No. 22-2277

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TERRANCE STANLEY & **AARIN NYGAARD**,

Petitioner-Appellant,

v.

Tricia Taylor, South Dakota Department of Social Services, et al., **BRENDA CLAYMORE, in her official capacity as Chief Judge, & FRANKLIN DUCHENEAUX, in his official capacity as Acting Chief Justice of the Cheyenne River Tribal Court of Appeals**,

Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION
(3:19-cv-03016-RAL)

APPELLANT AARIN NYGAARD'S REPLY BRIEF

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I. The Parental Kidnapping Prevention Act applies to the Cheyenne River Sioux Tribe.

The Parental Kidnapping Prevention Act (PKPA) - in no uncertain terms - was targeted to "deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards." *See* Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c), 94 Stat. 3569 (Dec. 28, 1980). Congress decried the onslaught of interstate removal of children by parents in violation of court orders or to forum shop. *Id.* Through the PKPA, it aimed to "avoid jurisdictional competition" and "discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child." *Id.* Only one interpretation of the PKPA proposed to this Court is consistent with those objectives: that of Appellant Aarin Nygaard, the father to a child kidnapped by her biological mother and who is now being detained by the Appellees Tribal Court Respondents despite a valid North Dakota state court order granting custody to Mr. Nygaard.

As set forth within the legislative history of the PKPA, "snatched children are abused children. Snatched children have to be protected by the Federal Government." *See* Parental Kidnapping Act of 1979, S. 105: Joint Hearing before the U.S. Senate Subcommittee on Criminal Justice of the Committee of the Judiciary and the Subcommittee on Child & Human Development of the Committee on Labor

and Human Resources, at 66 (Jan. 30, 1980) (Statement of Andrew Yankwitt). Congress did exactly that by enacting the PKPA, extending its reach throughout the geographic boundaries of the United States and beyond. Interpreting the PKPA in a manner consistent with its intended purpose requires the reversal of the district court's decision and the entering of an Order directing issuance of a Petition for Writ of Habeas Corpus.

A. Plain Language of the PKPA

Federal law aimed at preventing or punishing parental kidnapping identifies two potential scenarios: 1) parental kidnappings occurring within the United States; or 2) parental kidnappings occurring outside the United States. The PKPA addresses the former, while other federal law, including 18 U.S.C. § 1204,[1] addresses the latter.

As this case involves the parental kidnapping of a child within the United States, the relevant PKPA provision defines a "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory

[1] 18 U.S.C. § 1204 provides in part,

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

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

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

28 U.S.C. § 1738A. Pursuant to these provisions and the spirit of the PKPA, the Tribal Courts could not exercise jurisdiction in this matter because of the ongoing custody proceeding in North Dakota state court in which Ms. Taylor had actively participated before she took the children and absconded to the Cheyenne River Indian Reservation. *See* 28 U.S.C. § 1738A(g). Likewise, the Tribal Courts could not enter custody determinations contrary to the first-in-time North Dakota state court custody orders. *See* 28 U.S.C. § 1738A(a).

"To interpret a statute, [this Court] examine[s] both the clause at issue and the statute as a whole, as well as 'the objects and policy of the law, as indicated by

its various provisions, and give[s] to it such a construction as will carry into execution the will of the Legislature.'" *United States v. Ashcraft*, 732 F.3d 860, 862 (8th Cir. 2013) (quoting *Kokoszka v. Belford,* 417 U.S. 642, 650 (1974)). "Where the statute's language is unambiguous, we interpret the statute according to its plain language." *Id.* (quoting *United States v. Allmon,* 702 F.3d 1034, 1036 (8th Cir. 2012)). In this case, the district court found, and the Tribal Courts do not refute, that the phrase "territory . . . of the United States" is ambiguous. Therefore, this Court is not bound only to the express language of the PKPA. However, even the express language, on its own, supports that the PKPA applies to the Tribal Courts.

