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

Aarin Nygaard and Terrance Stanley, Petitioners, v Tricia Taylor; Ted Taylor, Jr.; Jessica Ducheneaux; Ed Ducheneaux; Cheyenne River Sioux Tribal Court; Brenda Claymore, in her official capacity as Chief Judge, Cheyenne River Sioux Tribal Court of Appeals; Frank Pommersheim, in his official capacity as Chief Justice; the South Dakota Department of Social Services; Todd Waldo in his official capacity as Social Worker; and Jenny Farlee in her official capacity as Social Worker, Respondents.	Civil No. 3:19-CV-03016-RAL

REPLY BRIEF IN SUPPORT OF PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Petitioners Aarin Nygaard and Terrance Stanley (collectively, "Fathers"), by and through the undersigned counsel, respectfully submit this Reply Brief in Support of their Motion for Summary Judgment. Fathers respectfully request a ruling that 1) the federal Parental Kidnapping Prevention Act, found at 28 U.S.C. § 1738A (hereinafter "PKPA"), applies to tribes including the Cheyenne River Sioux Tribe, its Reservation, and its Tribal Courts; and 2) the Cheyenne River Tribal Court and Tribal Court of Appeals, and specifically Chief Judge Brenda Claymore and Chief Justice Frank Pommersheim in their official capacities (collectively, "Tribal Courts"), have no jurisdiction to make custody determinations in the underlying matter and must recognize the North Dakota state court orders granting custody of the children to the Fathers. *See* Doc. 79.

Accordingly, Fathers respectfully request the issuance of a writ of habeas corpus and other appropriate relief as requested within the Amended Petition for Writ of Habeas Corpus, Doc. 8. Fathers incorporate by reference their arguments set forth in their Brief in Support of Summary Judgment, Doc. 79 (hereinafter, "Fathers' Brief in Support"), and in their Response to Tribal Court Respondents' Brief in Support of Summary Judgment, Doc. 93 (hereinafter, "Fathers' Response Brief").

ARGUMENT

The Parental Kidnapping Prevention Act - in no uncertain terms - was targeted to "deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards." *See* Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c), 94 Stat. 3569 (Dec. 28, 1980). Congress aimed to "avoid jurisdictional competition" and "discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child." *Id.* Only one interpretation of the PKPA proposed to this Court *sub judice* is consistent with those objectives: that of the Fathers.

For purposes of interpreting statutes aimed at preventing or punishing parental kidnapping, it seems there are two scenarios contemplated under federal law: 1) parental kidnappings occurring within the United States; or 2) parental kidnappings occurring outside the United States. The PKPA addresses the former, while a separate federal statute, 18 U.S.C. § 1204[1] addresses the latter.

[1] 18 U.S.C.§ 1204 provides,

> **(a)** Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.
> **(b)** As used in this section--

As indicated by a statement within the legislative history of the PKPA, "snatched children are abused children. Snatched children have to be protected by the Federal Government." *See* Parental Kidnapping Act of 1979, S. 105: Joint Hearing before the U.S. Senate Subcommittee on Criminal Justice of the Committee of the Judiciary and the Subcommittee on Child & Human Development of the Committee on Labor and Human Resources, at 66 (Jan. 30, 1980) (Statement of Andrew Yankwitt). Congress did exactly that through its enactment of the PKPA, extending its reach as far as possible within the geographic boundaries of the United States.

I. The plain language of the PKPA supports its application to Indian Tribes

To reiterate the key language in dispute here, the PKPA defines "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or

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> **(1)** the term "child" means a person who has not attained the age of 16 years; and
> **(2)** the term "parental rights", with respect to a child, means the right to physical custody of the child--
> > **(A)** whether joint or sole (and includes visiting rights); and
> > **(B)** whether arising by operation of law, court order, or legally binding agreement of the parties.
>
> **(c)** It shall be an affirmative defense under this section that--
> > **(1)** the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act and was in effect at the time of the offense;
> > **(2)** the defendant was fleeing an incidence or pattern of domestic violence; or
> > **(3)** the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.
>
> **(d)** This section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980.

possession of the United States[.]" *See* 28 U.S.C. § 1738A(b)(8). Pursuant to this broad definition, tribes are "entitled to the benefits conferred by the [PKPA] and subject to its obligations." *See In re Larch*, 872 F.2d 66, 68 (4th Cir. 1989). Two provisions within the PKPA are primarily relevant in today's case:

> (a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.
>
> ….
>
> (g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

28 U.S.C. § 1738A (emphasis added). Pursuant to the above provisions and the spirit of the PKPA, the Tribal Courts lacked jurisdiction to enter custody determinations contrary to the North Dakota state court orders.

