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
DISTRICT OF SOUTH DAKOTA, CENTRAL DIVISION
(3:19-cv-03016-RAL)

APPELLANT AARIN NYGAARD'S BRIEF

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SUMMARY OF THE CASE

Appellant Aarin Nygaard filed a Petition for Writ of Habeas Corpus because the Cheyenne River Sioux Tribal Court system and his child's maternal relatives have repeatedly refused to honor a valid state court Order awarding him custody of his child, C.S.N. The Tribal Court officials and C.S.N.'s maternal relatives have controlled C.S.N.'s custody status in violation of federal law after C.S.N.'s mother absconded to the Cheyenne River Sioux Reservation with C.S.N. and another child.

The primary issue in this case is whether the Parental Kidnapping Prevention Act (PKPA) applies to tribes such that it precludes the Tribal Courts' jurisdiction and requires the Tribal Courts to give the North Dakota state court Order full faith and credit. The Tribal Court Respondents and Nygaard, together with his co-Petitioner, filed cross motions for summary judgment. Interpreting the language of the PKPA, the United States District Court for the District of South Dakota held that the Act does not apply to tribes. Accordingly, the District Court granted the Tribal Court Respondents' motion for summary judgment and denied Petitioners' motion.

Nygaard appeals the District Court's decision, contending that the District Court erred in its interpretation of the PKPA, that the PKPA applies to tribes, and that Nygaard is entitled to judgment as a matter of law.

Aarin Nygaard requests 30 minutes of oral argument to present that the District Court's ruling is contrary to the PKPA.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellant Aarin Nygaard is a private individual and is not a non-governmental corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

On August 28, 2019, Aarin Nygaard filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Dakota. Within its September 24, 2021, Opinion and Order Denying Motion to Dismiss, the District Court ruled that it had jurisdiction over this matter under 28 U.S.C. section 1303, and separately concluded that it may also have jurisdiction under 28 U.S.C. section 1331. *See* Opinion and Order Denying Motion to Dismiss at 31 & n. 23.

On May 11, 2022, the court entered an Opinion and Order Granting Tribal Defendants' Motion for Summary Judgment and the State Defendants' Motion to Dismiss. A judgment was filed on that same date, and Nygaard timely filed a Notice of Appeal on June 10, 2022. The Judgment is a final order and this Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF ISSUES

1. Whether the District Court erred when it determined that the PKPA does not apply to Indian reservations, therefore erring by granting Tribal Defendants' Motion for Summary Judgment and denying Aarin Nygaard's Motion for Summary Judgment.

   In re Larch, 872 F.2d 66 (4th Cir. 1989)

   Eberhard v. Eberhard, 24 I.L.R. 6059 (Chy. R. Sx. Tr. Ct. 1997)

STATEMENT OF THE CASE

A. Factual Background

This legal journey for Aarin Nygaard and Terrance Stanley (collectively "Fathers") to regain physical custody of their children has a long and complicated history, including proceedings in North Dakota state court, the Cheyenne River Sioux Tribal Children's Court (Tribal Children's Court), the Cheyenne River Sioux Tribal Court of Appeals (Tribal Court of Appeals), the United States District Court for the District of North Dakota, and the court recently appealed from, the United States District Court for the District of South Dakota (District Court). While both Nygaard and Stanley have been deprived of their parenting time with their respective child at the hands of the Appellees, only Nygaard pursues this appeal; however, facts relating to both are relevant and included in this background section. In addition to the information provided below, the facts and background of this case are largely set forth in the District Court's Opinion and Order Denying Motion to Dismiss and its Opinion and Order Granting Tribal Defendant's Motion for Summary Judgment and the State Defendants' Motion to Dismiss. APP 044-89; R. Doc. 69; APP 261-93; R. Doc. 103.

This case involves Appellant Aarin Nygaard and his child, C.S.N. (born xx/xx/2013), as well as Terrance Stanley and his child, T.R.S (born xx/xx/2007). APP 235, ¶ 1; R. Doc. 96 at 1. Tricia Taylor (Tricia) is the mother of both children,

and all were domiciled in Fargo, North Dakota. APP 016, ¶ 24; R. Doc. 8 at 6; APP 235, ¶ 1; R. Doc. 96 at 1; APP 116, ¶ 2; R. Doc. 78 at 2. In March 2014, Nygaard initiated a lawsuit against Tricia in state district court for Cass County, North Dakota, seeking primary custody of C.S.N. among other things. APP 262-63; R. Doc. 103 at 2-3. After Tricia filed an answer and counterclaim in state court, the parties engaged in mediation and ultimately agreed to an interim shared parenting arrangement which the North Dakota state court adopted on July 25, 2014. APP 262-63; R. Doc. 103 at 2-3.

On August 28, 2014, a day that will forever haunt the Fathers, Tricia violated the stipulated interim custody order entered by the North Dakota state court and absconded from North Dakota to the Cheyenne River Indian Reservation (Reservation) with both children, who were six years old and one year old at the time. APP 119, ¶ 17; R. Doc. 78 at 5; APP 263; R. Doc. 103 at 3. Tricia was later convicted in North Dakota state court for parental kidnapping. APP 116, ¶ 2; R. Doc. 78 at 2; APP 266; R. Doc. 103 at 6. She was arrested by the Federal Bureau of Investigation on November 19, 2014, at which time the children were placed in the care of Tricia's brother, Ted Taylor Jr. (Ted). APP 236, ¶ 3; R. Doc. 96 at 2.

In the interim, Fathers sought and obtained custody orders from the North Dakota state court. APP 049; R. Doc. 69 at 6; APP 119, ¶ 18; R. Doc. 78 at 5; APP 120, ¶ 19; R. Doc. 78 at 6. The initial orders were ex parte, but subsequent orders

were issued on October 3, 2014 (for C.S.N.) and November 19, 2014 (for T.R.S.), after a hearing was held for which Tricia received notice but failed to appear. APP 049-50; R. Doc. 69 at 6-7. Final judgments were later obtained, again after proper notice to Tricia. APP 056; R. Doc. 69 at 13; APP 122, ¶ 29; R. Doc. 78 at 8.

Meanwhile, in December 2014, Ted initiated an action in Tribal Children's Court, requesting temporary custody of the children, although the request was later changed to seek the children's placement with Jessica Ducheneaux (Jessica), Tricia's sister. APP 119, ¶¶ 21-23; R. Doc. 78 at 6; APP 244-45, ¶¶ 22-24; R. Doc. 96 at 10-11. Without providing any notice of the Tribal Children's Court proceeding to the Fathers, the Tribal Children's Court concluded that it had personal and subject matter jurisdiction over the matter and granted two Temporary Custody Orders awarding custody of the children first to Ted, and then to Jessica, until further Order of the Tribal Children's Court. *Id.*

After becoming aware of the Tribal Children's Court's Order, Nygaard appealed that decision to the Cheyenne River Sioux Tribal Court of Appeals (Tribal Court of Appeals) in March 2015, challenging *inter alia* the Tribal Children's Court's jurisdiction and raising due process violations. APP 120-21, ¶ 24; R. Doc. 78 at 6-7. Within the Cheyenne River Tribal Court system, Fathers relentlessly challenged the Tribal Court's jurisdiction over the custody of the children pursuant to the PKPA and given the first-in-time North Dakota state court proceedings and

custody determinations. APP 057; R. Doc. 69 at 14; APP 074; R. Doc. 69 at 31; APP 268-69; R. Doc. 103 at 8-9. Fathers did not have to look far for authority supporting their position - the Tribal Court of Appeals, in a 1997 decision entitled *Eberhard v. Eberhard*, 24 I.L.R. 6059 (Chy.R.Sx.Tr.Ct. 1997), had analyzed the PKPA and unequivocally determined that the PKPA applies to the Tribe. *Eberhard* was thus controlling law in 2014, when Tricia Taylor fled North Dakota with the children to the Cheyenne River Sioux Reservation and when Fathers had initially been awarded custody of their children by a North Dakota state court of competent jurisdiction. APP 001-010; R. Doc. 1-66. *Eberhard* was also controlling law when the Tribal Children's Court awarded custody of the children to a nonparent in January 2015, without any notice to Fathers. APP 001-010; R. Doc. 1-66. As *Eberhard* was controlling law, Fathers spent years in the Tribal Children's Court and the Tribal Court of Appeals arguing that the Tribal Courts had no jurisdiction over the child custody matter based on that precedent. *See e.g.* APP 120, ¶ 24; R. Doc. 78 at 6-7; APP 053; R. Doc. 69 at 10; APP 121, ¶ 25; R. Doc. 78 at 7; APP 025, ¶ 64; R. Doc. 8 at 15; APP 097, ¶ 64; R. Doc. 70 at 8; APP 123, ¶ 32; R. Doc. 78 at 9; APP 129-211; R. Doc. 80-1.

