nothing in state law that prevents Vargo from training his staff to request that the Court afford Indian parents the procedural safeguards Plaintiffs assert apply to 48-hour hearings, or from giving parents a copy of the documents that Vargo has filed with the Court. See Complaint (Doc. 1), ¶ 46. Plaintiffs assert that even if the judiciary initiated the practice of refusing to afford an adequate hearing until 60 days later, Vargo has ratified and adopted this practice; making it Vargo's own official policy, practice, and custom. Id., ¶ 47. The example Plaintiffs use is that Vargo typically requests that the court grant DSS custody of Indian children for 60 days rather than requesting a prompt due process hearing. Id., ¶ 47.

Plaintiffs assert that Vargo must train his staff to ensure that Indian families receive the procedural protections guaranteed by federal law. Id., ¶ 48. Plaintiffs do not allege which of the Defendants are responsible for allegedly not allowing parents to see the petition and ICWA affidavit, but make general assertions against all Defendants. See e.g. Id., ¶¶ 49-51. While not entirely clear what policies, practices, and procedures are Vargo's in particular, and making most allegations critical of the judicial process in general, it is difficult to determine what exactly Plaintiffs aver Vargo has done wrong.

Defendant Judge Davis' brief has adequately delineated how the abuse and neglect ("A & N") process proceeds according to South Dakota statute and case law, and it will not be repeated herein. Just as Defendant Judge Davis argues, Vargo has no "policies, practices, and customs" of his own, but rather follows South Dakota statute regarding 48-hour hearings, which are not governed by ICWA.

Because Vargo follows state law and does not have his own practices or policies regarding these issues, Plaintiffs' Complaint is an attack on South Dakota's statutory compliance with federal law, and not Vargo's policies or practices. As Defendant Judge Davis cites and argues, Plaintiffs must first make the threshold showing that Mark Vargo is a "policymaker." However, as Defendant Judge Davis's brief argues, the 48-hour hearing protocol is set by state statute, and Vargo is compelled by oath to follow the procedures required of those statutes. As the case law cited in Defendant Judge Davis's brief indicates, because Plaintiffs fail to demonstrate any "policy" by Vargo beyond what is required by state statute, Plaintiffs' due process argument must fail.

The Eighth Circuit took up a remarkably similar case in Slaven v. Engstrom, 710 F.3d 772 (8th Cir. 2013). In Slaven, parents brought suit against a Hennepin County assistant County Attorney in his/her official capacity under 42 U.S.C. § 1983 for violation of their procedural due process rights when plaintiffs were not provided adequate notice of an emergency protective custody hearing and provided a meaningful hearing. The Eighth Circuit found that Hennepin County officials were not liable under § 1983 for implementing Minnesota law because those officials were required to do so. Id. at 779. The Slaven court recognized the United States Supreme Court authority requiring plaintiffs seeking to impose § 1983 liability to identify a policy or custom that caused the plaintiff's injury. Id. at 780 (citing Bd. of County Comm'rs of Bryan County, Okla v. Brown, 520 U.S. 397, 403 (1997)). Local governmental officials may only be held liable for "those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the [governmental body]." Brown, 520 U.S. 397 at 403-04. Because the plaintiffs did not allege that Hennepin County has policies separate and distinct from Minnesota law, the plaintiffs'

complaint merely complained of the judge's application of Minnesota law and handling and scheduling the emergency protective custody hearings. Slaven, 710 F.3d at 780. The Eighth Circuit found that without policies and practices separate from state law, the plaintiffs could not sue under § 1983. Id.

Specifically, the Slaven plaintiffs alleged that the court denied their right to provide rebuttal evidence and the right to cross-examine witnesses at the emergency custody hearing. Id. The plaintiffs alleged that because Hennepin County officials knew of evidence that could overcome the allegations offered in the petitions, the Hennepin County officials knowingly participated in the plaintiffs denied right to due process. Id. The court found that Hennepin County lacked any policymaking authority regarding the handling and scheduling of the emergency protective hearing and formal hearing, and that the plaintiffs' complaint essentially alleged that state law and the judge's application of that law, "not an independent Hennepin County policy", caused the alleged due process violations. Id. at 781.