When interpreting the PKPA's phrase "territory or possession of the United States," the district court and the Tribal Courts both overemphasize caselaw and other federal statutes enacted close in time to the PKPA's enactment. *See* Opinion and Order on Summary Judgment (App. 289-290 R. Doc. 103, at 29-30.) ("this Court looks to the ordinary meaning of "territory or possession of the United States' when the PKPA was enacted in 1980 to determine its meaning"); Tribal Courts' Brief at 39 (emphasizing *United States v. Wheeler*, 435 U.S. 313 (1978) to interpret "territory" within the PKPA). Instead, the term "territory . . .of the United States" in a federal statute should be read as a legal term of art with a well-known legal significance and thus interpreted using its accumulated "legal tradition and

meaning of centuries of practice[,]" not just at one point in time. *See USA Sales, Inc. v. Office of United States Trustee*, 532 F. Supp. 3d 921 (C.D. Cal. 2021) (quoting *Morrissette v. United States*, 342 U.S. 246, 263 (1952)); *cf. Frank's Landing Indian Community v. National Indian Gaming Commission*, 918 F.3d 610, 613 (9th Cir. 2019). The district court's ruling and Tribal Courts' argument analyzes the political meaning of "territories[,]" yet when considering the historical backdrop of "designations like state, territory [,] or possession found in federal full faith and credit recognition statutes," the Tribal Court of Appeals itself recognized that designations clearly had "geographic, rather than political meanings. Such terms were meant to include the courts of the Indian tribes, as in [the United States Supreme Court decision of] *Mackey*." *See Eberhard v. Eberhard*, 24 ILR 6059, 6065 (Chy. R. Sx. Tr. Ct. 1997) (App. 007, R. Doc. 1-66, at 7.)

The *Eberhard* Court's conclusion supporting a geographical connotation of "territories . . .of the United States" is consistent with the legal meaning of "territory": "1**.** A geographical area included within a particular government's jurisdiction; the portion of the earth's surface that is in a state's exclusive possession and control." Territory, Black's Law Dictionary (11th ed. 2019); *see also In re Settoon Towing, L.L.C.,* 859 F.3d 340, 347 (5th Cir. 2017) ("When a common legal term is used but not specifically defined in a statute, we give that term its general legal meaning."). Tribes and their reservations effortlessly fall

within that definition as they are located within the geographic boundaries of the United States and are subject to its plenary power. *See Kelly v. Kelly*, No. DV 08-013, 2008 WL 7904116, at *5-6 (Stand. R. Sioux Trib. Ct. June 23, 2008) (analyzing the Black's Law Dictionary and concluding that the Indian tribe and its reservation is a "territory" under 25 U.S.C. § 1738); *see also United States v. Kagama*, 118 U.S. 375, 379-80 (1886) ("these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union."). Indeed, the only Federal Court of Appeals to consider whether tribes and their reservations are "territories . . . of the United States" under the PKPA has answered in the affirmative. *See In re Larch*, 872 F.2d at 68.

B. Congressional Intent of the PKPA

As stated above, the district court determined that the PKPA was ambiguous. Opinion and Order on Summary Judgment (App. 289 R. Doc. 103, at 29.) If an ambiguity exists, courts look to the "legislative history and any other authorities that might facilitate [the court's] efforts to discern Congress's intent behind the particular statutory provision in question[.]" *See Owner-Operator Independent Drivers Ass'n, Inc. v. Supervalu, Inc.*, 651 F.3d 857, 863 (8th Cir. 2011). Thus, the PKPA's reference to "territory . . . of the United States" must be interpreted through the lens of Congress's intent behind the PKPA.

When examining the PKPA's purpose, it is clear that Congress intended it to apply throughout the United States to address the "national epidemic of parental kidnaping." *See Thompson v. Thompson*, 484 U.S. 174, 180 (1988); *see* Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(a)-(c), 94 Stat. 3568-69 (Dec. 28, 1980). Articulating as much, Congress stated in its Findings and Purposes of the PKPA that "it is necessary . . . to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions." Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(b), 94 Stat. 3568-69 (Dec. 28, 1980). A consistent nationwide application was crucial for both the families and the competing judicial systems. As recognized by the Standing Rock Sioux Court, "[i]Inconsistent results by competing sovereigns detrimentally impact not only the parties who are caught in the middle, but [the] interests of the sovereigns themselves." *Kelly*, 2008 WL 7904116, at *4.

