IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

AARIN NYGAARD, et al., Petitioners, v. TRICIA TAYLOR, et al., Respondents.	Civil No. 3:19-cv-03016-RAL **BRIEF IN SUPPORT OF TRIBAL COURT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

COME NOW Respondents Brenda Claymore, in her official capacity as Chief Judge of the Cheyenne River Sioux Tribal Court, and Frank Pommersheim, in his official capacity as Chief Justice of the Cheyenne River Sioux Tribal Court of Appeals (hereafter collectively "Tribal Court Respondents"), and for their Brief in Support of Tribal Court Defendants' Motion for Summary Judgment state as follows:

INTRODUCTION

In its order of October 15, 2021, this Court identified as a "central issue in this case" the question of "whether 28 U.S.C. § 1738A(a) and (b)(8), portions of the Parental Kidnapping Prevention Act (PKPA), extend to tribes and tribal courts." Order [doc. 73] 1 (Oct. 15, 2021). The Court adopted a schedule for "submission of the applicability of the PKPA and any closely related issue" on cross-motions for summary judgment. *Id*. The Court stated that the applicability of the PKPA is "strictly a legal issue," *id.*, and therefore relieved the parties of the burden of filing statements of undisputed facts under D.S.D. LR 56.1, *id*. at 2.

BACKGROUND

A. The Cheyenne River Sioux Tribe

The Cheyenne River Sioux Tribe ("Tribe") is a federally recognized Indian tribe whose sovereignty and right to self-government were recognized and affirmed in the Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868). The Tribe has a treaty-based government-to-government relationship with the United States.

The Supreme Court has considered the history of the Cheyenne River Sioux Tribe and its treaty relationship with the United States in various cases, including *South Dakota v. Bourland*, 508 U.S. 679 (1993), *Solem v. Bartlett*, 465 U.S. 463 (1984), and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

The Tribe comprises four of the seven bands of the Lakota Sioux – *Minnecoujou, Itazipco, Oohenumpa,* and *Siha Sapa*. It has approximately 25,000 enrolled members, a majority of whom live on the Cheyenne River Indian Reservation ("Reservation") in 16 tribal communities located throughout Ziebach and Dewey counties in north-central South Dakota. The Reservation, which was established pursuant to the Act of March 2, 1889, 25 Stat. 889, contains approximately 2.8 million acres of land and is roughly the size of the State of Connecticut.

The Tribe is organized under Section 16 of the Indian Reorganization Act, 48. Stat. 984 (Jun. 18, 1934), *codified as amended at* 25 U.S.C. § 5123, and is governed by a Constitution and By-Laws. *See* C.R.S.T. Const. and By-Laws (Dec. 27, 1935), as amended Feb. 11, 1966, Jun. 18, 1980, and Jul. 17, 1992.

B. The Cheyenne River Sioux Tribal Courts

The Tribal Constitution establishes a tribal court "for the adjudication of claims or disputes arising among or affecting the Cheyenne River Sioux Tribe," C.R.S.T. Const., Art. IV, § 1(k), and

the By-Laws provide that, "[t]he tribal courts shall have jurisdiction over claims and disputes arising on the reservation," C.R.S.T. By-Laws, Art. V, § 1(c). *See also* CRST Const., Art. I. The Tribal Courts, which consist of trial courts and an appellate court, are open to tribal members and non-members alike.

The Tribe's judicial system, like those of most modern tribal courts, follows procedures similar to those utilized in federal and state courts around the country. See Remarks, Justice Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. REV. 1, 5 (1997) (specifically acknowledging the C.R.S.T. court system). The principle of separation of powers is contained in the Tribe's Constitution. *See* C.R.S.T. Const., Art. IV, § 1(k) ("[d]ecisions of tribal courts may be appealed to tribal appellate courts, but shall not be subject to review by the Tribal Council"). Litigants are afforded due process of law and equal protection of the law. Trial procedures are governed by rules similar to the federal rules of civil and criminal procedure as well as the rules of evidence. Tribal Court judges are bound by their oath of office and follow the American Bar Association Code of Judicial Conduct.

Many of the judges of the Tribal Courts are well-trained and well-recognized jurists and academics. For example, Chief Justice Frank Pommersheim of the Tribal Court of Appeals is a member of the bar of South Dakota and a professor (emeritus) at the University of South Dakota School of Law. A graduate of Columbia University Law School, he serves on several tribal appellate courts, writes extensively in the area of Indian law and is a contributor to the HANDBOOK OF FEDERAL INDIAN LAW by Felix S. Cohen, and has received awards for teaching at the University of South Dakota and its law school.

The State of South Dakota authorizes its courts to give comity to the decisions of the Cheyenne River Sioux Tribal Courts. *See* S.D.C.L. § 1- 1-25. *See also*, *e.g.*, *One Feather v. O.S.T.*

Pub. Safety Comm'n, 482 N.W.2d 48, 49 (S.D. 1992); *Gesinger v. Gesinger*, 531 N.W.2d 17 (S.D. 1995). Similarly, federal courts afford comity to tribal court decisions. *See*, *e.g.*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987); *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006), *cert. denied*, 549 U.S. 1167 (2007).

The Tribal Court's fair and unbiased tribal procedures lead to fair and unbiased results. For instance, the Tribe itself frequently loses cases in the Tribal Courts. *See*, *e.g.*, *High Elk v. Iron Hawk*, Case No. 05-002-A, 33 Indian L. Rep. 6031 (C.R.S.T. Ct. App. 2006) (per curiam).

