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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	Case No. 5:13-cv-05020-JLV PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTIONS TO RECONSIDER

INTRODUCTION

The four Defendants have filed motions (Dockets 167, 170, 171) asking the Court to reconsider--in fact, repudiate--numerous conclusions of law set forth in its summary judgment Order, *Oglala Sioux Tribe v. Van Hunnik*, Civ. No. 5:13-cv-05020 (Order filed Mar. 30, 2015) (Docket 150). All of their arguments,

however, are redundant; indeed, most of them are being made not just for the second time, but for the third, such as whether the four Defendants are policy makers. *See Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017, 1029-33 (D.S.D. 2014) (holding that all four Defendants are policy makers); Docket 150 at 22-27 (holding that all four Defendants are policy makers).

Each Defendant cites Judge Schreier's decision in *Alliance Communs. Coop., Inc. v. Global Crossing Telecomms., Inc.*, 690 F. Supp. 2d 889 (D.S.D. 2010), for the proposition that the Federal Rules of Civil Procedure authorize motions to reconsider. But the Defendants wholly ignore the admonition in *Alliance*, which Judge Schreier relied on in denying a motion to reconsider, that:

> "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Hagerman v. Yukon Energy Corp.,* 839 F.2d 407, 414 (8th Cir.1988) [internal citation omitted]. A Rule 59(e) motion cannot be used "to introduce new evidence that could have been adduced during pendency of the summary judgment motion. . . . Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time." *Concordia College Corp. v. W.R. Grace & Co.,* 999 F.2d 326, 330 (8th Cir.1993) (quoting *Hagerman,* 839 F.2d at 414).

Alliance, 690 F. Supp. 2d at 893.

Here, as in *Alliance*, the Defendants present no arguments they could not have presented earlier, and offer no newly discovered evidence. Their motions merely take a second (or third) bite at the same apple, and should be rejected.

Given that all four Defendants make similar arguments, and each has joined in the motions of the others, Plaintiffs will address them in a single brief in the following order: Defendant Hon. Jeff Davis's motion, Defendant Mark Vargo's motion, and Defendants LuAnn Van Hunnik and Lynne Valenti's motion.

1. JUDGE DAVIS'S MOTION TO RECONSIDER SHOULD BE DENIED

Judge Davis challenges one of this Court's conclusions of law and two conclusions of fact. All three challenges lack merit.

A. Judge Davis is a policy maker

First, Judge Davis argues that the Court erroneously concluded as a matter to law that he is a policy maker for purposes of liability under 42 U.S.C. § 1983. Judge Davis concedes at the outset that he has made and lost this identical argument twice already. *See* Judge Davis' Memorandum of Law in Support of Motion to Alter, Amend, or Reconsider Pursuant to Rule 59 or Rule 60 (hereinafter "Davis Mem.") at 2.

Not only is Judge Davis's current argument redundant, but he is challenging a statement in the Court's decision that has no practical significance. Therefore, even if the Court's statement were incorrect (which is not the case), this is a futile effort.

The Court found that Judge Davis is a policy maker in part because there is "no right of appellate review of Judge Davis' 48-hour hearing decisions." *See* Docket 150 at 25. Judge Davis devotes ten pages of briefing in an effort to prove that a 48-hour decision is subject to appellate review. *See* Davis Mem. at 2-11. In the first place, ample authority supports the Court's conclusion that a 48-hour decision is not appealable. *See* Docket 150 at 25. But more importantly, this issue is a red herring: Judge Davis is a policy maker *regardless* of whether a 48-hour decision is appealable. The same argument that Judge Davis now makes was rejected three decades ago in *Pulliam v. Allen*, 466 U.S. 522 (1984).

The question in *Pulliam* was whether a particular systemic procedural practice of a state judge was unconstitutional, the identical question here.[1] The Court rejected the notion that before qualifying for relief under § 1983, the plaintiffs must show that "no alternative avenue of review was available." *Id*. at 536. Appealable or not, a trial judge's systemic procedural practice could be challenged, the Court held, on constitutional grounds under § 1983. In enjoining the practice, the Court confirmed that a state judge may be sued as any other policy maker, noting that "every Member of Congress who spoke to the issue assumed that judges would be liable under § 1983." *Id*. at 540 (citation omitted).