Despite the foregoing, both the district court and the Tribal Courts failed to consider the congressional intent and policy of the PKPA when interpreting its language. *See* Opinion and Order on Motion for Summary Judgment (App. 284-92 R. Doc. 103, at 24-32.) Instead, both the district court and the Tribal Courts erroneously narrow their analyses to exclude the congressional intent of the PKPA

and only address "whether the text of the PKPA [or] its legislative history [made] any reference to Indian tribes[.]" *See, e.g.,* Tribal Courts' Brief at 20-21; Opinion and Order on Motions for Summary Judgment (App. 289-292 R. Doc. 103, at 29-32.); c*f. Owner Operator Independent Drivers Ass'n*, 651 F.3d at 866 ("[t]he goal of statutory analysis, of course, is to give effect to the **Congressional intent behind the statute's enactment**.") (quoting *Estate of Farnam v. Comm'n of Internal Revenue*, 583 F.3d 581, 584 (8th Cir. 2009)) (emphasis added). Under their narrowed analysis, the district court and the Tribal Courts merely rely upon the absence of reference to "tribes" or "Indian country" to support that the PKPA does not extend to Indian tribes, their reservations, and their tribal courts. *See generally* Tribal Courts' Brief; Opinion and Order on Motions for Summary Judgment (App. 289-292 R. Doc. 103, at 29-32.)

Even though neither the district court nor the Tribal Courts considered the congressional intent of the PKPA when interpreting its language, one needs to look no further than the district court's Opinion and Order and the Tribal Court of Appeal's *Eberhard* decision to uncover their views as to the construction of the PKPA that would "carry into execution the will of the Legislature." *See Ashcraft*, 732 F.3d at 862. The district court admitted that applying the PKPA to tribes "might have better served Congress's purposes" and that the district court's interpretation excluding tribes from the scope of the PKPA "does not prevent

jurisdictional competition and conflict between [s]tate and tribal courts over child custody orders." *See* Opinion and Order on Motions for Summary Judgment (App. 292 R. Doc. 103, at 32.) (internal quotation marks omitted). In an even stronger declaration, the Tribal Court of Appeals had at one point affirmed that "Congress intended the PKPA to apply to tribal courts as a means of integrating them, and other courts, into the cooperative federalism framework of the national union." *Eberhard*, 24 I.L.R. at 6064 (App. 006 R. Doc. 1-66, at 6); *see id.* at 6063 (App. 005 R. Doc. 1-66, at 5) ("coverage of Indian tribes by the PKPA best furthers . . . the purposes of that legislation[.]").

The Tribal Courts attempt to undermine its own reasoning in *Eberhard* by claiming that the decision was based in part on mere "aspirations" of reciprocity and cooperation between tribes and states. Tribal Courts' Brief at 9. The Tribal Court had previously made the same claims when overruling *Eberhard* in this case, stating that "[w]ithout any demonstration of *actual* tribal-state reciprocity, the foundation of *Eberhard* gives way." (App. 014 R. Doc. 80-1, at 16.) Yet courts are bound by the rule of law. And the rule of law was precisely the basis for the Tribal Court of Appeals' *Eberhard* decision, including extensive legal reasoning and analysis. *See generally Eberhard*, 24 I.L.R. 6059 (App. 001-010 R. Doc. 1-66, at 1-10.) Any aspirations that other courts would join its sound legal reasoning in *Eberhard* do not undercut the Tribal Court of Appeals' extensive legal analysis

leading to the conclusion that the law, not the Tribal Courts' aspirations, supports the PKPA's applicability to the tribes.

Bearing in mind any ambiguity in the PKPA's phrase "territories . . . of the United States," and the congressional intent associated with the PKPA, caselaw analyzing that specific statute provides the best guidance in this matter. *See, e.g., Eberhard*, 24 I.L.R. 6059 (App. 001-010 R. Doc. 1-66, at 1-10); *cf. In re Larch,* 872 F.2d 66. On the other end of the spectrum, and carrying much less weight, is caselaw interpreting "territories" in contexts far removed from the PKPA, the full faith and credit principles, and the congressional intent related to the same. *See Owner-Operator Independent Drivers Ass'n*, 651 F.3d at 863. Both the district court and the Tribal Courts err in focusing on the latter category of caselaw, including the Supreme Court decisions of *United States v. Wheeler*, 435 U.S. 313 (1978)*, Puerto Rico v. Sanchez Valle,* 579 U.S. 59 (2016) and *Denezpi v. United States*, 142 S. Ct. 1838 (2022). *Cf.* Opinion and Order on Summary Judgment (App. 290 R. Doc. 103 at 30); Tribal Courts' Brief at 30-33, 39. Those cases do not involve an interpretation of "territory . . . of the United States" with the congressional intent of the PKPA in mind, and indeed the cases are not even engaging in statutory interpretation at all. *See Wheeler*, 435 U.S. 313 (for purposes of the dual-sovereignty doctrine of the Fifth Amendment's Double Jeopardy Clause, analyzing whether tribes are separate sovereigns when punishing tribal

offenders)[2]; *Sanchez Valle*, 579 U.S. 59 (for purposes of the dual-sovereignty doctrine, analyzing whether Puerto Rico is a separate sovereign); *Denezpi*, 142 S. Ct. 1838 (for purposes of the dual-sovereignty doctrine, analyzing whether the federal government may enforce a federal criminal law and separately enforce a corresponding tribal criminal law) *cf. Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929 (2022) (analyzing Indian Gaming Regulatory Act/Restoration Act).[3]