C. Tribal Self-Government and the Role of Tribal Courts

The Cheyenne River Sioux Tribe, like other federally recognized Indian tribes, is a sovereign nation that possesses inherent sovereign authority. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 788 (2014) (federally recognized Indian tribes "exercise inherent sovereign authority" over their members and territories) (citations omitted); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973) ("[Indian tribes'] claim to sovereignty long predates that of our own Government") (citations omitted); *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations"); Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, § 4.01[1][a] (2005 ed. & Supp. 2012) ("Indian tribes consistently have been recognized, first by the European nations, and later by the United States, as 'distinct, independent political communities,' qualified to exercise powers of self- government . . . by reason of their original tribal sovereignty") (internal citations omitted).

"Tribal courts play a vital role in tribal self-government." *Iowa Mut. Ins. Co.*, 480 U.S. at 14. Moreover, "the Federal Government has consistently encouraged their development." *Id*. at 14-15; *see also id*. at 16-17 ("[t]he federal policy of promoting tribal self-government encompasses

the development of the entire tribal court system"). *See, e.g.*, Indian Tribal Justice Act, 25 U.S.C. §§ 3601 *et seq*. (2000); Indian Tribal Justice and Legal Assistance Act, 25 U.S.C. §§ 3651(6)-(7) (2000) (congressional findings of federal policy acknowledging importance of tribal justice systems to tribal self- determination); Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 113 (1995) ("[T]ribal justice systems are essential pieces of the mosaic of tribal self-governance. The U.S. Department of Justice is firmly committed to increasing self-determination for American Indian tribal governments by strengthening tribal justice systems"). *See al*so Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 450 (2005).

The United States Supreme Court has long recognized the inherent authority of tribal courts to adjudicate civil disputes arising in Indian country. *See*, *e.g.*, *Iowa Mutual Ins. Co.*, 480 U.S. at 18-19; *Williams v. Lee*, 358 U.S. at 223. Tribal authority over domestic relations involving tribal members, including custody disputes involving tribal member children, is well-settled. *See*, *e.g.*, *Montana v. U.S.*, 450 U.S. 544, 564 (1981).

The United States Congress has also recognized the inherent authority of tribal courts to decide custody disputes involving Indian children. In the Indian Child Welfare Act ("ICWA"), Pub. L. 95-608, 92 Stat. 3069 (Nov. 8, 1978), *codified as amended at* 25 U.S.C. § 1901, *et seq*., Congress vested exclusive jurisdiction in tribal courts, including the Tribal Courts of the Cheyenne River Sioux Tribe, over certain child custody proceedings involving tribal member children who reside or are domiciled on the Reservation. 25 U.S.C. § 1911(a).[1]

[1] The ICWA defines the term "child custody proceeding" to include a "foster care placement," which shall mean "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated." 25 U.S.C. § 1903(1).

Further, the laws of the Tribe expressly grant jurisdiction to the Tribal Court over care and custody proceedings involving children who are members of the Tribe. The Children's Code of the Tribe provides that the Tribal Court "shall have jurisdiction over any child who is a member or eligible to become a member of the Cheyenne River Sioux Tribe no matter where domiciled, residing or found ..." C.R.S.T. Children's Code § 7.01. The Children's Code further provides that the Tribal Court "may decline jurisdiction where a forum with concurrent jurisdiction is exercising its authority or in cases where neither the child nor either parent is a Reservation resident in cases where justice may require declination." *Id*.

D. The Tribal Court Proceedings in This Case

The Tribal Court proceedings in this case are recited in the Memorandum Opinion and Order of the Cheyenne River Sioux Tribal Court of Appeals of February 25, 2019, and in this Court's Order of September 24, 2021. Further, Tribal Court records and recordings of Tribal Court proceedings have been filed with this Court and have been judicially noticed by this Court and made a part of the record in this case.

Tribal Court Respondents note, for present purposes, that this case concerns a petition for temporary custody of two minor children who are enrolled members of the Tribe, C.S.N. and T.R.S. The petition was filed by children's uncle, Ted Taylor, an enrolled member of the Tribe, and later joined in by the children's aunt, Jessica Ducheneaux, an enrolled member of the Tribe. Mr. Taylor had been instructed by the South Dakota Department of Social Services ("DSS") to file the temporary custody petition in Tribal Court when DSS placed the children in his care and custody following apprehension of the children's mother, Tricia Taylor, an enrolled tribal member, on an arrest warrant.

The petition for temporary custody alleged that the children were in need of care and custody, in part, because their mother had been detained and incarcerated and the children were essentially abandoned on the Reservation. Recognizing an immediate need to provide for care and custody of the children, the Tribal Court entered an order granting temporary custody to Ms. Ducheneaux.

This case involves allegations of abuse, neglect, and/or incapacity by one or more of the parents of the minor tribal member children. Among other things, there are allegations in the Tribal Court record of mistreatment and physical abuse by Petitioner Aarin Nygaard against Tricia Taylor and allegations of sexual abuse by Mr. Nygaard against T.R.S.

