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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	Case No. 5:13-cv-05020-JLV PLAINTIFFS' SECOND MOTION FOR PARTIAL SUMMARY JUDMENT: DUE PROCESS VIOLATIONS

INTRODUCTION

Plaintiffs respectfully submit this motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1. As discussed below, there is no genuine dispute as to any material fact regarding the legal claims presented herein and Plaintiffs are entitled to judgment as a matter of law.

Five separate claims for relief under the Due Process Clause are presented here. They share a common aim: all five seek to protect the parent-child relationship from unnecessary government intrusion. Thus, the claims raised here seek to preserve "perhaps the oldest of the fundamental liberties recognized by [the Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

"The bonds between a parent and child are, in a word, sacrosanct" and are protected by federal law against unwarranted invasion by the state. *Swipies v. Kofka*, 419 F.3d 709, 715 (8th Cir. 2005). Parental custody over a child is a constitutionally protected liberty interest. *Stanley v. Illinois*, 405 U.S. 645, 649-58 (1972); *see also Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. 1997) ("Both parents and children have a liberty interest in the care and companionship of each other."). As this Court has recognized, "[t]he 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.'" *Oglala Sioux Tribe v. Van Hunnik*, Civ. No. 5:13-5020 (D.S.D. Order Denying Motions to Dismiss Jan. 28, 2014), (Docket 69) ("MTD Order"), at 37 (quoting *Troxel*, 530 U.S. at 66).

Every constitutionally protected liberty interest is safeguarded against arbitrary loss by the Due Process Clause. *See Board of Pardons v. Allen*, 482 U.S. 369, 371, 381 (1987). That Clause requires the state to afford certain procedural protections whenever the state seeks to deny or curtail a liberty interest. *See Boddie v. Connecticut*, 401 U.S. 371 (1971); *Swipies*, 419 F.3d at 713-14; *Whisman*, 119 F.3d at 1309. Consequently, the state may not deny or curtail the right of a parent to retain custody of his or her child without affording both the parent and the child the protections required by the Due

Process Clause. *Swipies*, 419 F.3d at 715; *Whisman*, 119 F.3d at 1310; *see generally* MTD Order at 36-40.[1]

There are many real world consequences for the parents and children involved in the child custody proceedings at issue in this litigation. Numerous studies have chronicled the traumatic and often permanently scarring effect of the involuntary removal of children from their homes. *See, e.g.*, Paul Chill, "Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings," 4 *Family Court Review* 457, 457 (2003) ("Removals can be terrifying experiences for children and families. . . . Children are thrust into alien environments, separated from parents, siblings, and all else familiar, with little if any idea of why they have been taken there."). Feelings of terror, grief, and abandonment are typical, and a child's forced separation from parents at the hands of a stranger can adversely affect his or her capacity to form attachments in the future and to trust authority. *See id.* at 458.

"The decision to remove a [child] from the family home is always serious and the resulting disruptions can often be traumatic for both parent and child." *Rivera v. Marcus*, 696 F.2d 1016, 1017 (2d Cir. 1982). Only in exigent circumstances, when there is an imminent risk of serious injury, should the state separate children from their parents. *See generally Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2002); *Nicholson v. Williams*, 203 F. Supp.2d 153, 198-99 (E.D.N.Y. 2002) (citing expert testimony that even a short breach in the familial bond caused by involuntary separation of the child from his or her

[1] Children have a fundamental liberty interest in remaining in the care and custody of their parents and thus suffer a cognizable harm when removed from the home without adequate notice and hearing. *Whisman*, 119 F.3d at 1309 ("Both parents and children have a liberty interest in the care and companionship of each other.") (citing *Lehr v. Robertson,* 463 U.S. 248, 258 (1983)); *see also Suboh v. Dist. Attorney's Office of Suffolk Dist*., 298 F.3d 81, 91 (1st Cir. 2002)); *Brokaw v. Mercer County*, 235 F.3d 1000, 1018–19 (7th Cir. 2000).

home will likely be detrimental to the child's well-being, cause distress and despair, and result in feelings of self-blame that could last a lifetime); *B.S. v. Somerset County*, 704 F.3d 270, 272 (3d Cir. 2013) (recognizing that removing a child from the home is a "drastic" action that has "profound ramifications for the integrity of the family unit and for each member of it").

This is especially true for Indian children in foster care in South Dakota, because the South Dakota Department of Social Services ("DSS") places the vast majority of these children in non-Indian homes, thus separating them from both their family and their culture.[2] Indeed, a major reason Congress passed the Indian Child Welfare Act ("ICWA") in 1978 was to protect Indian children from experiencing these injuries. *See* H.R. Rep. No. 95-1386 (1978) at 9 (explaining that the removal of Indian children from their families by state welfare employees "is perhaps the most tragic and destructive aspect of American Indian life today," resulting in a crisis "of massive proportions"); *see also Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2561 (2013) (recognizing ICWA's "primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families"); MTD Order at 32 (recognizing that ICWA seeks to "curb the alarmingly high rate of removal of Indian children from Indian parents").

South Dakota, as every state, has established a process for the removal of children from their homes in emergency circumstances. *See* SDCL Chap. 26-7A. In South Dakota, a child may be taken into state custody by a law enforcement or court services officer without a court order when there is an "imminent danger to the child's life or safety" and there is insufficient time to apply for a court order. SDCL § 26-7A-12(4).

[2] According to a study conducted by National Public Radio (NPR) based on data collected from DSS, more than 80 percent of Indian children in foster care are placed in non-Indian homes by DSS. *See* http://www.npr.org/assets/blogs/ombudsman/South%20Dakota%20Foster%20Care.pdf at 63.

Alternatively, a court may order temporary custody of a child upon application by the state's attorney, social worker of DSS, or law enforcement officer, if there is good cause to believe that "[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." *Id.* § 26-7A-13(1)(b).

Under these provisions, no child may be held in custody longer than 48 hours (except weekends) "unless a temporary custody petition for an apparent abuse or neglect case or other petition has been filed." *Id.* § 26-7A-14. As such, the court must convene a hearing within 48 hours after the child is taken into custody (except weekends) "unless extended by the court." *Id.* § 26-7A-15. Whoever takes a child into state custody must immediately inform the child's parents or custodians, orally or in writing, that they have "the right to a prompt hearing by the court to determine whether temporary custody should be continued." *Id.* If the child is an Indian child, an effort must also be made to notify the child's tribe. *Id.* The purpose of South Dakota's temporary custody (or "48-hour") hearing is "to determine whether temporary custody should be continued" or whether the child may safely be returned to the parents. *Id.* If the court decides to continue custody, the court has the option under South Dakota law of giving legal custody of the child to DSS for a maximum of sixty days, after which the status of that custody must be reviewed by the court. *Id.* § 26-7A-16.[3]

All five due process issues addressed in this pleading concern the manner in which Defendants conduct 48-hour hearings involving Indian children. As shown below, the facts in the record are so clear that these issues may be summarily resolved.

[3] Thus, prior to the 48-hour hearing, DSS has *physical* custody of the child on an emergency basis. The 48-hour hearing also determines whether to give DSS *legal* custody.

PROCEDURAL BACKGROUND

In an order issued by this Court on January 28, 2014, Plaintiffs were granted the right to obtain the transcripts of every third 48-hour hearing conducted in the Seventh Judicial Circuit since January 1, 2010. *See* Order Granting Motion for Expedited Discovery (Docket 71). Since that date, there have been more than 370 ICWA hearings in the Seventh Judicial Circuit, with new hearings being held virtually each week. Plaintiffs' inquiry has thus resulted in the production of more than 120 hearing transcripts.

