United States Court Of Appeals
For The Eighth Circuit

No. 18–1723

Kimberly Watso, individually and on behalf of C.H. and C.P.,
her minor children, and Kaleen Dietrich,

Appellants,

vs.

Emily Piper in her official capacity as Commissioner of the
Department Of Human Services; Scott County;
Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community; and its
Judge John E. Jacobson, in his official capacity; Tribal Court of the Red Lake Band
of Chippewa Indians; and its Judge Mary Ringhand, in her official capacity,

Appellees.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Appellant Kimberly Watso is a non-Indian, non-tribal member. She had a child with a member of the Red Lake Band of Chippewa Indians. The Red Lake Band of Chippewa Indians is not a Public Law 280 tribe. Ms. Watso's minor child C.P. is a member of the Red Lake Band. C.P. *did not* reside within the Red Lake Band reservation. C.P. *did not* reside within the Public Law 280 Shakopee Mdewakanton Sioux Community.[1] Ms. Watso is not a Red Lake Band member. She objected to SMSC's tribal court jurisdiction over her child.

Ms. Watso had another child with another Native-American man who is a member of the SMSC. The minor child C.H., through his biological father, is an SMSC member. Ms. Watso is not an SMSC member. She objected to SMSC's tribal court jurisdiction over her child.

As C.P. and C.H.'s mother and parent, as a non-Indian and non-tribal member, Ms. Watso *did not* forfeit any of her constitutionally-protected parental rights. The fact that the children's biological father is a member of one tribe or another is relevant for only part of the inquiry regarding jurisdiction over the child. An administrative process sanctioned through state policy to determine judicial jurisdiction without a hearing is not contemplated to eviscerate federally protected constitutional rights.

[1] Appellee SMSC asserted that Ms. Watso told the SMSC tribal court that C.P. resided within the SMSC boundaries, citing her previous attorney's Memorandum to Dismiss, App. 620. SMSC Resp. Br. 29. That attorney was mistaken as the record later developed would be challenged and so reflected.

Neither did any of her children and in particular C.P. who by extraordinary circumstances found himself under SMSC tribal court jurisdiction and then ping-ponged to another tribe—Red Lake—which like SMSC, had no jurisdiction to take the minor child when Ms. Watso objected to SMSC jurisdiction.

The Indian Child Welfare Act did not contemplate the elimination of rights of non-member, non-Indian parents. In fact, the promulgated federal rules confirm that the rights of parents must be considered in situations in which their children can be ripped from their home to, in a sense, a "foreign jurisdiction," without sufficient due process. It is of particular need in Minnesota where SMSC is a Public Law 280 tribe and has not sought to obtain exclusive jurisdiction under federal law to overcome the objection of a non-Indian, non-member parent. And, while under the circumstances, such a Public Law 280 tribe might exercise concurrent jurisdiction with state courts concerning child protection proceedings, it is limited. There is a pivotal point in which the non-Indian, non-tribal parent's voice must be heard and adhered to.

The Indian Child Welfare Act did not eviscerate protected constitutional rights of non-Indian, non-member parents just because he or she had sexual relations with an Indian that resulted in a child. While the Act may favor an Indian family, the Act and subsequent federal regulations do not support discrimination of cross-racial interactions that results in the lack of a balance regarding parental rights, especially regarding a non-Indian and non-member parent and a non-member Indian child. There is a balance to be achieved which the Appellees have all but ignored.

REPLY ARGUMENT

I. The Minnesota Department of Human Services is to have no role in determining judicial jurisdiction or otherwise expedite jurisdiction to a tribal court.

The Department cannot ignore the constitutionally-protected parental rights.