On December 22, 2015, the Tribal Children's Court *inter alia* questioned the applicability of the PKPA to the Tribe despite *Eberhard*, and ultimately denied Fathers' Motion to Dismiss for Lack of Jurisdiction. APP 025, ¶ 64; R. Doc. 8 at

15; APP 056; R. Doc. 69 at 13; APP 097, ¶ 64; R. Doc. 70 at 8; APP 122-23, ¶ 31; R. Doc. 78 at 8-9; APP 249-50, ¶ 32; R. Doc. 96 at 15-16. Fathers appealed to the Tribal Court of Appeals and specifically addressed the application of the PKPA to the Tribe and the *Eberhard* precedent. APP 057; R. Doc. 69 at 14; APP 123, ¶ 32; R. Doc. 78 at 9; APP 250, ¶ 33; R. Doc. 96 at 16; APP 270; R. Doc. 103 at 10. Fathers directly presented the Tribal Court of Appeals with the question of whether the PKPA applies. *Id.* Instead of addressing the application of the PKPA to the tribe - a purely legal question - the Court remanded for evidence and findings of fact addressing the "home state" of the children and the circumstances of the children's removal to the Reservation. APP 027, ¶ 69; R. Doc. 8 at 17; APP 098, ¶ 69; R. Doc. 70 at 9; APP 123-24, ¶¶ 33-35; R. Doc. 78 at 9-10; APP 250, ¶¶ 34-36; R. Doc. 96 at 16-18; APP 271; R. Doc. 103 at 11. Because the Tribal Court of Appeals sought findings of fact for purposes of applying the provisions of the PKPA to the circumstances of this matter (that is, what constituted the child's home state), the purely legal (and threshold) question as to applicability of the PKPA was implicitly answered in the affirmative at that early point in the Tribal Court litigation. *See id.* In other words, the Tribal Court of Appeals could have addressed the purely legal question of whether it was bound by PKPA, but instead it requested findings as to

the facts relevant to the PKPA's underlying jurisdictional questions, seemingly entering the Act into its analysis in the first instance.[1] *See id.*

In 2018, Fathers finally thought they had received relief when the Tribal Children's Court recognized *Eberhard's* binding precedent that the PKPA applied to the Tribe and its courts.[2] APP 028, ¶ 74; R. Doc. 8 at 18; APP 062; R. Doc. 69 at 19; APP 099, ¶ 74; R. Doc. 70 at 10; APP 125, ¶ 42; R. Doc. 78 at 11; APP 254, ¶ 43; R. Doc. 96 at 20; APP 275; R. Doc. 103 at 15. Justice was short-lived, however.

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[1] The case of *Mitchell v. Preston*, 439 P.3d 718 (Wy. 2019) sheds further light upon the Tribal Court's perception of the PKPA as governing law during the period in which the Fathers were arguing for its applicability in their own Tribal Court case. In *Mitchell*, a Wyoming state court established custody of a child, in 2013 granting the father temporary custody subject to the mother's visitation. *See id.* at 720. Shortly thereafter, father moved to the Cheyenne River Indian Reservation and petitioned the Tribal Court for temporary full custody of the child on February 25, 2014. *Id.* The Tribal Court dismissed the father's petition because of the pending Wyoming state court custody proceeding. *Id.* The Tribal Court subsequently entered a couple emergency custody/protection orders concerning the child. *Id.* at 721. One such Order was a March 10, 2016 Order where the Cheyenne River Tribal Court "recognize[ed] the State of Wyoming had primary jurisdiction over the child's custody, but stat[ed] the tribal court could exercise temporary emergency jurisdiction over the child pursuant to the Parental Kidnapping Prevention Act" *Id.* (emphasis added). Ultimately, a May 29, 2017 Tribal Court Order comprehensively analyzed *inter alia* the PKPA and "concluded that the [Wyoming state] court had continuing jurisdiction over the child's custody and the tribal court did not have jurisdiction." *Id.* at 722.

[2] Prior to the 2018 decision of the Tribal Children's Court, Fathers had separately pursued a lawsuit in the United States District Court, District of North Dakota. That lawsuit was dismissed on the basis of failure to exhaust tribal remedies. *See* APP 170-192; R. Doc. 80-1 at 42-64.

Within a month's time, the Cheyenne River Sioux Tribal Council adopted a Tribal resolution overruling *Eberhard*. APP 213-218; R. Doc. 80-40.

The Tribal Court of Appeals followed suit in 2019, ultimately deciding – for the first time ever – to overturn a prior decision. APP 129-158; R. Doc. 80-1 at 1-30. Upon Jessica Ducheneaux's appeal of the Tribal Children's Court decision in favor of the Fathers, the Tribal Court of Appeals: (1) concluded the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, does not apply to the Tribe; (2) overruled its own precedent in *Eberhard*, which had concluded that the PKPA applies to the Cheyenne River Sioux Tribe; (3) determined the Indian Child Welfare Act, 25 U.S.C. § 1903 *et seq.* did not apply because the concerns of ICWA are not involved when a custody proceeding begins in Tribal Court;[3] and (4) concluded this was an "ordinary" custody case needing to be resolved according to Cheyenne River Sioux Tribal Law. APP 064-65; R. Doc. 69 at 21-22; APP 084; R. Doc. 69 at 41; APP 126, ¶ 48; R. Doc. 78 at 12; APP 129-49; R. Doc. 80-1 at 1-21. The Tribal Court of Appeals overturned *Eberhard* not necessarily because it was wrongly decided in the first instance, but seemingly more so because it was "grounded largely in an optimistic sense of (impending) tribal-state reciprocity" that never came to

[3] Fathers agree that ICWA does not apply. *See* 25 U.S.C. § 1903(1) (noting a child custody proceeding under ICWA includes only a foster care placement, termination of parental rights, preadoptive placement, or adoptive placement); 25 U.S.C. § 1912(a) (governing certain "involuntary proceeding[s] in a State court").

fruition. The Tribal Court of Appeals stated that "there does *not* appear to be a single state case that requires the state to give full faith and credit to a tribal court judgment in the context of the PKPA." APP 142-144; R. Doc. 80-1 at 14-16.

B. Procedural Background in the District of South Dakota

After the Tribal Court of Appeals' 2019 decision, Fathers filed a Petition for Writ of Habeas Corpus with the District Court on August 28, 2019, and an Amended Petition on July 2, 2020. APP 011-43; R. Doc. 8. Some difficulties serving a number of the named respondents resulted in unfortunate delays of this case early on, continuing to prolong Fathers' separation from their children. Later, Tricia, Ted Taylor, Jessica Ducheneaux, and Edward Ducheneaux all failed to respond to the Petition and Default was entered accordingly. R. Doc. 36; R. Doc. 60.