Petitioners Nygaard and Terrance Stanley moved to dismiss the petition for temporary custody in Tribal Court. They assert that jurisdiction to determine custody of the tribal member children lies in the Cass County District Court in North Dakota, not the Tribal Court, and further that the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A, requires the Tribal Court to give full faith and credit to the custody orders of the Cass County District Court and prevents the Tribal Court from modifying those orders.

In its Memorandum Opinion and Order on February 25, 2019, the Tribal Court of Appeals held that the PKPA does not apply to the Tribe or the Tribal Court and, as a result, the custody orders of the Cass County District Court are not entitled to full faith and credit. Those orders may be recognized and enforced under principles of comity. The Tribal Court of Appeals further held that the Tribal Court has jurisdiction, under tribal law, over the petition for temporary custody. Specifically, the court held that:

> Tribal law expressly grants jurisdiction to the Tribal Court over care and custody proceedings involving children who are members of the Tribe. The Children's Code of the Tribe provides that the Tribal Court "shall have jurisdiction over any child who is a member or eligible to become a member of the Cheyenne River Sioux

> Tribe no matter where domiciled, residing or found …" C.R.S.T. Children's Code § 7.01. The Children's Code further provides that the Tribal Court "may decline jurisdiction where a forum with concurrent jurisdiction is exercising its authority or in cases where neither the child nor either parent is a Reservation resident in cases where justice may require declination." *Id*.

In re C.S.N. and T.R.S., Appeal No. 18A01, Mem. Op. and Order 19 (Feb. 25, 2019), *reprinted in* Tribal Court Respondents' Notice of Filing Tribal Court Records and Request to Seal ("Tribal Court Record") (Aug. 26, 2021) [doc. 64], Exhibit H [doc. 64-16] at 142.

ARGUMENT

I. THE CHEYENNE RIVER SIOUX TRIBAL COURT HAS JURISDICTION OVER THE PETITION FOR TEMPORARY CUSTODY OF C.S.N. AND T.R.S.

The courts of the Cheyenne River Sioux Tribe have jurisdiction over the tribal court child custody proceedings that are the subject of this action, including *In re C.S.N. and T.R.S.*, Case No. 14FC391 (Cheyenne River Sioux Tribal Court), and that jurisdiction is recognized and affirmed in tribal law, including but not limited to the Cheyenne River Sioux Tribe Children's Code, and that jurisdiction is also recognized and affirmed in federal law, including but not limited to the Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), the Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868), the Act of February 28, 1877, 19 Stat. 254, the Indian Child Welfare Act, 92 Stat. 3069, 25 U.S.C. §§ 1901-1963, *see*, *e.g.*, 25 U.S.C. § 1911(a)[2]; *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883), and numerous other decisions of the federal courts affirming the inherent authority of Indian tribes to regulate domestic relations, domestic affairs, and the conduct of non-Indians.

[2] 25 U.S.C. § 1911(a) provides, in relevant part, that, "[a]n Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe …"

The Supreme Court has held that, through the Treaties of 1851 and 1868 and related statutes, the Great Sioux Nation and its constituent tribes, including the Cheyenne River Sioux Tribe, reserved the highest and best form of government, that of self-government, to wit:

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all,—that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.

Ex parte Crow Dog, 109 U.S. 556, 568 (1883). The treaties and federal statutes provide a federal law basis for the Tribe to exercise jurisdiction to protect its tribal member children.

In this case, the minor children, C.S.N. and T.R.S., are enrolled members of the Cheyenne River Sioux Tribe who reside and are present on the Cheyenne River Indian Reservation; the tribal member children were found to be in need of care, custody, and protection on the Reservation and were placed in the custody of their uncle, an enrolled member of the Cheyenne River Sioux Tribe and a non-parent relative, by the State of South Dakota Department of Social Services ("DSS"); DSS advised the children's uncle to petition the tribal court for temporary, protective custody of the minor children, which he did, and the children's aunt, also an enrolled member of the Cheyenne River Sioux Tribe and a non-parent relative, joined in the petition. This case involves allegations of abuse, neglect, and/or incapacity by one or more of the parents of the minor tribal member children, including allegations of mistreatment and abuse against the children's mother and allegations of sexual abuse against one of the minor children.

When tribal member children are found in need of care, custody, and protection on the Reservation, it is within the self-governing authority of the courts of the Cheyenne River Sioux Tribe to hear and decide a petition for temporary custody filed by non-parent relatives of the

children and to provide for the children's care, custody, and protection through temporary custody orders and otherwise.

II. THE PARENTAL KIDNAPPING PREVENTION ACT DOES NOT APPLY TO THE CHEYENNE RIVER SIOUX TRIBE OR THE CHEYENNE RIVER SIOUX TRIBAL COURT.

Petitioners assert that the federal Parental Kidnapping Prevention Act ("PKPA"), Pub. L. 96-611, § 8(a), 94. Stat. 3569 (Dec. 28, 1980), *codified as amended at* 28 U.S.C. § 1738A, deprives the Tribal Court of jurisdiction over the petition for temporary custody. The gravamen of Petitioners' argument is that the PKPA requires the Tribal Court to give full faith and credit to certain custody orders entered by the Cass County District Court in North Dakota and prevents the Tribal Court from modifying those state court orders. Not so.