The Appellee Minnesota Department of Health's Indian Children Welfare Manual ignores the federal protection of the rights of the parent. Under 25 C.F.R. § 23.106(b)[2] and 25 U.S.C. § 1921, higher standards of protection are required when a parent or parents assert those protections:

> [W]here applicable State or other Federal law provides a higher standard of protection *to the rights of the parent* or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard."[3]

The Manual pre-determines judicial jurisdiction of the parent and the child without a hearing and without a process that under federal regulations requires the higher standard of protection to prevail to protect the parental rights. The Manual does not respect the objection of a non-Indian, non-member parent:

> Except in emergencies, the following child custody proceedings *must be* transferred to tribal court:
>
> (1) Any such proceeding involving a ward of tribal court; or

[2] Notably, the regulatory standards are "*minimal* Federal standards" 23 C.F.R. § 23.106(a).
[3] Emphasis added.

> (2) Any such proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe.

Manual 12, 16.a.

In particular, C.P. did *not* reside nor otherwise was domiciled within the SMSC boundaries. Further, C.P. was *not* the child of an SMSC member. Not under any circumstance in this case could C.P. have been under the SMSC tribal court jurisdiction.

As the Appellees Scott County and the Department admit, their deference to the SMSC is not contingent upon the existence of a court proceeding or any administrative hearing. The transfer of jurisdiction would occur regardless of the circumstances involved and regardless of the objections of the non-Indian, non-member parent. But, the ICWA and federal regulations do not allow for this State and County circumvention of due process. Moreover, the County—as it did here—will assist the tribal court in exercising its jurisdiction regardless of the existing circumstances of the objecting parent. Whatever the original intent of the ICWA, and however worthy the goal to promote Indian culture, courts cannot turn a blind eye to what is occurring in a situation that does not promote familial harmony, but political discrimination—tribal members versus non-tribal members.

The Department's Manual has run the elevated risk of interfering with federal regulatory jurisdiction relating to parental rights. As is known, all fundamental rights comprised within the term liberty are protected by the federal constitution from

invasion by the States. *Planned Parenthood v. Casey,* 505 U.S. 833, 846–47(1992). The doctrine of substantive due process extends protections to fundamental rights in addition to the specific freedoms protected by the bill of rights. *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997); *see also Casey,* 505 U.S. at 848. A law that burdens a fundamental right is subject to strict scrutiny. *Casey,* 505 U.S. at 848. Strict scrutiny requires the state law—here, adopted state policies—to serve a compelling state interest and the means used must be narrowly tailored to achieve that end. *Griswold v. Connecticut,* 381 U.S. 479 (1965).

Both the Supreme Court and this Court of Appeals have "recognized a liberty interest which parents and children have in each other's companionship." *Harpole v. Arkansas Dep't of Human Servs.,* 820 F.2d 923, 927 (8th Cir.1987), citing *Lehr v. Robertson,* 463 U.S. 248, 258 (1983); *Myers v. Morris,* 810 F.2d 1437, 1462–63 (8th Cir.1987) ("[p]arents have a recognized liberty interest in the care, custody, and management of their children."). As such, in certain cases, parents have standing to sue for the deprivation of their own liberty interest, in the creation and maintenance of the parent-child relationship. See, *Mattis v. Schnarr,* 502 F.2d 588, 593–95 (8th Cir.1974). "[W]hen the state seeks to change or affect the relationship of parent and child in furtherance of a legitimate state interest …. a fourteenth amendment liberty interest is implicated and the state therefore must adhere to rigorous procedural safeguards." *Ortiz v. Burgos,* 807 F.2d 6, 8 (1st Cir.1986), citing *Santosky v. Kramer,* 455 U.S. 745, 753 (1982) (parental rights); *Little v. Streater,* 452 U.S. 1 (1981) (paternity);

Stanley v. Illinois, 405 U.S. 645 (1972) (custody determinations). As the U.S. Supreme Court has opined, "the interest of parents in the care, custody, and control of their children … is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville,* 530 U.S. 57, 65 (2000).

