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

AARIN NYGAARD, et al., Petitioners, v. TRICIA TAYLOR, et al., Respondents.	Civil No. 3:19-cv-03016-RAL **TRIBAL COURT RESPONDENTS' RESPONSE BRIEF IN OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT**

COME NOW Tribal Court Respondents and for their Response Brief in Opposition to Petitioners' Motion for Summary Judgment state as follows:

INTRODUCTION

Tribal Court Respondents have moved the Court for summary judgment in their favor and against Petitioners. Their argument is two-fold: first, that the Cheyenne River Sioux Tribal Court ("Tribal Court") has jurisdiction, under tribal and federal law, over the petition for temporary custody of C.S.N. and T.R.S., minor children who are enrolled members of the Cheyenne River Sioux Tribe ("Tribe") and who reside and are physically present on the Cheyenne River Indian Reservation ("Reservation");[1] and second, that the Parental Kidnapping Prevention Act ("PKPA"),

[1] The Tribal Court's jurisdiction is recognized and affirmed in tribal law, including but not limited to the Cheyenne River Sioux Tribe Children's Code, and in federal law, including but not limited to the Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), the Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868), the Act of February 28, 1877, 19 Stat. 254, the Indian Child Welfare Act, 92 Stat. 3069, 25 U.S.C. §§ 1901-1963, *see*, *e.g.*, 25 U.S.C. § 1911(a) (providing, in relevant part, that, "[a]n Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe …"); *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883), and numerous other decisions of the federal courts affirming the inherent authority of Indian tribes to regulate domestic relations, domestic affairs, and the conduct of non-Indians, *see*, *e.g., Montana v. U.S.*, 450 U.S. 544 (1981); *U.S. v. Cooley*, 141 S. Ct. 1638 (2021).

Pub. L. 96-611, § 8(a), 94. Stat. 3569 (Dec. 28, 1980), *codified as amended at* 28 U.S.C. § 1738A, does not apply to the Tribe or the Tribal Court and, therefore, does not deprive the Tribal Court of jurisdiction over the temporary custody petition.

Petitioners have also moved the Court for summary judgment. They request a ruling that the PKPA applies to the Tribe and the Tribal Court and that the Tribal Court has no jurisdiction to make determinations regarding the custody of the minor children. Pet. Br. 1.

The central issue in the parties' cross-motions for summary judgment is whether the PKPA applies to the Tribe and the Tribal Court. Tribal Court Respondents submit that it does not, for the reasons set forth below and in their Brief in Support of Tribal Court Respondents' Motion for Summary Judgment [doc. 83], which is incorporated herein by reference.

ARGUMENT

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

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

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

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

There is no reference to Indian tribes, tribal courts, or Indian country in the PKPA, and the Act's "legislative history lacks any suggestion that Congress intended the statute to apply to tribes." *Garcia v. Gutierrez*, 217 P.3d 591, 604 (N.M. 2009) (internal citation omitted).

Petitioners contend that the Tribe should be considered "a territory or possession of the United States," within the meaning of 28 U.S.C. § 1738A(b)(8), and as such, it should be bound by the PKPA. Although some courts have interpreted the PKPA in this manner, the greater weight of authority—and the more persuasive authority—holds that Indian tribes are not territories or possessions of the United States and, therefore, are not included within the full faith and credit mandate of the PKPA.

Before proceeding to these authorities, it is important to put the PKPA in its proper context by examining the Full Faith and Credit Clause in the U.S. Constitution and the Full Faith and Credit Act and the prevailing view that neither applies to Indian tribes or tribal courts.

A. Indian Tribes Are Not "States" Within the Meaning of the Full Faith and Credit Clause in the U.S. Constitution.

The Full Faith and Credit Clause in the U.S. 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." U.S. Const., art. IV, § 1. The Framers intended the clause 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.

Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935); accord, *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948) (holding that "[t]he full faith and credit clause is one of the provisions

incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation").

Indian tribes were not parties to the constitutional convention. *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991). It would be "absurd to suggest" that Indian tribes surrendered an aspect of their inherent sovereignty "in a convention to which they were not even parties." *Id*.