A. By Its Express Terms, the PKPA Does Not Apply to Indian Tribes, Tribal Courts, or Indian Country.

The PKPA provides, with some exceptions, that child custody and visitation orders entered by a state court with jurisdiction are entitled to full faith and credit in the courts of other states. The PKPA states, in relevant part, that:

> The appropriate authorities of every State shall enforce according to its terms, and shall not modify … [with some exceptions noted in the Act] any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

28 U.S.C. § 1738A(a). The PKPA defines the term "State" to mean "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States." 28 U.S.C. § 1738A(b)(8).

By its express terms, the PKPA applies to States, territories, and possessions of the United States, 28 U.S.C. § 1738A(b)(8), but it does not apply to Indian tribes or tribal courts. There is no reference to Indian tribes, tribal courts, or Indian country in the PKPA, and the Act's "legislative

history lacks any suggestion that Congress intended the statute to apply to tribes." *Garcia v. Gutierrez*, 217 P.3d 591, 604 (N.M. App. 2009), *citing* Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity,* 36 UCLA L. REV. 1051, 1063 n. 50 (1989) (noting that "the legislative history of the PKPA contains no discussion of tribal custody decrees," and that "Congress was manifestly concerned with reducing jurisdictional competition between state courts"). Indian tribes, tribal courts, and Indian country are not discussed in the salient legislative history of the PKPA.[3]

Congress knows how to include Indian tribes, tribal courts, and Indian country within the scope of its full faith and credit statutes when it intends to do so. Congress has adopted at least seven full faith and credit statutes that expressly apply to Indian tribes, tribal courts, or Indian country.[4] One of these statutes—the Maine Indian Claims Settlement Act, Pub. L. 96–420, 94 Stat. 1785 (Oct. 10, 1980)—was adopted by the same (96th) Congress that adopted the PKPA, and it expressly provides that the State of Maine and select Indian tribes "shall give full faith and credit to the judicial proceedings of each other." *Id*. at § 6(g). This statute, like the others, is "cogent

[3] *See*, *e.g.*, *Parental Kidnaping Prevention Act of 1979, S. 105, Joint Hearing of Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources*, 96th Cong., 2nd Sess., Serial No. 96-54 (Jan. 30, 1980); *Parental Kidnaping Prevention Act of 1979, S. 105, Addendum to Joint Hearing Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources*, 96th Cong., 2nd Sess., Serial No. 96-54 (Jan. 30, 1980); Congressional Record, *Proceedings and Debates of the 96th Congress*, 125 Cong. Rec. S374-395 (daily ed. Jan. 23, 1979). *See also Implementation of the Parental Kidnaping Prevention Act of 1980, Oversight Hearing of Subcomm. on Crime of the Comm. on the Judiciary*, 97th Cong., 1st Sess., Serial No. 99 (Sept. 24, 1981).

[4] The seven statutes are: the Federal Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B; the Indian Child Welfare Act, 25 U.S.C. § 1911(d); the Violence Against Women Act, 18 U.S.C. § 2265; the Indian Land Consolidation Act, 25 U.S.C. § 2207; the National Indian Forest Resources Management Act, 25 U.S.C. § 3106; the American Indian Agricultural Resource Management Act, 25 U.S.C. § 3713; and the Maine Indian Claims Settlement Act, Pub. L. 96-420, § 6(g), 94 Stat. 1785, 1793 (Oct. 10, 1980), *formerly codified at* 25 U.S.C. § 1725(g).

proof that Congress knew well how to express its intent directly when that intent was to subject" Indian tribes, tribal courts, or Indian country to the full faith and credit mandates of its statutes. *See Bryan v. Itasca Cnty*., 426 U.S. 373, 389-90 (1976). It did not do so in the PKPA.

Another statute—the Federal Full Faith and Credit for Child Support Orders Act—mandates full faith and credit between States for child support orders, 28 U.S.C. § 1738B(a), and it expressly defines the term "State" to mean "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, *and Indian country (as defined in section 1151 of title 18)*," 28 U.S.C. § 1738B(b)(9) (emphasis added). Similarly, the ICWA requires that, "[t]he United States, every State, every territory or possession of the United States, *and every tribe* shall give full faith and credit to the public acts, records and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings …" 25 U.S.C. § 1911(d) (emphasis added).

If Congress understood the terms "territories" or "possessions" to include Indian tribes or Indian country, as some have suggested in the PKPA context, then its inclusion of the term "Indian country" in 28 U.S.C. § 1738B(b)(9) and its inclusion of the term "every tribe" in the ICWA would have been superfluous. That is not the case, and courts must be "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (citation omitted). The canon against superfluity imposes on courts a "duty to give effect, where possible, to every word of a statute." *Duncan v. Walker*, 533 U.S. 167, 167 (2001). The term "Indian country," as used in 28 U.S.C. § 1738B, and the term "every tribe," as used in the ICWA, have effect if and only if we conclude—as we must—that the terms "territories" and "possessions" do not include Indian tribes or Indian country.

The omission of Indian tribes, tribal courts, and Indian country from the PKPA is clear evidence that Congress did not intend the statute to apply to Indian tribes:

> The explicit inclusion of tribes in these [other] statutes strongly suggests that Congress not only considers it necessary to specify when legislation is meant to apply to tribes, but also that Congress is capable of doing so when it desires. The most telling example is Section 1738(B), which immediately follows the PKPA in the United States Code. Section 1738(B) mandates full faith and credit between "states" for child-support orders, and it defines "state" as "a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, *and Indian country (as defined in section 1151 of title 18*)." 28 U.S.C. § 1738(B) (emphasis added). The PKPA employs a virtually identical definition of "state," except that it does not include the phrase "and Indian country."
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> We also observe the fundamental principle of Indian law that tribes retain "all inherent attributes of sovereignty that have not been divested by the Federal Government," and that "the proper inference from silence ... is that the sovereign power ... remains intact." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148–49 n. 14 (1982). Applied here, this principle strongly suggests that if Congress intends to dictate to tribal courts principles of full faith and credit, it must do so explicitly.