Citing *Pulliam*, the court *Tesmer v. Granholm*, 114 F. Supp. 2d 603 (E.D. Mich. 2000), held that state judges were subject to suit in a § 1983 action challenging their systemic procedural practice of denying appellate counsel to indigent criminal defendants.[2] Obviously, a trial court's decision to deny counsel to a criminal defendant is subject to review by an appellate court. Yet the *Tesmer* court adjudicated the issue, noting that the legislative history of § 1983 establishes "Congress' intent to reach unconstitutional actions by all state actors, including judges." *Id*. at 617. Indeed, no case supports Judge Davis' contention

[1] The systemic procedural practice at issue in *Pulliam* was a state judge's "practice to require bond for nonincarcerable offenses." *Pulliam,* 466 U.S. at 526. Here, the systemic procedural practices at issue include the refusal of Judge Davis to allow parents in 48-hour hearings to present oral testimony and cross-examine the state's witnesses, and his refusal to appoint counsel for those parents.

[2] Both here and in *Tesmer*, the plaintiffs challenged a judge's systemic procedural practice of denying counsel. Therefore, the court's holding in *Tesmer* is particularly apposite.

that a judge's practice is not an "official policy" if it is subject to appellate review, and *Pulliam* holds otherwise.

This is the same rule, too, with respect to policies created by executive officials, virtually all of which are subject to judicial review. The issue is never whether a policy is subject to judicial review. Rather, the issue is whether a policy "may fairly be said to represent official policy" because it was *established* by the person vested with the authority under state law to establish it. *See Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978); *see also Ware v. Jackson County, Missouri*, 150 F.3d 873, 880 (8th Cir. 1998) ("Official policy involves 'a deliberate choice to follow a course of action made from among various alternatives' by an official who is determined by state law to have the final authority to establish governmental policy.") (internal citation omitted). If a policy, practice, or custom could never become "final" until it was reviewed by a higher court, then the only persons who would ever be policy makers for purposes of § 1983 liability are the justices who sit on the state and federal supreme courts.

Judge Davis' logic is not only refuted by *Pulliam* and *Tesmer* in the judicial arena, but by a host of cases in the executive arena, all of which rejected the claim that the presence of some reviewing authority rendered the policy under review less "final" for purposes of governmental liability. The Eighth Circuit rejected this very contention in *Ware*. *See id.*, 150 F.3d at 886 (holding that a prison administrator's policy was "final" for purposes of § 1983 liability even though all of his policies "were subject to review and at times were reviewed" by supervisors). *See also McGreevy v. Stroup*, 413 F.3d 359, 368-69 (3d Cir. 2005)

(holding that the actions of a school principal and superintendent constituted "final" policy even though the School Board had the authority to review all actions of those officials); *Lytle v. Carl*, 382 F.3d 978, 985-86 (9th Cir. 2004) (holding that the ability to have a school superintendent's policy reviewed by an outside arbitrator "does not mean that the [superintendent] does not speak for the District when he or she initially makes [the policy].")

Government liability attaches when an injury results from the implementation or "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy . . . ." *Monell*, 436 U.S. at 694. Even a single decision by an official with policymaking authority could constitute "official policy." *See Pembaur v. City of Cinncinnati*, 475 U.S. 469 (1986) (holding that a municipality was liable for a single decision by a county prosecutor which authorized an unconstitutional entry into the plaintiff's clinic). Whether a particular official "has 'final policymaking authority' is a question of state law." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion).

Here, South Dakota law clearly assigns to each judge in a 48-hour hearing the authority to establish the rules of evidence for that proceeding. Judge Davis explains this very fact on page 12 of his Memorandum, quoting from the South Dakota Guidelines at p. 35: "**RULES OF EVIDENCE DO NOT APPLY** SDCL 26-7A-56. Instead the Court may design its own rules of evidence to fully inform the Court." *See* Davis Mem. at 12, quoting Guidelines at 35 (emphasis in

Guidelines). Judge Davis's Memorandum also conveniently cites *Cheyenne River Sioux Tribe v. Davis*, 822 N.W.2d 62 (S.D. 2012), which single-handedly dooms his argument. In *Cheyenne River*, the South Dakota Supreme Court stated that pursuant to SDCL 26-7A-56, all initial juvenile custody proceedings, including 48-hour hearings, "are to be conducted *under rules prescribed by the court* to inform it of the status of the child and to ascertain the child's history, environment and condition." *Davis*, 822 N.W.2d at 65-66 (emphasis added).