Nothing in the Constitution provides that tribes are to be treated as states. Indeed, the Supreme Court has held time and again that Indian tribes are not states. *See*, *e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Arizona v. California*, 373 U.S. 546, 597 (1963) ("An Indian Reservation is not a State."); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("Tribal reservations are not States."). In *Cherokee Nation*, the Court found that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else." 30 U.S. (5 Pet.) at 26. Tribes are neither states of the Union nor foreign nations, but "domestic dependent nations." *Id*. at 26-27. Tribes are not "dependent on," "subordinate to," or equal in status to the states. *See Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154 (1980).

For thousands of years before the formation of the United States, Indian tribes were independent sovereign nations. As the Supreme Court explained in *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973): "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."

The Constitution re-affirms the framework of nation-to-nation relations between the United States and Indian nations that was established under the Articles of Confederation and indeed, by European nations that were predecessors of the United States. As President Reagan said:

> When European colonial powers began to explore and colonize this land, they entered into treaties with sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this administration pledges to uphold.

Pres. Reagan, *Statement on American Indian Policy* (January 24, 1983). Presidents Nixon, Johnson and Kennedy had promoted the Indian Self-Determination Policy in the 1960s and 1970s, which formed the background for the Reagan Policy Statement.

In the late 1860s, Congress embarked on the Indian Peace Policy, settling the Powder River War with Chief Red Cloud and the Sioux Nation by entering the Fort Laramie Treaty of 1868, which reserved tribal self-government, including the power to administer justice and maintain domestic relations. At the same time, the Fourteenth Amendment was promulgated and ratified, and the Senate framers made clear that Indian tribes were sovereign nations, not subject to Federal laws of general applicability or state laws. Senator Trumbull of the Senate Judiciary Committee explained that Native Americans were not made U.S. Citizens by the Fourteenth Amendment Citizenship Clause because native people were subject to the jurisdiction of Indian nations, not the United States. *See Elk v. Wilkins*, 112 U.S. 94 (1884).

The Full Faith and Credit Clause of the Constitution is intended to draw together the several states by requiring respect for the public acts of sister states and bringing the states together into an integral Union. *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935). Indian treaties in

contrast, were intended to maintain nation-to-nation relations while preserving the authority of Tribal Governments, as self-governing nations under the United States' protection.

It is axiomatic that since Indian tribes are not states, they are not subject to the Full Faith and Credit Clause.

B. Indian Tribes are Not "States, Territories, or Possessions" Within the Meaning of the Full Faith and Credit Act.

The Full Faith and Credit Act, Act of May 26, 1790, ch. 11, 1 Stat. 122, *codified as amended at* 28 U.S.C. § 1738, extends the full faith and credit doctrine to the territories and possessions of the United States. It states in relevant part that:

> [t]he records and judicial proceedings of any court of any such State, Territory or Possession 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.

28 U.S.C. § 1738.

While there is some disagreement among the federal and state courts as to whether tribes constitute "Territories" within the meaning of the Full Faith and Credit Act, the Supreme Court has made clear that Tribal Government authority is based upon inherent Indian sovereignty, not a derivative Federal sovereignty as is the case with Territories. See *United States v. Wheeler*, 415 U.S. 313 (1978) (Indian tribes are a separate people with the power of regulating their own internal and social relations, unlike territories). Accordingly, 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.

The U.S. Supreme Court has never squarely addressed the question of whether or not tribes constitute "Territories" under the Full Faith and Credit Act. The Court ruled in the mid-nineteenth century that tribes are territories within the meaning of a federal probate statute, *United States ex*

rel. Mackey v. Coxe, 59 U.S. (18 How.) 100, 102 (1855), but later cited with approval a lower federal court case holding that tribes are not territories within the meaning of a federal extradition statute. *New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 474-75 (1909) (citing *Ex parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883)). When discussing the issue, the Court has been careful to emphasize the limited reach of its precedents: "Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded *in some circumstances* as entitled to full faith and credit in other courts." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 n.21 (1978) (citation omitted; emphasis added).