Silence within the PKPA's legislative history as to Indian tribes does not suggest Congress intended to exempt tribes from the purview of the PKPA. Instead, including tribes within the scope of the PKPA is consistent with the rule that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary."[4] *See E.E.O.C. v. Fond du Lac Heavy Equipment & Const. Co., Inc.*, 986 F.2d 246, 248 (8th Cir. 1993). This also

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

[3] Even when analyzing the term "territories" in other federal statutes, 25 U.S.C. § 175, *inter alia*, shows that "territories" can certainly include tribes and their reservations. *See* 25 U.S.C. § 175 ("In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.").

[4] The expectation for Congress to identify when a generally applicable statute is not intended to apply to tribes is in line with *DeMent*'s tender that "an analysis of the legislative history may show that Congress did not intend for the PKPA to apply to Indian tribes." *See DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514 n.4 (8th Cir. 1989).

distinguishes the Maine Indian Claims Settlement Act, ICWA, and other Acts specific to tribal interests, from the PKPA, a generally applicable statute. *Cf.* Tribal Courts' Brief at 40 & n.16. In addition, and unlike the two acts considered *in pari materia* in *Menominee Tribe v. United States*, 391 U.S. 404 (1968), the Maine Indian Claims Settlement Act was not considered by the same committees of the Senate and the House as the PKPA. *Cf.* Tribal Courts' Brief at 40.

There are exceptions to the rule of generally applicable statutes, including where a Tribe's right to self-governance or its ability to "make [its] own substantive law in internal matters and to enforce that law in [its] own forums[,]" is affected. *Cf. Fond du Lac Heavy Equipment & Const.*, 986 F.2d at 249. However, the PKPA cannot be read as conflicting with that right to self-governance. By its express terms, the PKPA does not involve strictly internal tribal matters, as jurisdictional boundaries must be crossed to implicate its provisions.

Despite the foregoing, even if this Court determines that the PKPA does not plainly encompass tribes, the current circumstances present one of those "'rare cases' [that] when a statute's plain text produces a result 'demonstrably at odds with the intentions of its drafters, ... those intentions must be controlling.'" *See Owner-Operator Independent Drivers Ass'n*, 651 F.3d at 863 (quoting *United Van Lines, LLC,* 556 F.3d 690, 694 (8th Cir. 2009)). There is no question that the PKPA was intended to "deter interstate abduction and other unilateral removals of

children" and to limit parents' ability to forum shop amongst a variety of jurisdictions. *See* 28 U.S.C. § 1738A. To satisfy that clear intent, tribes and their reservations within the geographic boundaries of the United States must be encompassed by the PKPA. To conclude otherwise "would lead to . . . seemingly illogical and indefensible results." *See Eberhard*, 24 I.L.R. at 6066 (APP 008).

C. Full Faith and Credit laws

Although their interpretations are not directly at issue, the district court and Tribal Courts point out that certain full faith and credit statutes, such as the Full Faith and Credit Act for Child Support Orders, explicitly encompass "Indian country" for the proposition that Congress knew how to include Indian tribes within the scope of full faith and credit statutes. *See, e.g.,* Tribal Courts' Brief at 38-40. Accordingly, the contention is that because Congress did not reference "Indian tribes" or "Indian country" in addition to United States territories and possessions in the PKPA, Congress opted not to extend the PKPA to tribes. In addition to flipping the above-discussed rule of general applicability on its head, this position fails to recognize the general progression of full faith and credit laws.

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

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

> the Effect thereof.