It should go without saying that child custody proceedings, especially those that seek to sever the bonds of natural parents from their children, directly concern the rights of both children and parents. *See Parharm v. J.R.,* 442 US. 584, 601–02 (1979) (recognizing the due process interests of both parents and children are implicated by child commitment proceedings); *Santosky,* 455 U.S. 745, 759 (decision to terminate parental rights works "'a unique kind of deprivation'" of a parent's fundamental liberty interests). Notably, "Congress intended to create a federal private right of action in tribes and individuals to seek a determination of their ICWA rights and obligations in federal district court...." *Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017, 1036 (D.S.D. 2014), *quoting Doe v. Mann,* 415 F.3d 1038, 1045 (9th Cir.2005).

When the state proscribes policies to administratively transfer jurisdiction to a tribal court on the sole basis of the child's lineage to a Public Law 280 Indian tribe in Minnesota, it runs afoul of the liberty interests of both the parent and child. The Manual also fails to distinguish between a non-Indian, non-member parent and an Indian, tribal-member parent.

Here, the Manual also does not distinguish between non-Public Law 280 tribes and Public Law 280 tribes. SMSC is a Public Law 280 tribe. Red Lake is not. Public

Law 280 relates primarily to the application of state civil and criminal law in court proceedings. *Bryan v. Itasca County, Minnesota,* 426 U.S. 373, 387 (1976). Here, SMSC did not seek exclusive jurisdiction regarding child custody proceedings under the ICWA. Thus, while under *certain* circumstances "[n]othing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority," *Walker v. Rushing,* 898 F.2d 672, 675 (8th Cir. 1990), this is not that case. Because Ms. Watso, as a non-Indian, non-member parent objected to the jurisdiction of the SMSC tribal court, she did not waive jurisdiction to the tribal court. The lack of the SMSC's application to obtain exclusive jurisdiction under the ICWA to subsume any existing "concurrent jurisdiction," fails to overcome Ms. Watso's objection. Moreover, jurisdiction in state court would not necessarily result in the removal of an Indian child from his or her culture, but the assurance of federal constitutional protections at issue when a non-Indian, non-tribal member parent objects to tribal-court jurisdiction under the circumstances in this case.

Here, concurrent jurisdiction would exist if *both* parents agreed to tribal court jurisdiction. Likewise, when a parent objects to tribal court jurisdiction, the inquiry of the Department must end. *See Minneapolis & St. L.R. Co. v. Bombolis,* 241 U.S. 211, 221 (1916) (concurrent jurisdiction exists "unless excepted by express constitutional limitation or by valid legislation"); *Missouri ex rel. St. Louis, B. & M.R. Co. v. Taylor,* 266 U.S. 200, 208 (1924) ("As [Congress] made no provision concerning the remedy, the federal and the state courts have concurrent jurisdiction"). Here, the Manual does

not. Under the Manual, the Department overrides the objection of the non-Indian, non-member parent.

Notably, under the ICWA and regulations the Department is to have *no role* in determining judicial jurisdiction or otherwise expedite jurisdiction to a tribal court.

Neither the ICWA nor the federal ICWA's regulations define an agency as a court; nor do they make references to agency "referrals." While 25 U.S.C. § 1919 and 25 C.F.R. § 23.110 refer to agreements that can be made between states and Indian tribes, one of which exists in Minnesota, any existing agreement must meet the requirements of 25 C.F.R. § 23.106(b).[4] As noted above, if the federal minimum standards established under the ICWA are exceeded either by state or federal law regarding protecting parental rights, the higher standard prevails. Thus, the federal court is to apply the higher standard or protection afforded to the parent—here, protection of parental rights under the U.S. Constitution and federal law.

Here, the Department's Manual is, in part, a result of an existing Tribal-State Agreement. Thus, any administrative process adopted as a policy process, cannot fall *below* the minimum federal standards of protecting parental rights that would be subject to review. Notably, the Agreement expressly provides that: "[n]o provision of

[4] "[W]here applicable State or other Federal law provides a higher standard or protection to the rights of the parent… than the protection accorded under the Act, the ICWA requires State or Federal court to apply the higher State or Federal standard.'