The lower federal courts are split as to the applicability of the Full Faith and Credit Act to Indian tribes. In several late nineteenth century cases, the Eighth Circuit held that the judgments of Indian tribes "are on the same footing with the proceedings and judgments of the courts of the territories of the Union, and are entitled to full faith and credit." *Mehlin v. Ice*, 56 F. 12, 19 (8th Cir. 1893); *see also Exendine v. Pore*, 56 F. 777 (8th Cir. 1893); *Standley v. Roberts*, 59 F. 836 (8th Cir. 1894); *Cornells v. Shannon*, 63 F. 305, 306-7 (8th Cir. 1894).[2]

However, more recently, the Ninth Circuit held in *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997), *cert. denied,* 523 U.S. 1074 (1998), that Congress did not intend to include Indian tribes within the terms "territories or possessions," as used in the Full Faith and Credit Act.

[2] Not all observers agree that these Eighth Circuit cases definitively hold that tribes are "territories." *See* Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders,* 34 N.M. L. REV. 381, 385 (2004) ("[I]n closely examining the opinions of the [Eighth Circuit], it is quite clear that none have ever conclusively determined that tribes are indeed 'Territories'...."). Others question that there is any relationship between the 19th century opinions of the Eighth Circuit and the present day full faith and credit statute. *See* Fred L. Ragsdale, Jr., *Problems in the Application of Full Faith and Credit for Indian Tribes,* 7 N.M. L. REV. 133, 139 (1977) ("[T]he relationship between the [8th Circuit] cases and full faith and credit legislation ... is tenuous at best.").

For the Ninth Circuit in *Wilson*, "the decisive factor" was Congress's "enactment of subsequent statutes which expressly extended full faith and credit to certain tribal proceedings." *Id*. The court reasoned that by enacting these other statutes, Congress has made clear its understanding that tribal court judgments are not entitled to full faith and credit under 28 U.S.C. § 1738:

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

127 F.3d at 808-809. In the absence of a federal mandate to apply full faith and credit in Indian country, the Ninth Circuit held that "the enforcement of tribal court judgments in federal court must inevitably rest on the principles of comity." *Id*.[3]

Most state and tribal courts that have considered the question have concluded that Indian tribes are not "Territories" within the meaning of the Full Faith and Credit Act. Indeed, a "majority of state courts that have considered the question have opted for comity." R. Clinton, et al., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 294 (4th ed. 2003) (citing *John v. Baker*, 982 P.2d 738 (Alaska 1999); *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985)). *Accord*, F. Pommersheim, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 89 (1995). These state courts have held that Indian tribes are not territories for the purposes of full faith and credit. *See*, *e.g.*, *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 694 (Ariz. Ct. App. 1977) (holding that the "word 'territory' as used in 28 U.S.C. § 1738 was not intended to apply to [Indian tribal governments]"); *Desjarlait v. Desjarlait*, 379 N.W.2d 139, 144 (Minn. Ct. App. 1985) (holding that Full Faith and Credit Clause applies only to states, not tribes); *Lohnes v. Cloud*, 254 N.W.2d 430, 433 (N.D. 1977) (same); *Fredericks v. Edie-Kirschmann Ford*, 462 N.W.2d 164 (N.D. 1990) (same).

Some state courts have, at one time, held that Indian tribes are "territories," within the meaning of 28 U.S.C. § 1738, only to retreat from that position. For example, in *Jim v. C.I.T. Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975), the New Mexico Supreme Court held that, "the laws of the Navajo Tribe of Indians are entitled by Federal Law, 28 U.S.C. § 1738, to full faith and

[3] *Accord*, *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co.*, No. 04-22774-CIV, 2006 WL 8433224, at *9-10 (S.D. Fla. Jan. 19, 2006) (tribal court judgments are not entitled to full faith and credit under 28 U.S.C. § 1738 because Indian tribes are not "territories" or "possessions").