Respondents Cheyenne River Sioux Tribal Court, Chief Judge Brenda Claymore, Cheyenne River Sioux Tribal Court of Appeals, and (then) Chief Justice Frank Pommersheim moved to dismiss the case against the Fathers on February 26, 2021, arguing that the District Court had no jurisdiction over the matter, that the Fathers had not exhausted their tribal court remedies, and that the Tribal Children's Court and Tribal Court of Appeals were protected from suit by sovereign immunity. *See* APP 044-89; R. Doc. 43; R. Doc. 69. The District Court held that the Tribal Children's Court and Tribal Court of Appeals had sovereign immunity and should be dismissed from the suit, but denied the Respondents' Motion to Dismiss in all

other respects and directed the Fathers and the individually-named Tribal judicial officers (Tribal Court Respondents) to address the issue of whether the PKPA applies to tribes for determinations of custody issues. APP 044-89; R. Doc. 69.

The Fathers and Tribal Court Respondents then filed cross motions for summary judgment on the issue of whether the PKPA applies to tribes such that tribal courts must not exercise jurisdiction in custody cases that are ongoing in another jurisdiction in accordance with the PKPA and must give full faith and credit to the custody orders of other jurisdictions. APP 111-14; R. Doc. 77; APP 219-21; R. Doc. 82. The South Dakota Department of Social Services (DSS) and two of its employees, named in the lawsuit because of their role in the placement of C.S.N. and T.R.S. and the invocation of Tribal Children's Court's (supposed) jurisdiction over the matter, also moved to dismiss the action against them while the cross motions were pending. R. Doc. 90. The District Court issued an Opinion and Order Granting Tribal Defendants' Motion for Summary Judgment and the State Defendants' Motion to Dismiss (Opinion and Order on Summary Judgment) on May 11, 2022, holding that the PKPA does not apply to tribal courts. APP 261-93; R. Doc. 103. On June 20, 2022, Aarin Nygaard timely filed his Notice of Appeal. APP 118, ¶ 9; R. Doc. 78 at 4.

Contrary to the North Dakota state court Orders granting the Fathers custody of their respective child, the children remain on the Reservation, albeit in the

physical custody of Tricia's sister Jessica and not with Tricia.[4] APP 117-18, ¶ 8; R. Doc. 78 at 3-4. To summarize the timeline and facts, Aarin provides the following:

Date	**Event**
2007	T.R.S., child of Terrance Stanley and Tricia Taylor is born. APP 119, ¶ 13; R. Doc. 78 at 5; APP 241, ¶ 14; R. Doc. 96 at 7.
2011	Terrance and Tricia divorce through a state court proceeding in Cass County, North Dakota and child support is subsequently ordered by that same court. APP 119, ¶ 14; R. Doc. 78 at 5; APP 241-42, ¶ 15; R. Doc. 96 at 7-8.
2013	C.S.N., child of Aarin Nygaard and Tricia Taylor is born. APP 119, ¶ 15; R. Doc. 78 at 5; APP 242, ¶ 16; R. Doc. 96 at 8.
March 2014	Aarin initiates state court custody proceeding in Cass County, North Dakota. Tricia subsequently submits to the North Dakota state court's jurisdiction, and files an answer, counterclaim, and motion. APP 119, ¶ 16; R. Doc. 78 at 16; APP 242, ¶ 17; R. Doc. 96 at 8.
July 25, 2014	Cass County District Court enters a stipulated interim order in Aarin and Tricia's custody case. Shortly thereafter, Tricia took C.S.N. to the Cheyenne River Sioux Reservation in violation of the parties' stipulated order. Tricia also took T.R.S. to the Cheyenne River Sioux Reservation at this same time. APP 047; R. Doc. 69 at 4; APP 119, ¶ 17; R. Doc. 78 at 5.

[4] 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 Nygaard in North Dakota. The North Dakota court ordered Tricia to be held in custody until Tricia returned C.S.N. to Nygaard, but "[t]he 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." "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." APP 118, ¶¶ 9-11; R. Doc. 78 at 4.

October 3, 2014	Cass County District Court enters amended interim order in Aarin's custody case, awarding Aarin custody of C.S.N. APP 049; R. Doc. 69 at 6; APP 119, ¶ 18; R. Doc. 78 at 5.
November 19, 2014	Cass County District Court enters interim order awarding Terrance custody of T.R.S. APP 120, ¶ 19; R. Doc.78 at 6.
November 26, 2014	Tricia was arrested by the Federal Bureau of Investigation. APP 120, ¶ 20; R. Doc. 78 at 6; APP 244, ¶ 21; R. Doc. 96 at 10; APP 266; R. Doc. 103 at 6.
December 1, 2014	Ted Taylor, Jr. files petition in Tribal Children's Court seeking custody of C.S.N. and T.R.S. Although listed as the fathers on the petition, at least Aarin did not receive notice of this petition and there is no indication in the Tribal Court record that Terrance received notice. APP 021, ¶ 46; R. Doc. 8 at 11; APP 051; R. Doc. 69 at 8; APP 095-96, ¶ 46; R. Doc. 70 at 6-7; APP 120, ¶ 21;R. Doc. 78 at 6; APP 266; R. Doc. 103 at 6.
December 18, 2014	Tribal Children's Court grants temporary joint custody of children to Ted Taylor Jr. and Jessica Ducheneaux. APP 021, ¶ 46; R. Doc. 8 at 11; APP 051; R. Doc. 69 at 8; APP 095-96, ¶ 46; R. Doc. 70 at 6; APP 120, ¶ 22; R. Doc. 78 at 6; APP 245, ¶ 23; R. Doc. 96 at 11.
January 13, 2015	Tribal Children's Court grants custody of C.S.N. and T.R.S. to Jessica Ducheneaux. APP 022, ¶ 48; R. Doc. 8 at 12; APP 052; R. Doc. 69 at 9; APP 120, ¶ 23; R. Doc. 78 at 6; APP 245, ¶ 24; R. Doc. 96 at 11; APP 267; R. Doc. 103 at 7.
March 2015	Aarin appeals the Tribal Children's Court's custody award, which was shortly thereafter remanded for "an immediate rehearing" as Tribal Court of Appeals concluded in its April 15, 2015, ruling that Aarin's due process rights were violated. APP 120, ¶ 24; R. Doc. 78 at 6.
May 8, 2015	Aarin and Terrance file a Motion to Dismiss and Request for Hearing with the Tribal Children's Court, referencing as attachments the North Dakota state court custody orders and arguing *inter alia* that the PKPA requires that those state court orders be given full faith and credit. APP 053; R. Doc. 69 at 14; APP 121, ¶ 25; R. Doc. 78 at 7.
July 30, 2015	Although the Tribal Children's Court record provided to this Court did not contain the referenced attachments of the North Dakota state court custody orders with the May 8,