In the same manner, Plaintiffs here assert the same allegations against Vargo. For the same reasons as stated in Slaven, this Court should dismiss Plaintiffs' Complaint.

b. Prosecutorial Immunity Under § 1983.

Prosecuting attorneys, including those representing the Department of Social Services, are entitled to absolute prosecutorial immunity from § 1983 suits when the attorney acts within the scope of his prosecutorial duties. Parkell v. South Carolina, 687 F.Supp.2d 576, 587 (D.S.C. 2009). A prosecutor's conduct in initiating prosecution and his conduct preliminary to the initiation of prosecution are protected, and so is the conduct within the courtroom wherein the prosecutor acts as an advocate for the State. Buckley v. Fitzsimmons, 509 U.S. 259, 272 (1993).

See also Weller v. Dept. of Soc. Serv. for the City of Baltimore, 901 F.2d 387, 397 (4th Cir. 1990) (attorneys for DSS are expressly afforded prosecutorial immunity).

Prosecutors are extended absolute immunity from § 1983 suits "for conduct of prosecutors that was intimately associated with the judicial phase of the criminal process." Buckley, 509 U.S. at 270 (internal quotations omitted) (citing Imbler v. Pachtman, 424 U.S. 409 (1976)). This absolute immunity extends to a prosecutor's involvement in a probable cause hearing. Id. (citing Burns v. Reed, 500 U.S. 478, 489-90 (1991)). Appearing before a judge and presenting evidence in support of a motion for a search warrant involves a prosecutor's role as an advocate for the State, and is therefore protected. Id. at 271. "Because issuance of a search warrant is a judicial act, appearance at the probable-cause hearing was intimately associated with the judicial phase of the criminal process." Id. (internal quotations omitted) (citing Burns, 500 U.S. at 492). A prosecutor's presentation of a State's case is immune from § 1983 suit. Imbler, 424 U.S. at 430.

As indicated above, the most the Complaint alleges against Vargo is that if the judiciary initiated the practice of refusing to afford an adequate hearing until 60 days, Vargo has ratified and adopted this practice, making it Vargo's own official policy, practice, and custom. Doc. 1, ¶ 47. Even if this allegation were true, certainly such is "intimately associated with the judicial phase" of the A & N emergency custody process. As such, Vargo is afforded absolute immunity from suit under § 1983.

c. Coercion.

There are no allegations that Defendant Vargo has coerced the Plaintiffs into waiving their rights. A review of the Complaint indicates that Plaintiffs are not alleging that Defendant

Vargo coerced Plaintiffs or anyone else into waiving their rights. Defendant Vargo cannot be found in violation of this claim, as Plaintiffs have made no such claim against him.

d. The Court should not entertain this action under the Rooker-Feldman abstention doctrines.

In Carson P. v. Heineman, 240 F.R.D. 456 (D.Neb. 2007), the minor plaintiffs claimed that the State of Nebraska's actions or inactions in implementing its child welfare system violated the Constitution and federal statutes, as well as Fourteenth Amendment procedural and substantive due process rights. Id. at 464. On a motion to dismiss, the court discussed the Rooker-Feldman and Younger abstention doctrines, as well as standing principals.