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

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

Tribal Courts' Brief at 24 (quoting *Milwaukee Cty. v. M.E. White Co.,* 296 U.S. 268, 276-77 (1935)). The First Congress of the United States followed suit, enacting a full faith and credit provision consistent with the Constitution. *See* Full Faith and Credit Act, ch. 11, 1 Stat. 122 (May 26, 1790), *codified as amended*, 28 U.S.C. § 1738. Although the earliest version of the federal statute was more in line with the Constitution's Full Faith and Credit Clause in that it referenced only "states," 28 U.S.C. § 1738 was subsequently amended to include "Territories" and "Possessions" of the United States:

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

> court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

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

The Tribal Courts allege a distinction between earlier full faith and credit provisions and subsequent full faith and credit statutes that specifically reference Indian tribes, such as those addressing child support orders and protection orders. Those Acts, while enacted during a time where a distinction was more evident, support a consistent application of full faith and credit to the tribes and their reservations. For example, the Full Faith and Credit of Child Support Orders Act, codified at 28 U.S.C. § 1738B (just after the PKPA) was intended to be fully consistent with the PKPA:

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

See S. Rep. 103-361, 5, 103rd Cong., 2d Sess. 1994, 1994 U.S.C.C.A.N. 3259, 3261 (Aug. 25, 1994) (emphasis added). Ultimately, as the Cheyenne River Tribal Court of Appeals stated in its now overturned *Eberhard* decision, it "can discern no logical

congressional policy which would distinguish child support orders governed by 28 U.S.C. § 1738B or protection orders governed by 18 U.S.C. § 2265, where the statutes expressly apply to tribal courts and their orders, from child custody orders governed by the PKPA." *Id.* at 6066 (App. 008 R. Doc. 1-66, at 8.)

D. Inapplicability of the Indian Child Welfare Act

As with the *Eberhard* decision, the Tribal Court Respondents have reversed their position on the applicability of the Indian Child Welfare Act (ICWA), contending that pursuant to ICWA and its Tribal Children's Code, they have *exclusive* jurisdiction over this matter. Tribal Courts' Brief at 22-23. Yet in its 2019 decision, the Tribal Court of Appeals provided that "[i]n the end, this is an 'ordinary' custody case" and without reservation concluded that ICWA only applies to cases beginning in state court and did not apply to the matter at hand. (App. 148 R. Doc. 80-1, at 20). *Cf. DeMent,* 874 F.2d at 515 ("This case no longer represents a child custody battle; it has become a dispute over whether a tribal court violates a non-Indian's due process rights by refusing to give full faith and credit to a state custody decree."); *In re Larch*, 872 F.2d at 69 (stating that ICWA "clearly indicates that a state court may lawfully award custody of an Indian child to a non-Indian parent in a divorce proceeding.").

Regardless of the Tribal Courts' recent shift in their attempt to invoke ICWA, the ICWA regulatory scheme is clear and unequivocal: "ICWA does not apply to .

. . (1) A Tribal court proceeding[.]" *See* 25 C.F.R. § 23.103(b). In addition, the Tribal Courts' reliance upon 25 U.S.C. § 1911(a) is misplaced. That statute provides:

> 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, except where such jurisdiction is otherwise vested in the State by existing Federal law. . . .

25 U.S.C. § 1911(a). Under these circumstances, however, the children should not be determined to "reside" or be "domiciled" on the reservation because their presence was in violation of the North Dakota state court orders. *See Merrill v. Altman*, 2011 S.D. 94, ¶¶ 16-22, 807 N.W.2d 821, 825-27 (concluding that an Indian child did not "reside" on the reservation for purposes of ICWA because the child's presence was in violation of a court order, and also stating that "such forum-shopping cannot be condoned as it is incompatible with existing jurisdiction"); *Cf.* (R. Doc. 1-7, at 2-3; R. Doc. 1-13.) Indeed, removing children to different locations to invoke a that court's jurisdiction is precisely what the PKPA expressly prohibits through subsection (d):

> The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met **and such State remains the residence of the child or of any contestant.**

28 U.S.C. § 1738A(d)(emphasis added).

The Tribal Courts also ignore the exception in 25 U.S.C. § 1911(a). A tribe's "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" must give way when "**such jurisdiction is otherwise vested in the State by existing Federal law**. . . ." *See* 25 U.S.C. § 1911(a) (emphasis added). Here, the PKPA vests jurisdiction in the North Dakota state courts and eliminates any plausible argument that ICWA grants the Tribal Courts exclusive jurisdiction in this matter.

Finally, this matter is not a "child custody proceeding" within the confines of ICWA. The Tribal Courts ignore the key qualifying provision in that definition: "Such term . . . shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime . . . ." *See* 25 U.S.C. § 1903(1). Here, Ms. Taylor's crime, among others, of parental kidnapping forecloses ICWA's applicability.