	2015 Motion to Dismiss, the Tribal Children's Court entered an Order of Continuance and Order for Brief on July 30, 2015, requiring the parties to "submit a short brief addressing the issue of whether or not the court should recognize the orders entered from North Dakota." APP 121, ¶ 26; R. Doc. 78 at 7; APP 246, ¶ 27; R. Doc. 96 at 12.
August 4, 2015	A court trial was held in Cass County District Court to establish primary residential responsibility of C.S.N. APP 121, ¶ 27; R. Doc. 78 at 7; APP 247, ¶ 28; R. Doc. 96 at 13.
September 1, 2015	A court trial was held in Cass County District Court to establish primary residential responsibility of T.R.S. APP 056; R. Doc. 69 at 13; APP 121, ¶ 28; R. Doc. 78 at 7; APP 247-48, ¶ 29; R. Doc. at 13-14.
September 4, 2015	Cass County District Court issued orders awarding primary residential responsibility of T.R.S. to Terrance and C.S.N. to Aarin, subject to Tricia's parenting time. APP 056; R. Doc. 69 at 13; APP 122, ¶ 29; R. Doc. 78 at 8.
October 29, 2015	After repeated instances where the Tribal Children's Court hearings were rescheduled because Tricia, Jessica, or Ted were not served with notice of the hearing (even though actual notice was provided by the Tribal Court staff to Tricia, Jessica, and Ted in at least one instance), the Tribal Children's Court holds a hearing to address Fathers' Motion to Dismiss, with counsel for Fathers and counsel for the Cheyenne River Sioux Tribe – Intervenors appearing. There is no indication that Tricia, Jessica, or Ted appeared at the October 29, 2015 hearing. APP 025, ¶ 64; R. Doc. 8 at 15; APP 097, ¶ 64; R. Doc. 70 at 8; APP 122, ¶ 30; R. Doc. 78 at 8; APP 248-49, ¶ 31; R. Doc. 96 at 14-15; APP 269; R. Doc. 103 at 9.
December 22, 2015	Tribal Children's Court denies Aarin and Terrance's motion to dismiss, determining: 1) PKPA may not apply to Tribe, 2) the Tribal Court has jurisdiction under ICWA, and 3) ICWA trumps the PKPA. As to the PKPA exception set forth in 28 U.S.C. § 1738A(c)(2)(C), the Tribal Children's Court acknowledged that the "North Dakota authorities who investigated [Tricia's] claim [that she and the children were subject to mistreatment and abuse by Fathers] did not substantiate her

	allegations of abuse, but neither did they rule her claims to be frivolous or impossible-rather they are unproven." APP 025, ¶ 64; R. Doc. 8 at 15; APP 056; R. Doc. 69 at 13; APP 097, ¶ 64; R. Doc. 70 at 8; APP 122-23, ¶ 31; R. Doc. 78 at 8; APP 249-50, ¶ 32; R. Doc. 96 at 16.
January 19, 2016	Aarin and Terrance appeal the Tribal Children's Court's December 2015 order and specifically address the application of the PKPA to the Tribe and the *Eberhard* precedent. APP 057; R. Doc. 69 at 14; APP 123, ¶ 32; R. Doc. 78 at 9; APP 250, ¶ 33; R. Doc. 96 at 16; APP 270; R. Doc. 103 at 10.
September 1, 2016	Tribal Court of Appeals concludes that Fathers' due process rights were violated, noting that "[n]o parent – whether Indian or non-Indian – can have their custodial rights modified without notice and opportunity to be heard." The Tribal Court of Appeals reserves ruling on the applicability of the PKPA and remands for another hearing as to the tribal custody petition filed by Ted and Jessica, directing the Tribal Children's Court to take evidence as to comity and as to the circumstances relevant to the PKPA including evidence of the children's home state and whether they were kidnapped and illegally brought to the Reservation. Despite its statement that "[n]o parent – whether Indian or non-Indian – can have their custodial rights modified without notice and opportunity to be heard[,]" the Tribal Court of Appeals orders that "[i]nterim custody of the children shall remain with Ms. Jessica Ducheneaux during the pendency of said hearing unless the trial judge shall find good cause to the contrary." APP 027, ¶ 69; R. Doc. 8 at 17; APP 098, ¶ 69; R. Doc. 70 at 9; APP 123-24, ¶¶ 33-35; R. Doc. 78 at 9-10; APP 250-51, ¶¶ 34-36; R. Doc. 96 at 16-17; APP 271; R. Doc. 103 at 11.
November 2016	Aarin and Terrance petition the United States District Court for the District of North Dakota for habeas relief. APP 027, ¶ 70; R. Doc. 8 at 17; APP 098, ¶ 70; R. Doc. 70 at 9; APP 124, ¶ 36; R. Doc. 78 at 10; APP 252, ¶ 37; R. Doc. 96 at 18.
May 24, 2017	The North Dakota Federal District Court dismisses the Fathers' habeas petition. APP 027-28, ¶ 71; R. Doc. 8 at 17-18; APP 086; R. Doc. 69 at 43; APP 098, ¶ 71; R. Doc. 70

	at 9; APP 124, ¶ 37; R. Doc. 78 at 10; APP 252, ¶ 38; R. Doc. 96 at 18.
June 12, 2017	Fathers file Petition for Writ of Mandamus with the Tribal Court of Appeals, requesting the "Honorable Court to bear in mind that each day that goes by without resolution to this case is another day they are without their children" and "that a special judge be appointed to immediately hear and decide the jurisdiction issues in this matter . . . [,]" which is later dismissed by the Tribal Court of Appeals. APP 124, ¶ 38; R. Doc. 78 at 10; APP 252-53, ¶ 39; R. Doc. 96 at 19.
July 31, 2017	The Tribal Children's Court dismisses Aarin and Terrance's petition for comity. APP 124, ¶ 39; R. Doc. 78 at 10; APP 253, ¶ 40; R. Doc. 96 at 19.
November 14, 2017	Aarin submitted a comprehensive pleading to the Tribal Children's Court, including all of the North Dakota state court custody orders. APP 124, ¶ 40; R. Doc. 78 at 10; APP 253, ¶ 41; R. Doc. 96 at 19; APP 274; R. Doc. 103 at 14.
March, 21, 2018	Terrance submits to the Tribal Children's Court the North Dakota state court's Judgment awarding him custody of T.R.S. APP 061; R. Doc. 69 at 18; APP 124, ¶ 41; R. Doc. 78 at 10; APP 254, ¶ 42; R. Doc. 96 at 20; APP 274; R. Doc. 103 at 14.
April 18, 2018	The Tribal Children's Court dismissed Ted and Jessica's petition for temporary custody, determining that: 1) the matter was not governed by ICWA, 2) PKPA applied on the Cheyenne River Sioux Reservation, and 3) Aarin and Terrance's North Dakota orders were not entitled to comity. APP 028, ¶ 74; R. Doc. 8 at 18; APP 062; R. Doc. 69 at 19; APP 099, ¶ 74; R. Doc. 70 at 10; APP 125, ¶ 42; R. Doc. 78 at 11; APP 254, ¶ 43; R. Doc. 96 at 20; APP 275; R. Doc. 103 at 15.
May 2, 2018	Jessica appeals the Tribal Children's Court's decision and requests an emergency stay so the children may remain in Jessica's care during the appeal, which was later granted. APP 125, ¶ 44; R. Doc. 78 at 11; APP 255, ¶ 45; R. Doc. 96 at 21.

May 4, 2018	Cheyenne River Sioux Tribal Council adopts resolution overruling *Eberhard*. APP 028, ¶ 75; R. Doc. 8 at 18; APP 099, ¶ 75; R. Doc. 70 at 10; APP 125, ¶ 45; R. Doc. 78 at 11; APP 213-18; R. Doc. 80-40; APP 255-56, ¶ 46; R. Doc. 96 at 21-22.
September 24, 2018	Tribal Court of Appeals enters Memorandum Opinion and Order, denying Fathers' Motion to Dismiss Appeal for appellant's failure to file brief timely, setting briefing schedule, and ordering a fact finding hearing as to the circumstances of Tricia's arrest on the Reservation. APP 125, ¶ 46; R. Doc. 78 at 11; APP 256, ¶ 47; R. Doc. 96 at 22.
December 20, 2018	Tribal Children's Court enters Findings of Fact pursuant to Tribal Court of Appeals' September 24, 2018 Order. APP 126, ¶ 47; R. Doc. 78 at 12; APP 256, ¶ 48; R. Doc. 96 at 22.
February 25, 2019	The Tribal Court of Appeals: 1) overrules *Eberhard* and finds the PKPA does not apply to the matter, 2) concludes that ICWA does not apply, and 3) determines the case is governed by the Tribal Children's Code. The Tribal Court of Appeals remanded for a determination of the best interests of the children. APP 029, ¶ 78; R. Doc. 8 at 19; APP 064-65; R. Doc. 69 at 21-22; APP 099, ¶ 78; R. Doc. 70 at 10; APP 126, ¶ 48; R. Doc. 78 at 12; APP 127, ¶ 53; R. Doc. 78 at 13; APP 256-57, ¶ 49; R. Doc. 96 at 22-23; APP 258, ¶ 54; R. Doc. 96 at 24; APP 277-78; R. Doc. 103 at 18; APP 129-158; R. Doc. 80-1 at 1-30.
August 28, 2019	Fathers file a Petition for Writ of Habeas Corpus with the United States District Court for the District of South Dakota ("District Court"). R. Doc.1.
February 11, 2021	Clerk enters default against Respondents Ted Taylor, Jr., Jessica Ducheneaux, and Ed Ducheneaux. R. Doc. 36.
May 17, 2021	Clerk enters default against Respondent Tricia Taylor. R. Doc. 60.
September 24, 2021	The District Court denies a Motion to Dismiss filed by the Tribal Court Defendants. The District Court concludes that it had subject matter jurisdiction, that the Tribal Court and