Garcia, 217 P.3d at 605 (emphasis in original). *See also id*. at 606 (noting that "reading 'territories' to mean 'tribes' [in the PKPA] would render superfluous the explicit inclusion of 'Indian tribes' in Section 1738(B) and other statutes that on their terms apply to 'territories' and also to 'tribes'").

Congress did not dictate in the PKPA that Indian tribes or tribal courts are to be included within its full faith and credit mandate. In the absence of any clear congressional intent, this Court should not strain to include tribes or tribal courts within the PKPA's mandate. "The Indian canons of construction would suggest that any federal law purporting to restrict the sovereign powers of an Indian nation should do so expressly so that reserved powers are retained in the absence of clear congressional intent to the contrary." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.07[2][b] (2005).

The Supreme Court has often stated that Congress must "unequivocally" express when it intends to abrogate inherent tribal rights and immunities. *See Michigan v. Bay Mills Indian Cmty*.,

572 U.S. 782, 790 (2014). "That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id*. (citations omitted). "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citations omitted). Accordingly, out of "proper respect both for tribal sovereignty itself and for the plenary authority of Congress," the courts must "tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

Nothing in the PKPA's text or legislative history reflects an "unequivocal," "express," or "clear" congressional intent to subject Indian tribes, tribal courts, or Indian country to the full faith and credit mandate of the PKPA.

B. The Cheyenne River Sioux Tribe Has Determined that the PKPA Does Not Apply to the Tribe or the Tribal Courts.

The Cheyenne River Sioux Tribe has determined, through judicial decisions and positive legislation, that the PKPA does not apply to Indian tribes or tribal courts. *See*, *e.g.*, *In re C.S.N. and T.R.S.*, Appeal No. 18A01, Mem. Op. and Order 10-18 (Feb. 25, 2019), *reprinted in* Tribal Court Record [doc. 64], Exh. H [doc. 64-16] at 133-140; C.R.S.T. Res. No. 171-2018-CR (May 4, 2018). *See also* C.R.S.T. Res. No. E-233-97-CR (adopted by C.R.S.T. Exec. Comm. on Aug. 20, 1997, and approved by C.R.S.T. Tribal Council on Sept. 4, 1997), *as amended by* C.R.S.T. Res. No. 323-05-CR (Aug. 4, 2005). These and other authorities are discussed below.

In *Eberhard v. Eberhard*, 24 ILR 6059 (C.R.S.T. Ct. App. Feb. 18, 1997), the Tribal Court of Appeals held that, in its view, the Tribe is a "State," within the meaning of the PKPA. *Eberhard* was a common law decision and, as such, it was subject to modification and adjustment by the Cheyenne River Sioux Tribal Council ("Tribal Council"), the legislative and governing body of

the Tribe. *See United States v. Lara*, 541 U.S. 193, 207 (2004) (noting that the common law is subject to the paramount authority of the legislature).

Shortly after *Eberhard* was decided, the Tribal Council enacted laws to establish comity, not full faith and credit, as the principle under which foreign orders or judgments may be recognized and enforced in the Tribal Court. *Eberhard* was decided in February 1997. In September 1997, the Tribal Council ratified Executive Resolution No. E-233-97-CR, which provides that the courts of the Tribe will recognize and enforce a foreign order or judgment only under principles of comity and, specifically, only if:

1. The court that issued the order or judgment had both subject matter and personal jurisdiction over the parties;
2. The order or judgment was not fraudulently obtained;
3. The process by which the said order or judgment was obtained fully complied with the prerequisites of impartial administration of justice and fairness, including due notice and a hearing;
4. The order or judgment does not contravene the public policy of the Cheyenne River Sioux Tribe;
5. The order or judgment complies with the laws, ordinances, and regulations of the jurisdiction from it was obtained; and
6. The jurisdiction issuing the order or judgment also grants comity to the orders and judgments of the Cheyenne River Sioux Tribal Court.

C.R.S.T. Res. No. E-233-97-CR (adopted by C.R.S.T. Exec. Comm. on Aug. 20, 1997, and approved by C.R.S.T. Tribal Council on Sept. 4, 1997), *as amended by* C.R.S.T. Res. No. 323-05-CR (Aug. 4, 2005) (adding subsection (6)).

By making the rule of comity the express law of the Tribe, the Tribal Council clarified that the Tribe is not bound by the PKPA or subject to the full faith and credit provisions in the PKPA or in any other federal statute that does not expressly include Indian tribes, tribal courts, or Indian country. In so doing, the Tribal Council effectively overrode *Eberhard* and rendered it inapplicable to future cases.