Plaintiffs' attorneys have examined each transcript. These transcripts provide clear and convincing proof that since January 1, 2010 to today, Defendant Hon. Judge Jeff Davis ("Judge Davis"), together with state prosecutors and DSS employees, has pursued policies and practices that deprive parents of custody of hundreds of Indian children without providing those parents and children with even rudimentary due process.[4]

SUMMARY JUDGMENT STANDARD

A district court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although "the moving party . . . bears the initial

[4] Six judges have presided over 48-hour hearings in the Seventh Judicial Circuit since January 2010: Judges Davis, Ecklund, Thorstenson, Trimble, Pfeifle, and Mandel. The hearing transcripts show that all six judges follow *identical* policies and practices with respect to the five issues addressed in this pleading. Plaintiffs believe that Judge Davis is responsible for the policies and practices pursued by the other judges. However, Plaintiffs are *not* seeking a ruling at the present time as to whether Judge Davis is responsible for the actions of the other judges (although that could change depending on the outcome of a Motion to Compel currently pending before the Court). For now, Plaintiffs are confining this motion for partial summary judgment to the policies and practices employed by Defendant Davis in all of his 48-hour hearings, including hearings he conducted just a few days ago, and the policies and practices of the other three named Defendants, each of whom is responsible for one or more of the constitutional deprivations at issue here.

burden of proving that summary judgment is appropriate," *Hanson v. F.D.I.C.*, 13 F.3d 1247, 1253 (8th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), this burden may be satisfied by showing "that there is an absence of evidence to support the nonmoving party's case," *Celotex Corp.*, 477 U.S. at 325.

In response to a motion for summary judgment, the nonmoving party must "go beyond the pleadings and by affidavit or otherwise designate specific facts showing that there is a genuine issue for trial." *Planned Parenthood of Minnesota/S. Dakota v. Rounds*, 372 F.3d 969, 972 (8th Cir. 2004) (internal quotation marks omitted) (citing *Commercial Union Ins. Co. v. Schmidt*, 967 F.2d 270, 271 (8th Cir. 1992)). This is an "affirmative burden on the non-moving party," *Commercial Union Ins. Co.*, 967 F.2d at 271, and only "when the record permits reasonable minds to draw conflicting inferences about a material fact" may summary judgment be denied, *Ozark Interiors, Inc. v. Local 978 Carpenters*, 957 F.2d 566, 569 (8th Cir. 1992) (citing *Donovan v. General Motors*, 762 F.2d 701, 703 (8th Cir. 1985)); *Wermager v. Cormorant Township Bd.*, 716 F.2d 1211, 1214 (8th Cir. 1983)).

ARGUMENT

All of the 48-hour hearings conducted by Defendants since January 1, 2010 have violated the Due Process Clause of the Fourteenth Amendment in most, if not all, of the five respects discussed below, thereby causing significant and irreparable injuries to the two Tribal Plaintiffs and the Plaintiff Class of Indian parents. These five areas of constitutional violations are:

(1) Defendants have failed to give parents adequate notice of the claims against them, the issues to be decided, and the State's burden of proof;

(2) Defendants have denied parents the opportunity to present evidence in their defense;

(3) Defendants have denied parents the opportunity to confront and cross-examine adverse witnesses;

(4) Defendants have failed to provide indigent parents with the opportunity to be represented by appointed counsel; and

(5) Defendants have removed Indian children from their homes without basing their removal orders on evidence adduced in the hearing, and then subsequently issued written findings that bore no resemblance to the facts presented at the hearing.

Defendants' 48-hour hearings are so fundamentally unfair and one-sided that they amount to nothing more than a charade. As recently as June 23, 2014, for instance, Judge Davis conducted a 48-hour hearing in Case No. A14-444, where the only questions he asked the mother before removing her two children were whether she understood her rights and whether she wanted an attorney.[5] No adverse allegations were made against the mother. Nor did the state introduce any evidence indicating (much less proving) that the children would be at risk if returned to the mother. Nor was the mother asked if she wanted to present any evidence or make a statement. Judge Davis simply took away her children.

Equally illustrative is the 48-hour hearing that Judge Davis conducted on November 8, 2010. At stake in that hearing was the custody of two Indian children. These children had the same mother but different fathers. The mother was present at the

[5] All transcripts cited in this brief are being filed with the Court as Ex. 1 to the Decl. of Peter W. Beauchamp in Supp. of Pls.' Motions for Partial Summ. J. ("Beauchamp Decl."). These transcripts have been placed in chronological order. Thus, cases beginning with "A10" mean that those cases were filed in 2010. Likewise, cases that begin with "A14" mean that they were filed in 2014.

hearing, along with one of the fathers. The Deputy State's Attorney informed Judge Davis at the outset of the hearing that the State was seeking an order granting DSS custody of both children for 60 days until the next hearing. *See* Transcript of Case No. A10-1191 at 2. Judge Davis informed the parents that the hearing could be handled "expeditiously," explained some rights they would have in upcoming proceedings in the case, and then–without asking the parents a single question and without receiving any evidence whatsoever–announced that "it's my intention to grant the petition for temporary custody." *Id*. at 2-3, 4. The father then inquired if he was allowed to ask Judge Davis a question. When Judge Davis said that he could, the father asked: "I would just like to know what I did wrong that my son is not with me. That's all I'm asking." *Id*. at 5. Judge Davis replied: "That, sir, I honestly can't tell you at this point because nothing has been checked out and verified to come to me yet." *Id.* About a minute later, and still with no evidence having been presented to justify removing the children from their home, Judge Davis concluded the hearing. That same day, Judge Davis signed a Temporary Custody Order ("TCO") giving DSS custody of both children for 60 days.[6] What is more, the TCO expressly concluded that returning the son to the father "is likely to result in serious emotional or physical damage" to the child, and yet not a shred of evidence had been introduced during the hearing to support that conclusion.

Accompanying this brief are transcripts of twenty-nine 48-hour hearings conducted by Judge Davis since January 1, 2010, including three conducted on June 23,

[6] For each transcript cited in this brief, the accompanying temporary custody order is being filed with the Court as Exhibit 2.

2014.[7] As discussed below, in the vast majority of these hearings, the parents received no notice of the allegations against them. Moreover, in *none* of the hearings were parents afforded a right to counsel, given an opportunity to present evidence, or allowed to cross-examine the DSS employee who submitted an affidavit alleging that the children would suffer serious emotional or physical damage if allowed to remain in the home. Yet, in *all* of these cases Judge Davis granted the State's request for continued custody, usually for 60 days. What is more, in all of these cases, Judge Davis made identical written findings in his TCOs, concluding in all of them that returning the children to their parents would cause "serious emotional and physical damage" to the children and that DSS had made "active efforts" to reunite the family, even though nothing had been introduced into evidence to support those findings during any of these hearings. *See generally* Beauchamp Decl. Ex. 1.

The five due process procedures that Plaintiffs seek to safeguard in this motion are well-settled principles of constitutional law. Four of these principles were discussed in this Court's MTD Order. First, the Due Process Clause "'protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.'" MTD Order at 37 (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)); *see also Whisman*, 119 F.3d at 1309. Retaining the custody of one's child is a fundamental liberty interest that cannot be abridged except through procedures meeting the requisites of the Due Process Clause. *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982). As this Court stated last year in a related context, "'[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.'"

[7] The only hearings conducted by Judge Davis that are not included in Ex. 1 to the Beauchamp Decl. are those where the court promptly transferred custody of the Indian child to a tribal court upon motion of an intervening Indian tribe.

Kurtenbach v. Malson-Rysdon, No. CIV. 12-5047, 2013 WL 4647513, at *2 (D.S.D. Aug. 29, 2013) (quoting *Santosky*, 455 U.S. at 753-54).