This Court lacks subject matter jurisdiction pursuant to D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983), and Rooker v. Fid. Trust Co., 263 U.S. 413, 415 (1923). Under the Rooker-Feldman doctrine, lower federal courts lack subject matter jurisdiction over challenges to state court judgments. Ballinger v. Culotta, 322 F.3d 546, 548 (8th Cir. 2003). "The doctrine bars federal courts from hearing cases brought by the losing parties in state court proceedings alleging 'injury caused by the state-court judgment and seeking review and rejection of that judgment.'" Mosby v. Ligon, 418 F.3d 927, 931 (8th Cir. 2005) (citing Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005)). "District courts may not review state court decisions, even if those challenges allege that the state court's action was unconstitutional because federal jurisdiction to review most state court judgments is vested exclusively in the United States Supreme Court." Carson P., 240 F.R.D. at 522, (internal quotations and citations omitted). "A party who was unsuccessful in state court thus is barred from seeking what in substance would be appellate review of the state judgment in a United States district court based on the losing party's claim that the state judgment itself violates the loser's federal rights." Id. at 522 (internal citations and quotations omitted). "This jurisdictional bar extends not only to

straightforward appeals but also [to] more indirect attempts by federal plaintiffs to undermine state court decisions." Id. (internal citations and quotations omitted). "Federal district courts thus may not exercise jurisdiction over general constitutional claims that are inextricably intertwined with specific claims already adjudicated in state court." Id. (internal citations and quotations omitted).

Plaintiffs may argue that they do not seek reversal of the state court rulings in their individual cases, and therefore the Rooker- Feldman doctrine does not apply. But such an argument holds true only if "this court could enter prospective relief in favor of the plaintiffs without addressing the merits and reasoning of past . . . court rulings" Id. at 523. Plaintiffs have asked this Court to review the very issues Plaintiffs raised in their state court proceedings, which have been conclusively determined in Cheyenne River Sioux Tribe v. Davis, 2012 S.D. 69.[1] Essentially, Plaintiffs dislike the South Dakota Supreme Court's opinion in Cheyenne River, and instead of appealing that case to the United States Supreme Court, wish to have the legal issues relitigated in this Court. The Rooker-Feldman doctrine prohibits just that.

No Plaintiff was without opportunity to seek adjudication regarding the emergency custody exception found in 25 U.S.C. § 1922 in her state court proceedings, including before the South Dakota Supreme Court and the United States Supreme Court. Instead of following the proper process, Plaintiffs instead seek this Court's review of issues the Plaintiffs did appeal or could have appealed in their underlying cases. Whether pursuant to the Rooker-Feldman or the or the Younger doctrine, this Court should dismiss Plaintiffs' claims. See e.g. Carson P., 240 F.R.D. 456 at 529.

2. Plaintiffs' Have Failed to Establish Standing Required for Article III Jurisdiction

[1] This argument was fully briefed in Defendant Judge Davis' brief in support of his motion to dismiss, and will not be reargued herein.

Because the issue of standing pertains to a federal court's subject-matter jurisdiction under Article III, it is properly raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). Standing is examined at "the commencement of the litigation." Id. (citations omitted). Generally, to have standing to sue in federal court, a plaintiff must meet the requirements set forth in the so-called "Case or Controversy Clause" of Article III of the United States Constitution. U.S. Const. art. III, § 2; Warth v. Seldin, 422 U.S. 490, 498 (1975). A plaintiff must allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Id. at 498–99 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). "[T]he plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations, internal quotation marks, and footnote omitted).

Standing "is perhaps the most important of the jurisdictional doctrines." Here, all Plaintiffs have failed to prove Article III standing and without such a showing, the Court does not have jurisdiction to consider this matter. Each Plaintiff must individually demonstrate standing. U.S. v. Hays, 515 U.S. 737, 742 (1995).

The United States Supreme Court has clearly indicated "the irreducible constitutional minimum of standing" which contains three elements. Id. First, the Plaintiff must have suffered an "injury in fact," which is defined as an invasion of a legally-protected interest that is a) concrete and particularized; and b) actual or imminent, not conjectural or hypothetical. Id. at 743. Second, there must be a causal connection between the injury and the conduct complained of. Id. Third, it must be likely, as opposed to merely speculative, that the injury will be

redressed by a favorable decision. Id. The U.S. Supreme Court has characterized these principles by repeatedly refusing "to recognize a generalized grievance against allegedly illegal government conduct as sufficient for standing to invoke the federal judicial power." Id. The burden is upon the party seeking the exercise of jurisdiction in his favor, to clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. Id.