credit in the courts of New Mexico because the Navajo Nation is a 'territory' within the meaning of that statute." However, in *Garcia v. Gutierrez*, 217 P.3d 591, 606 (N.M. 2009), a case rejecting the application of the PKPA to Indian tribes, the New Mexico Supreme Court retreated from its decision in *Jim*:

> One case often cited for the proposition that Indian tribes qualify as "territories" for the purposes of full faith and credit is *Jim v. CIT Fin. Services Corp*., 87 N.M. 362, 533 P.2d 751 (1975). There, this Court held that under the general full faith and credit statute, 28 U.S.C. § 1738, the laws of the Navajo Nation were entitled to full faith and credit in New Mexico courts. With virtually no discussion, this Court concluded that the federal statute applied "because the Navajo Nation is a 'territory' within the meaning of that statute." *Jim,* 87 N.M. at 363, 533 P.2d at 752. *Jim* is a brief opinion which offers little explanation in support of its holding, which was at the time, and continues to be, controversial. The opinion is easily distinguished from the present case, in part because it interprets Congress's general full faith and credit statute, not the PKPA, and is therefore not directly applicable here. Furthermore, the opinion's failure to acknowledge the considerable debate, which has only grown since 1975, about whether "territory" means "tribe" weakens its conclusion. We need not overrule *Jim,* because it does not apply directly to the statute at issue, but we do note that its conclusion, and attendant dearth of reasoning, has become highly suspect in light of the subsequent development of case law over the last 35 years.
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> In sum, we are persuaded by the growing chorus of cases holding that tribes are not "states" for full faith and credit purposes unless Congress explicitly designates them as such, and that tribes are not "territories or possessions" within the meaning of the PKPA. As a result, in the absence of further congressional action in this area, New Mexico is not bound to defer to tribal courts under the terms of the PKPA, and tribal courts are likewise not bound to defer to New Mexico courts. The PKPA simply does not apply here.

Garcia, 217 P.3d at 606–7.

Similarly, in *Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho 1982), the Idaho Supreme Court held that the phrase "Territories and Possessions," as used in 28 U.S.C. § 1738, is "broad enough to include Indian tribes, at least as they are presently constituted under the laws of the United States." The court was motivated, in whole or in part, by a belief that, "this holding will facilitate better relations between the courts of this state and the various tribal courts within Idaho."

Id. However, in *Coeur d'Alene Tribe v. Johnson*, 162 Idaho 754 (2017), the Idaho Supreme Court overruled *Sheppard*:

> Although we value good relations with the tribal courts within Idaho, we are unable to continue to apply the strained construction of 28 U.S.C. section 1738 that we adopted in *Sheppard* in order to advance that important objective. Therefore, we overrule the holding in *Sheppard* that tribal judgments are entitled to full faith and credit and adopt the reasoning of the Ninth Circuit in *Wilson* and hold that tribal court judgments are entitled to recognition and enforcement under principles of comity.

Id. at 758.

The Supreme Court of Washington once held that, "[t]ribal court decrees are entitled to full faith and credit to the same extent as decrees of sister states." *In re Adoption of Buehl*, 555 P.2d 1334, 1342 (Wash. 1976). However, the Washington Supreme Court has since retreated from that position, adopting a court rule that allows state courts to exercise discretion in deciding whether or not to enforce tribal court judgments. Wash. Super. Ct. R. 82.5 (adopted 1995).

Numerous states have, by case law, statute, or court rule, rejected full faith and credit and adopted comity as the rule by which they will recognize and enforce tribal court decisions. Among these states are Arizona, Connecticut, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Washington, Wisconsin, and Wyoming. *See* S. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 338-45 (2000) (collecting cases, statutes, and court rules). *See* S.D.C.L. § 1-1-25; N.D.C.C. § 27-01-09; N.D. Ct. R. 7.2(b). These states have concluded that Indian tribes are not states, territories, or possessions within the meaning of 28 U.S.C. § 1738, for if they were, their judgments would be entitled to full faith and credit under that statute.