	Tribal Court of Appeals have sovereign immunity, that the Tribal judicial officers did not have sovereign immunity, that tribal court remedies have been exhausted, and that Fathers may seek a declaratory judgment. APP 044-089; R. Doc. 69.
May 11, 2022	On cross motions for summary judgment, the District Court issues an Opinion and Order Granting Tribal Defendants' Motion for Summary Judgment and the State Defendants' Motion to Dismiss; a Judgment for Tribal Defendants and Judgment of Dismissal for State Defendants is also entered. APP 261-295; R. Doc. 103; R. Doc. 104.

SUMMARY OF THE ARGUMENT

Decades ago, the United States Congress recognized a crisis parents and children were facing when it came to litigating child custody determinations across varying jurisdictions. In response, it enacted the Parental Kidnapping Prevention Act of 1980 "to remedy the inapplicability of full faith and credit requirements to custody determinations and to deter parents from kidnapping their children to relitigate custody in another state." *See DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514 n.3 (8th Cir. 1989). The spirit and language of the Act protect parents with valid child custody orders in a jurisdiction from having their children stolen from them and shuttled to another jurisdiction so another parent may attempt seek a more favorable child custody determination. To fulfill this purpose, the PKPA requires "states," defined to include United States territories and possessions, to not exercise jurisdiction in custody cases that are ongoing in another jurisdiction in

accordance with the PKPA and to enforce valid custody determinations made by other "states." 28 U.S.C § 1738A.

The PKPA as enacted, together with various courts' interpretation of the same (including the Cheyenne River Sioux Tribal Court of Appeals' prior interpretation), establishes that Congress both intended to and effectively did make the PKPA applicable to tribal jurisdictions through the PKPA's definition of "state." The PKPA's legislative history and related federal statutes likewise show that tribes are "states" under the definition provided in the PKPA. The District Court erred in concluding that "state" as defined in the PKPA meant that it did not apply to tribal courts, and thus erred in granting the Tribal Court Respondents' Motion for Summary Judgment. Based on that error, the District Court declined to grant Nygaard's Motion for Summary Judgment. Had the District Court applied the correct interpretation of the PKPA, Appellant Nygaard would have been entitled to judgment as a matter of law.

STANDARD OF REVIEW

Nygaard challenges a portion of the District Court's decision granting summary judgment in favor of the Tribal Court Respondents and denying Nygaard's Motion for Summary Judgment. The grant of summary judgment is subject to de novo review, "with all justifiable factual inferences being drawn in favor of the party opposing summary judgment. *Cook v. United States,* 86 F.3d 1095, 1097 (Fed. Cir.

1996) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986)); *Karras v. Karras*, 16 F.3d 245, 247 (8th Cir. 1994). A denial of summary judgment is also reviewed de novo, "applying the same standard that governed the district court's decision." *Collins v. Bellinghausen*, 153 F.3d 591, 595 (8th Cir. 1998). "Summary judgment is appropriate only where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Butler v. Crittenden Cty., Ark.*, 708 F.3d 1044, 1049 (8th Cir. 2013) (internal quotation marks omitted). Questions of law, including the interpretation and application of a federal statute, are reviewed de novo. *United States v. Tebeau*, 713 F.3d 955, 959 (8th Cir. 2013); *United States v. Vig*, 167 F.3d 443, 447 (8th Cir. 1999).

ARGUMENT

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

This appeal hinges upon whether the PKPA applies to the Cheyenne River Sioux Tribe to prevent the Tribal Courts from exercising jurisdiction in light of the North Dakota state court proceedings and to require the Tribal Courts to honor North Dakota state court's custody determinations of both Children. Contrary to the District Court's conclusion that the Tribal Courts are not bound by the PKPA, only one interpretation of the PKPA is consistent with the plain language of the PKPA, as well as its legislative history and related federal statutes: the PKPA applies to Indian tribes, including the Cheyenne River Sioux Tribe. The canon of construction

supporting interpretation of a federal statute in favor of Indians and case law surrounding the PKPA further confirm that the PKPA applies to the Cheyenne River Sioux Tribe in the case *sub judice*.

A. Plain Language of the PKPA

Congress enacted the PKPA in 1980 with the express and necessary goal of reducing the number of custody disputes occurring between persons claiming rights of custody and visitation of their shared children in courts of different jurisdictions. *See* Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(a), 94 Stat. 3568-69 (Dec. 28, 1980). Specifically, Congress noted the devastating effects of the system then in place, which allowed parents or others seeking custody of children to litigate the custody issue in multiple jurisdictions while not requiring the courts to recognize or honor the orders of one another. Congress articulated some of those alarming effects:

> those characteristics of the law and practice [*e.g.* inconsistent and conflicting laws and practices among jurisdictions to determine their own jurisdiction and whether to recognize other jurisdictions' decisions] … contribute to a tendency of parties involved in such dispute to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and

> among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of the other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians.

Id. Congress's intent with the PKPA was multifaceted, but one of its primary purposes was clearly 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, 94 Stat. 3569.

Defining "States" as "[S]tate[s] of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and territor[ies] or possession[s] of the United States[,]" Congress clearly set forth within the PKPA itself the purposes for such legislation, specifically to:

> (1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;
>
> (2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;
>
> (3) facilitate the enforcement of custody and visitation decrees of sister States;
>
> (4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

> (5) avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and
>
> (6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

See id., 94 Stat. 3569; *see also* 28 U.S.C § 1738A(b)(8) (defining "State").

The Eighth Circuit Court of Appeals has stated succinctly that the purpose of the PKPA is "to remedy the inapplicability of full faith and credit requirements to custody determinations and to deter parents from kidnapping their children to relitigate custody in another state." *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514 n. 3 (8th Cir. 1989) (citing *Thompson v. Thompson*, 484 U.S. 174, 180-82 (1988)). Further, in addition to Congress's stated findings and purposes, the Supreme Court of the United States has likewise noted the importance of the PKPA, stating that prior to its enactment "a parent who lost a custody battle in one State had an incentive to kidnap the child and move to another State to relitigate the issue. This circumstance contributed to widespread jurisdictional deadlocks like this one, and more importantly, to a national epidemic of parental kidnaping." *Thompson*, 484 U.S. at 180-81. As the Supreme Court indicated, "[t]he context of the PKPA . . . suggests that the principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations." *Id.* at 181.

