No. 22-2277

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

AARIN NYGAARD,
Petitioner-Appellant,

v.

TRICIA TAYLOR, *et al*.,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA,
ROBERTO LANGE, CHIEF JUDGE,
CASE NO. 3:19-CV-030016-RAL

BRIEF OF APPELLEES CHEYENNE RIVER SIOUX TRIBAL COURT, BRENDA D. CLAYMORE, IN HER OFFICIAL CAPACITY AS CHIEF JUDGE OF THE CHEYENNE RIVER SIOUX TRIBAL COURT, CHEYENNE RIVER SIOUX TRIBAL COURT OF APPEALS, AND FRANKLIN DUCHENEAUX, IN HIS OFFICIAL CAPACITY AS ACTING CHIEF JUSTICE OF THE CHEYENNE RIVER SIOUX TRIBAL COURT OF APPEALS

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SUMMARY OF THE CASE

The Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A, provides, with some exceptions, that a custody or visitation order made by a state court with jurisdiction is entitled to full faith and credit in the courts of other states. The PKPA defines the term "state" to include states, territories, and possessions. It does not mention Indian tribes, and there is no suggestion in the legislative history that Congress intended the Act to apply to Indian tribes or tribal courts.

The central question in this case is whether, despite its failure to mention Indian tribes or Indian country, the PKPA applies to the Cheyenne River Sioux Tribe. The district court held that it does not. Relying on well-settled precedents, including *United States v. Wheeler*, 435 U.S. 313 (1978), and *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016), the district court held that tribes are distinct from states, territories, and possessions. By examining the Indian Child Welfare Act and other full faith and credit statutes that expressly mention Indian tribes or Indian country, in addition to states, territories, and possessions, the district court determined that Congress does not view these terms as synonymous. Instead, when Congress intends to apply full faith and credit to Indian tribes, it does so by express reference to Indian tribes or Indian country in the statute. The PKPA is not such a statute. Accordingly, this Court should affirm the judgment of the district court.

Tribal Court Appellees request 30 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellees Cheyenne River Sioux Tribal Court, Brenda D. Claymore, in her official capacity as Chief Judge of the Cheyenne River Sioux Tribal Court, Cheyenne River Sioux Tribal Court of Appeals, and Franklin Ducheneaux, in his official capacity as Acting Chief Justice of the Cheyenne River Sioux Tribal Court of Appeals, hereafter referred to collectively as "Tribal Court Appellees," state that they are either governmental entities or individual governmental officials sued in their official capacities.

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- *Ex parte Crow Dog*, 109 U.S. 556 (1883)
- *Williams v. Lee,* 358 U.S. 217(1959)
- Fort Laramie Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851)
- Fort Laramie Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868)
- Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq*.

2. Whether, despite its failure to mention Indian tribes, tribal courts, or Indian country, the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, applies to the Cheyenne River Sioux Tribe.

- *Wheeler v. United States*, 435 U.S. 313 (1978)
- *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016)
- *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998)
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- Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A

STATEMENT OF CASE

A. The Cheyenne River Sioux Tribe

The Cheyenne River Sioux Tribe ("Tribe") is a federally recognized Indian tribe that reserved its original, inherent right to self-government through the Fort Laramie Treaty of 1851, 11 Stat. 749 (Sept. 17, 1851), and the Fort Laramie Treaty of 1868, 15 Stat. 635 (Apr. 29, 1868). The Tribe is a constituent tribe of the Great Sioux Nation, and its reservation is within the territory "set apart for the absolute and undisturbed use and occupation" of the Great Sioux Nation in the Fort Laramie Treaty of 1868. Art. 2.

The boundaries of the Cheyenne River Indian Reservation were established by the Act of March 2, 1889, 25 Stat. 889, and have never been diminished. *See Solem v. Bartlett*, 465 U.S. 463, 481 (1984). The reservation contains approximately 2.8 million acres of land. *Id*., at 467 n.6. It is home to a majority of the Tribe's approximately 22,000 enrolled members. R. Doc. 54, at 4.

The Tribe is organized under Section 16 of the Indian Reorganization Act, 48 Stat. 984 (Jun. 18, 1934), *codified as amended at* 25 U.S.C. § 5123, and is governed by a Constitution and By-Laws. *See* C.R.S.T. Const. and By-Laws (Dec. 27, 1935), *as amended* Feb. 11, 1966, Jun. 18, 1980, and Jul. 17, 1992 (R. Doc. 54-1).

B. The Cheyenne River Sioux Tribal Court

The Tribal Constitution establishes a Tribal Court "for the adjudication of claims or disputes arising among or affecting the Cheyenne River Sioux Tribe." C.R.S.T. Const., Art. IV, § 1(k) (R. Doc. 51-4, at 6). The By-Laws provide that, "[t]he tribal courts shall have jurisdiction over claims and disputes arising on the reservation," C.R.S.T. By-Laws, Art. V, § 1(c) (R. Doc. 54-1, at 17). The Tribal Court, which consists of a trial court and an appellate court, is open to tribal members and non-members.

The Tribal Court follows rules of procedure and evidence similar to the federal rules. *See* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. REV. 1, 5 (1997) (specifically acknowledging the C.R.S.T. court system). The principle of separation of powers is enshrined in the Tribe's Constitution. *See* C.R.S.T. Const., Art. IV, § 1(k) (R. Doc. 54-1, at 6) ("[d]ecisions of tribal courts may be appealed to tribal appellate courts, but shall not be subject to review by the Tribal Council").