For their part, most tribal courts have concluded that the full faith and credit doctrine is not applicable in Indian country. The Navajo Nation Court of Appeals articulated the prevailing tribal

view when it stated that Indian tribes, "stand beyond the bounds of [the] rule of [full faith and credit], such as it presently exists and governs the constitutional relation ships [sic] of the states of the United States." *In re Guardianship of Chewiwi*, 1 Navajo Rptr. 120, 125 (Navajo 1977). The court stated:

> It should not be necessary for this court to remind anyone that Indian nations and tribes were not signatories to the United States Constitution and were not intended to be included within the scope of the mandate of Article IV, Section 1. Nor does Title 28, United States Code, Section 1738, which was written to effectuate the mandate of Article IV, Section 1, provide a clear guide to the relationship between Indian courts.It is our opinion that 28 U.S.C. 1738 does not purport to govern the relationship between Indian courts. The constitutional provision upon which it is based did not envision Indian courts being in existence nor did the act itself.

Id. Thus, the prevailing, modern view among the federal, state, and tribal courts is that Indian tribes are not states, territories, or possessions within the meaning of the Full Faith and Credit Act. It necessarily follows that Indian tribes are not states, territories, or possessions within the meaning of the PKPA, either.

It is noteworthy that the States of North and South Dakota have rejected the notion that Indian tribes are territories entitled to full faith and credit, instead providing for comity jurisdiction for tribal court orders. *See Gesinger v. Gesinger*, 531 N.W.2d 17 (SD 1995).

C. Indian Tribes Are Not "States, Territories, or Possessions" Within the Meaning of the PKPA.

Petitioners argue that the plain language of the PKPA as well as its legislative history confirm that the PKPA applies to Indian tribes. Pet. Br. 9. Yet, neither the PKPA nor its legislative history mentions Indian country, Indian tribes, or tribal courts.

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

history lacks any suggestion that Congress intended the statute to apply to tribes." *Garcia*, 217 P.3d at 604 (N.M. 2009).

Congress knows how to include Indian tribes, tribal courts, and Indian country within the scope of its full faith and credit statutes when it intends to do so. Congress has adopted at least seven full faith and credit statutes that expressly apply to Indian tribes, tribal courts, or Indian country.[4] One of those statutes is the Indian Child Welfare Act ("ICWA"), Pub. L. 95-608, 92 Stat. 3069 (Nov. 8, 1978), *codified as amended at* 25 U.S.C. § 1901, *et seq*., which was adopted two years before the PKPA and which expressly provides that, "[t]he United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity." 25 U.S.C. § 1911(d). Another statute—the Federal Full Faith and Credit for Child Support Orders Act—mandates full faith and credit between States for child support orders, 28 U.S.C. § 1738B(a), and it expressly defines the term "State" to mean "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, *and Indian country (as defined in section 1151 of title 18)*," 28 U.S.C. § 1738B(b)(9) (emphasis added). These statutes are "cogent proof that Congress [knows] well how to express its intent directly," *Bryan v. Itasca Cnty*., 426

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

U.S. 373, 389-90 (1976), when it intends to subject Indian tribes, tribal courts, and Indian country to a federal full faith and credit mandate, and Congress expressed no such intent in the PKPA.

Congress did not intend the terms "territories" or "possessions" to include Indian tribes or Indian country, for if it did, then its inclusion of the term "every tribe" in the ICWA, 25 U.S.C. § 1911(d), and its inclusion of the term "Indian country" in 28 U.S.C. § 1738B(b)(9), would have been superfluous. The courts must be "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (citation omitted). The courts have a "duty to give effect, where possible, to every word of a statute." *Duncan v. Walker*, 533 U.S. 167, 167 (2001). The term "every tribe," as used in the ICWA, and the term "Indian country," as used in 28 U.S.C. § 1738B, have effect if and only if we conclude—as we must—that the terms "territories" and "possessions" do not include Indian tribes or Indian country.

