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

PETITIONERS' RESPONSE TO TRIBAL COURT RESPONDENTS' MOTION TO DISMISS

Petitioners Aarin Nygaard and Terrance Stanley, by and through the undersigned counsel, respectfully submit this response to Respondents' Cheyenne River Sioux Tribal Court; Brenda Claymore, in her official capacity as Chief Judge; Cheyenne River Sioux Tribal Court of Appeals; and Frank Pommersheim, in his official capacity as Chief Justice ("Tribal Respondents" or "Tribal Court Respondents") Motion to Dismiss, Doc. 42. Petitioners respectfully request this Court to deny Tribal Respondents' Motion because 1) this Court has jurisdiction over the parties and relief requested; 2) Petitioners are not required to exhaust tribal court remedies, 3) even if Petitioners are required to exhaust tribal court remedies, they have done so; and 4) the Petition involves the appropriate parties and requests appropriate relief.

Facts

This case involves Petitioner Aarin Nygaard and his child, C.S.N. (born xx/xx/2013), as well as Petitioner Terrance Stanley and his child, T.R.S (born xx/xx/2007). *See generally* Amended Petition, Doc. 8, & ¶¶ 24-25, 38. Tricia Taylor is the mother of both children, and in August 2014, Tricia took the children and absconded to the Cheyenne River Indian Reservation, which later resulted in a North Dakota state criminal conviction for parental kidnapping. Amended Petition, Doc. 8, ¶¶ 14, 29, 43, 44, 52. Tricia was arrested by the Federal Bureau of Investigation in November 2014,[1] at which time the children were placed in the care of Tricia's brother, Ted Taylor Jr. Amended Petition, Doc. 8, ¶¶ 44-45.

In December 2014, Ted initiated an action in Cheyenne River Sioux Tribal Court (Tribal Court), requesting temporary custody of the children, although the request was later changed to seek the children's placement with Jessica Ducheneaux, Tricia's sister. Amended Petition, Doc. 8, ¶¶ 46, 78. Without any notice to Aarin and Terrance of the Tribal Court proceeding, the Tribal Court granted two Temporary Custody Orders awarding custody of the children first to Ted, and then to Jessica, until further Order of the Tribal Court, and concluded that it had personal jurisdiction and subject matter jurisdiction. Amended Petition, Doc. 8, ¶¶ 46-49.

In March 2015, Aarin and Terrance appealed the Tribal Court Order to the Cheyenne River Sioux Tribal Court of Appeals (Tribal Court of Appeals), challenging *inter alia* the Tribal Court's

[1] In their Brief in Support of their Motion to Dismiss, Tribal Respondents state Tricia Taylor, the children's mother, "was arrested on the Reservation by the Federal Bureau of Investigation ("FBI") on a misdemeanor bad check warrant." Tribal Respondents' Brief in Support of Motion to Dismiss ("Tribal Brief"), Doc. 43, at 2. In what appears to be an attempt to minimize Ms. Taylor's conduct in this matter, Tribal Respondents have ignored the federal arrest warrant issued for Ms. Taylor which clearly provides the offense is "Unlawful Flight to Avoid Prosecution in violation of Title 18, United States Code, Section 1073." Exhibit 67 to Petition for a Writ of Habeas Corpus, Doc. 1-67. The federal warrant directly correlated with the state court warrant for parental kidnapping. *Id.*

jurisdiction and raising due process violations. Amended Petition, Doc. 8, ¶ 51. Since then, the case has bounced between the Tribal Court and the Tribal Court of Appeals, resulting in no less than four decisions by the Tribal Court of Appeals. *See* Tribal Court of Appeal decisions attached to Petition, Docs. 1-32, 1-55, 1-64, & 1-65.

To date, and in violation of North Dakota state court Orders granting Aarin and Terrance custody of their respective child, the children remain on the Reservation, albeit with Tricia's sister Jessica and not with Tricia.[2] Amended Petition, Doc. 8, ¶¶ 22, 28-29, 33, 35, 40, 42, 55, 59-60.