The Tribal Courts' unlawful placement of the children with a maternal aunt is also not a "foster care placement" under ICWA's purview. *See* 25 U.S.C. § 1903(1)(i). ICWA defines a "foster care placement" as:

> any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated[.]

25 U.S.C. § 1903(1)(i). However, the only reason Mr. Nygaard cannot have his child returned upon demand is because of the Tribal Courts' invalid "temporary" decision and their continued refusal to return his daughter. Most notably, there has never been an action filed by a Tribal Prosecutor against Mr. Nygaard alleging that his child was in need of care, a process required pursuant to the Tribe's own laws. *See* Tribal Children's Code § 7.02(D); § 7.07 (requiring that the petition be filed by a "presenting officer" on behalf of the Tribe); § 8.05 (providing that "[i]n cases where it appears that a child has been or will be abused, or whenever the child has been taken into emergency custody, the prosecutor, in consultation with the tribal, federal, or state social services agency, may file a petition in the Children's Court, utilizing the placement procedures found in section 7.04"). Instead, the Tribal Court action began, and remains, a private party's petition for guardianship over children despite the fathers' objections and pleas for their return. *See also* (App. 202 R. Doc. 80-1, at 74.) ("There are very serious allegations of abuse and neglect being made in this matter. If D.S.S. believed the children to be abused and/or neglected by the custodial parent, in this case the fathers, it would have been mandatory for the agency to investigate and document such abuse or neglect and file the proper petition in court instead of directing a family member to file a private custody petition."). While the Tribal Courts state that "it is within the self-governing authority of the Tribal Court to hear and decide a petition for temporary

custody and to provide for the children's care, custody, and protection[,]" at no point has that occurred by the tribal authorities. *Cf.* Tribal Courts' Brief at 23.

In essence, the Tribal Courts have endorsed and facilitated a private party's taking of a child from a parent and then requiring the parent to disprove allegations made by a third party in order to regain custody of his child. Even if the North Dakota state court orders awarding custody to Mr. Nygaard were entirely disregarded, the actions and orders taken by the Tribal Courts have unlawfully detained the child from her father.

E. Plenary Power of the Federal Government.

The Tribal Courts invest a portion of their argument in discussing Tribal justice systems and tribes' inherent authority over domestic affairs on the reservation, including child custody proceedings for tribal member children that reside on the reservation. *See* Tribal Courts' Brief at 21. In the specific context of tribal judicial systems, the Tribal Courts point out that Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands[.]" Tribal Courts' Brief at 4. Yet a tribe's inherent authority is not unbridled. Given the ward-guardian relationship with the federal government, the Tribe is "subject to the federal government's superior and plenary powers[,]" as stated above. *See United States v. Red Lake Band of Chippewa Indians*, 827 F.2d

380, 383 (8th Cir. 1987). "This status has been interpreted to mean that Indian tribes retain all fundamental attributes of sovereignty unless divested of them by federal law or by the 'necessary implication of their dependent status.'" *Id*. In other words, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *See Fond du Lac Heavy Equipment and Const. Co., Inc.*, 986 F.2d at 248 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978)). Ultimately, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the United States Supreme Court has] consistently described as 'plenary and exclusive.'" *United States v. Lara,* 541 U.S. 193, 200 (2004). Here, Congress has invoked those powers through its enactment of the PKPA.

Moreover, a tribe's inherent authority and right of self-governance, including to adjudicate "disputes affecting personal and property rights on Native lands" is not limitless. The Tribal Courts posit that they are merely exercising their judicial authority over the Tribe's "domestic affairs." *See* Tribal Courts' Brief at 22. But this case implicates more than mere "internal matters" of a tribe. Indeed, this matter originated in North Dakota state courts, where it was being actively litigated by both Mr. Nygaard and Ms. Taylor.

It also cannot be said that the Tribe has inherent authority over the children because they reside on the reservation. While a tribe has authority over domestic

affairs including child custody, this is a case where all parties, including the mother, fathers, and both children, were domiciled and resided in North Dakota prior to Ms. Taylor's unlawful action culminating in a conviction for parental kidnapping.