The Tribal Court of Appeals recognized this fact in its Memorandum Opinion and Order of September 1, 2016, in *In re C.S.N. and T.R.S.*, when it declined to address "issues potentially involving the Parental Kidnapping Prevention Act" and held that comity, not full faith and credit, controls the question of whether a foreign custody order will be recognized and enforced by the Tribal Courts:

> The central provision of Tribal law that speaks to the issue of the Cheyenne River Sioux Tribal Court potentially recognizing and enforcing a state court order is grounded in the principle of 'comity,' not full faith and credit. This 'comity' provision is found in Executive Resolution (#E-233-97-CR).

Mem. Op. and Order at 5 (Sept. 1, 2016) (citing C.R.S.T. Res. No. E-233-97-CR).

In May 2018, the Tribal Council enacted Resolution No. 171-2018-CR, which expressly provides that:

> the Cheyenne River Sioux Tribe is not a "State" within the meaning of the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, and is not subject to the Act's obligations ….
>
> the custody and visitation orders and judgments of foreign Tribal and State courts may be recognized and enforced by the Cheyenne River Sioux Tribal Courts under the principles of comity set forth in C.R.S.T. Res. No. E-233-97-CR (adopted by Executive Committee on Aug. 20, 1997, and approved by Tribal Council on Sept. 4, 1997), as amended by C.R.S.T. Res. No. 323-05-CR (Aug. 4, 2005), not under principles of full faith and credit ….

Resolution 171-2018-CR 5-6 (May 4, 2018).

In its Memorandum Opinion and Order of February 25, 2019, in *In re C.S.N. and T.R.S.*, the Tribal Court of Appeals confirmed that the PKPA does not apply to the Tribe or its courts. *Id.* at 10-18. The court noted that a construction of the PKPA as being applicable to Indian tribes or tribal courts "is quite strained and appears to readily exceed the bounds of its 'plain meaning.'" *Id.* at 11.

> Nowhere in the [PKPA] does the term Indian or Indian tribe appear. Most importantly, the term is not mentioned in the definition of 'state' which appears at

> 28 U.S.C. § 1738A(b)(8). This 'plain meaning' approach is further supported by the well-known Indian canons of construction that hold that 'any federal law purporting to restrict the sovereign powers of an Indian nation should do so expressly so that reserved powers are retained in the absence of clear congressional intent to the contrary.'

Id. (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.07(2)(b) (2005) and citing 67 C.J.S. PARENT AND CHILD § 102 (2018) (declaring that, "[t]he Parental Kidnapping Prevention Act does not apply to Indian tribes, and thus, tribes are not bound to give full faith and credit under the Act to state court judgments in state court cases").[5]

The Tribal Court of Appeals noted that the Tribe's laws, including Executive Resolution No. E-233-97 (R, 1997), Resolution No. 323-05-CR (2005), and Resolution No. 171-2018- CR (2018), "outline the specific contours of Cheyenne River Sioux Tribe's adherence to the well-known principle of comity," not full faith and credit. *Id*. at 17. The court noted that the Tribe's rule of comity applies to "*all* 'foreign' judgments." *Id.* (emphasis in original). The court also noted that, "the most recent and updated Tribal Resolution on comity [Resolution No. 171-2018-CR] includes the observation that the Tribe does not consider itself a 'state' within the meaning of the PKPA." *Id*.

The Tribal Court of Appeals surveyed the laws of other tribal, federal, and state courts and noted that, "the relevant caselaw is virtually unanimous in holding that the PKPA does *not* apply to tribes." *Id*. at 11 (emphasis in original). *See also id*. at 11-13 (collecting cases). The court also noted that states, like North Dakota, enforce the orders and judgments of tribal courts under

[5] "[T]he preeminent canon of statutory interpretation requires [courts] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Bedroc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). Statutory interpretation thus begins by reading a statute in light of the "'ordinary meaning of [its] language.'" *Engine Mfrs Ass'n v. S. Coast Air Quality Mgmt Dist*., 541 U.S. 246, 252 (2004).

principles of comity, not full faith and credit. *Id*. at 18 (citing N.D.R. Ct. 7.2, which permits the recognition and enforcement of certain tribal court orders under principles of comity). South Dakota follows the same rule, recognizing tribal court orders under principles of comity, not full faith and credit. *See* S.D.C.L. § 1-1-25.

To avoid any confusion on the matter, the Tribal Court of Appeals formally overruled its prior decision in *Eberhard* and confirmed that *Eberhard*'s long-since-repudiated holding on the applicability of the PKPA to the Tribe or its courts has no continuing force or vitality. *In re C.S.N. and T.R.S.*, Appeal No. 18A01, Mem. Op. and Order 18, 20 (Feb. 25, 2019).

C. Many Other Courts Have Determined that the PKPA Does Not Apply to Indian Tribes or Tribal Courts.

Many other courts have determined that the PKPA does not apply to Indian tribes or tribal courts. Indian tribes are not States, territories, or possessions of the United States and are not included within the scope of the PKPA.

Numerous state courts have held that the PKPA does not apply to Indian tribes or tribal courts. For example, in *Garcia v. Gutierrez*, 217 P.3d 591 (N.M. App. 2009), the Supreme Court of New Mexico held that Indian tribes are not states, territories, or possessions within the meaning of the PKPA and, consequently, are not subject to the full faith and credit mandate in the PKPA. *Id*. at 606. The court noted that there is a "growing chorus of cases holding that tribes are not 'states' for full faith and credit purposes unless Congress explicitly designates them as such, and that tribes are not 'territories or possessions' within the meaning of the PKPA." *Id*. *See also id*. at 603-606 (collecting cases).