"The rule against generalized grievances applies with as much force in the equal protection context as in any other." Id. In Allen v. Wright, the U.S. Supreme Court made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury "accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." Allen v. Wright, 468 U.S. 737, 755 (1984) (accord Hays, 515 U.S. at 743-44). "Only those citizens able to allege injury as a direct result of having *personally* been denied equal treatment may bring such a challenge, and citizens who do so carry the burden of proving their standing, as well as their case on the merits." Hays 515 U.S. at 746 (citing Allen, 468 U.S. at 755).

The Supreme Court has used juror selection as an example, (citing Powers v. Ohio, 499 U.S. 400 (1991)). Powers held that "[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." But of course, where an individual juror is excluded from the jury because of race, that juror has *personally* suffered the race-based harm recognized in Powers, and it is the fact of *personal* injury that is required. Hays, 515 U.S. at 746-47.

"Federal courts, bound by Article III, are 'not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution.'" Dillard v. Chilton Co. Comm., 495 F.3d 1324, 1331 (11th Cir. 2007) (citing Hein v. Freedom From Religion

Found, Inc., 551 U.S. 587, 598 (2007)). "[A] plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." Id. at 642-43 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). As in Lance v. Coffman, "[t]he only injury . . . allege[d] is that the law . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." Lance v. Coffman, 549 U.S. 437, 442 (2007) (per curium).

"Moreover, when … the plaintiff is seeking injunctive relief he must establish that he personally faces a realistic, immediate, and non-speculative threat of being prospectively subjected to or harmed by the particular conduct at issue." Newman v. Voinovich, 789 F.Supp. 1410, 1415 (S.D. Ohio 1992) (citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-77 (1982)); Bishop v. Bartlett, 575 F.3d 419, 425 (4th Cir. 2009) (allegations based on speculation will not withstand a standing challenge).

"Although a case may not be moot, a plaintiff still has the burden of showing that equitable relief is necessary, and the mere possibility of future injury is insufficient to enjoin official conduct." Olagues v. Russoniello, 770 F.2d 791, 799 (9th Cir.1985) (citing U.S. v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). "[t]he Supreme Court's admonition that any injunction regarding government functions is generally only permitted in 'extraordinary circumstances,' as officials should be given the 'widest latitude' possible while performing their official duties." Olagues, 770 F.2d at 799 (internal quotations and citations omitted).

When determining whether to grant or deny a request for a permanent injunction, Plaintiffs must satisfy the four factors required in Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743, 2756 (2010). Those factors are as follows:

1. Plaintiffs have suffered an irreparable injury;

2. that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;

3. that, considering the balance of hardships between the plaintiffs and defendants, a remedy in equity is warranted; and

4. that the public interest would not be disserved by a permanent injunction.

"An injunction should issue only if the traditional four-factor test is satisfied." Monsanto, 130 S.Ct. at 2757.

As Wright and Miller have noted:

> Since an injunction is regarded as an extraordinary remedy, it is not granted routinely; [footnote omitted] indeed, the court usually will refuse to exercise its equity jurisdiction unless the right to relief is clear… [H]istorically, and even today, the main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has no adequate legal remedy.

Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2942 (1995).

Plaintiffs have failed to prove Article III standing and without such a showing the Court does not have jurisdiction to consider this matter. To be clear, each Plaintiff must individually demonstrate standing. Hays, 515 U.S. at 743-44. As provided above, Plaintiffs may not assert the legal rights of a third party. Here, Plaintiffs do not assert that they personally will suffer some distinct injury-in-fact – that being an impending 48-hearing in which they must participate. Moreover, in light of the Plaintiffs' option to transfer A & N proceedings to tribal court, the alleged injury cannot be traced with some degree of causal certainty to Defendants' conduct.