Finally, no court's inherent authority supplants Mr. Nygaard's constitutional right to due process, including the requirement that the presiding court have personal jurisdiction over him. *See DeMent*, 874 F.2d at 514 ("[I]f a tribal court acts outside the scope of its jurisdiction, that action may constitute a due process violation."); *cf. id.* ("[W]e believe that a tribal court exercising in personam jurisdiction over a nonmember nonresident parent of a minor child domiciled within the Indian reservation may violate due process under section 1302(8) of the [Indian Civil Rights Act]"). Ultimately, while its inherent authority allows the Tribal Courts to rule on certain matters within its jurisdiction, the federal government's enactment of the PKPA has divested the Tribal Courts of that authority in cases like this.

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

In addition to a reversal of the district court's grant of Tribal Courts' Motion for Summary Judgment, an Order directing the grant of Mr. Nygaard's Motion for Summary Judgment is appropriate. Despite their echoing of vague abuse allegations,[5] there is no evidence in the Tribal Court record that justifies the Tribal

[5] The Tribal Courts claim that "the alleged abuse of T.R.S. had been 'substantiated' by North Dakota Social Services, but the local prosecutor found insufficient

Courts' continued jurisdiction. *Cf.* 28 U.S.C. § 1738A(c). Notably, in the initial pleadings in which the maternal aunt and uncle filed a petition for custody of the children, there is no reference to abuse allegations. The only basis for the petition was that Ms. Taylor was arrested and unavailable to care for the children, and otherwise supported by Ms. Taylor's declaration stating that "I Tricia Bernice Taylor give my sister Jessica Ducheneaux custody of my two children[.]" (R. Doc. 1-20, at 3, 7, 8, 11, 12.) As clear evidence of the arbitrariness of the Tribal Court's continued detention of the children from their fathers, the allegations were only

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evidence to file a criminal charge[.]" Tribal Courts' Brief at 13. In support of this assertion, the Tribal Courts cite to their December 20, 2018 Findings of Fact issued by the Tribal Children's Court. Those Findings were issued after a hearing on December 19, 2018, and pursuant to the remand order of the Tribal Court of Appeals that a hearing be conducted "for the sole purpose to receive evidence and witness testimony provided by the parties as to the roles of the Federal Bureau of Investigation (FBI) and South Dakota Department of Social Services (SD DSS) in effecting an arrest of Ms. Tricia Taylor, the mother of the children on the Cheyenne River Sioux Reservation, turning her children over to the SD DSS, and the ensuing legal action that was brought in the Cheyenne River Sioux Tribal Court." (R. Doc. 1-64, at 4.) At the December 19, 2018, hearing, counsel for the Fathers noted a special appearance and did not call any witnesses because they had no information regarding the circumstances of Ms. Taylor's arrest. (R. Audio recording of Dec. 19, 2018 hearing at 2:30). Counsel for the Fathers requested a standing objection as to anything outside of the narrow issue on remand and they otherwise had no notice that evidence regarding the allegations would be presented. (R. Audio recording of Dec. 19, 2018 hearing at 8:15). In addition, the only evidence that the North Dakota Social Services had "substantiated" any alleged abuse was the testimony by the Tribally-appointed guardian ad litem, in which she contradicted herself, first stating several times that the investigation had not been completed, but then stating that it had been completed and the abuse was substantiated. Mr. Nygaard vehemently denies any and all abuse allegations.

against one father. In any event, unproven allegations by a private party, are insufficient to deprive a parent of his child (and a child of her father).

CONCLUSION

Over three thousand days have passed since Mr. Nygaard's child was taken from him. His child that he loves and for whom he has custody pursuant to a valid court order.

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

Dated this 30th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

Comes now the undersigned counsel for Appellant and, with regard to the foregoing document, certifies as follows:

1. That the aforementioned document, was, before submission, scanned by the undersigned for viruses on November 30, 2022, utilizing the website http://www.virustotal.com and was found to be virus free.
2. That the aforementioned document complies with Fed. R. App. P. 32(a)(5) in that it was prepared in a proportionally spaced typeface using Microsoft Word 0365, Times New Roman typeface in font size 14.
3. That the aforementioned document complies with Fed. R. App. P. 32(a)(7)(B)(ii) in that it contains 6,300 words.

Dated this 30th day of November, 2022.

/s/ Stacy R. Hegge
Stacy R. Hegge
GUNDERSON, PALMER, NELSON & ASHMORE, LLP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via the Court's CM/ECF filing system on counsel for all Appellees.

Dated this 30th day of November, 2022.

/s/ Stacy R. Hegge
Stacy R. Hegge