As indicated in Fathers' earlier briefing, various court decisions, including but not limited to decisions by the Eighth Circuit Court of Appeals, support the conclusion that "territories" encompass Indian tribes and Indian reservations, and the Fourth Circuit Court of Appeals has expressly concluded as much for purposes of the PKPA. *See* Fathers' Brief in Support, Doc. 79, at 14-16; Fathers' Response Brief, Doc. 93, at 9-10; *In re Larch*, 872 F.2d at 68. The Indian law canon of construction indeed supports the inclusion of Indian tribes and Indian country for purposes of full faith and credit. *See* Fathers' Brief in Support, Doc. 79, at 18-19; Fathers' Brief in Response, Doc. 93, at 5; *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 783 (D.S.D. 2006) (noting courts look to "construe federal statutes liberally in favor of the tribe and interpret ambiguous provisions to the tribe's benefit"). As the Cheyenne River Sioux Tribal Court of

Appeals itself pointed out in 1997 in *Eberhard*, interpreting the PKPA to apply to Indian tribes favors tribes as it requires full faith and credit to be afforded to tribal court decisions, protecting tribal court jurisdiction where appropriate. *See Eberhard v. Eberhard,* 24 I.L.R. 6059, 6063 (Chy.R.Sx.Tr.Ct. 1997) (now overturned).

Despite the PKPA's reference to "territories" and "possessions" of the United States, the Tribal Courts primarily rely upon the absence of reference to "tribes" or "Indian country" to support their position that the PKPA does not extend to Indian tribes, their reservations, and their tribal courts. *See* Tribal Courts' Response Brief, Doc. 95, at 3. The Tribal Courts point out that certain full faith and credit statutes, such as the Full Faith and Credit Act for Child Support Orders, explicitly encompass "Indian country" as an example that Congress knew how to include Indian tribes within the scope of full faith and credit statutes. The Tribal Courts contend that because Congress did not reference "Indian tribes" or "Indian country" in addition to United States territories and possessions, Congress opted not to extend the PKPA to tribes. This position fails to recognize the general progression of full faith and credit laws.

The Full Faith and Credit Clause as found in Article IV, Section 1 of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

As noted by the Tribal Courts, this constitutional provision was intended:

> to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Tribal Courts' Response Brief, Doc. 95, at 3 (quoting *Milwaukee Cty. v. M.E. White Co.,* 296 U.S. 268, 276-77 (1935)). The First Congress of the United States followed suit, enacting a full faith and credit statute in line with the Constitution. *See* Full Faith and Credit Act, ch. 11, 1 Stat. 122 (May 26, 1790), *codified as amended*, 28 U.S.C. § 1738. Although the earliest version of the federal statute was more in line with the Constitution's Full Faith and Credit Clause in that it referenced only "states," 28 U.S.C. section 1738 subsequently has been amended to include "Territories" and "Possessions" of the United States:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

With specific nationwide objectives that cannot, and should not, be disregarded, the PKPA (found at 28 U.S.C. § 1738A) was then enacted in 1980 and incorporates language similar to that of 28 U.S.C. § 1738, including "territories" and "possessions" of the United States within its scope.

The Tribal Courts advocate for a distinction between the former statutes and subsequent full faith and credit statutes that specifically reference Indian tribes, such as those addressing child support orders and protection orders. These Acts, while enacted during a time where a distinction was more evident, support a consistent application of full faith and credit to the tribes. For example, the Full Faith and Credit of Child Support Orders Act, codified at 28 U.S.C. § 1738B

(just after the PKPA) was intended to be fully consistent with the PKPA:

> This bill is similar to legislation passed by Congress in 1980 to address the problems caused by the lack of uniform enforcement of child custody orders. "The Parental Kidnapping Prevention Act of 1980" required states to give full faith and credit to child custody decisions. This proposal extends exactly the same recognition to child support orders.