Thus, as SDCL 26-7A-56 (and the South Dakota Supreme Court's construction of it) make clear, Judge Davis sets the policy for the evidentiary procedures challenged in this lawsuit. He is vested with that authority under state law. Each time he exercises that authority, he creates a "final policy." *See Pembaur*, 475 U.S. at 480-85.

In short, Judge Davis is correct in stating that a policy maker for purposes of § 1983 liability must have "final" policy making authority. *See* Davis Mem. at 2. However, he misunderstands "final" in this context. As this Court has explained twice now, citing *Jett*, 491 U.S. at 737, a policy maker for purposes of § 1983 "is one with 'the power to make official policy on a particular issue." *See* Docket 150 at 22. Judge Davis would substitute the word "make" in that sentence with "judicially review," as if the people who judicially review a policy thereby make that policy. But that is not the law. Judge Davis' understanding of his liability under § 1983 is completely contrary to federal jurisprudence.

As this Court found–and as Judge Davis does not, and cannot, deny– Judge Davis has made a deliberate choice from various alternatives to establish

such systemic practices as denying parents in his 48-hour hearings an opportunity to present oral testimony; denying them an opportunity to cross-examine the state's witnesses; basing his temporary custody orders entirely on documents filed by state employees prior to the hearing; and issuing temporary custody orders that fail to instruct the Department of Social Services (DSS) to comply with 25 U.S.C. § 1922. Indeed, Judge Davis has even chosen to continue these practices despite what this Court said about them in January 2014 in denying his motion to dismiss. Accordingly, his "deliberate choice[s] to follow a course of action made from among various alternatives" are official policies for purposes of liability under § 1983. *Oglala Sioux Tribe*, 993 F. Supp. 2d at 1029. Thus, Judge Davis' "new" argument is a rehash of his old one and should (for the third time) be rejected.

B. The Court Made No Errors of Fact

Judge Davis takes issue with two alleged "errors of fact." *See* Davis Mem. at 11-13. The first of these is the following:

> Specifically, the Court found that Judge Davis stated that no testimony is permitted at the 48-hour hearing. (Docket 150, at 41.) This is different from Judge Davis' actual statement that no oral testimony is taken. (Docket 130, at 5.)

See Davis Mem. at 12.

This challenge borders on the frivolous. Judge Davis has misread the Order. The Order clearly states that "no oral testimony is permitted during the 48-hour hearings he conducts. (Docket 130 at p. 5.)" *See* Docket 150 at 41. The Order does not state that *no* testimony is permitted. After all, this Court is keenly aware that Judge Davis permits written testimony. Indeed, the manner in

which Judge Davis has received written testimony is part of the constitutional defect: written testimony was submitted to Judge Davis *ex parte* and not marked as evidence. *See* Docket 150 at 13 ("The defendants acknowledge Seventh Circuit judges receive an ICWA affidavit prior to the 48-hour hearing, but the affidavit is not marked as a hearing exhibit. (Docket 131 ¶ 8.)" Such *ex parte* communications, the Court held, violated the Due Process Clause. Docket 150 at 41. Thus, the facts cited by the Court were wholly correct (and so was the Court's conclusion of law based on those facts).

Next, Judge Davis takes issue with the Court's description of 48-hour hearings as "evidentiary hearings." *See* Davis Mem. at 12. According to Judge Davis, a 48-hour hearing is *not* an evidentiary hearing. In support of this claim, Judge Davis cites *Cheyenne River Sioux Tribe v. Davis*, which (as just noted) construed SDCL 26-7A-56 as authorizing each judge to determine what type of 48-hour hearing to hold, and then upheld Judge Davis's decision to rely exclusively on *ex parte* communications as "sufficient evidence of a need for temporary custody to permit the trial courts" to remove children from their homes. *Id*. 822 N.W.2d at 66.

Judge Davis is overlooking the obvious. When this Court said that a 48-hour hearing "is" an evidentiary hearing, the Court was explaining that the Due Process Clause requires those hearings *to be* evidentiary hearings, and that "[t]he SD Guidelines contemplate that the 48-hour hearing is an evidentiary hearing which may be extended if necessary." Docket 150 at 33. The Court was well aware that 48-hour hearings conducted by Judge Davis are not evidentiary

hearings. The Court cites that fact in holding that Judge Davis's 48-hearings violate the Due Process Clause.