In *John v. Baker*, 982 P.2d 738, 763 (Alaska 1999), the Supreme Court of Alaska held that, because "Congress does not view Indian tribes as 'states, territories, or possessions,' the PKPA does not accord full faith and credit to tribal judgments." Similarly, in *In re Custody of Sengstock*,

477 N.W.2d 310 (Wis. App. 1991), the court rejected the view that an Indian tribe is a "state" or "territory" under the PKPA, but nonetheless recognized a tribal court custody order under principles of comity.

Numerous tribal courts have held that the PKPA does not apply to Indian tribes or tribal courts. For example, in *Miles* v. *Chinle Family Court*, 7 Am. Tribal Law 6708, 2008 WL 5437146 (2008), the Navajo Nation Supreme Court held that the PKPA does not include Indian tribes in its definition of "State" and, consequently, does not apply to Indian tribes or bind their courts.

Similarly, in *In re Custody of C.M.A.*, 3 Am. Tribal Law 336, 2001 WL 36152576 (2001), the Fort Peck Court of Appeals held that the PKPA does not apply to Indian tribes or tribal courts and opined that Congress deliberately omitted Indian country from the PKPA because of the special relationship and interest Indian tribes have with their children, as recognized in the Indian Child Welfare Act ("ICWA"), including 25 U.S.C. § 1911. Indeed, it is widely recognized that the ICWA is a "strong congressional expression in favor of tribal self-determination as to the upbringing of tribal children." *Garcia,* 217 P.3d at 607 (citing 25 U.S.C. § 1901(3), which states that, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," and *Miss. Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 37 (1989), in which the Supreme Court observed that the ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society"). The Fort Peck Court of Appeals noted in *In re Custody of C.M.A.*, that in 28 U.S.C. § 1738B, unlike the PKPA, "Indian Country was expressly included … to insure that all children could be assured that enforcement of the support due to them would be uniform within the exterior boundaries of the United States and its possessions."

For other tribal court decisions finding the PKPA inapplicable to Indian tribes and tribal courts, *see*, *e.g.*, *Tupling v. Kruse*, 15 Am. Tribal Law 23, 2017 WL 2443081 (Colville Tribal Court of Appeals 2017) (PKPA does not apply to Indian tribes); *Mother H v. Father H*, 6 Mash. Rep. 424, 2017 WL 3039105 (Mashantucket Pequot Tribal Court 2017) (PKPA does not apply to tribal nations).

In *In re Larch*, 872 F.2d 66, 68 (4th Cir. 1989), the court held that the Eastern Band of Cherokee Indians is a "state," within the meaning of 28 U.S.C. § 1738A(b)(8), and as such, it is entitled to the benefits conferred by the PKPA, but the court declined to choose between competing tribal and state court child custody orders—or to issue a writ of habeas corpus—because there is no private cause of action under the PKPA, citing *Thompson v. Thompson*, 484 U.S. 174 (1988).

In re Larch is an outlier. The court appeared to treat Indian tribes as "territories" and to equate tribal courts with "territorial courts." 872 F.2d at 68. However, the court's treatment of the issue was limited, largely because the court concluded that there is no private right of action under the PKPA, and its holding must give way to the greater weight of authority that Indian tribes are not "territories or possessions," within the meaning of the PKPA or the Full Faith and Credit Act, 28 U.S.C. § 1738. *See* Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity,* 36 UCLA L. REV. 1051, 1063 n. 50 (1989) (noting that "most courts have concluded that Indian tribes are not 'territories or possessions' of the United States and therefore are not bound by the full faith and credit guarantee"); Stephanie Moser Goins, *Comment: Beware the Ides of Marchington: The Erie Doctrine's Effect on Recognition and Enforcement of Tribal Court Judgments in Federal and State Court,* 32 Am. Indian L.Rev. 189, 207 (2007) (observing that modern courts have "rejected the 19th century view of tribes as entities under the

ownership of the United States," and that the "prevailing modern view among courts is that tribes are not properly considered 'territories' or 'possessions' within the meaning of 28 U.S.C. § 1738").

In *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997), *cert. denied,* 523 U.S. 1074 (1998), the court held that Congress did not intend to include Indian tribes within the terms "territories or possessions," as used in 28 U.S.C. § 1738. The court reasoned that by enacting other statutes, like the ICWA, that expressly grant full faith and credit recognition to the judgments of tribal courts, Congress has made clear its understanding that tribal court judgments do not routinely command such recognition under 28 U.S.C. § 1738.