Law and Argument

I. Applicable Standard for Motion to Dismiss and Issuance of Order to Show Cause

The Supreme Court of the United States has detailed its standard under Federal Rule of Civil Procedure 12 in considering motions to dismiss and said:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*; *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (C.A.7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, *see Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, *see* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–236 (3d ed.2004) (hereinafter Wright & Miller)

[2] After completing a prison sentence for parental kidnapping, Tricia was re-arrested on a charge of contempt of court for failing to return C.S.N to North Dakota. *See* Tribal Court Order dated April 18, 2018, Doc. 1-62, at 5. The North Dakota court ordered Tricia to be held in custody until Tricia returned C.S.N. to Aarin. *Id.* "The North Dakota Supreme Court subsequently reversed the order and [Tricia] was released on September 20, 2017 on the condition she return C.S.N. to Mr. Nygaard within 72 hours." *Id.* "At the time [Tricia] appeared in Tribal Court on February 23, 2018, she was a fugitive from North Dakota for failing to abide by that condition of her release." *Id.*

> ("[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact), *see, e.g.*, *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

Bell Atlantic v. Twombly, 550 U.S. 544, 556 (2007). Regarding Motions to Dismiss on subject matter jurisdictional grounds, the Eighth Circuit Court of Appeals has indicated that "all doubts on jurisdictional points must be resolved in favor of a plenary trial rather than dismissal at the pretrial stage[.]" *Miller v. Cent. Chinchilla Grp., Inc.,* 494 F.2d 414, 417 (8th Cir. 1974).

Here, Petitioners have pleaded specific factual allegations and provided grounds for their entitlement to relief and therefore, Tribal Respondents' Motion to Dismiss must be denied. More specifically as to habeas petitions, courts have noted that:

> Unless petition for habeas corpus reveals on its face that as a matter of law petitioner is not entitled to writ, writ or order to show cause must issue. The usual practice is for the petitioned court to issue an order to show cause.

See Wright v. Dickson, 336 F.2d 878, 881 (9th Cir. 1964). Petitioners have sustained allegations of constitutional violations by a preponderance of the evidence and this Court should find as such and issue a Writ of Habeas Corpus or an Order to Show Cause. Where allegations present an issue of fact, the proper procedure is to issue a writ, have the persons produced, and hold a hearing at which evidence is received. *Walker v. Johnston*, 312 U.S. 275, 285 (1941). Therefore, if this Court finds that there is an issue of fact, this Court should issue a writ, have the children produced, and hold a hearing on those facts. However, if this Court finds that there are no issues of fact, this Court should issue the writ and have the children produced forthwith without such hearing.

II. Tribal Respondents should be estopped from arguing that Petitioners have not exhausted tribal court remedies because the Petitioners nave not filed any

petitions with the Tribal Court asking the Tribal Court to grant comity to the North Dakota state court orders.

Regarding the merits of Tribal Respondents' Motion to Dismiss, Tribal Respondents offer a prime example of the arduous process that Aarin and Terrance have faced these past seven years in their quest to bring their children home and exhaust tribal court remedies. Permeating their Brief, Tribal Respondents rely heavily on the fact that Aarin and Terrance have not filed any petitions asking the Tribal Court to recognize and enforce the North Dakota state court orders granting them custody of their children. *See, e.g.,* Tribal Brief, Doc. 43, at 4, 9-11. Tribal Respondents state that "[w]ith one exception, Petitioners have not availed themselves of [tribal laws regarding enforcement of foreign judgments] by filing appropriate petitions to domesticate the North Dakota state court orders in Tribal Court" and "[n]either Mr. Nygaard nor Mr. Stanley has filed a petition to have any other state court order recognized by the Tribal Court[.]" *Id.* at 4. Emphasizing the tribal law that sets forth factors for the Tribal Court to consider when a party seeks recognition and a grant of comity to a foreign judgment, the Tribal Respondents continually fall back on their position that "Petitioners have not filed petitions in the Tribal Court to domesticate the state court orders they claim the Tribal Court must recognize and enforce[.]" *Id.* at 9-11; *see also id* at 9 ("Petitioners have not filed petitions to domesticate those state court orders or to seek recognition and enforcement of those orders in Tribal Court[.]"). Ultimately, the Tribal Respondents contend that "Petitioners cannot escape exhaustion of available tribal court remedies by claiming futility when they have not filed petitions for domestication, recognition, and enforcement of their state court orders." *Id.* at 11.