Thus, it was appropriate for the Court to conclude that a 48-hour hearing *is* an evidentiary hearing, while recognizing that Judge Davis violates the Due Process Clause every time he refuses to hold one. Similarly, to whatever extent *Cheyenne River* ratified Judge Davis's refusal to comply with the Due Process Clause, *Cheyenne River* misconstrues federal law and cannot be followed. *See Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985) (rejecting under the Supremacy Clause an interpretation of federal law made by the South Dakota Supreme Court); *Olcott v. The Supervisors*, 83 U.S. 678, 683 (1872) (recognizing that it is the province of federal courts to ultimately decide federal issues).

In sum, Judge Davis's motion to reconsider should be denied in its entirety. This Court committed no errors of fact or law. Moreover, Judge Davis's motion should never have been filed because it cites to no newly discovered evidence and all of its arguments of law either were made or could have been made earlier.

2. DEFENDANT VARGO'S MOTION TO RECONSIDER SHOULD BE DENIED

Twice in its summary judgment decision, the Court identified Defendant Mark Vargo as the duly elected State's Attorney for Pennington County, South Dakota. *See* Docket 150 at 2, 11. The decision thoroughly discussed Mr. Vargo's role in the county's child custody proceedings, and found that he is a policy maker. See Docket 150 at 2-3, 21-22, 26-27, 41. The Court had already

examined Vargo's role in Pennington County's child custody proceedings and determined that Vargo was a policy maker under the facts alleged. *See Oglala Sioux Tribe*, 993 F. Supp. 2d at 1031-33. Yet, Vargo claims in his motion to reconsider that the Court was indecisive as to which governmental entity Vargo represents, and "Vargo assumes the claims against him in his official capacity, as stated in the complaint, are suits against Pennington County." *See* Mark Vargo's Memorandum in Support of his Motion to Alter, Amend or Reconsider Pursuant to Rule 59 or Rule 60 (hereinafter "Vargo Mem.") at 2. Clearly, Vargo's assumption is correct: the Court determined that he is a policy maker for the county that elected him as its State's Attorney.

Two points must be emphasized at the outset regarding the substance of Vargo's motion to reconsider. First, no newly discovered facts are cited in his motion, and all of his legal arguments either were raised or could have been raised earlier.[3] Therefore, this motion should not have been filed.

Second, Vargo grossly distorts the Court's summary judgment decision. He ignores critical facts relied on by the Court in its decision, and then calls the decision insufficiently supported. Even more troubling is that Vargo accuses the Court of making findings that the Court did not make.

Vargo claims at the outset that the Court found only three reasons for finding that Vargo is a policy maker. *See* Vargo Mem. at 4. Even if those were the only reasons cited by the Court, they are more than sufficient grounds for the

[3] The only issue Vargo addresses in his motion is whether he is a policy maker; Vargo has unsuccessfully litigated that issue twice already.

Court's conclusion. But those were not the only reasons. Indeed, Vargo's list ignores his most culpable and indefensible acts.

As Vargo tells the story, he is the innocent victim of a state court judge whose policies Vargo was unable to halt.[4] *Vargo takes no responsibility for anything.* He claims that "mere awareness" of Judge Davis's policies does not make him a policy maker, *see* Vargo Mem. at 8 (citation omitted), as if Vargo played no personal role in injuring the Plaintiffs. Similarly, Vargo reminds us that a prosecutor does not become a policy maker just because he or she "is present when a state court judge violates an individual's constitutional rights," Vargo Mem. at 10, as if Vargo was nothing more than a bystander.

Vargo criticizes this Court for basing liability on his failure to challenge Judge Davis's policies, and for acquiescing to them. *See* Vargo Mem. at 4, 9-13. Those derelictions of duty are in fact actions for which Pennington County is responsible, for reasons explained in the Court's decision. But more importantly, Vargo overlooks all the derelictions of duty he committed all on his own.