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

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

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

Congress did not dictate in the PKPA that Indian tribes or tribal courts are to be included within its full faith and credit mandate. In the absence of any clear congressional intent, this Court should not strain to include tribes or tribal courts within the PKPA's mandate. "The Indian canons of construction would suggest that any federal law purporting to restrict the sovereign powers of an Indian nation should do so expressly so that reserved powers are retained in the absence of clear congressional intent to the contrary." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.07[2][b] (2005). Petitioners' argument about the Indian canons of construction is misplaced. Pet. Br. 16-19.

The Supreme Court has often stated that Congress must "unequivocally" express when it intends to abrogate inherent tribal rights and immunities. *See Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 790 (2014). "That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id*. (citations omitted). "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citations omitted). Accordingly, out of "proper respect both for tribal sovereignty itself and for the plenary authority of Congress," the courts must "tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Nothing in the PKPA's text or legislative history reflects an "unequivocal," "express," or "clear" congressional intent to subject Indian tribes, tribal courts, or Indian country to the full faith and credit mandate of the PKPA.

D. Most Courts Have Concluded that the PKPA Does Not Apply to Indian Tribes or Tribal Courts.

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

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

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

In *John v. Baker*, 982 P.2d 738, 763 (Alaska 1999), the Supreme Court of Alaska held that because, "Congress does not view Indian tribes as 'states, territories, or possessions,' the PKPA does not accord full faith and credit to tribal judgments." Similarly, in *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. App. 1991), the court rejected the view that an Indian tribe is a "state" or "territory" under the PKPA, but nonetheless recognized a tribal court custody order under principles of comity.

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

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

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

Rep. 424, 2017 WL 3039105 (Mashantucket Pequot Tribal Court 2017) (PKPA does not apply to tribal nations).

Petitioners cite *In re Larch*, 872 F.2d 66, 68 (4th Cir. 1989), for the proposition that Indian tribes are territories within the meaning of the PKPA. However, the court's treatment of the issue was limited, largely because the court concluded that there is no private right of action under the PKPA, citing *Thompson v. Thompson*, 484 U.S. 174 (1988), and its holding must give way to the greater weight of authority that Indian tribes are not "territories or possessions," within the meaning of the PKPA or the Full Faith and Credit Act, 28 U.S.C. § 1738.

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

E. Tribal Court Respondents Are Not Estopped or Barred by the Law of the Case Doctrine from Asserting that the PKPA Does Not Apply to the Tribe or the Tribal Court.

In its Memorandum Opinion and Order of February 25, 2019, in *In re C.S.N. and T.R.S.*, the Tribal Court of Appeals formally overruled its prior decision in *Eberhard v. Eberhard*, 24 ILR 6059 (C.R.S.T. Ct. App. Feb. 18, 1997), and confirmed that the PKPA does not apply to the Cheyenne River Sioux Tribe or the Cheyenne River Sioux Tribal Court. *See* Tribal Court Record, Exh. H [doc. 64-16] at 133-141. The court held that a construction of the PKPA as applicable to Indian tribes or tribal courts "is quite strained and appears to readily exceed the bounds of its 'plain meaning.'" *Id*. at 11.

> Nowhere in the [PKPA] does the term Indian or Indian tribe appear. Most importantly, the term is not mentioned in the definition of 'state' which appears at 28 U.S.C. § 1738A(b)(8). This 'plain meaning' approach is further supported by the well-known Indian canons of construction that hold that 'any federal law

> purporting to restrict the sovereign powers of an Indian nation should do so expressly so that reserved powers are retained in the absence of clear congressional intent to the contrary.'