Tribal Court Respondents' current position that Aarin and Terrance were required to file new Petitions to request the Tribal Court to grant comity to the North Dakota state court orders is contrary to the Tribal Court of Appeals' Memorandum Opinion and Order dated September 1,

2016, Doc. 1-55. In its decision, the Tribal Court of Appeals remanded the case to the Tribal Court and directed that the Tribal Court:

> take the necessary evidence – including, if necessary, witness testimony, to make an express written determination whether *each* and every element of the Tribal comity provisions set out in Executive Resolution No. E-233-97-CR is satisfied (or is not) by clear and convincing evidence and an express conclusion as a matter of law whether comity is to be granted.

Doc. 1-55, at 7. Crucially, the Tribal Court of Appeals went on to state that "**[i]t is further noted that given the already lengthy proceedings in this case – now approaching almost two years – that resolution of comity issue shall be handled directly on remand without the necessity of filing a new and independent action.**"[3] *Id.*

Based on this earlier position, Tribal Court Respondents should be estopped from now arguing that Aarin and Terrance were required to file a new and independent action (ie. Petition) to ask the Tribal Court to recognize the North Dakota state court orders. "Judicial estoppel is an equitable doctrine which 'prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.'" *Van Horn v. Martin*, 812 F.3d 1180, 1182 (8th Cir. 2016) (quoting *New Hampshire v. Maine,* 532 U.S. 742, 749, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)). "The circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1047 (8th Cir. 2006) (internal quotation marks and citation omitted). "Three factors, while not an exhaustive formula for determining the applicability of judicial estoppel, aid a court in determining whether to apply the doctrine. *Id.*

[3] Upon remand, the Tribal Court acknowledged the other North Dakota state court orders in which custody was awarded to Aarin and Terrance, but the Tribal Court only analyzed under comity principles Aarin's Petition for recognition of a foreign judgment in a previously filed independent action. *See* Tribal Court Order dated April 18, 2018, Doc. 1-62, at 11-12.

(internal quotation marks omitted). Those three factors are: "(1) whether a party's later position is 'clearly inconsistent' with its previous position; (2) whether the party succeeded in persuading the first court to accept its position; and (3) 'whether the party seeking to assert an inconsistent position would derive an unfair advantage ... if not estopped.'" *Van Horn*, 812 F.3d at 1182 (quoting *Stallings,* 447 F.3d at 1047).

Here, Tribal Court Respondents' position that Aarin and Terrance were required to file new and independent actions to ask the Tribal Court to grant comity to the North Dakota state court orders is "clearly inconsistent" with the Tribal Court of Appeals' earlier statement that comity *shall* be handled directly on remand without the necessity of filing a new and independent action." Doc. 1-55, at 7. As this directive came from the Tribal Court of Appeals, the Tribal Court Respondents should be foreclosed from arguing that they did not accept their own position. And without question, an unfair advantage is derived if now, four years after the Tribal Court of Appeals' directive, Aarin and Terrance are required to return to Tribal Court to file new and independent Petitions requesting the Tribal Court to grant comity to the North Dakota state court orders.

Tribal Respondents contend that the only Petition filed in which either Aarin or Terrance requested the Tribal Court to recognize a foreign judgment was a North Dakota state court ex parte order and that no "other state court orders have been placed in evidence in the Tribal Court proceedings." *See* Tribal Brief at 11. In support of that contention, Tribal Respondents cite to a Tribal Court of Appeals Memorandum Decision and a Tribal Court Order that were entered prior to a Tribal Court Order and Tribal Court Findings of Fact acknowledging the other North Dakota state court orders in which custody was awarded to Aarin and Terrance. *See* Docs. 1-55 & 1-61; *see also* Doc. 1-62; Tribal Court Findings of Fact, Doc. 1-68. In the Tribal Court Findings of Fact

in one of those later proceedings, the Tribal Court found that "the [North Dakota state court] had a full trial in regard to this matter on August 4, 2015 after providing notice to Ms. Taylor." Doc. 1-62, at 3. Similarly, the Tribal Court found that "Mr. Stanley was also awarded full custody of T.R.S. by [the North Dakota state court] after a full trial on August 4, 2015." *Id.* at 4.[4] *Cf.* Amended Petition, Doc. 8, ¶ 77; Tribal Court Findings of Fact, Doc. 1-68, ¶ 4. Based on the foregoing, Petitioners have pleaded sufficient jurisdictional facts and Tribal Respondents should be estopped from arguing that Aarin and Terrance have failed to exhaust tribal court remedies by not filing "petitions for domestication, recognition, and enforcement of their state court orders." *Cf.* Tribal Brief, Doc. 43, at 11.