Any relief this Court may grant is not likely to redress any Plaintiff's injury, as no Plaintiff has alleged that they have a 48-hour hearing impending. Rather, read in light most favorable to Plaintiffs, the record provides a "generalized grievance" that is shared by many. As to Plaintiffs, this alone establishes their failure to maintain Article III standing. Allen, 468 U.S. at 755; see also Bishop v. Bartlett, 575 F.3d 419, 425 (4th Cir. 2009) (allegations based on speculation will not withstand a standing challenge).

Plaintiffs allege no more than a generalized grievance with no indication that they will suffer an injury-in-fact that is concrete and particularized and actual and imminent, not conjectural or hypothetical. Hays, 515 U.S. at 743. Because none of the Plaintiffs can prove injury-in-fact, they cannot prove a causal relationship between the injury and the challenged conduct or that the injury likely will be redressed by a favorable decision as required by Pucket v. Hot Springs School District No. 23-2, 526 F.3d 1151, 1157 (8th Cir. 2008). In addition, Plaintiffs must prove that they have suffered an irreparable injury before the Court may grant a permanent injunction. Monsanto Co., 130 S.Ct. at 2756. Without such a showing, Plaintiffs' claims must be dismissed.

In Carson P., the District Court of Nebraska discussed standing in a similar case. 240 F.R.D. 456, 509. The court recognized that standing ensures that "the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Id. (citing Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004)). Standing includes both Article III standing and prudential standing, "which embodies judicially self-imposed limits on the exercise of federal jurisdiction." Id. (citing Elk Grove 542 U.S. at 11). Prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights . . . ." Id. (citing Elk Grove, 542 U.S. at 11). "Without such limitations – closely related to Art. III concerns but

essentially matters of judicial self-governance – the court would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Id. at 510 (citing Elk Grove, 542 U.S. at 11).

In Carson P., at the time of filing the complaint, two plaintiffs were minors who had previously been in the Nebraska Health and Human Services' ("HHS") legal custody. Id. at 511. These two plaintiffs went on to hit the age of majority. Id. The court dismissed their claims for injunctive and declaratory relief, finding they lacked standing. Id. at 511; see e.g. Elizabeth M., 458 F.3d 779, 784–85 (8th Cir.2006) (holding the district court abused its discretion by including former residents of residential mental health facilities in a class seeking declaratory and injunctive relief for allegedly harmful state practices and policies); 31 Foster Children v. Bush, 329 F.3d 1255, 1263 (11th Cir.2003) (holding that two plaintiffs who had been adopted had no legally cognizable interest in the outcome of a lawsuit for injunctive relief—they were "no longer in the defendants' legal or physical custody and therefore cannot be further harmed by the defendants' alleged illegal practices. Because the plaintiffs' amended complaint seeks only prospective injunctive relief against the defendants to prevent future harm, no live controversy exists between them and these two plaintiffs."); J.B. ex rel. Hart v. Valdez, 186 F.3d. 1280, 1290 (10th Cir. 1990) (granting defendants' motions to dismiss certain named plaintiffs because they had reached the age of majority or otherwise fallen outside of state custody, rendering their claims moot); Robinson v. Leahy, 73 F.R.D. 109, 113–14 (D.C.Ill.1977) (holding that a post-adjudication child welfare custody, unlike pretrial detention (distinguishing Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)), cannot be characterized as so transitory that a

putative class representative whose claim became moot before a class was certified can nonetheless represent the class).

"Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if accompanied by any continuing, present adverse effects . . . ." Park v. Forest Service of U.S., 205 F.3d 1034, 1037 (8th Cir. 2000). "If the alleged unlawful conduct is not ongoing, the plaintiff does not have standing unless he or she demonstrates the existence of a real and immediate threat of suffering a similar injury in the future." Carson P. 240 F.R.D. at 512 (citing Park, 205 F.3d at 1037).

Plaintiffs have not alleged that they are likely to abuse or neglect their children in the immediate future, and therefore suffer a "real and immediate threat" of a 48-hour hearing in the manner they allege violates federal law. Without any such allegation, Plaintiffs lack standing to pursue their claims.

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