> Because Indian nations are not referenced in the statute [28 U.S.C. § 1738], the question is whether tribes are 'territories or possessions' of the United States under the statute. The United States Supreme Court has not ruled on the precise issue and its pronouncements on collateral matters are inconclusive....
>
> In our view, the decisive factor in determining Congress's intent was the enactment of subsequent statutes which expressly extended full faith and credit to certain tribal proceedings [including] the Indian Land Consolidation Act, … the Maine Indian Claims Settlement Act, … and the Indian Child Welfare Act of 1978 …
>
> A later legislative act can be regarded as a legislative interpretation of an earlier act and "is therefore entitled to great weight in resolving any ambiguities and doubts." *Erlenbaugh v. United States,* 409 U.S. 239, 243–44 (1972) (quoting *United States v. Stewart,* 311 U.S. 60, 64–65 (1940)). If full faith and credit had already been extended to Indian tribes, enactment of the Indian Land Consolidation Act, the Maine Indian Claims Settlement Act, and the Indian Child Welfare Act would not have been necessary. Further, the separate listing of territories, possessions and Indian tribes in the Indian Child Welfare Act provides an indication that Congress did not view these terms as synonymous. Thus, we conclude that Congress did not extend full faith and credit to the tribes under 28 U.S.C. § 1738.
>
> Further, if Congress had specifically intended to include Indian tribes under the umbrella of 28 U.S.C. § 1738, it could have easily done so … by further amending the statute once ambiguous judicial constructions appeared. It chose not to, but rather elected to create a special exception in cases of Indian child custody determinations and land trusts.
>
> Given this history, it would be imprudent of us to now construe the phrase "territories and possessions" in [28 U.S.C. ¶ 1738] … to assume the meaning of the

> language Congress used in the Indian Child Welfare Act ("every territory or possession of the United States, *and every Indian tribe*") (emphasis added) …
>
> Certainly, there are policy reasons which could support an extension of full faith and credit to Indian tribes. Those decisions, however, are within the province of Congress or the states, not this Court. Full faith and credit is not extended to tribal judgments by the Constitution or Congressional act, and we decline to extend it judicially.

127 F.3d at 808-809.

Many other courts have reached the same conclusion that Indian tribes are not "territories or possessions," within the meaning of 28 U.S.C. § 1738. *See*, *e.g.*, *Coeur d'Alene Tribe v. Johnson*, 405 P.3d 13, 16 (Idaho 2017) (holding that tribal court judgments are not entitled to full faith and credit under 28 U.S.C. § 1738); *Brown v. Babbitt Ford, Inc.,* 571 P.2d 689, 694 (Ariz. App. 1977) (Indian tribes are not "territories" of the United States); *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co.*, No. 04-22774-CIV, 2006 WL 8433224, at *9-10 (S.D. Fla. Jan. 19, 2006) (tribal court judgments are not entitled to full faith and credit under 28 U.S.C. § 1738 because Indian tribes are not "territories" or "possessions").[6]

The States of North and South Dakota do not give full faith and credit to the judgments of Indian tribal courts. *See* S.D.C.L. § 1-1-25; N.D.C.C. § 27-01-09; N.D. Ct. R. 7.2(b). These states, and many others, have concluded that Indian tribes are not states, territories, or possessions within the meaning of 28 U.S.C. § 1738, for if they were, their judgments would be entitled to full faith

[6] In a related context, courts have held that the Uniform Child Custody Jurisdiction Act ("UCCJA") does not apply to Indian tribes or tribal courts. *See*, *e.g.*, *Desjarlait v. Desjarlait,* 379 N.W.2d 139, 144 (Minn.Ct.App.1985) (determining that Minnesota's UCCJA does not apply to jurisdictional disputes between state courts and tribal courts, and that the federal constitution's full faith and credit clause "expressly applies to matters between states, not to matters between tribal courts and states"); *Malaterre v. Malaterre,* 293 N.W.2d 139, 144 (N.D.1980) (refusing to resolve a child-custody issue between a tribal court and a state court on the basis of the UCCJA, because the UCCJA "pertains to fact situations which involve jurisdictional disputes with sister states").

and credit under that statute. Just as Indian tribes are not states, territories, or possessions under 28 U.S.C. § 1738, they are not states, territories, or possessions under the PKPA.

The PKPA does not apply to Cheyenne River Sioux Tribe or its courts. The child custody and visitation orders and judgments of foreign courts are not entitled to full faith and credit in the Tribal Court, but may be recognized and enforced under the principles of comity set forth in C.R.S.T. Res. Nos. E-233-97-CR, 323-05-CR, and 171-2018-CR.

CONCLUSION

For the reasons set forth herein, Tribal Court Respondents move the Court to enter summary judgment in their favor.[7]

Dated: December 2, 2021

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[7] In making this motion, and in limiting the scope of the motion to the "central issue" identified by the Court, namely "whether 28 U.S.C. § 1738A(a) and (b)(8), portions of the Parental Kidnapping Prevention Act (PKPA), extend to tribes and tribal courts," Order [doc. 73] 1, Tribal Court Respondents do not waive any other claims or defenses they have asserted or may assert and instead expressly preserve all such claims and defenses.

For example, Tribal Court Respondents assert that, even if the PKPA did apply to the Tribe, it contains exceptions that, if met, would allow the Tribal Court to enter a temporary custody order concerning the minor children. One of those exceptions concerns children who are in immediate need of care and custody. 28 U.S.C. § 1738A(c)(2)(C). Another exception concerns children over whom a court has exclusive jurisdiction. 28 U.S.C. § 1738A(f). The Indian Child Welfare Act provides exclusive jurisdiction to tribal courts over child custody proceedings, including foster care placements, involving children who reside or are domiciled on the reservation. 25 U.S.C. § 1911(a). Foster care placements may be initiated by state agencies or other custodians and guardians, including non-parent relatives. *See* 25 U.S.C. § 1903(1)(a).

CERTIFICATE OF SERVICE

I certify that on December 2, 2021, I caused a true and correct copy of the foregoing to be served by operation of the Court's Case Management/Electronic Case Filing System on all parties and counsel of record.

/s/ Steven J. Gunn
STEVEN J. GUNN