III. This Court has jurisdiction pursuant to 25 U.S.C. § 1303 and *DeMent v. Oglala Sioux Tribal Court* to grant Petitioners' requested relief.

This Court has authority under federal habeas statutes to afford relief to Petitioners. 25 U.S.C. § 1303; *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989). The plain language of 25 U.S.C. § 1303 provides, "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

Tribal Respondents argue that the minor children here are not in "custody" or "detention" of the Tribe or the Tribal Court, meaning this Court lacks jurisdiction under 25 U.S.C. § 1303. In support of their argument, Tribal Respondents state that there are no allegations in this matter that (1) the tribal court illegally took custody of the children, (2) the tribal court made the children

[4] Although these findings were made by the Tribal Court, it only analyzed, under comity principles, Aarin's petition for recognition of a foreign judgment that was in a previously filed, independent action. *See* Tribal Court Order dated April 18, 2018, Doc. 1-62, at 11-12.

wards of the court, or (3) the tribal council enacted legislation declaring the tribe had sole jurisdiction over the children. Tribal Brief, Doc. 43, at 8.

However, Circuit Courts have previously concluded that children subject to illegal tribal court orders are detained or in custody for the purposes of habeas corpus petitions under 25 U.S.C. § 1303. *DeMent*, 574 F.2d at 515 (concluding children were detained by the tribe by an order of the tribal court and by resolution of the tribal council, after the tribal court refuse to enforce a California custody decree); *United States ex rel. Cobell v. Cobell*, 503 F.2d 790, 795 (9th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975) (concluding a tribal court lacked jurisdiction over a child custody determination after a state court properly determined custody and a writ of habeas corpus was properly granted); *compare*, *Weatherwax ex rel. Carlson v. Fairbanks*, 619 F.Supp. 294, 295-96 (D. Mont. 1985) (concluding plaintiff was not entitled to habeas corpus relief when he was simply challenging the tribal court custody decision and the matter did not involve a valid state order contradicting tribal court jurisdiction).

In addition to the precedent providing for jurisdiction in these situations, Respondents rely on distinguishable case law to argue this Court lacks authority to determine parental rights or child custody under federal habeas corpus statutes. *See Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 512 (1982). In *Lehman*, a mother challenged a state-court judgment involuntarily terminating her parental rights. 458 U.S. at 505-06. The Supreme Court of the United States specifically addressed the question of "whether federal habeas corpus jurisdiction, under § 2254, may be invoked to challenge the constitutionality of a state statute under which a State has obtained custody of children and has terminated involuntarily the parental rights of their natural parent." *Id.* at 507. Ultimately, the Court concluded the child custody case was not subject to federal court jurisdiction under § 2254, noting a potential state interest in habeas child custody

matters but that "[t]he federal government, however, has no parallel substantive interest in child custody matters that federal habeas would serve." *Id.* at 515-16. Notably, *Lehman* did not involve tribal courts, parental kidnapping, valid state custody orders between parents, or a habeas corpus petition under 28 U.S.C. § 1303. Further, like a state interest in providing relief in child custody cases, the federal government has a different substantive interest in child custody matters involving tribal courts lacking jurisdiction.

In *Cochrun v. Young*, an unpublished case from this district, a prisoner filed a federal habeas corpus action pursuant to 28 U.S.C. § 2254. Case No. CIV-14-5066, 2015 WL 3544851 (D.S.D. June 4, 2015). As part of his habeas petition, the prisoner stated some claims about his children; however, this Court determined there was no cognizable claim, citing the language from *Lehman* as relied upon by Respondents. Notably, *Cochrun* did not involve any tribal courts, parental kidnapping, valid state custody orders between parents, or a habeas corpus petition under 28 U.S.C. § 1303.