It was Vargo who decided to withhold from Indian parents in 48-hour hearings a copy of the petition for temporary custody, thus depriving those parents of their constitutional right to adequate notice. Indeed, Vargo continued that unconstitutional practice for four months after the Court informed him in January 2014 that parents had a due process right to receive that petition. *See Oglala Sioux Tribe*, 993 F. Supp. 2d at 1037 (finding "the risk of erroneous

[4] *See, e.g.* Vargo Mem. at 8 ("Vargo and his courtroom deputies did not have the authority to stop Judge Davis's conduct, regardless of whether or not it was in violation of plaintiffs' constitutional rights.")

deprivation high when Indian parents are not afforded the opportunity to know what the petition against them alleges.") Vargo was not just "present" when Indian parents were denied adequate notice: Vargo was the perpetrator of that injury. Vargo was not merely "aware" that parents were being kept in the dark, it was his decision that put them there.

Likewise, it was Vargo who decided not to call witnesses during 48-hour hearings, thus depriving parents of their constitutional right to confront and cross-examine. Vargo had a duty "to seek justice at all times." Docket 150 at 3. Vargo "'is an independent administrator of justice.'" *Id*. at 3 n.5 (quoting *Connick v. Thompson*, ___ U.S. ___, 131 S.Ct. 1350, 1362 (2011)). Yet, as the transcripts of more than a hundred 48-hour hearings prove, not once did Vargo try to satisfy his constitutional obligation to ensure that parents heard the evidence against them and were afforded an opportunity to confront that evidence.[5] Vargo even refused to call witnesses after the Court informed him in January 2014 that parents in 48-hour hearings have a right to cross-examine the people who sign ICWA affidavits. *See Oglala Sioux Tribe,* at 1037-38.

Similarly, it was Vargo—and no one else—who decided not cite ICWA's § 1922 in his petitions for temporary custody. As the Court noted in its summary judgment decision, "[a]s recently as June 23, 2014, petitions for temporary

[5] The fact that Judge Davis might have denied Vargo's request to call witnesses does not justify Vargo's failure to try. We will never know what Judge Davis would have done. All we know with certainty is that Vargo had a duty to seek justice in those hearings. At each 48-hour hearing, Vargo should have informed the court that he needed to present oral testimony from the person who signed the ICWA affidavit. By not trying, Vargo contributed to Plaintiffs' constitutional injuries, which then made it easier for him to remove Plaintiffs' children.

custody of Indian children submitted by the State's Attorney's staff to the Seventh Circuit judges routinely failed to cite § 1922 or its mandates. (Docket 109 ¶ 18.)" Docket 150 at 22. Thus, six months after the Court had ruled that 48-hearings must be conducted in compliance with § 1922, Vargo was still refusing to inform parents of the fact that § 1922 applied to their proceeding.

These derelictions fall squarely on Vargo's shoulders. Vargo was not just "present" when someone else violated federal law: Vargo violated federal law. Each time Vargo failed to provide parents with a copy of the petition, each time he failed to cite § 1922 in his petition, and each time he failed to call the signer of the ICWA affidavit to the stand, he caused constitutional injury for which Pennington County is responsible. *See Pembaur*, 475 U.S. at 480 (holding that a single decision by a county prosecutor possessing final authority under state law that causes constitutional injury can create liability for the county).

Vargo accuses this Court of basing his culpability on actions taken by Judge Davis, and yet the Court did no such thing. *See* Vargo Mem. at 12 (stating that the Court cannot find Pennington County liable "solely as a result of Davis's actions."); *see also id.* at 7 (citing cases for the principle that Pennington County cannot be held liable "based solely on the actions of its judges."). There is nothing in the Court's decision that bases Vargo's liability on the malfeasance of Judge Davis. On the contrary, the Court based Vargo's liability on Vargo's malfeasance.

Vargo claims that the South Dakota Supreme Court in *Cheyenne River* "blessed" his conduct. *See* Vargo Mem. at 5 ("Here, any 'policy' of Pennington

County was nothing more than application of state law as blessed by the South Dakota Supreme Court."). *See also id*. at 8 ("It is unclear why Vargo or his deputies should have 'sought to change' Judge Davis's practices, when the South Dakota Supreme Court declined to reject Davis's practices in *Cheyenne River Sioux Tribe v. Davis.*")

Vargo's argument is fundamentally flawed. Even if *Cheyenne River* lulled Vargo into a false sense of confidence that his policies were lawful, nonetheless they were still his policies. Because those policies violated federal law and he is the official under state law possessing the authority to establish those policies, his actions created liability for Pennington County. Surely the prosecutor in *Pembaur* thought that he was doing the right thing, just like Vargo did. Both of them were wrong. As a consequence, both of them exposed their governmental entities to liability under § 1983.