[the] Agreement is intended to change the jurisdictional provisions set forth in the Indian Child Welfare Act."[5]

An agency is *prohibited* by law to make a determination of judicial jurisdiction. Only the tribal court or state court may do so:

> §23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a tribe?
>
> (a) The Indian Tribe of which it is believed the child is a member….
> (b) The determination by a Tribe…is solely within the jurisdiction and authority of the Tribe, *except as otherwise provided by Federal law*….
> (c) The State court….

23 C.F.R. § 23.108 (emphasis added).[6]

Neither the ICWA nor governing federal regulations reflect that a state agency through an administrative process is allowed to make the determination of or otherwise facilitate an Indian child transfer to a tribe or tribal court. When a child is within the jurisdiction of a county who enforces the procedures of the Department's manual, as Scott County admits it does so, the county must engage in a process in which *the state court* makes the determination—not the agency. Here, the Manual runs afoul of the Supremacy Clause. Because the Manual is violative of the Supremacy

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[5] 2007 Tribal/State Agreement 4; http://www.icwlc.org/wpsite/wp-content/uploads/2014/05/7a.-2007-Tribal-State-Agreement.pdf (last visited Nov. 6, 2017).

[6] Note that the SMSC has not applied for exclusive jurisdiction for child custody proceedings. Therefore, the determination of the SMSC tribal court is not definitive.

Clause, prospective injunctive relief is available to prohibit both the Department and Scott County from making agency jurisdictional decisions. Neither deny making jurisdictional decisions under the provisions and policies of the Manual.

II. SMSC's failure to seek exclusive jurisdiction from the Department of Interior precludes the tribal court to affect jurisdiction over an objecting non-Indian, non-member parent and her child.

Meanwhile, arguments are made that Section 1911(a)'s provision that "where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child." *See e.g.* Scott Cty Resp. Br. 11. This might be true if the SMSC tribal court ever had "exclusive jurisdiction" in the first instance. Note the phrase "shall retain." The phrase predisposes the existence of exclusive jurisdiction in the first instance. As a Public Law 280 tribe, SMSC tribal court does not have it. "In short, the explicit references to Public Law 280 in ICWA, ICWA's clear definition of child custody proceedings, and the statutory structure of ICWA demonstrate that Congress intended Public Law 280 states to have jurisdiction over Indian child dependency proceedings unless tribes availed themselves of § 1918 [petitioning Interior] in order to obtain exclusive jurisdiction." *Doe v. Mann,* 415 F.3d 1038, 1064 (9th Cir. 2005)

As the Ninth Circuit has found under *Native Village of Venetie I.R.A. Council v. State of Alaska,* 944 F.2d 548, 561 (9th Cir. 1991), until a Public Law 280 tribe has

sought exclusive jurisdiction, any jurisdiction it claims to have is limited to concurrent at best as explained above:

> The relevant portions of the Indian Child Welfare Act enable the Secretary of the Interior to grant to a tribe, upon receipt of a proper petition, exclusive jurisdiction (over all or a portion of the appropriate "Indian country") or referral jurisdiction of child-custody proceedings. *See* 25 U.S.C. § 1918(b)(2) (1988). Each of these types of jurisdiction is broader than any tribal jurisdiction which is concurrent with the states. Exclusive jurisdiction, of course, is clearly broader than concurrent jurisdiction. Likewise, referral jurisdiction is broader in scope than concurrent jurisdiction, in that referral jurisdiction is concurrent *but presumptively tribal* jurisdiction. *See id.* § 1911(b). Thus, there is something for a tribe to "reassume" under section 1918—namely, exclusive or referral jurisdiction—even if Public Law 280 is read as not divesting the tribes of concurrent jurisdiction.