In *Mueller v. Missouri Div. of Family Servs.*, a father petitioned for a writ of habeas corpus under 28 U.S.C. § 2241, alleging that a state agency had wrongful custody of his sons. 123 F.3d 1021, 1022 (8th Cir. 1997). After discussing the complex history of the matter, the 8th Circuit Court of Appeals concluded the federal court lacked jurisdiction where the state assumed custody of children because it was in the children's best interests. *Id.* at 1023. In *Mueller*, the court also noted that custody determinations can be handled through direct appeals. *Id.* Notably, *Mueller* did not involve any tribal courts, parental kidnapping, valid state custody orders between parents, or a habeas corpus petition under 28 U.S.C. § 1303.

The *Amerson* court determined that even though a child had been housed in state institutions that was not "custody" under 28 U.S.C. § 2254. *Amerson v. Iowa, Dep't of Human*

Servs., 59 F.3d 92, 94-95 (8th Cir. 1995). *Amerson* involved a mother whose parental rights had been terminated filing a habeas petition as next friend of her child. *Id.* at 93. The court did not note any jurisdictional challenges to the order granting the child's custody to the state. *Id.* at 94-95. The *Amerson* court concluded that federal habeas relief was not available because the state's physical custody of the child pursuant to a state court order was not the type of confinement for which habeas jurisdiction traditionally exists. *Id.* Notably, *Amerson* did not involve any tribal courts, parental kidnapping, valid state custody orders between parents, or a habeas corpus petition under 28 U.S.C. § 1303.

Importantly, *Lehman*, which Respondents heavily rely upon, was distinguished by the 8th Circuit in *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989). Tribal Respondents attempt to distinguish *DeMent* from this matter; however, the facts are nearly directly on point and *DeMent* is the law in this Circuit. First, in *DeMent*, the 8th Circuit specifically noted the father should be able to seek habeas relief under 25 U.S.C. § 1303 because the matter no longer represented a child custody battle and was instead a dispute over a tribal court's violation of "a non-Indian's due process rights by refusing to give full faith and credit to a state custody decree." *Id.* at 515. The *DeMent* court concluded:

> [W]e believe that DeMent's children are being detained by the tribe by an order of the tribal court. The tribal court made the girls wards of the court on November 23, 1984 and has refused to enforce the California custody decree. Furthermore, on June 17, 1985, the Oglala Sioux Tribal Council passed Resolution 85–109 declaring that the Tribe has sole jurisdiction over the DeMent children. If DeMent is correct and the California decree is valid, a federal court order may be the only way to compel the tribe to return the children to their father. Thus, we believe that habeas corpus relief is available under section 1303 to determine the validity of the California decree and the appropriateness of the tribal court's exercise of jurisdiction.

Id.

This matter, like *DeMent*, is clearly different and distinguishable from more typical habeas matters because this is **not** a collateral attack of a court's custody decision. Instead, like the father in *DeMent*, Petitioners here hold valid state court custody decrees and have had their due process rights violated by the Tribal Respondents' refusal to give full faith and credit to the North Dakota Orders. Therefore, habeas corpus relief is available under 25 U.S.C. § 1303 to determine the validity of the North Dakota Orders and the appropriateness of the Cheyenne River Sioux Tribal Court's exercise of jurisdiction.

Tribal Respondents further attempt to distinguish this matter from *DeMent* because that case involved a custody dispute between parents and this action involves "an application for temporary custody of children present on the Reservation by non-parent relatives of the minor children." Tribal Brief, Doc. 43, at 8. However, this argument ignores the underlying facts and ongoing determinations by the Tribal Court. The fathers have valid North Dakota Orders granting them custody. Respondent Tricia Taylor fled to the Reservation, kidnapping their children in violation of these orders. The individual who has "temporary" custody of the minor children is Tricia Taylor's sister. Again, in what appears to be an attempt to minimize the illegal conduct leading up to this matter, Tribal Respondents claim this is only a simple application for temporary custody, instead of a more than five-year legal saga in which the Petitioners have repeatedly and consistently disputed Tribal court jurisdiction.

This case is not akin to a state taking custody of a child like in *Amerson*, or a state court termination of parental rights like in *Lehman*, or a prisoner concerned about custody of his children like in *Cochrun*. Petitioners are two fathers of these children seeking to challenge the Tribal Respondents' assertion of jurisdiction and the due process violations by Tribal Respodents in

failing to give the North Dakota state custody orders full faith and credit, just like the *DeMent* court determined is appropriate under 25 U.S.C. § 1303.