Second, when exigent circumstances prevent the state from providing a parent with notice and a hearing prior to removing a child from the home, the Due Process Clause requires the state to provide adequate notice and hearing promptly after the removal. *See Swipies*, 419 F.3d at 715; *Whisman*, 119 F.3d at 1310 ("Even if defendants had a right to take temporary custody of [the child], defendants had a corresponding obligation to afford [the parents] an adequate post-deprivation hearing."); *K.D. v. County of Crow Wing*, 434 F.3d 1051, 1056 n.6 (8th Cir. 2006) ("Once a child is removed from parental custody without a court order, the state bears the burden to initiate prompt judicial proceedings to a provide post deprivation hearing."); *see also Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998) ("[D]ue process guarantees that the post-deprivation judicial review of a child's removal be prompt and fair.")

Third, as this Court explained: "'The due process clause ensures every individual subject to a deprivation [of a child] "the opportunity to be heard at a meaningful time and in an meaningful manner."'" MTD Order at 36 (quoting *Swipes*, 419 F.3d at 715; *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). What constitutes a meaningful safeguard in the context of child removal is discussed below.

Lastly, whenever, as here, a plaintiff seeks to demonstrate a violation of procedural due process, the "plaintiff, first, must establish that his protected liberty or property interest is at stake. Second, the plaintiff must prove that the defendant deprives him of such an interest without due process of law." MTD Order at 36 (citing *Gordon v. Hansen*, 168 F.3d 1109, 1114 (8th Cir. 1999)); *see also Swipies*, 419 F.3d at 715. With

respect to the first inquiry (whether a liberty interest is at stake), there is no dispute. *See* MTD Order at 37 (noting that Defendants concede that Plaintiffs' liberty interest in the care, custody, and control of their children is at stake in a 48-hour hearing).

The second inquiry (whether the liberty interest is being deprived without due process) requires the three-step analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See* MTD Order at 37. Under this analysis, as this Court noted, the following three factors are balanced:

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

MTD Order at 37 (citing *Mathews*, 424 U.S. at 335); *see also Santosky*, 455 U.S. at 758-59 (holding that the *Mathews* test applies to child custody proceedings).[8]

For the reasons explained below, under *Mathews*, all five of the policies and practices challenged in this motion deprive Plaintiffs of a liberty interest without due process. The first factor to balance in the *Mathews* test is "the private interest that will be affected by the official actions." *Mathews*, 424 U.S. at 335. Given that the private interest that will be affected is the same for all five challenges, it will be discussed here at the outset.

The five policies and practices under scrutiny in this motion occur in connection with Defendants' 48-hour hearings. The end result of a 48-hour hearing is often the

[8] Although *Santosky* involved the permanent termination of parental rights, the *Mathews* analysis also applies to cases involving temporary deprivations of parental rights, as this Court recognized. MTD Order at 37; *see also Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 484-86 (7th Cir. 2011); *Kia P. v. McIntyre*, 235 F.3d 749, 759-60 (2d Cir. 2000).

removal of Indian children from their homes. Indeed, as noted in the Statement of Uncontested Facts ("SUF"), in 100 percent of the 48-hour hearings conducted by Judge Davis (except for those in which jurisdiction over the child was promptly transferred to a tribal court), Judge Davis granted the State's request for continued custody, and removed the Indian child or children involved in those hearings from their homes. *See* SUF ¶ 1. Therefore, the private interest at stake in Judge Davis's 48-hour hearings could not be of greater significance. *See Troxel*, 530 U.S. at 65 (recognizing that the right to maintain custody of one's child is a "fundamental" liberty interest); *Santosky*, 455 U.S. at 758-59; *see also* MTD Order at 37 (noting that because Plaintiffs are challenging practices employed by Defendants in proceedings that can result in the loss of child custody, "the first [*Mathews*] factor is satisfied")

The other two *Mathews* factors will be discussed in connection with each of the five policies and practices challenged in this motion. However, three principles should be kept in mind, as they are applicable to all five challenges.

First, because South Dakota has both a "right" and a "duty" to protect minor children, *see Stanley v. Illinois*, 405 U.S. 645, 649 (1972), the State shares the parents' interests in ensuring that 48-hour hearings are constitutionally adequate. *See Whisman*, 119 F.3d at 1311 (noting that a state has an interest in providing a prompt and meaningful hearing when it removes a child from the home and should not "'sit back and wait'" for a parent to request adequate process (quoting *Duchesne v. Sugarman*, 566 F.2d 817, 828 (2nd Cir. 1977))); *see also Alsager v. District Court of Polk County*, 406 F.Supp. 10, 22 (S.D. Iowa 1975), *opinion adopted sub nom.*, *Alsager v. Dist. Court of Polk Cnty., Iowa*, 545 F.2d 1137 (8th Cir. 1976).

Second, this lawsuit concerns the removal of Indian children from their families, and Congress has declared it to be a significant goal of the federal government to minimize the risk of unfair, mistaken, and unwarranted removals of Indian children from their families. *See* 25 U.S.C. § 1902 ("[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families."); *see also* MTD Order at 32 (noting that ICWA is designed to "curb the alarmingly high rate of removal of Indian children from Indian parents"). This strong federal interest weighs in favor of ensuring that Defendants' 48-hour hearings comply with all requirements of the Due Process Clause.

Lastly, the third *Mathews* factor requires this Court to assess the risk that Defendants' current policies and practices will result in the wrongful deprivation of custody, and the likely value of additional procedural safeguards. *Mathews*, 424 U.S. at 335. As explained more fully below, the risk of an erroneous deprivation is enormously high in Defendants' 48-hour hearings, because the very procedures being denied are those that have been recognized as *indispensable* to a fair and just hearing.

1. DEFENDANTS HAVE FAILED TO PROVIDE PLAINTIFFS WITH ADEQUATE NOTICE

"One of the core purposes of the Due Process Clause is to provide individuals with notice of claims against them." MTD Order at 38. This "core purpose" has repeatedly been disregarded in Defendants' 48-hour hearings.

The Eighth Circuit has squarely held that in a hearing in which a parent may lose custodial rights to a child, the parent must receive constitutionally adequate notice, and that this notice:

> should include the date, time and place of the hearing; a clear statement of the purpose of the proceedings and the possible consequences to the subject thereof; the alleged factual basis for the proposed [deprivation of custody]; and a statement of the legal standard upon which [deprivation of custody] is authorized.

Syrovatka v. Erlich, 608 F.2d 307, 310 (8th Cir. 1979) (quoting *Alsager*, 406 F. Supp. at 25)); *see also United States v. Lopez*, No. CR 11-50073-JLV, 2012 WL 6629595, *3 (D.S.D. Dec. 19, 2012) (Viken, C.J.) (quoting this language from *Syrovatka*).

Under South Dakota law, a state district court must convene a hearing involving the custody of an Indian child within 48 hours (except weekends) following the removal of a child from the home, based on a submission to the court by the State's Attorney of a Petition for Temporary Custody ("PTC"). *See* S.D.C.L. §§ 26-7A-14. In addition, the South Dakota Judicial "Guidelines" for 48-hour hearings states requires that an "ICWA Affidavit" from a qualified expert will be submitted at the 48-hour hearing. *See* "South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases," promulgated by the South Dakota Unified Judicial System ("Guidelines") in 2007 and recently amended in 2014 (*available at* http://ujs.sd.gov/uploads/pubs/SDGuidelinesAandNProceedings.pdf). Together, these two documents contain the State's allegations against the parents. (On occasion, attached to the PTC is a police report, if the child's removal occurred as a result of law enforcement involvement).

The evidence conclusively shows that every Indian parent who participated in a 48-hour hearing conducted by Judge Davis since January 1, 2010, was denied his or her right under the Due Process Clause to adequate notice. The "notice" that Defendants

provided to Indian parents in those hearings was infirm in the following three respects, each one of which constitutes a violation of the Due Process Clause.