Stated differently, even if Vargo's decision to keep parents in the dark was "blessed" in *Cheyenne River*, no such blessing changes the fact that he created an unconstitutional policy for which Pennington County is now liable. The question here is not whether Vargo had a good faith belief that his actions were lawful. The question is whether Vargo is the official under state law possessing "the final authority to establish governmental policy." *Ware*, 150 F.3d at 880. This Court was manifestly correct in determining that Vargo is vested under state law with creating several of the policies that caused Plaintiffs' constitutional injuries. As the Court explained when Vargo made this identical argument previously, Vargo's attempt to avoid culpability by relying on *Cheyenne River*

"ignores the parents' due process rights to see [the petition and ICWA affidavit], confront them and cross-examine the document preparers." Docket 150 at 41.

Vargo also raises three other contentions that must be addressed:

1. Vargo claims that "the court improperly shifted the burden at summary judgment." Vargo Mem. at 6. It was "plaintiffs' burden to establish the lack of a question of material fact, not the defendants' burden to show that there is a question of material fact." *Id.*

Without doubt, it was Plaintiffs' burden to establish the lack of a question of material fact. And that is precisely what Plaintiffs did do. Plaintiffs established, for instance, that it was Vargo's practices (1) to refuse to give parents at the 48-hour hearing a copy of the petition for temporary custody, (2) to refuse to inform parents that the 48-hour hearing was governed by § 1922, and (3) to refuse to call the person who signed the ICWA affidavit as a witness. Vargo, despite being faced with those incriminating facts, failed to introduce any evidence that would defeat summary judgment. That is why he lost.

2. Vargo claims that summary judgment was improper because "a jury must determine" whether Vargo's practices caused constitutional injury. Vargo Mem. at 11. Vargo's claim ignores Rule 56 of the Federal Rules of Civil Procedure, which permits a court to resolve factual claims lacking material dispute. Here, based on more than a hundred transcripts of 48-hour hearings and more than fifty ICWA affidavits, the Court was easily able to determine that Vargo's practices violated federal law and deprived Plaintiffs of their federal rights. *See* Docket 150. There was no need to convene a jury.

3. Lastly, Vargo quarrels with the Court's conclusion that Vargo acquiesced in Judge Davis's unconstitutional procedures. In particular, Vargo claims that the Court misapplied *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994), because, Vargo asserts, "*Coleman* does not stand for the proposition that a municipal policy maker like Vargo always creates a policy that fairly represents official policy of the municipality when she 'does not challenge' the policies of a non-municipal judge.'" Vargo Mem. at 9.

This issue was thoroughly briefed in the summary judgment proceedings. Vargo's argument was then, and still is, "untenable." Docket 150 at 26. Moreover, Vargo did far more than not "challenge" Judge Davis. Vargo willingly participated in patently unconstitutional hearings despite his responsibility to seek justice. He made no effort to ensure that parents were given adequate notice; on the contrary, he deliberately kept Indian parents in the dark regarding the allegations against them. He made no effort to present witness testimony. He made no effort to provide parents with an opportunity to confront the signer of the ICWA affidavit. He made no effort to ensure that parents would have access to counsel. He made no effort to have the 48-hour hearing comply with § 1922. He "created the appearance of regularity in a highly irregular process," by acquiescing in a proceeding that denied rudimentary procedural fairness. Docket 150 at 27. Vargo did not merely neglect to challenge policies employed by Judge Davis; Vargo adopted those policies as his own and helped enforce them. *See Coleman*, 40 F.3d at 262; *see also Dodds v. Richardson*, 614 F.3d 1185, 1190-92, 1203-04 (10th Cir. 2010) (holding that a county sheriff who helps implement a

municipal judge's unconstitutional bond procedures can be held liable for such acquiescence); *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990) ("As we discussed earlier, a municipal custom may be established by proof that officials with policymaking responsibility knew of and acquiesced in an unlawful course of conduct.").

The Court was eminently correct in concluding that Vargo is a policy maker and that he created policies that resulted in Plaintiffs' constitutional injuries. His motion for reconsideration should be denied.

3. DSS DEFENDANTS' MOTION TO RECONSIDER SHOULD BE DENIED

Defendants Luann Van Hunnik and Lynne Valenti (hereinafter "DSS") ask the Court to reconsider its ruling, which found them to be policy makers whose decisions caused injury to the Plaintiffs. *See* Memorandum of Law in Support of Motion to Reconsider ("DSS Mem.") (Docket 168). For the reasons set forth below, DSS's motion should be denied. Indeed, because the motion cites no newly discovered evidence and merely reiterates arguments made previously, the motion should not have been filed.