Regardless, as this Court can see in the Petition, Amended Petition, and Addendum to the Amended Petition, these facts have been alleged in this matter. Petitioners have alleged nearly exactly the same issues here – (1) the Tribal Respondents' actions have caused and contributed to the illegal detention of the children, (2) the Tribal Respondents have asserted jurisdiction over the children and refused to concede jurisdiction to the appropriate court, and (3) the Cheyenne River Sioux Tribal Council enacted a specific resolution overruling its own precedent and determining the Parental Kidnapping Prevention Act no longer applied on the Cheyenne River Sioux Reservation in direct response to this action, which then directly resulted in the Tribal Respondents concluding they had sole jurisdiction over these children.

Finally, of note, the Tribal Respondents state the children have been in the care of Jessica Ducheneaux since 2015 in an attempt to detract from its own actions controlling the placement of children. Tribal Brief, Doc. 43, at 2. Yet Respondents ignore the default entered by the Clerk against the Ducheneauxs and Ted Taylor, Jr. Clerk's Entry of Default, Doc. 36. Pursuant to Federal Rule of Civil Procedure 55(a), the Clerk entered default on February 11, 2021. *Id.* In making any determination in this matter, this Court should consider this default already entered and the possibility of inconsistent determinations through a dismissal against some parties and default against others, when the relief requested implicates each of these parties. Ultimately, this Court has jurisdiction over this matter pursuant to *DeMent* and 25 U.S.C. § 1303 and should deny the Tribal Respondents' Motion to Dismiss.

IV. Petitioners are excepted from exhaustion requirements and have otherwise exhausted their tribal court remedies.

Unless an exception applies, federal courts cannot entertain challenges to jurisdiction of tribal courts until the petitioner has exhausted its remedies in tribal court. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855-86 (1985). The Supreme Court of the United States said:

> [T]he existence of and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.

Id. The Court has also said the tribal court must have a "full opportunity to determine its own jurisdiction . . . at a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987). If a tribal appellate court upholds the lower court's determination on jurisdiction, a petitioner may generally challenge that ruling in federal district court. *Id.* at 19. However, if tribal jurisdiction is conducted in bad faith, patently violative of jurisdiction prohibitions, or if exhaustion would be futile, exhaustion is not required. *National Farmers*, 471 U.S. at 856, n. 21.

Exhaustion of tribal remedies is not required when the action is patently violative of express jurisdictional prohibitions or it is otherwise plain that the tribal court lacks jurisdiction over the dispute, such that adherence to the exhaustion requirement would serve no purpose other than delay. *National Farmers*, 471 U.S. at 856, n.1; *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). Exhaustion is also not an inflexible requirement, and courts have considered a balancing process

to weigh "the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights." *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1146 (8th Cir. 1973).

Here, Petitioners have alleged the exceptions to exhaustion of tribal remedies apply. The Tribal Court lacks jurisdiction over the Petitioners and the custody determinations. The court's inquiry into whether it is plain that tribal court jurisdiction is lacking has been equated to whether that jurisdiction is "colorable" or "plausible." *See Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008). In *Atwood*, the 9th Circuit concluded tribal court jurisdiction was plausible because the original custody dispute occurred in tribal court and a custody agreement noted the tribal court would continue to have jurisdiction over the matter. *Id.* The court specifically noted that a tribal nonmember who enters tribal court has entered into a consensual relationship with the tribe, presumably granting plausible jurisdiction over a child custody matter. *Id.*

Unlike *Atwood*, Petitioners have not availed themselves of tribal court jurisdiction. They have appeared in tribal court, through counsel, only for the limited purpose of objecting to the tribe's alleged jurisdiction over them. Further, as detailed throughout the Petition and Amended Petition, the tribal court plainly lacks jurisdiction over child custody where (1) the children did not reside on the reservation prior to their kidnapping and (2) a different court previously asserted and found it had valid, continuing jurisdiction over child custody determinations due to their actual residence and domicile. Tribal jurisdiction is not plausible here. Therefore, this Court should conclude Petitioners are not required to exhaust their tribal remedies in this matter.