First, it was not until two months ago (May 2014) that Defendant Vargo began to provide Indian parents and Indian tribes in 48-hour hearings with a copy of the PTC. *See* SUF ¶¶ 9-10 (citing Defendant Vargo's answer to Interrogatory No. 2). It is significant to note that this Court ruled on January 28, 2014 that it would violate the Fourteenth Amendment to keep Indian parents "in the dark" about the allegations against them in 48-hour hearings, *see* MTD Order at 38, and yet it took Defendant Vargo four additional months before he finally agreed to comply with the Due Process Clause.

This Court has already determined that "the risk of erroneous deprivation [is] high when Indian parents are not afforded the opportunity to know what the petition against them alleges." MTD Order at 38. This Court has also already determined that the burden of supplying parents with the documents filed with the court prior to the 48-hour hearing "is inconsequential," as these documents "are provided to the presiding judge and can at very little cost be provided to Indian parents." *Id*. at 39. Indeed, Defendant Vargo admitted in response to an interrogatory that it would not be burdensome to provide the PTC to Indian parents. *See* SUF ¶ 11 (citing Defendant Vargo's answer to Interrogatory No. 10). Unless Mr. Vargo submits some evidence to the contrary, the Court may conclude that at no time since January 1, 2010 would it have been burdensome for Mr. Vargo or his predecessors to have provided Indian parents with the PTC, yet they failed to do so anyway.

Plaintiffs are entitled to a judgment from this Court declaring that the failure of Defendant Vargo (and his predecessors) to provide Indian parents with a copy of the PTC

prior to or during the 48-hour hearings constitutes a violation of the Due Process Clause. *See Syrovatka*, 608 F.2d at 310 (quoting *Alsager*, 406 F. Supp. at 25) (holding that parents in custody hearings must be informed of "'the alleged factual basis for the proposed [removal]'"); *see also In re Gault*, 387 U.S. 1, 33 (1967) (internal quotation marks and citation omitted) ("Notice, to comply with due process requirements . . . must set forth the alleged misconduct with particularity."); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985) (holding that "written notice of the charges" must generally proceed the loss of any constitutionally protected interest). As discussed at the end of this brief, Plaintiffs are entitled to a permanent injunction against Defendant Vargo in his official capacity so as to ensure that neither Defendant Vargo nor any of his successors will once again establish the practice of not providing Indian parents with a copy of the PTC prior to their 48-hour hearing.[9]

A second constitutional infirmity is evident from the fact that it was not until January 2014 that the DSS Defendants, LuAnn Van Hunnik and Kim Malsam-Rysdon (later replaced by Lynne A. Valenti), began providing Indian parents in Judge Davis's 48-hour hearings with a copy of the ICWA Affidavit. *See* SUF ¶¶ 8-9. These affidavits provide critical information regarding the allegations against the parents, and are always cited in the PTC.[10] This failure to provide Indian parents with a copy of the ICWA Affidavit prevented the parents from obtaining adequate constitutional notice, and Plaintiffs are entitled to summary judgment on this claim. *See Syrovatka*, 608 F.2d at

[9] For reasons explained at the end of this brief, Defendant Vargo's sudden decision to provide Indian parents with a copy of the PTC does not render moot Plaintiffs' request for injunctive relief against him. *See, e.g.*, *Ctr. for Spec. Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 697 (8th Cir. 2012) (noting the "heavy burden" a defendant must meet to avoid injunctive relief in a situation where, as here, the defendant engaged in years of unconstitutional activity and only after suit was filed adopted a corrected policy that the defendant remains free to abandon at any minute).

[10] A sample of 45 ICWA Affidavits are attached as Exhibit 7 to the Beauchamp Decl.

310. As discussed below, Plaintiffs are entitled to declaratory and injunctive relief against Defendants Van Hunnik and Valenti in their official capacities, so as to ensure that these Defendants and their successors will not return to their old ways.

The failure to provide parents with a copy of the PTC and the ICWA Affidavit, the transcripts show, was not cured during Judge Davis's hearings because *in not one* of those hearings did Judge Davis or any witness orally provide the allegations contained in the PTC and ICWA Affidavit. *See generally* Beauchamp Decl. Ex. 1. In answer to an interrogatory, Judge Davis stated that he would have provided parents with a copy of the PTC and the ICWA affidavit had any parent requested one. *See* SUF ¶ 7. The infirmity of this "sit back and wait" policy is obvious. *See Whisman*, 119 F.3d at 1311 (condemning a similar "sit back and wait" policy in child custody proceedings). Given that parents in Judge Davis's 48-hour hearings have a constitutional right to adequate notice, Judge Davis should have inquired whether the State's Attorney had given them the PTC and whether DSS had given them the ICWA Affidavit. Judge Davis did not even make that inquiry in the hearings held on June 23, 2014, nor in any other 48-hour hearing after this Court's ruling on the motion to dismiss. Judge Davis did nothing to ensure that Indian parents were not "left in the dark not knowing the allegations against them while suffering the consequence of losing custody of a child for 60 to 90 days." *See* MTD Order at 38. Thus, Judge Davis contributed to the violation of Plaintiffs' right to adequate notice.

A third constitutional infirmity arises from the fact that at no time from January 1, 2010 to the present have Defendants provided Indian parents in 48-hour hearings with adequate notice of "the purpose of the proceedings" or "a statement of the legal standard"

that governs that hearing, as required by the Due Process Clause. *See Syrovatka*, 608 F.2d at 310 (quoting *Alsager*, 406 F. Supp. at 25). As the transcripts conclusively show, Defendant Davis has informed Indian parents only of the purpose of a 48-hour hearing under state law and about the standard employed under state law, and never informed them about the purpose of a 48-hour hearing under ICWA or the standard required by ICWA. Indeed, the "notice" that Judge Davis typically provided to Indian parents was both incomplete and misleading. *See* SUF ¶¶ 6-18, 33-35.

South Dakota law requires the court at a 48-hour hearing to "consider the evidence of the need for continued temporary custody of the child *in keeping with the best interests of the child.*" S.D.C.L. § 26-7A-18 (emphasis added). A best interest of the child standard, however, is definitely not the standard under ICWA. "Indeed, evidence of widespread misuse of best interest determinations regarding Indian children" was a main reason why Congress enacted ICWA, as use by state courts of a best interest standard resulted in the removal of many Indian children from impoverished homes and their placement with wealthier white persons. *See* Barbara Ann Atwood, *Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children* (2010) at 235-36. Therefore, Congress deliberately selected a much tougher standard, as reflected in 25 U.S.C. § 1922. Section 1922 eliminates the state's focus on the best interests of the child and instead requires that the child be returned to the family unless the state carries its burden of proving that removal from the home is "necessary to prevent imminent physical damage or harm to the child." 25 U.S.C. § 1922. The question, then, is not whether the child might be better off with a white family; rather, the question is whether the child will suffer imminent injury if allowed to remain at home.

To this day, Judge Davis refuses to accept the fact that ICWA has any bearing on 48-hour hearings involving Indian families, which explains why he does not inform Indian parents that any ICWA rights attach at that stage. As recently as June 23, 2014, when counsel for an intervenor Indian tribe asked Judge Davis to apply ICWA standards during a 48-hour hearing, Judge Davis replied: "ICWA doesn't apply to a 48-hour hearing, Mr. Hanna, and I decline your invitation. We'll be in recess," and the hearing came to an end. *See* Transcript of Case No. A14-444 (June 23, 2014).