To address those issues, the PKPA, as set forth in 28 U.S.C. section 1738A, provides, in full:

> (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.
>
> (b) As used in this section, the term—
>
> (1) "child" means a person under the age of eighteen;
> (2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;
> (3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;
> (4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;
> (5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;
> (6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;
> (7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State

whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(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.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(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.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no

> longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

28 U.S.C. § 1738A (emphasis added).

Crucial to determining the scope of the PKPA is the definition of "State", as the PKPA's requirement (subject to limited exceptions) that full faith and credit be given to custody determinations is directed to "State" courts and authorities. *See* 28 U.S.C. § 1738A(a). As indicated above, the PKPA defines "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States." *See* 28 U.S.C. § 1738A(b)(8). Reinforced by various court decisions, this definition plainly[5] includes tribes and territories including Indian reservations.

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[5] On statutory interpretation, the Eight Circuit has stated that:

> "[t]he plain language of a statute is the starting point in every case involving statutory construction." *Adams v. Apfel*, 149 F.3d 844, 846 (8th Cir.1998). "If the statute is clear and unambiguous, judicial inquiry is complete." *Id.* "A statute is clear and unambiguous when 'it is not possible to construe it in more than one reasonable manner.'" *Id.* (quoting *Breedlove v. Earthgrains Baking Cos.*, 140 F.3d 797, 799 (8th Cir. 1998), cert. denied, 525 U.S. 921, 119 S.Ct. 276, 142 L.Ed.2d 228 (1998)). If a statute is unambiguous, its legislative history is not consulted unless exceptional circumstances dictate otherwise:
>
> > "Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but '[i]n the absence of a "clearly expressed legislative intention to the contrary," the language of the statute itself "must ordinarily be regarded as conclusive."' Unless exceptional circumstances dictate otherwise, '[w]hen we

In *DeMent*, a case with underlying facts notably similar to the present matter before this Court, the Eighth Circuit recognized that the Oglala Sioux Tribe alleged the PKPA did not apply to it. 874 F.2d at 514 n.4. Ultimately, while not deciding the issue of the application of the PKPA to tribes, the *DeMent* court noted both the Supreme Court of the United States and the Eighth Circuit have concluded that the term "territories" in earlier statutes included tribes. *Id.* (citing *United States ex rel. Mackey v. Coxe*, 59 U.S. 100, 103 (1856) (concluding the Cherokee Nation was a territory); *Cornells v. Shannon*, 63 F. 305, 306 (8th Cir. 1894); *Standley v. Roberts*, 59 F. 836, 845 (8th Cir. 1894); *Mehlin v. Ice*, 56 F. 12, 19 (8th Cir. 1893)). In addition to those rulings noted in *DeMent*, other courts have similarly interpreted "territories" as encompassing Indian tribes. *See, e.g., United States v. White*, 237 F.3d 170, 173 (2d Cir. 2001) (noting a regulation applying to "a territory or possession of the United States" encompassed Indian reservations); *Jim v. CIT Fin.*

> find the terms of a statute unambiguous, judicial inquiry is complete.' "
>
> *In re Erickson Partnership*, 856 F.2d 1068, 1070 (8th Cir. 1988) (quoting *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987) (citations omitted)). The Eighth Circuit further recognized that "[t]he mere fact that statutory provisions conflict with language in the legislative history is not an exceptional circumstance permitting a court to apply the legislative history rather than the statute." *In re Erickson Partnership*, 856 F.2d at 1070.

Loudner v. United States, 170 F.Supp.2d 926, 928 (D.S.D. 2001).

Servs. Corp., 533 P.2d 751, 752 (N.M. 1975) ("Navajo Nation is a 'territory' within the meaning of [28 U.S.C. § 1738]"); *Kansas v. Wakole*, 945 P.2d 421, 423-24 (Kan. Ct. App. 1997) (noting a state statute recognizing license from "state, territory or possession of the United States" included Indian nations in its definition). Notably, in *Martinez v. Superior Court*, 731 P.2d 1244, the Arizona Court of Appeals analyzed a similar question of whether a tribe qualifies as a "state" for purposes of the Uniform Child Custody Jurisdiction Act (defining "a state to mean any state, territory or possession of the United States") and held that "Indian reservations are territories or possessions of the United States as used in the Uniform Child Custody Jurisdiction Act and that this was the intention of the legislature which enacted it." 731 P.2d 1244, 1247 (Ariz. Ct. App. 1987).

Specifically addressing the application of the PKPA to tribes, the United States Fourth Circuit Court of Appeals, in *In re Larch*, 872 F.2d 66, held that a tribe "is a 'state' as defined by section 1738A(b)(8) for the purpose of the PKPA and that it is entitled to the benefits conferred by the Act and subject to its obligations." 872 F.2d 66, 68 (4th Cir. 1989). The Court of Appeals of Washington, while acknowledging a split on the question, found *In re Larch* and *Martinez* persuasive in the interpretation of the PKPA's application to tribes. *See In re Marriage of Susan C.*, 60 P.3d 644, 649-50 (Wash. App. 2002). The Court of Appeals of the Confederated Salish and Kootenai Tribes has also indicated that the PKPA governs

tribal court jurisdiction, concluding that the tribal trial court lacked jurisdiction under the PKPA because the reservation was not the child's home state. *See Monteau v. Monteau*, 5 Am. Tribal Law 26, 33-34 (Salish-Kootenai C.A. Apr. 26, 2004). Recently in 2019, the Wyoming Supreme Court in *Mitchell v. Preston*, 439 P.3d 718 (Wy. 2019), followed suit when it noted that the Cheyenne River Tribal Court had appropriately recognized its limitations under the PKPA, and concluding the Tribal Court was prohibited under the PKPA from modifying a custody order from the state court. Last but certainly not least, as noted by the Cheyenne River Sioux Tribal Court of Appeals itself in its earlier (yet now overruled) opinion, the PKPA "incorporated references to states, territories and possessions, which, since 1856, had been interpreted to include Indian tribes." *Eberhard*, 24 I.L.R. at 6065 (emphasis added).

There is no ambiguity here. The PKPA was enacted by Congress to prevent the very situation faced by these Fathers when a mother kidnapped the children and absconded to a new jurisdiction. Congress's expansive definition of "State" mandates application of the PKPA to this situation and to tribal courts in general, thus ensuring that the PKPA confronted its stated purpose.

B. Indian Law Canon of Construction and Legislative History of PKPA

In its Opinion and Order on Summary Judgment, the District Court found the term "territory or possession of the United States" to be ambiguous. The District

Court seemingly dismissed the precedent holding that the terms "territory" and "state" include Indian tribes. However, even if this Court were to agree the definition of "State" as found in the PKPA is ambiguous, the District Court erred by failing to recognize the applicable Indian law canon of construction: when interpreting a federal statute relating to Indian law, courts look to "construe federal statutes liberally in favor of the tribe and interpret ambiguous provisions to the tribe's benefit." *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 783 (D.S.D. 2006). As the Cheyenne River Sioux Tribal Court of Appeals itself determined in 1997 in *Eberhard*, interpreting the PKPA to apply to tribes favors Indian tribes as it requires full faith and credit to be afforded to tribal court decisions, protecting tribal court jurisdiction where appropriate. *See* 24 I.L.R. at 6063 (now overturned). Such conclusion "protects tribal sovereignty and the right of self-government of the Lakota people in many instances[.]" *Id.* Further, the application of the PKPA "does not diminish the sovereignty of the court to which it applies. Rather, it protects their jurisdiction by assuring that other sovereigns will not 'second guess' child custody orders granted full faith and credit under the Act." *Id.* Ultimately, "coverage of Indian tribes by the PKPA best furthers both the purposes of [the PKPA] and the sovereign interests of the tribes." *Id.* The foregoing Indian

law canon of construction commands an interpretation that the PKPA applies to tribes.[6]

Not only does the Indian law canon of construction support the clear inclusion of tribes within the bounds of the PKPA, the legislative history, as detailed in the cases above and in *Eberhard*, confirms the same result. While the Eighth Circuit in *DeMent* indicated that "an analysis of the legislative history may show that Congress did not intend for the PKPA to apply to Indian tribes[,]" an actual review of that legislative history supports the opposite - that the PKPA was intended to apply to Indian tribes. *See* 874 F.2d at 514 n.4.