This Court should also find Petitioners exempt from exhaustion requirements because further tribal court action is futile. The Cheyenne River Sioux Tribal Court of Appeals itself has already determined that the PKPA applies on the reservation. *Eberhard v. Eberhard*, 24 ILR 6059,

6060, 6062-64 (Chy.R.Sx.Ct.App. 1997); *See* Petition Exhibit 66. Although the tribal council, during the midst of this case, has now overruled *Eberhard*, it only noted that "the Tribal Council effectively rendered *Eberhard* inapplicable to future cases." *See* Exhibit 64 (Memorandum Opinion and Order - September 24, 2018 (emphasis added)). There is no provision in the resolution noting it was intended to be applied retroactively to this matter, which has been pending in the tribal court system since 2014. Further, in light of the tribe's ongoing and concerted efforts to revoke *Eberhard*'s applicability for this case specifically, going so far as to specifically reference North Dakota custody orders in its resolution, any efforts to seek recognition of the valid North Dakota Orders in the CRSTC are futile. In considering the balancing test of exhaustion requirements, this Court should consider the Petitioners' need to adjudicate deprivations of their individual rights against the significant opportunity the tribal courts have had to strengthen their authority and correctly adjudicate the matter. *See O'Neal*, 482 F.2d at 1146. Again, Petitioners have been attempting to resolve this matter with the tribal court for more than five years, and any further action is futile.

Respondents also state that "temporary custody of the minor children shall remain with Ms. Ducheneaux pending a hearing to determine whether that award of custody is in the best interests of the children." Tribal Brief, Doc. 43, at 2. "Temporary" is defined as "Lasting for a time only; existing or continuing for a limited (usu. short) time; transitory." Black's Law Dictionary (11th ed. 2019). To put this in context of exhaustion of tribal remedies and the continued frustration of Petitioners' rights, by Respondents' own timeline, the children have been in Ms. Ducheneaux's custody since January 2015, more than six years ago. The Cheyenne River Sioux Tribal Court of Appeals ordered this "temporary" custody hearing to be held in its February 25, 2019 decision. Exhibit 65 to Petition, Doc. 1-65. The Cheyenne River Sioux Tribal Court did

not follow that directive and set the hearing, at least not until the Tribal Respondents were served with this habeas petition, and the hearing suddenly became a priority more than a year and a half later. *See* Addendum to Amended Petition for a Writ of Habeas Corpus ("Addendum"), Doc. 18. There is nothing temporary about the inappropriate custody arrangement perpetually set in place by the Tribal Respondents.

If this Court concludes exhaustion is required here, Petitioners have met the requirement. In *DeMent*, the court concluded the father did not exhaust his tribal court remedies, in part because he should have appealed the tribal court's decision as to jurisdiction to the tribal court of appeals before seeking habeas relief in federal court. 874 F.2d at 516-17. In most cases where courts have concluded a petitioner has failed to exhaust his or her tribal remedies, the petitioner has taken up no appeal and has otherwise sought to quickly interfere with tribal court proceedings. *Iowa Mut. Ins. Co.*, 480 U.S. at 17 (noting the petitioner has not yet obtained tribal appellate review, and until then, the tribal courts had not had a full opportunity to evaluate the claim); *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 847 (9th Cir. 2009) (concluding a plaintiff did not exhaust her tribal court remedies because a tribal court appeal was pending and had not yet come to a determination); *Boozer v. Wilder*, 381 F.3d 931, 936-37 (9th Cir. 2004) (noting petitioner filed a habeas petition in federal court only days after motions were filed in tribal court and no tribal court appeal was taken up); *Gray v. Tulalip Tribal Court*, Case No. C19-1623-JLR-MAT, 2020 WL 4004491 (W.D. Wash. June 12, 2020) (noting the petitioner made no effort to appeal his conviction in tribal court, which was fatal to his habeas petition because he had no exhausted his claim in tribal court).

Here, Petitioners have taken up several appeals and in doing so, years have elapsed without custody of their children due to the violation of their due process rights. Notably, Respondents do

not acknowledge any of the above case law and instead argue Petitioners should have filed their own actions in tribal court. However, it is clear that Petitioners have given the tribal courts adequate time to come to an appropriate decision, and Petitioners now appropriately bring this request for habeas relief, having exhausted their appeals and options in the tribal court. Petitioners should be permitted to proceed in this matter as they have exhausted tribal court remedies and appeals.