See S. Rep. 103-361, 5, 103rd Cong., 2d Sess. 1994, 1994 U.S.C.C.A.N. 3259, 3261 (Aug. 25, 1994) (emphasis added). Ultimately, as the Cheyenne River Tribal Court of Appeals stated in its now overturned decision of *Eberhard*, 24 I.L.R. at 6066, it "can discern no logical congressional policy which would distinguish child support orders governed by 28 U.S.C. § 1738B or protection orders governed by 18 U.S.C. § 2265, where the statutes expressly apply to tribal courts and their orders, from child custody orders governed by the PKPA." Instead of interpreting the PKPA as Congress's intentional exclusion of Indian tribes and tribal courts from full faith and credit, and only bringing Indian tribes within the realm of full faith and credit in other limited instances, the PKPA must be read to fill the gap that remained with 28 U.S.C. § 1738, just as the full faith and credit of child support orders and of protection orders, fills other gaps within that section. *See Thompson v. Thompson*, 484 U.S. 174, 180-81 (1988) ("[t]he context of the PKPA . . . suggests that the principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations.").

The Tribal Courts next contend that 28 U.S.C. § 1738 and, as follows, 28 U.S.C. § 1738A cannot be read to encompass Indian tribes because that would make other full faith and credit statutes such as the ICWA and 28 U.S.C. §1738B (full faith and credit for child support orders) "superfluous." *See* Tribal Courts' Response Brief, Doc. 95, at 14. Under the Tribal Courts' position, however, the entirety of 28 U.S.C. § 1738A and other full faith and credit statutes would be "superfluous" when considering the unqualified language of 28 U.S.C. §1738. There would be

no need for the PKPA, full faith and credit of child support orders or protection orders, and other federal acts explicitly providing for full faith and credit in certain areas of the law.

Aside from the above progression of full faith and credit statutes, and in looking towards the definition of "territories" within 28 U.S.C. § 1738, the Tribal Courts cite to the United States Supreme Court's decision in *United States v. Wheeler*, 415 U.S. 313 (1978),[2] and contend that "the prevailing, modern view is that tribes are not territories, and, therefore, they are not included within the full faith and credit mandate in 28 U.S.C. § 1738." Tribal Courts' Response Brief, Doc. 95, at 6. However, *Wheeler* involved whether a tribe had given up its "sovereign power to punish tribal offenders[,]" a question dissimilar to that posed today regarding whether Congress intended tribes to fall within the PKPA's reference to "territories" or "possessions" of the United States. *See id.* at 324. Notably, in analyzing that question, the Supreme Court highlighted that tribes are "physically within the territory of the United States and subject to ultimate federal control[.]" *Id.* at 322; *see also id.* at 326 (discussing that the "limitations [of a tribe's sovereign power] rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations."). The Supreme Court also recognized the limitation to the Tribe's sovereignty through Congressional acts, stating that "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers." *Id*. at 323; *see also id.* at 327 ("It is true that in the exercise of the powers of self-government, as in all other matters, the Navajo Tribe, like all Indian tribes, remains subject to ultimate federal control."). Ultimately, "the

[2] *United States v. Wheeler*, 435 U.S. 313 (1978) has since been superseded by statute, as stated in *United States v. Lara*, 541 U.S. 193 (2004).

Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the United States Supreme Court has] consistently described as "plenary and exclusive." *United States v. Lara,* 541 U.S. 193, 200 (2004). Here, Congress has invoked those powers through its enactment of the PKPA.

Additionally, despite the Tribal Courts' contention that the modern prevailing view is tribes are not "territories" for purposes of full faith and credit, the Arizona Supreme Court in *Tracy v. Superior Ct. of Maricopa Cty.*, 810 P.2d 1030 (Az. 1991), indicated to the contrary - that "[a] majority of courts has deemed Indian tribes to be territories for purposes of the federal statute extending the application of the full faith and credit clause to the territories and possessions of the United States, 28 U.S.C. § 1738." *Id.* at 1040. In a similar vein, Tribal Courts overstep with their contention that "most courts" do not extend the PKPA to Indian tribes or Tribal Courts. *See* Tribal Courts' Response Brief, Doc. 95, at 16 (D.). While Fathers acknowledge the split of authority on each topic, the ultimate fact remains that only the Fathers' cited authority and proposed interpretation of the PKPA is aligned with the Congressional intent of the PKPA.