Judge Davis's interpretation of § 1922 is erroneous for the reasons explained in this Court's MTD Order of January 28, 2014, as discussed at length in Plaintiffs' First Motion for Partial Summary Judgment: Violations of 25 U.S.C. § 1922, being filed today. Section 1922 of ICWA "provides a substantive right to Indian parents" in 48-hour hearings. MTD Order at 32. Section 1922 mandates that state officials involved in the removal of an Indian child from the home "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." 25 U.S.C. § 1922. This means that state officials involved in 48-hour hearings must perform two tasks as part of those hearings. First, these officials must prove *during* the 48-hour hearing that the emergency that required the child's removal from the home continues to exist. MTD Order at 32-33. Second, if the state satisfies that burden and demonstrates a continuing emergency, then *at the conclusion* of the hearing, the court must order the state agency to which custody has been placed to return the child to the home as soon as the emergency terminates. *Id*. Moreover, as this Court explained, violations of § 1922 in Defendants' 48-hour hearings are not only inconsistent with the purpose of ICWA, but they also

exacerbate any violations of the Due Process Clause that Defendants may be inflicting: "This deprivation [caused when a child is removed from the home] is compounded if the child is taken from the parents without considering whether the emergency that permitted the child's removal still exists." *Id*. at 38.

Thus, the notice that Indian parents are entitled to receive prior to or during a 48-hour hearing *must* include a recitation of their rights under § 1922, that is, parents must be informed that their children will be returned to them at the conclusion of the hearing unless the State proves that continued custody is "necessary to prevent imminent physical damage or harm to the child." 25 U.S.C. § 1922.

The notice required by § 1922 should be contained in the PTC provided to the parents by Defendant Vargo. This would ensure that parents receive adequate notice of the proceedings at the earliest time. Similarly, in order to ensure that parents receive adequate and timely notice, Defendants Van Hunnik and Valenti must ensure that the ICWA Affidavit contains a fair summary of any evidence the state has that keeping the child in the home will place that child at serious risk of physical or emotional harm.

The facts in the record are clear that *in not one* 48-hour hearing were Indian parents notified that they have rights under § 1922 (and in not one 48-hour hearing has Judge Davis applied the is "necessary to prevent imminent physical damage or harm to the child" standard of proof required by § 1922). Not a single PTC refers to that standard,[11] and in every 48-hour hearing over which Judge Davis has presided, he employed a "best interest of the child" standard and not an ICWA standard. *See*

[11] Attached as Exhibit 8 to the Beauchamp Decl. are PTC's filed in three 48-hour hearings held June 23, 2014. They make no reference to § 1922 nor its standard. If Defendant Vargo is aware of any PTC that has even referred to the § 1922 standard, he should file it with the Court, as Plaintiffs have not seen one.

generally Beauchamp Decl. Ex. 1. As Judge Davis told parents in the 48-hour hearings he conducted on June 23, 2014: "The purpose of this hearing is to make certain that the interests of all parties are protected. They're conducted in the best interests of the child." *See* Transcript of Case No. A14-444 (June 23, 2014).

Defendants Davis, Vargo, Van Hunnik, and Valenti lack the discretion to ignore § 1922. Their failure to inform Indian parents of their rights under § 1922 in 48-hour hearings prevents those parents from receiving notice of "the purpose of the proceedings" or "a statement of the legal standard" to be used in those hearings, in violation of the Due Process Clause. *See Syrovatka*, 608 F.2d at 310 (quoting *Alsager*, 406 F. Supp. at 25). Defendants' failure to provide constitutionally adequate notice is particularly inexcusable, because providing proper notice would be "simple, straightforward, and virtually costless." *See Kornblum v. St. Louis Cnty., Mo.*, 72 F.3d 661, 664 (8th Cir. 1995). Plaintiffs are entitled to summary judgment on their claim that all four Defendants are violating Plaintiffs' rights to adequate notice.

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

As discussed, the right of a parent to retain custody of his or her child is a constitutionally protected liberty interest. *Swipies*, 419 F.3d at 713-14; *Whisman*, 119 F.3d at 1309. Every constitutionally protected liberty interest is safeguarded against arbitrary loss by the Due Process Clause. *Board of Pardons*, 482 U.S. at 371, 381; *Swipies*, 419 F.3d at 715; *Whisman*, 119 F.3d at 1310; *see generally* MTD Order at 36-40. Consequently, Defendants' 48-hour hearings must afford parents the safeguards required by the Due Process Clause. After all, nearly 100 percent of Defendants' 48-hour

hearings involving Indian children result in orders removing those children from their homes. *See* Beauchamp Decl. Exs. 1, 2; SUF ¶ 1.

One of the procedural safeguards that must be afforded to each parent at Defendants' 48-hour hearings is an opportunity to present evidence. "[A] fundamental purpose of the due process clause is to allow the aggrieved party the opportunity to present his case and have its merits fully judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). A core element of due process in any hearing involving the potential loss of a liberty interest is the right to call witnesses and present documentary evidence to rebut the State's case. *See Wolff v. McDonnell*, 418 U.S. 539, 566 (1974) ("Ordinarily, the right to present evidence is basic to a fair hearing . . . ."); *Morrissey v. Brewer*, 408 US 471, 489 (1972) (holding that parole revocation hearings normally must include the "opportunity to be heard in person and to present witnesses and documentary evidence"); *Bartholomew v. Watson*, 665 F.3d 915, 918 (9th Cir. 1982) ("The right to call witnesses is basic to the fairness of a hearing.").

The right to present evidence in one's defense is particularly critical in the context of child custody determinations, due to the interests at stake. *See Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1020 (7th Cir. 2000) ("[A] child's right to be nurtured by his parents cannot be denied without an opportunity to be heard in a meaningful way."); *Doe v. Staples*, 706 F.2d 985, 990 (6th Cir. 1983) (holding that in a hearing seeking removal of a child from the home, "[t]he parents [must] be given a full opportunity at the hearing to present witnesses and evidence on their behalf").

In *every* 48-hour hearing involving Indian children conducted since January 1, 2010, Defendants violated this constitutional right of parents to present evidence in their

defense. *See* Beauchamp Decl. Ex. 1; SUF ¶¶ 19-24. Defendant Davis admitted in response to Request for Admission No. 19 that his established policy is to ban all testimony during 48-hour hearings. (A copy of Judge Davis's response is attached as Exhibit 4 to the Beauchamp Decl.—Judge Davis admits that "no oral testimony is taken at a 48-hour hearing."). The other judges on the Seventh Judicial Circuit have adopted the same policy as Judge Davis, and these judges have also notified parents that they are not permitted to offer any testimony during a 48-hour hearing. *See* Beauchamp Decl. Ex. 1, Case A13-609 (September 9, 2013) (Pfeifle, J.) Transcript at 2 ("We will not take testimony [during a 48-hour hearing]."); Case A13-616 (September 12, 2013) (Pfeifle, J.) Transcript at 2 ("we do not take evidence" during a 48-hour hearing); Case A14-47 (January 24, 2014) (Mandel, J.) Transcript at 2 ("This is an informal proceeding, and by that I mean that there's no testimony taken."). Indeed, parents who express a desire to present a defense have been told by presiding judges not to discuss the facts of their case at the 48-hour hearing. *See, e.g.*, *id.*, Case A10-1119 (October 14, 2010) (Thorstenson, J.) (telling parent "I don't want you discussing the details of the case, but work with DSS and see what they can do.") Transcript at 6.

As explained earlier, only in recent months have parents been allowed to see the petition filed against them by Defendant Vargo, and to see the ICWA affidavit prepared by agents of Defendants Van Hunnik and Valenti. However, being allowed to see these documents is a meaningless gesture because parents are not permitted to offer any testimony in rebuttal. *Cf. Spielman v. Hildebrand*, 873 F.2d 1377, 1385 (10th Cir. 1989) (finding no due process violation where parents "were afforded a full hearing in state court prior to losing custody" and "had the opportunity to present evidence and to cross-

examine opposing witnesses"). Because parents lack the right to testify on their own behalf or to call witnesses in their support, an order granting the State's PTC is a foregone conclusion. Indeed, *100 percent* of the PTCs submitted to Judge Davis since January 1, 2010 have been granted (other than a few that were dismissed for a technical reason such as lack of jurisdiction). *See* Beauchamp Decl. Exs. 1, 2; SUF ¶ 1. This creates an enormous "risk of an erroneous deprivation" of fundamental parental rights. *See Mathews*, 424 U.S. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)).