Indeed, in its decision in *Eberhard*, 24 I.L.R. at 6062-66, the Cheyenne River Tribal Court of Appeals itself had extensively analyzed the PKPA and concluded that the legislative history and history of related legislation supports the PKPA's application to tribal courts. The *Eberhard* Court concluded *inter alia* "that Congress meant to include Indian tribes and their reservation with the statutory phrases 'State'

[6] Although a tribal court in this instance challenges the application of the PKPA to its courts, the best interest of tribes across the nation must be considered under the Indian law canon of construction. Applying the PKPA to tribes and their courts will provide tribal court child custody decisions the full faith and credit they are entitled to under the Act and will promote the tribal self-governance and respect for tribal courts envisioned in *Eberhard* [When considering the problems Congress was addressing, it is illogical to think that they would create a system in which tribal court child custody orders are not entitled to full-faith and credit, while simultaneously creating a safe-haven on Indian reservations for people to abscond with their children].

and 'a territory or possession of the United States[.]'" 24 I.L.R. at 6064. At that time, the Cheyenne River Tribal Court of Appeals was "convinced 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." *Id*. In support of its conclusion, the Tribal Court relied upon various full faith and credit statutes and concepts, as well as the Supreme Court of the United States' consistent employment of full faith and credit "to integrate all political units located within the United States into the federal union, believing that references in the federal statutes to courts *of* the states or territories constituted geographic, rather than political, references." *Id. Cf. Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2497, 2502 (2022) (although in the context of state criminal jurisdiction in "Indian country," discussing that the "territorial paradigm" in which Congress operated in the earlier 1800s was "abandoned later in the 1800s" and "Indian country in each State became part of that State's territory[,]" or in other words, "a reservation was in many cases a part of the surrounding State or Territory . . .").

The *Eberhard* Court further concluded that no logical reason existed "for requiring full faith and credit for tribal court custody orders in Indian Child Welfare Act proceedings under 28 U.S.C. § 1911(d) and not for child custody orders ancillary to divorce under the PKPA." *Id.* at 6066. The Court in *Eberhard* refused to "resort to maxims of statutory interpretation which would, if applied as argued, lead to such

seemingly illogical and indefensible results." *Id.* While acknowledging that the PKPA does not expressly mention tribes, the *Eberhard* Court elucidated the absence of the PKPA's reference to tribes:

> when Congress enacted the [PKPA], it legislated against a well established interpretive backdrop under which the courts had interpreted designations like state, territory or possession found in federal full faith and credit recognition statutes to adopt geographic, rather than political, meanings. Such terms were meant to include the courts of Indian tribes, as in *Mackey*. . . . Congress was not required to explicitly refer to Indian tribes since the judicial interpretive backdrop against which it legislated, including the *Mackey* case, clearly reflected that tribes were included within the states, territories, or possessions of the United States.

Id. at 6065.[7] This legislative history, and the *Eberhard* Court's well-reasoned analysis of the same, supports that the definition of "State" within the PKPA includes the tribes located within the geographic boundaries of the United States. While the Tribal Court of Appeals has now overturned *Eberhard* in the proceedings implicated here, its earlier analysis of the legislative history in *Eberhard* remains on point.[8]

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[7] As highlighted in the now-overturned *Eberhard* decision, later enacted statutes that specifically reference Indian tribes do not alter the backdrop under which the PKPA was enacted. Those later statutes referencing Indian tribes "merely clarified the already existing congressional intent by making it explicit in the face of an emerging debate" regarding "whether the relevant federal full faith and credit statutes should and do apply to Indian tribal courts and their orders." *Eberhard*, 24 I.L.R. at 6065.

[8] Notably, the Cheyenne River Tribal Court of Appeals Order overruled the *Eberhard* precedent only after the Fathers' case had been pending before it for more than four years. In its analysis, the Tribal Court of Appeals did not sufficiently readdress its interpretation of the definition of "State," within the

Accordingly, whether this Court reviews the plain language of the PKPA, the legislative history in the event of ambiguity, precedent, or interprets the statute under the Indian law canon of construction, the ultimate conclusion remains that the PKPA applies to tribes, the North Dakota state courts retain exclusive jurisdiction over this child custody matter, and the Tribal Courts are required to honor the North Dakota state court Orders.

C. Caselaw Against Application of the PKPA to Indian Tribes is Unpersuasive

In its recent 2019 decision overruling *Eberhard*, the Tribal Court of Appeals stated, "[t]he relevant caselaw is virtually unanimous in holding that the PKPA does *not* apply to tribes." *See* APP 139. As compared to the detailed and meticulous decision in *Eberhard*, when deciding the PKPA no longer applied to it in reference to this case, the Tribal Court of Appeals determined it no longer wished to follow its precedent and based that determination on only a few cases. *See* APP 129-158 (Tribal Court of Appeals citing *Garcia v. Gutierrez*, 217 P.3d 591 (N.M. 2009); *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. App. 1991); *John v. Baker*, 982 P.2d 739 (Alaska 1999); *Miles v. Chinle Family Court*, 7 Am. Tribal Law 608, Case No. SC-CV-04-08 (Nav. Sup. Ct. Feb. 21, 2008)). Yet those cases carry minimal weight when reviewing the particular circumstances of each case and considering

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PKPA but rather attempted to minimize its own well-reasoned interpretation as having been based on hope and idealization.

Eberhard's own thorough analysis of the PKPA legislative history which justifies the Act's lack of explicit reference to Indian tribes.

For example, in *Garcia v. Gutierrez*, 217 P.3d 591 (N.M. 2009), the Supreme Court of New Mexico acknowledged that courts are divided on the issue of the application of the PKPA to tribes and recognized the Cheyenne River Sioux Tribal Court of Appeals' decision of *Eberhard* as an acknowledgment of a tribe applying the PKPA to its tribal courts. *Id.* at 604. The *Garcia* court points to the PKPA's lack of reference to Indian tribes, as compared to other federal enactments and the Uniform Child Custody Jurisdiction and Enforcement Act (which specifically includes Indian tribes), to support its finding that the PKPA was not to apply to Indian tribes. *See Garcia*, 217 P.3d at 604-05. Hinted at in *Eberhard*, however, later enacted federal statutes "clarified the already existing congressional intent [that federal full faith and credit statutes should and do apply to Indian tribal courts and their orders] by making it explicit in the face of the emerging debate." *Eberhard*, 24 I.L.R. at 6065. Further, while not federal law, the UCCJEA was drafted in 1997, 17 years after the PKPA. *See* Uniform Child-Custody Jurisdiction and Enforcement Act (1997), 9 U.L.A. 657 (1999); *cf. In re L.S.*, 257 P.3d 201, 205-06 (Colo. 2011).

Notably in *Garcia*, despite concluding the PKPA did not apply to the tribe in that case, the state court went on to decide the proper result would be for both the tribal court and state court to exercise concurrent jurisdiction. *Id.* at 607. The court

also encouraged comity between the state and tribal court, noting the UCCJEA itself facilitates communication between courts for that purpose. *Id.* at 608. Finally, the facts of *Garcia* are also distinguishable in that the parties admitted the state of New Mexico did not qualify as a home state and that no "home state" existed as defined by the UCCJEA. *Id.* at 596.