II. Estoppel and Law of the Case Doctrine

Next, the Tribal Courts summarily oppose any implication that the PKPA applied to the Cheyenne River Indian Reservation during the pendency of this matter in Tribal Court. Yet, the PKPA was raised by the Fathers throughout the proceeding, and the Tribal Court, indeed, ruled in 2018 that it *did* apply to the Tribe. Further, the Tribal Court of Appeals indicated in its September 2016 decision that "given the length of the proceedings to date and the inadequate record below, essential fairness and judicial efficiency deem it appropriate *not* to review *at this time* the various (future) issues potentially involving" the PKPA. *See* Ex. 55 to Petition, Doc. 1-55 (emphasis in original). If the Courts' conclusion was that the PKPA did not apply to the Tribal Courts and that

Eberhard was overruled, it could have said so in several different instances, rather than waiting nearly five years to do so. For the foregoing reasons, and considering the Tribal Courts were applying the PKPA in at least one other case during the same time frame as this matter, both the principles of estoppel and the law of the case doctrine justify the PKPA's application to the Tribal Courts in this matter. *See United States v. Bartsh*, 69 F.2d 864, 866 (8th Cir. 1995); *Harms v. Cigna Ins. Co.*, 421 F.Supp.2d 1225, 1228 (D.S.D. 2006); *see also Mitchell v. Preston*, 439 P.3d 718 (Wy. 2019).

III. Under the PKPA, the Tribe lacks jurisdiction over this child custody matter.

Finally, other than conclusory statements, the Tribal Courts have failed to demonstrate how they would have jurisdiction if this Court concludes that the PKPA applies. The Tribal Courts first point to (a portion of) one exception within the PKPA that would authorize *temporary* emergency jurisdiction and contend that this case involves "allegations of abandonment, abuse, neglect, and/or incapacity." Tribal Courts' Response Brief, Doc. 95 at 21. "[A]llegations," however, are insufficient to deprive a parent of his child (and a child of her father) for nearly eight years. The North Dakota state court orders were consistent with the PKPA, and those proceedings were ongoing prior to the Tribal Court's involvement. *See* 28 U.S.C. § 1738A(a), (g); SUMF ¶¶ 8. Further, the North Dakota Orders are valid court orders entitled to recognition under the PKPA. *See* SUMF ¶ 8 (citing North Dakota state court Orders).

As the applicability of ICWA, the Tribal Courts in their earlier decisions in this matter have rejected that ICWA applies and should not now be permitted to reverse course. There has been no Petition filed by the Tribe or formal allegations of abuse or neglect by any other governmental entity. Rather, the state court proceedings began as a custody dispute between parents, then turning to a nonparent's petition for custody of Fathers' children. ICWA has no bearing on this matter.

CONCLUSION

The Cheyenne River Tribal Court's reasoning in its (now overturned) decision in *Eberhard* remains compelling. The PKPA, aimed precisely at the situation that has occurred in this matter, requires that exclusive and continuing jurisdiction to make child custody determinations remain in the home state. Here, that home state is unquestionably North Dakota, where the Fathers and Mother were first addressing this matter in state court before Mother kidnapped the children and took them to the Cheyenne River Indian Reservation. The Tribal Courts are required to recognize the North Dakota state court custody determinations granting custody of the children to their Fathers, and there are no applicable exceptions in which the Tribal Courts may rely upon for jurisdiction in this matter. Issuance of a writ of habeas corpus and other appropriate relief will not right the wrongs that the Fathers and these children have endured. But it is a necessary start.

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Dated this 18th day of January, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to D.S.D. Civ. LR 7.1.B.1, I certify that the foregoing complies with the type volume limitation. In reliance upon the document properties provided by Microsoft Word, in which the foregoing was prepared, the Brief contains 3,414 words, excluding the caption, date and signature block, any addendum materials, and any certificates of counsel.

Dated this 18th day of January, 2022.

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CERTIFICATE OF SERVICE

I certify that on January 18, 2022, I caused a true and correct copy of the foregoing to be served through the Court's Case Management/Electronic Case Filing System on the following:

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