This Court held in its MTD Order that due process would be violated if "Indian parents are required to wait 60 days or longer before being given the opportunity to present evidence and cross-examine witnesses in an effort to return their children to their care or the care of an Indian custodian." MTD Order at 40. This Court further noted that providing parents with the additional procedural safeguard of presenting evidence at the 48-hour hearing could not be said to "impose[ ] an undue administrative or financial burden on defendants." *Id.* Plaintiffs have now proven that the allegations in their complaint are true: as a matter of routine since January 1, 2010, Judge Davis has removed Indian children from their homes and placed them in the custody of DSS for up to 60 days without affording the parents a hearing in which they could present evidence and cross-examine adverse witnesses.[12] Accordingly, Plaintiffs are entitled to judgment as a matter of law that Plaintiffs' rights under the Due Process Clause have been and are being

[12] Given that Judge Davis, in nearly all of his 48-hour hearings, granted custody to DSS for 60 days, this Court need not determine whether a shorter amount of time would also violate the Due Process Clause. However, the Eighth Circuit held in *Swipies* that a delay of even seventeen days before providing an adequate hearing following the removal of a child violated the Due Process Clause, and further indicted that a delay of even seven days would be unconstitutional. 419 F.3d at 715 (holding that "a parent should not have to wait seventeen days after his or her child has been removed for a hearing").

violated by Defendants' refusal to afford parents an adequate opportunity to present evidence in their defense at 48-hour hearings.

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

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970); *see also Morrissey*, 408 U.S. at 489. "It is fundamental to a full and fair review required by the due process clause that a litigant have an opportunity to be confronted with all adverse evidence and to have the right to cross-examine available witnesses." *Nevels v. Hanlon*, 656 F.2d 372, 376 (8th Cir. 1981) (citing *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)); *see also Smith v. Edmiston*, 431 F. Supp. 941, 945 (W.D. Tenn. 1977) (finding that where parents were not allowed to cross-examine witnesses in dependency and neglect proceedings, those proceedings "did not meet the minimal standards of due process").

In *not one* 48-hour hearing conducted by Judge Davis since January 1, 2010 were parents afforded an opportunity to confront and cross-examine adverse witnesses. *See* Beauchamp Decl. Ex. 1; SUF ¶¶ 25-28. Yet, in virtually all those hearings, DSS submitted an ICWA Affidavit to Judge Davis by an adverse witness. The fact that parents since January 2014 have been provided a copy of that Affidavit (at long last) does nothing to cure the constitutional defect created by prohibiting parents from being able to confront and cross-examine the author of that document.

Indeed, parents in Judge Davis's 48-hour hearings are little more than spectators. They are not informed that they can object in any fashion to the removal of their children.

Strikingly, not one judge in one hearing since January 2010 has ever advised an Indian parent that he or she has a right to contest the petition filed by the State's Attorney or the Affidavit filed by DSS. *See* Beauchamp Decl. Ex. 1; SUF ¶ 25. Rather, parents are forced to sit by as state officials remove their children.

Defendants' refusal to allow Indian parents to object to the evidence presented against them creates a significant danger that their children will be wrongly removed from their custody. *See Mathews*, 424 U.S. at 335 (citing *Goldberg*, 397 U.S. at 263-271). This Court's MTD Order notes that due process is violated if "Indian parents are required to wait 60 days or longer before being given the opportunity to . . . cross-examine witnesses," and that providing parents with this additional procedural safeguard would not "impose[] an undue administrative or financial burden on defendants." MTD Order at 40. In fact, as the transcripts show, a DSS caseworker is present at virtually every 48-hour hearing. *See generally* Beauchamp Decl. Ex. 1. Therefore, allowing that person to be cross-examined could not involve considerable extra time or expense, and besides, this is an examination that will otherwise occur later. Accordingly, Defendants' refusal to provide parents with an opportunity to confront the State's evidence, cross-examine available adverse witnesses, or even voice their opposition to the continued deprivation of their parental rights, violates procedural due process.

Defendants argued in previous pleadings that the type of hearing proposed by Plaintiffs will involve substantial time and resources, considerably more than what Defendants' cursory hearings currently require, and that Defendants cannot conveniently provide such a hearing. Plaintiffs' response to this argument is two-fold. First, as the Eighth Circuit and this Court have made clear, the commands of the Due Process Clause

require all state officials to provide parents with meaningful notice and a hearing whenever the state invades the parental bond, due to the constitutionally protected liberty interests that hang in the balance. *See Swipies*, 419 F.3d at 715; MTD Order at 36-40; *see also Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994) (holding that state officials who impound an automobile must provide the owner with a meaningful hearing within seven days).

Second, Defendants' argument is contrary to what South Dakota's own Judicial Guidelines expressly recommend and anticipate:

> A Temporary Custody (48 Hour) Hearing *involves substantial time and resources.* At the conclusion of the hearing, the parties should leave with a decision from the Court concerning the placement of the child that is based on careful consideration of the circumstances of the case. Due to constraints of time, it might not be possible for the Court to conduct a complete initial custody hearing. In these circumstances, the Court should:
>
> a. Decide all issues that can be immediately resolved at the current 48 Hour Temporary Custody Hearing;
> b. Provide specific guidance as to the persons who must be present and the issues to be decided if hearing must be continued;
> c. *Continue the Temporary Custody (48 Hour) Hearing and set the time, date and place of the continued hearing.*

2014 Guidelines at 41-42 (emphasis added). Thus, Defendants not only have the authority to continue a 48-hour hearing, but also the constitutional duty to do so in appropriate cases. Therefore, the cursory, short, and entirely superficial hearings they hold cannot be justified under any theory or claim.

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

Given what is at stake in a 48-hour hearing and the complex factual and legal issues that likely will arise in many of these hearings, the Due Process Clause requires a presumption that counsel must be appointed to indigent Indian parents to assist them with

these hearings. For reasons just explained, parents have a right to a meaningful hearing, and the "'right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" *Goldberg*, 397 U.S. at 269-70 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

In *Lassiter v. Department of Social Services of Durham County, N. C.*, the United States Supreme Court applied the *Mathews* analysis to determine whether due process required appointment of counsel in all hearings concerning termination of parental rights, and found that the question must be answered on a case-by-case basis. 452 U.S. 18, 32 (1981); *see also Turner v. Rogers*, 131 S.Ct. 2507, 2517-18 (2011) (relying on *Lassiter* and *Mathews* in holding that appointment of counsel in civil contempt proceedings should be determined on a case-by-case basis, consistent with the Due Process Clause). Chief Justice Burger's concurring opinion in *Lassiter* is instructive here:

> Faced with a formal accusatory adjudication, with an adversary—the State—that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or to defer to the State's expertise, the defendant parent plainly is outstripped if he or she is without the assistance of the guiding hand of counsel. When the parent is indigent, lacking in education, and easily intimidated by figures of authority, the imbalance may well become insuperable.

452 U.S. at 46 (Burger, C.J., concurring) (internal quotation marks and citations omitted). Indeed, the *Lassiter* majority indicated that counsel should more likely be appointed where a case is complex and involves expert testimony "which few parents are equipped to understand and fewer still to confute." *Id.* at 30.

Under the *Lassiter/Mathews* analysis, indigent Indian parents should be offered the opportunity for counsel to assist them in Defendants' 48-hour hearings (and if such an

opportunity is not offered, the court should give a reason on the record). This is evident for a few reasons. First, 48-hour hearings in the Seventh Judicial Circuit often involve complex legal questions involving the interaction of state law with the federal ICWA, which have different legal standards. Moreover, in every case involving an Indian child, the State submits an affidavit from an expert. Many Indian parents (indeed, most parents, regardless of race) would have significant difficulty cross-examining an expert represented by the State's Attorney's office, particularly where both the expert and the State's Attorney are likely to be sophisticated and to regularly participate in 48-hour hearings. *See Lassiter*, 452 U.S. at 46. Accordingly, a presumption should exist that counsel must be appointed to assist parents at the 48-hour hearing.