In *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. App. 1991), the issue was the opposite scenario to this matter, because it involved a parent attempting to bring a custody action in state court *after* a tribal court already asserted jurisdiction over the matter. 477 N.W.2d at 311-12. To determine whether the state court had jurisdiction, the *Sengstock* court analyzed the applicability of the Uniform Child Custody Jurisdiction Act (UCCJA) (the precursor to the current UCCJEA). *Id.* at 313-15. With one conclusive sentence, the court noted that the tribe was "neither a state nor a foreign country[,]" but failed to analyze whether the tribe was a "territory or possession of the United States" for purposes of the UCCJA. *Id.* at 314. Finally, while the court determined that the UCCJA did not explicitly include tribes, ultimately the court concluded the tribal court order should be recognized under the doctrine of comity. *Id.*

In line with the above cases, in *John v. Baker*, 982 P.2d 739 (Alaska 1999), the Supreme Court of Alaska rejected the PKPA's application to tribes because the legislation and legislative history failed to explicitly mention tribes. *Id.* at 762. The

Baker court concluded comity was the proper framework for determining when state courts should recognize tribal court decisions. *Id.* at 761. Notably, as a distinction from the present matter, *John* involved a parent first filing and obtaining a tribal court order regarding custody and then later filing a state court custody action. *Id.* at 743. *John* has also been distinguished by another Supreme Court of Alaska case, *Starr v. George*, 175 P.3d 50 (Alaska 2008), in which the court concluded that tribal resolutions in a case, adopted without notice and an opportunity to be heard, were not entitled to comity or full faith and credit.

Yet again in *Miles v. Chinle Family Court*, 7 Am. Tribal Law 608, Case No. SC-CV-04-08 (Nav. Sup. Ct. Feb. 21, 2008), the Supreme Court of the Navajo Nation rejected the application of the PKPA because it did not explicitly reference Indian tribes. *Id.* at 613. To put it in context, *Miles* involved an initial tribal court custody order, and one parent took the child and left the Nation. 7 Am. Tribal Law at 610-11. While the court in *Miles* determined that the PKPA did not apply to the Navajo Nation, the court also noted consistent with its own tribal court decisions, "a family court may not decline jurisdiction except to defer to a state or other Indian tribe that has already invoked concurrent jurisdiction over the child." *Id.* at 614. For the foregoing reasons, the above cases are not persuasive in this matter.

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

As the PKPA applies to Indian tribes, the District Court erred in granting the Tribal Court Respondents' Motion for Summary Judgment. In turn, the court also erred in denying Aarin's Motion for Summary Judgment. There are no disputed material facts and the law confirms that Aarin is entitled to relief as a matter of law when considering the substantive provisions of the PKPA.

The District Court did not reach the issue of whether the Tribal Courts lack jurisdiction over this child custody matter pursuant to the PKPA after erroneously concluding that the PKPA does not apply to Indian tribes.[9] However, the record makes clear that the Tribal Courts have no jurisdiction to modify the North Dakota state court orders that were made consistently with the PKPA because the PKPA applies to tribes. *See* 28 U.S.C. § 1738A(a). Additionally, the North Dakota state court proceedings were undisputedly ongoing prior to the Tribal Court's (unlawful) exercise of jurisdiction. *See* 28 U.S.C. § 1738A(g). As detailed throughout the Fathers' Amended Petition, and encompassed by the Tribal Court record, the North Dakota court orders and proceedings were first in time, in accordance with the

[9] Given the law and undisputed facts, this issue is ripe for consideration without requiring remand. *Cf. Roberts v. Van Buren Public Schools*, 773 F.2d 949, 955 (8th Cir. 1985) (indicating that for a question of law, the court "may determine [the] issue in the first instance at the appellate level, possibly making remand unnecessary or limiting the scope of the issues to be considered.").

PKPA, and complied with due process. North Dakota is the proper "home state" of C.S.N. pursuant to the PKPA. The North Dakota Orders are valid court orders entitled to full faith and credit under the PKPA. Ultimately, there is no genuine dispute regarding North Dakota's jurisdiction to make the child custody determinations as to C.S.N.

The Tribal Court record likewise fails to justify any exceptions of the PKPA to allow Tribal Court jurisdiction over this matter. At the outset, the award of custody to a maternal relative of the children violated subsection (e) of the PKPA, which requires reasonable notice and an opportunity to be heard to "any parent whose parental rights have not been previously terminated[.]" 28 U.S.C. § 1738A(e). Notably, when Fathers subsequently learned of their children's location and sought to obtain custody through the Tribal Courts, they were denied the same even though there was no valid Tribal Court order granting custody to the relative. Even without a valid Tribal Court order, the default of the Tribal Courts became to improperly allow the relatives to retain custody of the children until and unless Fathers could prove their entitlement to their own children. In doing so, the Tribal Courts have unlawfully exercised jurisdiction over this matter long before the Tribal Court of Appeals' 2019 decision and contrary to Fathers' fundamental rights to make parental decisions as to "the care, custody, and control of [their] children." *See Troxel v. Granville*, 530 U.S. 57, 66 (2000).

While the PKPA provides some exceptions to the home state having exclusive, continuing jurisdiction over a custody determination, those are not implicated in this case at this time. A Tribal Court of Appeals decision hinted that the Tribal Courts may have jurisdiction under the PKPA because "the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse." *See* 28 U.S.C. § 1738A(c). Based upon the Tribal Court record, there is no evidence that the children have been abandoned and there has been no finding of an emergency due to alleged mistreatment or abuse. Notably, in its April 18, 2018 decision, the Tribal Children's Court acknowledged that "[t]here are very serious allegations of abuse and neglect being made in this matter[,]" but then made the point that "[i]f 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."

Even assuming *arguendo* there was some emergency warranting a temporary intervention, no justification exists to allow continuing jurisdiction for more than six years based upon a temporary situation caused by Ms. Taylor's kidnapping of the Appellant's child. *See Mitchell*, 439 P.3d at 724 ("Emergency jurisdiction under the

PKPA is temporary and should continue only so long as the emergency exists or until a court that has jurisdiction to enter or modify a permanent custody award is apprised of the situation and accepts responsibility to ensure that the child is protected.") (internal quotation marks omitted).

Most notably, Ms. Taylor and her relatives implicated and named as Respondents in this case have not appeared in this litigation despite being served either personally or through publication. Ms. Taylor and those other Respondents have had the opportunity to appear and make claims of mistreatment or abuse, but tellingly, they have failed to avail themselves of that opportunity. It is not the position of the Tribal Courts to gather evidence and to make those claims.

CONCLUSION

The PKPA applies to the Tribal Court, and the North Dakota state court has proper jurisdiction over the matter. The Cheyenne River Sioux Tribal Court has violated the PKPA by failing to give full faith and credit to the North Dakota state court Orders and by exercising jurisdiction in a proceeding for custody or visitation while the North Dakota state court had exclusive and continuing jurisdiction consistent with the provisions of 28 U.S.C. § 1738A. Issuance of a writ of habeas corpus and other appropriate relief is necessary to facilitate the rightful return of these children to their Fathers and to put an end to this eight-year nightmare for Aarin Nygaard. Aarin respectfully requests this Court to 1) reverse the District Court's

grant of Tribal Courts' Motion for Summary Judgment, 2) reverse the District Court's denial of Aarin's Motion for Summary Judgment, and 3) enter an Order directing issuance of a Petition for Writ of Habeas Corpus.

Dated this 24nd day of August, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that prior to submission, the foregoing Brief and Addendum were scanned by the undersigned for viruses utilizing the website http://www.virustotal.com and was found to be virus free. Additionally the undersigned certifies that the Brief complies with the type-volume limitation of Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure. Times New Roman 14-point type face is used, and excluding the cover page, Corporate Disclosure Statement, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service, this Brief contains 11,997 words. Pursuant to Eighth Circuit Rule of Appellate procedure 28A(c), the undersigned certifies that the name and version of word processing software used to prepare the Brief is Microsoft Office Word.

Dated this 24nd day of August, 2022.

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CERTIFICATE OF SERVICE

I certify that on August 24, 2022, I caused a true and correct copy of the foregoing to be served through the Court's Case Management/Electronic Case Filing System on the following:

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