The remainder of Respondents' argument is based on their position that Petitioners were required to domesticate the North Dakota Orders in Tribal Court. However, in addition to the fact that the Respondents should be estopped from making such argument, domesticating such orders, filing a habeas petition, or "any other original action in the Tribal Court" could be construed as an admission of jurisdiction. Brief, at p. 4; *See Adam v. Saenger*, 303 U.S. 59, 67-68 (1938) ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence"). The issue in this matter is that the Tribal Court lacks jurisdiction over Petitioners and these custody determinations. Admitting jurisdiction in the tribal court for the purposes of exhausting tribal remedies for the purposes of filing a federal habeas petition alleging a lack of jurisdiction is illogical. Further, it does not appear that any court has specifically determined that domesticating a foreign order or filing a habeas petition in tribal court is required to exhaust tribal remedies. Instead, courts have focused on whether there has been a full opportunity for the tribal court to consider the matter. Here, through several appeals and remands, the tribal court has had that opportunity and habeas relief is appropriate. Therefore, even if this Court concludes an exemption does not apply, Petitioners have exhausted their tribal remedies and this Court has jurisdiction over this matter.

V. Tribal Respondents are appropriate parties to this action.

The Tribal Respondents are proper parties as their orders are what is holding the children on the reservation illegally. "Writ of habeas corpus does not act upon prisoner who seeks relief, but upon person who holds him in what is alleged to be unlawful custody . . . consequently, petition for writ of habeas corpus must be directed to individual who holds petitioner in allegedly unlawful custody." *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667, 673 (7th Cir. 2003) (citation and quotations omitted). "As the 'custody' requirement has expanded to encompass more than actual physical custody, so too has the concept of a custodian as a respondent in a habeas case." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 899 (2d Cir. 1996). As in *Poodry*, the Tribal Courts Respondents' orders are holding the children illegally on the reservation, and they are properly named respondents in this matter.

As noted in *DeMent*, "the ICRA cannot be directly enforced against Indian tribes because they are shielded from suit by sovereign immunity. The Act, however, may be enforced against officers of the tribe." 874 F.2d at 515 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 65 (1978)). "In *Santa Clara Pueblo*, the Supreme Court held that the ICRA does not authorize the maintenance of suits against a tribe nor does it constitute a waiver of sovereignty . . . The only exception is that federal courts do have jurisdiction under the ICRA over habeas proceedings." *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1278 (10th Cir. 2006). As the Tribal Judges are akin to officers of the tribe, as alleged in the Tribal Respondents' Motion to Dismiss, and they are acting in violation of federal law by claiming jurisdiction over these parties where they plainly do not have jurisdiction, the Tribal Respondents do not have immunity from this suit and are properly named respondents.

In addition, *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes,* 623 F.2d 682, 685

(10th Cir. 1980) supports that the Tribal Court and Tribal Court of Appeals are appropriate parties because as evidenced by the background of this case, the Petitioners have "no remedy within the tribal machinery[.]" Therefore, this Court should conclude it has jurisdiction over the Tribal Respondents in this matter.

Conclusion

In conclusion, this Court should deny the Tribal Respondents' motion to dismiss because this Court may grant habeas relief under 25 U.S.C. § 1303 and Petitioners are either exempt from exhaustion requirements or have otherwise met such requirements.

Dated this 19th day of March, 2021.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

Marty J. Jackley
Stacy Hegge
111 W Capitol Ave, Suite #230
Pierre, SD 57501
Phone: 605-494-0105
Fax: 605-342-9503
mjackley@gpna.com
shegge@gpna.com
Attorney for Petitioners

O'KEEFFE, O'BRIEN, LYSON & FOSS LTD.

TRACY J. LYSON (ND ID No. 06138)
SARAH A. AABERG (ND ID No. 08393)
720 Main Avenue
Fargo, ND 58103
Phone: (701) 235-8000
Fax: (701) 235-8023
tracy@okeeffeattorneys.com
sarah@okeeffeattorneys.com
Attorneys for Petitioners