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

The Tribal Court of Appeals did not hold, at any time during the pendency of the petition for temporary custody in the Tribal Court, that the PKPA applies to the Tribe or the Tribal Court. Rather, in its Memorandum Opinion and Order of September 1, 2016, the Tribal Court of Appeals declined to review "the various (future) issues potentially involving the Parental Kidnapping Prevention Act," Tribal Court Record, Exh. G [doc. 64-15] at 109, and instead held that comity, not full faith and credit, controls the question of whether a foreign custody order may be recognized and enforced by the Tribal Courts:

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

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

Further, in its Memorandum Opinion and Order of February 25, 2019, the Tribal Court of Appeals noted that the Tribe's laws, including Executive Resolution No. E-233-97 (R, 1997), Resolution No. 323-05-CR (2005), and Resolution No. 171-2018-CR (2018), "outline the specific contours of Cheyenne River Sioux Tribe's adherence to the well-known principle of comity," not full faith and credit. Tribal Court Record, Exh. H [doc. 64-16] at 140.The court noted that the Tribe's rule of comity applies to "*all* 'foreign' judgments." *Id.* (emphasis in original). The court also noted that, "the most recent and updated Tribal Resolution on comity [Resolution No. 171-

2018-CR] includes the observation that the Tribe does not consider itself a 'state' within the meaning of the PKPA." *Id*.

Eberhard was a common law decision and, as such, it was subject to modification and adjustment by the Cheyenne River Sioux Tribal Council ("Tribal Council"), the legislative and governing body of the Tribe. *See United States v. Lara*, 541 U.S. 193, 207 (2004) (noting that the common law is subject to the paramount authority of the legislature). After *Eberhard* was decided, the Tribal Council enacted Executive Resolution No. E-233-97 (R, 1997), Resolution No. 323-05-CR (2005), and Resolution No. 171-2018-CR (2018), to establish comity, not full faith and credit, as the principle under which foreign orders or judgments may be recognized and enforced in the Tribal Court.

By making comity the express law of the Tribe, the Tribal Council clarified that the Tribe is not bound by the PKPA or subject to the full faith and credit provisions in the PKPA. In so doing, the Tribal Council effectively overrode *Eberhard* and rendered it inapplicable to future cases. In Resolution No. 171-2018-CR, the Tribal Council expressly provided that:

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

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

To avoid any confusion on the matter, in its Memorandum Opinion and Order of February 25, 2019, the Tribal Court of Appeals confirmed that *Eberhard*'s long-since-repudiated holding

on the applicability of the PKPA to the Tribe or its courts has no continuing force or vitality. Tribal Court Record, Exh. H [doc. 64-16] at 141, 143.

II. EVEN IF THE PKPA DID APPLY TO THE TRIBE, THE TRIBAL COURT WOULD HAVE JURISDICTION OVER THE PETITION FOR TEMPORARY CUSTODY OF C.S.N. AND T.R.S.

Even if the PKPA did apply to the Tribe, it contains exceptions that, if met, would allow the Tribal Court to enter a temporary custody order concerning the minor children. One of those exceptions concerns children who are in immediate need of care and custody. 28 U.S.C. § 1738A(c)(2)(C). This case involves allegations of abandonment, abuse, neglect, and/or incapacity by one or more of the parents of the minor children. Among other things, there are allegations in the Tribal Court record of mistreatment and physical abuse by Petitioner Aarin Nygaard against Tricia Taylor and allegations of sexual abuse by Mr. Nygaard against T.R.S.

Another exception in the PKPA concerns children over whom a court has exclusive jurisdiction. 28 U.S.C. § 1738A(f). The Indian Child Welfare Act provides exclusive jurisdiction to tribal courts over child custody proceedings, including foster care placements, involving children who reside or are domiciled on the reservation. 25 U.S.C. § 1911(a). Foster care placements may be initiated by state agencies or other custodians and guardians, including non-parent relatives. *See* 25 U.S.C. § 1903(1)(a). In this case, the petition for temporary custody may be regarded as a foster care placement within the meaning of the ICWA, and the Tribal Court would have exclusive jurisdiction over such a proceeding.

CONCLUSION

For the reasons set forth herein, Tribal Court Respondents move the Court to enter summary judgment in their favor and against Petitioners.

Dated: January 5, 2022

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CERTIFICATE OF SERVICE

I certify that on January 5, 2022, I caused a true and correct copy of the foregoing to be served by operation of the Court's Case Management/Electronic Case Filing System on all parties and counsel of record.

/s/ Steven J. Gunn
STEVEN J. GUNN