944 F.2d at 561 (original emphasis).

SMSC has not applied to the Department of Interior for exclusive jurisdiction. Indeed, this Court has not opined on this issue. However, we learn from the Ninth Circuit in *Doe v. Mann,* 415 F.3d 1038, 1048 (9th Cir. 2005), the prerequisite necessary for SMSC to achieve exclusive jurisdiction is to *seek* exclusive jurisdiction: "the carve out of Public Law 280 states from ICWA's exclusive tribal jurisdiction was a conscious undertaking on the part of Congress."*Mann,* 415 F.3d at 1064. Thus, as it exists today, at best, SMSC has concurrent jurisdiction when the parties agree to tribal court jurisdiction. But, the tribal court of a Public Law 280 tribe who has not successfully petitioned Interior cannot overcome the objection of the non-Indian, non-member parent.

It should be noted that Appellee SMSC asserts that the Supreme Court decision in the *Mississippi Band of Choctow Indians v. Hoyfield,* 490 U.S. 30 (1989) is controlling in this case. However, in *Hoyfield,* both parents were tribal members and resided on the reservation. The case does not stand for the proposition that the SMSC has inherent or expressed authority under the ICWA over child custody proceedings involving objections to jurisdiction of non-Indian, non-member parents.

As to C.P., as a member of the Red Lake Band, C.P. could have been subject to the Red Lake Band's tribal court; however, he did not reside within its reservation. 21 U.S.C. § 1911(a). Moreover, Red Lake did not have a child custody proceeding involving C.P. at the time SMSC asserted, incorrectly, its jurisdiction over the minor child. Hence, as to C.P., because of Ms. Watso's objection to SMSC tribal court jurisdiction, state court jurisdiction should have been available to her and her son, "Public Law 280 states may exercise jurisdiction over child custody proceedings." *Mann,* 415 F.3d at 1062. But, if she waived jurisdiction to either tribal court, which she did not, concurrent jurisdiction would have allowed the tribal court to proceed.

Similarly, as to C.H., as a member of SMSC, C.H. could have been subject to the SMSC's tribal court; however, SMSC has not successfully applied to Interior. So, once Ms. Watso objected to tribal court jurisdiction, state court jurisdiction should have been made available to her and her son, "Public Law 280 states may exercise jurisdiction over child custody proceedings." *Mann*, 415 F.3d at 1062. But, if Ms.

Watso waived jurisdiction to SMSC tribal court, which she did not, concurrent jurisdiction would have allowed.

III. The Red Lake Band's tribal court did not properly assert jurisdiction over C.P. under ICWA.

In stark contrast to the SMSC arguments, the Red Lake Band tribal court makes its arguments. Red Lake is not a Public Law 280 tribe. However, under the circumstances of this case, Red Lake insists that it had jurisdiction over C.P. While C.P. is a member of the Red Lake Band, he did not reside within the reservation. Under 21 U.S.C. § 1911(a) Red Lake had *no* authority or retained exclusive jurisdiction over C.P. because C.P. did not reside within Red Lake's reservation:

> An 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…. Where the Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

Red Lake presumed that SMSC had proper jurisdiction over C.P.[7] and because SMSC was engaged in a child custody proceeding at the time Red Lake sought removal of the child. However, if SMSC did not have proper jurisdiction over C.P. and the child custody proceedings were an improper exercise of jurisdiction, Red Lake had no legal standing to seek the removal of C.P. to Red Lake. Furthermore, C.P. was not a ward of the Red Lake tribal court; therefore, Red Lake could not exercise any asserted claim of jurisdiction over C.P. regardless of where he resided.

[7] Red Lake Resp. Br. 25–26.

The phrase at issue under § 1911(a), "Where a child is a ward of a tribal court" refers to the Indian tribe of original jurisdiction (Red Lake), consistent with the first sentence of the same provision "[a]n Indian tribe [Red Lake] shall have jurisdiction exclusive as to…" and the second phrase of the last sentence in § 1911(a), "the Indian tribe [Red Lake} shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child." C.P. was not a ward of the Red Lake tribal court. C.P. did not reside within the Red Lake reservation. Hence, the SMSC tribal court could not defer to Red Lake jurisdiction for the reasons Red Lake presumed it had jurisdiction.