Lassiter employed the *Mathews* balancing test in determining that counsel should be provided in child custody cases in appropriate instances. That same analysis should be used here, of course. Here, the balance sharply favors the appointment of counsel in all 48-hour hearings involving Indian children due to the presence of the state's expert witness and the complexity of legal issues. The private interest at stake is of fundamental importance, and so is the interest of the federal government in curbing the unwarranted removal of Indian children from their homes. Without counsel who can gather the facts, argue the law, and cross-examine the state's expert, the risk of an erroneous deprivation is high. At a bare minimum, Judge Davis must either offer to appoint counsel or state on the record why such an option is unnecessary.

Yet, it is the policy and practice of Judge Davis to *never* offer to appoint counsel to represent indigent parents in his 48-hour hearings. *See* Beauchamp Decl. Ex. 1; SUF ¶¶ 39-42. Even on those occasions when Judge Davis informs parents that they have a

right to counsel, that right is confined to proceedings that will occur after the 48-hour hearing has ended. *See id*. Similarly, in no hearing has the State's Attorney or DSS made a request or a recommendation that the court appoint counsel for a parent to assist with the 48-hour hearing or that the hearing being continued until counsel is obtained. *See id*.

The additional burden to the state of appointing counsel to represent parents at the 48-hour hearing is minimal in light of the fact that South Dakota law already makes such appointment *mandatory* if the parent requests counsel. *See* SDCL 26-7A-31:

> Court appointed attorney--Compensation. If the child or the child's parents, guardian, or other custodian requests an attorney *in proceedings under this chapter* or chapter 26-8A, 26-8B, or 26-8C and if the court finds the party to be without sufficient financial means to employ an attorney, the court *shall appoint an attorney for the party*.

(emphasis added); *see also In re People ex rel. S. Dakota Dep't of Soc. Servs.*, 691 N.W.2d 586, 591 (S.D. 2004) (holding that a trial court erred in allowing an abuse and neglect adjudicatory hearing to continue without ensuring that the mother received assistance of counsel pursuant to SDCL 26–7A–31).

Section 26-7A-31 provides that the court "shall" appoint counsel "in proceedings under this chapter," and 48-hour hearings are proceedings under Chapter 26.[13] The significance of South Dakota's statutory guarantee of counsel for indigent parents in 48-hour hearings is twofold. First, it demonstrates that Defendants' current policies and practices violate § 26-7A-31. Second, it demonstrates that Defendants' current policies and practices also violate the Due Process Clause, given that this state-created property

[13] A similar right to counsel in 48-hour hearings is guaranteed by ICWA as well. *See* 25 U.S.C. § 1912(b) (emphasis added) ("In any case in which the court determines indigency, the parent or Indian custodian *shall* have the right to court-appointed counsel in any removal, placement, or termination proceeding."). 25 U.S.C. § 1912(b).

interest in the assistance of counsel, having thus been created, may not be deprived without due process. Property interests protected against deprivation by the Fourteenth Amendment "are normally not created by the Constitution. Rather, they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975) (internal quotation marks and citation omitted); *see also Board of Pardons v. Allen*, 482 U.S. 369 (1987) (holding that a state statute under which state officials "shall" parole prisoners who meet certain criteria creates a protected liberty interest that cannot be denied absent due process); *SDDS, Inc. v. State of S.D.*, 994 F.2d 486, 494 (8th Cir. 1993) (finding a constitutionally protected property interest created under state law); *Mishler v. Nevada State Board of Medical Examiners*, 896 F.2d 408, 409-10 (9th Cir. 1990) (holding that license to practice medicine is a property interest that cannot be deprived without affording holder due process safeguards); *Doe v. Todd Cnty. Sch. Dist.*, No. CIV. 05-3043, 2006 WL 3025855, at *9 (D.S.D. Oct. 20, 2006) (citing *Goss* and noting that "[t]he laws of the State of South Dakota establish a right to a public education. The United States Supreme Court has characterized such a right as a property interest.").

Therefore, the mandate in SDCL 26–7A–31 that Defendants afford indigent parents access to legal counsel in all proceedings under Chapter 26 (which includes 48-hour hearings) creates a property right that parents may not be deprived of without due process. *See Waln By & Through Waln v. Todd Cnty. Sch. Dist.*, 388 F. Supp. 2d 994, 1000 (D.S.D. 2005) ("[B]efore there can be a significant deprivation of any property right, . . . certain minimum due process procedures must be met."). For instance, due process requires Defendants to ensure that any waiver of the right to counsel by indigent

parents at abuse and neglect proceedings be made "voluntarily, knowingly, and intelligently." *In re People*, 691 N.W.2d at 590 (citation omitted). Here, Defendants fail to even offer parents the option.

The deprivation by Defendants of Indian parents' due process right to counsel at 48-hour hearings can be easily remedied. Because an indigent parent has a right to a hearing within 48 hours as well as a right (under both state and federal law) to be represented by appointed counsel in that hearing, the parent could either choose to adjourn the immediate hearing and return with counsel after a one- or two-day adjournment, or make a voluntary, knowing, and intelligent waiver of their right to counsel following a detailed explanation of the consequences by the court on the record. Such a practice would be consistent with the process by which counsel is oftentimes appointed for criminal defendants in state court, an apt analogy. *See id.* at 591 (citation omitted) ("Although the basis of the constitutional right to counsel in criminal cases differs from the statutory right to counsel in termination-of-parental-rights cases, we see enough of a parallel between the two rights in this context to require a trial court that relieves an appointed attorney in a termination case of representation to appoint a substitute counsel so as to protect the parent's already exercised right to counsel."). Accordingly, Plaintiffs are entitled to prevail on this claim as a matter of law.

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

The Due Process Clause requires that the conclusions of fact reached by Judge Davis in his 48-hour hearings rest solely on the evidence adduced at those hearings *See Goldberg*, 397 U.S. at 271 (citing *Ohio Bell Tel. Co. v. PUC,* 301 U.S. 292 (1937); *United States v. Abilene & S.R. Co.*, 265 U.S. 274, 288-89 (1924)) (noting that an

essential requisite of due process is that the decision maker render a decision based on "evidence adduced at the hearing" and that to demonstrate compliance with this command, the decision maker "should state the reasons for his determination and indicate the evidence he relied on"); *see also Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 793 n.22 (2005) (citing *Goldberg* for same). When due process requires a hearing, it "implies both the privilege of introducing evidence and the duty of deciding in accordance with it. . . . . [T]o make an essential finding without supporting evidence is arbitrary action." *Chicago Junction Case*, 264 U.S. 258, 265 (1924); *see also Baldwin v. Hous. Auth. of City of Camden*, 442 F. App'x 719, 720 (3d Cir. 2011) ("Due process . . . requires a decision maker to state the reasons for his or her decision and indicate the evidence he or she relied on."); *Clark v. Alexander*, 85 F.3d 146, 150 (4th Cir. 1996) (citing *Goldberg* for requirement that housing authority termination process include "a decision, based solely on evidence adduced at the hearing, in which the reasons for the decision are set forth"); *Doe v. Staples*, 706 F.2d 985, 990-91 (6th Cir. 1983) (holding that when children are removed from the home, "due process requires . . . [t]he hearing officer conducting the removal hearing [to] state in writing the decision reached and the reasons upon which the decision is based").

Even a cursory examination of Judge Davis's hearing transcripts and the orders he issued following those hearings disclose two glaring procedural deficiencies. First, in not one hearing did Judge Davis permit the presentation of any testimony, and in nearly all of his hearings, no facts were presented, even unsworn. Consequently, his Temporary Custody Orders ("TCOs") could not possibly have been based on evidence adduced at the hearing; there was no evidence adduced. *See* SUF ¶¶ 35-42.