At the outset, Plaintiffs must bring the following matter to the Court's attention: DSS misled the Court in earlier proceedings (and continues to do so here). As a result, the Court made a finding in favor of DSS that was unwarranted.

In its summary judgment decision, the Court states: "DSS also asserts that since June 2012 it has been DSS's written policy to provide the ICWA affidavit to parents attending a 48-hour hearing." Docket 150 at 13, citing Docket 131 ¶ 8.

Docket 131 is DSS's Statement of Material Facts. In paragraph 8, these Defendants declare: "Since June 2012, it has been the written policy of DSS to provide a copy of the ICWA affidavit to the parent(s), if present at the 48 Hour Hearing." Similarly, Defendant Van Hunnik testified in her Affidavit (Docket 132-1 ¶ 75): "Since June 2012, it has been the written policy of CPS [Child Protection Services of DSS] to provide a copy of the ICWA Affidavit to the parent(s), if present at the 48 Hour Hearing. Defendants' Exhibit 15."

An examination of the written policy to which Van Hunnik refers, however, demonstrates that her testimony is false. The written policy (Defendants' Exhibit 15) states in whole with respect to the ICWA Affidavit (emphasis added):

> The ICWA Affidavit: This affidavit should be completed by the Family Services Specialist on the case, **if possible,** for the 48-hour hearing **or** for the next scheduled hearing**.** The original should be filed with the court and copies provided to the parties. **Check with the State's Attorney for the process to be followed to do so.** See example in the Forms section at the end of this Chapter (a current copy is available in FACIS).

Had DSS wanted to create the policy Van Hunnik claims they created, the policy would state something along these lines: "The ICWA Affidavit: The Family Services Specialist must complete the affidavit prior to the 48-hour hearing and provide a copy to the parents(s) at the hearing, if they attend." But the actual policy says no such thing. Under the actual policy, first, the ICWA affidavit does not have to be prepared until *after* the 48-hour hearing. Second, although a copy must eventually be provided to the parents, the written policy permits the State's Attorney to determine when the parents will receive it. (The State's Attorney represents DSS in all child custody proceedings. *See* SDCL § 26-7A-9.) The

written policy creates no deadline by which parents must receive the affidavit and instead leaves the matter entirely in the discretion of DSS counsel.[6]

Van Hunnik's testimony is not just self-serving, it is deceptive. Her written policy does *not* require "DSS to provide a copy of the ICWA affidavit to the parent(s), if present at the 48 Hour Hearing," as she claims. No wonder, as the Court found, there was no reference to an ICWA affidavit "in 77 out of 78 cases," and no wonder parents "asked about the allegations against them or why their children were removed." Docket 150 at 13-14.

As the Court found, the facts were already sufficiently clear to justify summary judgment as to whether parents received the ICWA affidavit at the 48-hour hearing. Now, the facts are even more compelling because we know that Van Hunnik gave false testimony. DSS did not (and does not) have a written policy that requires DSS employees to provide parents in 48-hour hearings with the ICWA affidavit. In fact, DSS's written policy allows employees to create the affidavit after the hearing, and allows the State's Attorney to determine when a copy will be provided to the parents. In Pennington County, this written policy resulted, as the facts clearly show, in withholding the ICWA affidavit from parents until sometime after the 48-hear hearing had ended.

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[6] It bears emphasis that even though the written policy provides that the ICWA affidavit "should be filed with the court and copies provided to the parties," DSS employees determine if it is "possible" even to draft it prior to the 48-hour hearing. Moreover, if the affidavit is created by employees that soon, the policy leaves the timing of its delivery entirely in the hands of the State's Attorney. In Pennington County, Defendant Vargo refused until May 2014 to give parents his petition for temporary custody at the 48-hour hearing. He has never stated that he gave, or anyone else gave, parents the ICWA affidavit any sooner than they received the petition, and any statements made by Van Hunnik on that subject lack credibility.