SMSC made no finding that C.P. was a ward of the Red Lake tribal court.[8] The fact a child protection file had opened, until there is some adjudication of the need for foster care placement, under the ICWA regulatory definitions, the open file is not a "child custody proceeding:" ""foster care placement' which shall mean any action *removing* an Indian child from its parent … for temporary placement in a foster home…." 21 U.S. C. § 1903 (1)(i). Nothing in the record reflects the intent to do so by Red Lake. But, as the record stands, the opening of the file was mistakenly believed to be sufficient for SMSC to transfer the matter to Red Lake. Here, the legality of the removal still stands as an open issue. Regardless, we assert Red Lake did not properly assert jurisdiction over C.P.

[8] Plts. Comp. Ex. 5.

IV. The SMSC tribal officials, as well as Red Lake, are not immune from liability or injunctive relief when they act outside the authority of the sovereign.

Contrary to the Appellees SMSC and Red Lake's position regarding immunity for the community defendants, if tribal officers are acting outside the authority of the sovereign, they are subject to suit.[9] As the U.S. Court of Appeals for the Eighth Circuit has held in *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 460 (8th Cir. 1993), where an exception to sovereign immunity of Indian tribes applies under *Ex parte Young,* 209 U.S. 123, 159–60 (1908), under certain circumstances, tribal officers are not clothed with the tribe's sovereign immunity because the named officers acted outside the authority of the sovereign. The Eighth Circuit has quoted from *Tenneco Oil Co. v. Sac and Fox Tribe of Indians,* 725 F.2d 572, 574 (10th Cir.1984):

> When the complaint alleges that the named officer Respondents have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked.... If the sovereign did not have the power to make a law, then the official by necessity acted outside the scope of his authority in enforcing it, making him liable to suit.

This is consistent with other courts' interpretation of the *Ex parte Young* doctrine such as in *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1155 (10th Cir. 2011) where the appellate court wrote that "the alleged unlawful exercise of tribal court jurisdiction in violation of federal common law is an ongoing violation of

[9] Red Lake Resp. Br. 19–21; SMSC Resp. Br. 22–24.

'federal law' sufficient to sustain the application of the *Ex parte Young* doctrine. Satisfied that [the plaintiff] seeks prospective relief to enjoin a tribal official from enforcing an order in contravention of controlling federal law, we agree with the district court that this action falls within the *Ex parte Young* exception, and therefore is not barred by the doctrine of sovereign immunity." (Citation omitted.)

V. Ms. Watso did not waive her Section 1914 claim under Count I of the underlying Complaint.

Likewise, Ms. Watso did not waive her Section 1914 claim. The underlying complaint and arguments before the district court is entirely within the subject area of and about SMSC ICWA jurisdiction.[10] The fact that Section 1914 was not specifically cited is not fatal as the Appellee SMSC would like this Court to believe. Moreover, the claim asserts a federal question regarding tribal court jurisdiction over non-Indian, non-member parents: "We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question." *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 852–853 (1985). If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void." *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 554 U.S. 316, 324 (U.S.2008). Hence, Ms. Watso has waived no argument as it relates to Count I of her Complaint.

[10] SMSC Resp. Br. 20–21. *See also* Red Lake Resp. Br. 22.

VI. The claims against C.P. are neither moot nor barred by claim preclusion.

Finally, the claims asserted against Red Lake and SMSC as it relates to C.P. is neither moot nor barred by claim preclusion.[11] The situation involving C.P. could occur again as he remains a minor. However, a case may become moot if a party no longer has "a personal stake in the outcome of the controversy." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). Voluntary cession of a challenged practice may deprive a court of jurisdiction if the party asserting mootness carries the "heavy burden" of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). SMSC has not shown that the alleged wrongdoing could not reasonably be expected to recur again.