Second, the majority of Judge Davis's conclusions of fact were wholly manufactured by him and find no support in evidence adduced during the hearing. To illustrate, in nearly 100 percent of his TCOs, Judge Davis expressly found that DSS had engaged in "active efforts" aimed at reunification of the family. *See* Beauchamp Decl. Ex. 2; SUF ¶¶ 39, 42. Yet, that subject was not addressed *during a single one* of his hearings. Even if one considers the DSS Affidavits filed in each of those cases,[14] which were not shown to the parents until recently and which to this day parents are forbidden from challenging, any "active efforts" finding based on them is specious. First, the vast majority of the ICWA Affidavits filed in Judge Davis's cases only describe efforts that DSS had made within the past 24 hours or planned to make in the future, and hardly support a finding that "active efforts" to achieve reunification had already been made. In any event, such a finding lacks reliability because parents were *never* given a chance to offer an opinion on the issue.

Similarly, in nearly 100 percent of his Orders, Judge Davis expressly found that continued custody of the child in the home "is likely to result in serious emotional or physical damage to the child(ren)." *See* Beauchamp Decl. Ex. 2. Yet, zero testimony was submitted on that subject in the vast majority of his hearings, and the ICWA Affidavits rarely discussed anything akin to the subject. *See* Beauchamp Decl. Ex. 1, 7. Indeed, had Judge Davis obeyed the command of citing to evidence in the record to support his findings, he would have been unable to find anything to cite. The only thing Judge Davis apparently did in all of his cases was to rush through the proceeding and then check all of the boxes on the pre-printed TCO that he always checked.

[14] *See, e.g.*, Beauchamp Decl. Ex. 7.

The failure of Judge Davis to decide the State's petitions for temporary custody of Indian children "solely on the legal rules and evidence adduced at the [48-hour] hearing" and to then "state the reasons for his determination and indicate the evidence he relied on" plainly deprived Plaintiffs of due process. *See Goldberg*, 397 U.S. at 271. In light of the fact that representatives from the State Attorney's office and DSS, including an ICWA expert, attended his 48-hour hearings, the failure of Judge Davis to acquire evidence on which he might base a decision, and then to issue written findings anyway, is inexplicable and inexcusable. Accordingly, Plaintiffs are entitled to summary judgment on this claim.

PLAINTIFFS ARE ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF

Defendants Davis, Vargo, Van Hunnik, and Valenti are responsible for numerous (and on-going) violations of Plaintiffs rights under the Due Process Clause. Plaintiffs are therefore entitled to an effective remedy to prevent any further violations. As the Eighth Circuit has explained, "where legal rights are invaded and a federal statute [such as 42 U.S.C. § 1983] provides a right to sue for such invasion, federal courts may use any available remedy to make good the wrong." *Miener v. State of Missouri.*, 673 F.2d 969, 977 (8th Cir. 1982) (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)); *see also Fond du Lac Band of Chippewa Indians*, 68 F.3d 253, 256 (8th Cir. 1995) ("Where necessary to ensure compliance with federal law, the Supreme Court has approved broad injunctive relief aimed at state officials." (citation omitted)). A more comprehensive explanation of Plaintiffs' right to declaratory and injunctive relief is contained in Plaintiffs' First Motion for Partial Summary Judgment being filed today and incorporated herein by reference.

Defendants will likely contend that the Court should not grant any remedy to Plaintiffs with respect to those practices that Defendants recently abandoned, regardless of how many years those practices existed, despite how tenaciously Defendants defended them in their motions to dismiss, despite the irreparable harm these practices have caused, despite how quickly Defendants could return to their old ways once this case ends, and despite the fact that Defendants abandoned these practices only after this lawsuit was filed and their motions to dismiss were denied. If Defendants make that request, it should be denied.

The Supreme Court and Eighth Circuit have made it clear that where, as here, a Defendant suddenly ceases unconstitutional conduct after years of pursuing it and only after suit has been filed, a district court should issue a permanent injunction on behalf of the plaintiff to guard against a resumption of the misconduct. The law is a jealous mistress, and infidelity is not quickly forgotten. A defendant's post-filing cessation of unconstitutional behavior, the Supreme Court has held, can render moot a request for injunctive relief only if "(1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953)); *see also Strutton v. Meade*, 668 F.3d 549, 556 (8th Cir. 2012) ("Mere voluntary cessation of a challenged action does not moot a case. Rather a case becomes moot "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (citation omitted)), *cert. denied,* 133 S. Ct. 124 (2012).

Moreover, the burden of proof falls on the defendant to demonstrate "that there is no reasonable expectation that the wrong will be repeated." *W.T. Grant Co.*, 345 U.S. at 636; *see also Strutton*, 668 F.3d at 556 ("The burden of showing that the challenged conduct is unlikely to recur rests on the party asserting mootness."). This burden of proof "in a heavy one." *County of Los Angeles*, 440 U.S. at 631; *see also Ctr. for Spec. Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 697 (8th Cir. 2012) (rejecting a claim for mootness made by state officials on the grounds that they did "not meet the heavy burden to show mootness."). A defendant cannot satisfy this burden merely by showing that the behavior has ceased. Rather, the defendant can prevail only by showing that the wrongful behavior has been *irrevocably* eradicated. *Gwaltney v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66 (1987) (quoting *United States v. Phosphate Expert Ass'n, Inc.*, 393 U.S. 199, 203 (1968)) ("The defendant must demonstrate that it is *'absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'"); *see also Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006) (holding that a case was not moot where the defendant remained free to return to his old ways).

If this lawsuit sought injunctive relief against an overcrowded jail and, in response to the lawsuit, the defendants constructed a much larger jail, plaintiffs' request for injunctive relief would likely become moot due to the immutable nature of the improvement. *See Bell v. Wolfish*, 441 U.S. 520, 542 n.25 (1979). On the other hand, where (as here) a defendant is free to return to his old ways at any time, then the defendant cannot possibly prove "with assurance" that the harm will not be repeated, and in that situation a permanent injunction must issue. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Green v. County School Board*, 391 U.S. 430, 438

(1968) (holding that the cessation of unconstitutional conduct will not render moot a request for injunctive relief unless the defendant proves that the illegal system has been eradicated "root and branch"); *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.,* 540 F.3d 752, n.8 (8th Cir. 2008) (internal quotations and citations omitted) (rejecting a claim of mootness where the absence of a permanent injunction would leave the defendant "free to return to his old ways" and the defendant had not "made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"); *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006) (holding that a request for injunctive relief had not become moot merely because of the defendant's cessation of the challenged activity where the defendant retained the ability to resume that activity at any time); *U.S. v. Mercy Health Services*, 107 F.3d 632, 636 (8th Cir. 1997) (same); *Stephenson v. Davenport Community Sch. Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1997) (same); *Arkansas Med. Soc., Inc. v. Reynolds,* 6 F.3d 519, 529 (8th Cir. 1993) (same).

Long after this lawsuit was filed, the DSS Defendants started providing ICWA Affidavits to Indian parents in 48-hour hearings, and Defendant Vargo started providing the PTC to them as well. Tomorrow, however, these defendants are free to return to their old ways. Plaintiffs have suffered years of constitutional violations at the hands of these defendants and their predecessors. It is time to guarantee that no further violations can occur.

CONCLUSION

The Due Process Clause requires that Indian parents in Defendants' 48-hour hearings be afforded a meaningful hearing at a meaningful time. As demonstrated above,

Plaintiffs are not receiving what that Clause requires. Plaintiffs respectfully request that the Court grant summary adjudication in their favor.

Respectfully submitted this 11th day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that, on July 11, 2014, I electronically filed the foregoing Motion with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel for Defendants:

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