With this as background, we can easily dispose of the arguments contained in DSS's motion for reconsideration. First, DSS argues that the Court cited only one ground for finding Van Hunnik and Valenti culpable: "for acquiescing or ratifying Judge Davis's alleged policies." DSS Mem. at 2. But that argument wholly ignores the main portion of Van Hunnik's and Valenti's culpability: they failed to ensure that Indian parents would receive a copy of the ICWA affidavit at the 48-hour hearing. This failure has nothing to do with Judge Davis's malfeasance. Judge Davis did not order DSS to keep parents in the dark; DSS made that decision. Van Hunnik and Valenti failed to provide adequate notice to Indian parents in 48-hour hearings; neither by written policy nor by practice did they ensure that their employees would even create, much less provide, parents with the ICWA affidavit in 48-hour hearings.[7]

In a similar vein, Van Hunnik and Valenti argue that the Court's decision fails to identify any "official policy" or "governmental custom" created by DSS that caused injury to the Plaintiffs. DSS Mem. at 11; *see also id*. at 10 ("Plaintiffs' summary judgment submissions fail to proffer or identify the existence of any 'governmental custom' by the State/DSS."); *see also id*. at 15 ("The Court points to no policies or customs of DSS that lead to liability of Ms. Valenti and/or Ms. Van Hunnik."). Van Hunnik and Valenti thus pretend as if they are not the administrators responsible for the failure of their employees to provide the ICWA

[7] DSS points out that although DSS prepares the ICWA affidavit, Vargo prepares the petition for temporary custody, and from this they argue that they are not accountable for Vargo's delay in providing the petition to parents. *See* DSS Mem. at 4. That argument, however, ignores the fact that Vargo is counsel for DSS in these proceedings. *See* SDCL § 26-7A-9. If DSS wanted Vargo to provide parents with adequate notice, DSS could have instructed him to do so.

affidavit to Indian parents in 48-hour hearings. Yet, Van Hunnik and Valenti are the officials empowered by state law to ensure that Indian parents receive a copy of the ICWA affidavit, and by both policy and practice they failed to fulfill that duty, as the Court found. *See* Docket 150 at 13-15.

The DSS Defendants take umbrage over the fact that this Court assumed they "understand 48-hour hearings are intended to be evidentiary hearings." DSS Mem. at 7, citing Docket 150 at 26. Given that both the South Dakota Guidelines and the Due Process Clause contemplate that each and every 48-hour hearing must *of course* allow parents rudimentary due process before the state removes a child from the home, the Court's assumption would seem appropriate. *See Troxel v. Granville*, 530 U.S. 57 (2000); *Swipies v. Kofka*, 419 F.3d 709 (8th Cir. 2005).

Apparently, Valenti and Van Hunnik do not know that 48-hour hearings are evidentiary hearings, and the Court may have given them too much credit. The Court can, if it wishes, change its statement in that regard, but their state of mind is irrelevant in any event. Regardless of whether they knew that 48-hour hearings are evidentiary hearings, they are the officials who set the policy as to when Indian parents will be given the ICWA affidavit.[8] As with Vargo, they may have believed that the policy they created was adequate, but they were wrong, and their policy exposed the State to liability. *See Monell*, 436 U.S. at 694; *Ware*, 150 F.3d at 880.

[8] The DSS Defendants do not deny that fact. Indeed, they contend, as discussed above, that the written policy they did enact pursuant to their authority is constitutionally adequate.

DSS also criticizes the Court's application of *Coleman* to the facts of this case. *See* DSS Mem. at 13-14. Van Hunnik and Valenti make the same arguments as Vargo did in his motion for reconsideration. Therefore, DSS's arguments are as unavailing as Vargo's.

Vargo represents DSS in all child custody matters. *See* SDCL § 26-7A-9. Therefore, Vargo's decision to withhold the petition for temporary custody from parents, to refuse to call the DSS employee who signed the ICWA affidavit to the stand, and his decision not to notify parents that DSS must comply with ICWA's § 1922 are attributable to DSS. DSS should have instructed their attorney to comply with federal law. All of Vargo's derelictions made it easier for DSS to prevail in 48-hour hearings, but those victories were achieved by first depriving Indian parents, Indian children, and Indian tribes of their federal rights, as this Court correctly determined.

CONCLUSION

Defendants' motions to reconsider should be denied.

Respectfully submitted this 11th day of May, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2015, I filed the foregoing Reply Brief with the /CMECF System, which sent a notice of electronic filing to the following counsel for Defendants and other counsel of record:

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