Moreover, C.P.'s claims are not barred by claim preclusion.[12] C.P.'s earlier habeas corpus petition could not carry the claims asserted in the underlying § 1983 Complaint for damages and for injunctive relief. "In some cases either habeas corpus or § 1983 may appear to provide a means for obtaining relief. Often § 1983 will be preferred because it provides remedies, such as damages and injunctive relief, unavailable under habeas corpus. Legal fees may be recoverable under § 1983. Also, § 1983 actions, but not habeas corpus petitions, are covered by the Federal Rules of

[11] *See* Red Lake Resp. Br. 29–32; SMSC Resp. Br. 41.
[12] *Id.* 42.

Civil Procedure, which include extensive discovery procedures. Finally, § 1983, unlike habeas corpus, does not require the petitioner to have first exhausted judicial or administrative remedies. Section 29:30.Federal civil rights action (42 U.S.C.A. § 1983), Law of Probation & Parole § 29:30 (2d) (citations omitted). Further, in *Jackson v. Official Reps. & Empl. of Los Angeles Police Dept.,* 487 F.2d 885 (9th Cir.1973), a § 1983 action, the Ninth Circuit held that issue preclusion did not apply because the issue had not been litigated in the prior criminal trial and federal habeas corpus proceeding. *Id.* at 886. Thus it is unnecessary to address in a § 1983 action the preclusive effect of a prior federal habeas proceeding. *See also Quarles v. Sager,* 687 F.2d 344, 346 (11th Cir.1982) (prior federal habeas judgment could not have preclusive effect on a subsequent § 1983 action because the relevant issues were not determined on the merits). The underlying stipulation to dismiss with prejudice was not an adjudication on the merits. No determinative hearing was held on any allegation asserted within the habeas petition. Thus the earlier proceeding does not preclude C.P. from claims asserted in a §1983 action.[13]

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[13] *Compare: Semtek Intern. Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 505–06 (2001). ("18 Wright & Miller § 4435, at 329, n. 4 ("Both parts of Rule 41 ... use the phrase 'without prejudice' as a contrast to adjudication on the merits"); 9 *id.,* § 2373, at 396, n. 4 ("'[W]ith prejudice' is an acceptable form of shorthand for 'an adjudication upon the merits' ").
See also **Goddard,* 14 Cal.2d, at 54, 92 P.2d, at 808 (stating that a dismissal "with prejudice" evinces "[t]he intention of the court to make [the dismissal] on the merits"). The primary meaning of "dismissal without prejudice," we think, is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim. That will also ordinarily (though not always) have the consequence

CONCLUSION

The Appellants respectfully request the district court order be reversed dismissing the underlying complaint and remanding the matter for further proceedings in accordance with the disposition of this Court.

Dated: July 24, 2018

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of not barring the claim from *other* courts, but its primary meaning relates to the dismissing court itself. Thus, Black's Law Dictionary (7th ed.1999) defines "dismissed without prejudice" as "removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim," *id.,* at 482, 92 P.2d 804, and defines "dismissal without prejudice" as "[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the applicable limitations period," *ibid.*
3 We think, then, that the effect of the "adjudication upon the merits" default provision of Rule 41(b)—and, presumably, of the explicit order in the present case that used the language of that default provision—is simply that, unlike a dismissal "without prejudice," the dismissal in the present case barred refiling of the same claim in the United States District Court for the Central District of California. That is undoubtedly a necessary condition, but it is not a sufficient one, for claim-preclusive effect in other courts."

United States Court Of Appeals
For The Eighth Circuit

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Emily Piper in her official capacity as Commissioner of the
Department Of Human Services; Scott County;
Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community; and its
Judge John E. Jacobson, in his official capacity; Tribal Court of the Red Lake Band
of Chippewa Indians; and its Judge Mary Ringhand, in her official capacity,

Appellees.

CERTIFICATE OF COMPLIANCE

1. I certify that I am a current member of this Bar in good standing.

2. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

   ☑ This document contains 4,944 words.

3. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because:

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Dated: July 24, 2018

/s/Erick G. Kaardal
Erick G. Kaardal