South Dakota authorizes its courts to give comity to the decisions of the Tribal Court. *See* S.D.C.L. § 1-1-25; *Gesinger v. Gesinger*, 531 N.W.2d 17 (S.D. 1995); *One Feather v. O.S.T. Pub. Safety Comm'n*, 482 N.W.2d 48, 49 (S.D. 1992).

C. Tribal Self-Government and the Role of the Tribal Courts

The Tribe and its courts "exercise inherent sovereign authority," *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 788 (2014) (citation omitted), and "powers of self-government," 25 U.S.C. § 1302(a). The Tribe's "claim to sovereignty long predates that of our own Government." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973).

"Tribal courts play a vital role in tribal self-government," *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987), and "the Federal Government has consistently encouraged their development." *Id*., at 14-15. *See, e.g.*, Indian Tribal Justice Act, 25 U.S.C. § 3601, *et seq*.; Indian Tribal Justice and Legal Assistance Act, 25 U.S.C. § 3651, *et seq.* Congress has declared that:

> tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments;
>
> 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; and
>
> enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency.

25 U.S.C. § 3651(5)-(7).

Tribal courts have inherent authority to adjudicate civil disputes arising in Indian country. *See*, *e.g.*, *Iowa Mut. Ins. Co.*, 480 U.S., at 18-19; *Williams v. Lee,*

358 U.S. 217, 223 (1959). Tribal authority over domestic relations, including custody disputes involving tribal member children, is well-settled. *See*, *e.g.*, *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883); *Montana v. U.S.*, 450 U.S. 544, 564 (1981). *See generally United States v. Cooley*, 141 S. Ct. 1638 (2021).

In the Indian Child Welfare Act ("ICWA"), Pub. L. 95-608, 92 Stat. 3069 (Nov. 8, 1978), *codified as amended at* 25 U.S.C. § 1901, *et seq*., Congress vested exclusive jurisdiction in tribal courts over child custody proceedings involving tribal member children who reside or are domiciled on Indian reservations. 25 U.S.C. § 1911(a). The ICWA defines "child custody proceeding" to include, among other things, a "foster care placement," meaning "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).[1]

Tribal law confers jurisdiction in the Tribal Court over custody proceedings involving tribal member children. *See* C.R.S.T. Children's Code § 7.01 (R. Doc. 85-

[1] The term "foster care placement" includes an action for protective placement of an Indian child in the home of a non-parent relative. *See*, *e.g.*, *In re Guardianship of J.C.D.*, 686 N.W.2d 647 (S.D. 2004); *In re Mahaney*, 51 P.3d 776 (Wash. 2002); *In re Custody of A.K.H.*, 502 N.W.2d 790 (Minn. App. 1993); *Matter of Guardianship of Ashley Elizabeth R.*, 863 P.2d 451 (N.M. App. 1993); *In re Q.G.M.*, 808 P.2d 683 (Okla. 1991); *A.B.M. v. M.H.,* 651 P.2d 1170 (Alaska 1982), *cert. denied*, 461 U.S. 914 (1983).

1, at 22). The Tribal Court "may decline jurisdiction where a forum with concurrent jurisdiction is exercising its authority or in cases where neither the child nor either parent is a Reservation resident in cases where justice may require declination." *Id*.

D. The Tribal Court Proceedings in This Case[2]

In December 2014, the Tribal Court was presented with a petition for temporary custody of two children who are enrolled members of the Tribe, C.S.N. and T.R.S. *See* R. Doc. 64-5, at 6-9. The petition was filed by children's uncle, Ted Taylor, a tribal member, and later joined by the children's aunt, Jessica Ducheneaux, also a tribal member. R. Doc. 64-5, at 12. The South Dakota Department of Social Services ("DSS") left the children in Mr. Taylor's care and custody following arrest of the children's mother, Tricia Taylor, a tribal member, on the Reservation. R. Doc. 64-13, at 33-34. *See also* R. Doc. 64-5, at 8-9 (DSS Present Danger Plan).

The petition for temporary custody alleged that the children were in need of care and custody, in part, because their mother had been arrested and incarcerated. R. Doc. 64-5, at 6-9. In addition, the proceedings in Tribal Court involve allegations of abuse and neglect, including allegations of alcohol and substance abuse, abuse and mistreatment by Mr. Nygaard against Ms. Taylor, and sexual abuse by Mr.

[2] The Tribal Court record was filed with, and judicially noticed by, the District Court. *See* R. Doc. 64, at 1-2 (index); R. Doc. 64-1 through R. Doc. 64-18 (Tribal Court documents); R. Doc. 67 (Tribal Court audio recordings).

Nygaard against T.R.S.[3] The Tribal Court entered an order granting temporary custody to Ms. Ducheneaux. R. Doc. R. Doc. 64-5, at 13-17. Ms. Ducheneaux works for the Indian Health Service. R. Doc. 64-13, at 13. Her husband, Ed Ducheneaux, is a rancher. *Id*.

Mr. Nygaard and Terrance Stanley, the fathers of C.S.N. and T.R.S., respectively, were not joined in the petition for temporary custody. They appealed the temporary custody order, R. Doc. 64-14, at 3-4, and the Tribal Court of Appeals vacated the order and remanded the case to the Tribal Court with instructions to

[3] *See*, *e.g.*, R. Doc. 64-1, at 2-6 (Petition for Domestic Violence Protection Order); R. Doc. 64-2, at 2-3 (Petition for Emergency Custody); R. Doc. 64-2, at 6 (Findings of Fact); R. Doc. 64-3, at 43, 48 (Order); R. Doc. 64-4, at 2-4 (Petition for Domestic Violence Protection Order); R. Doc. 64-5, at 6-9 (Petition for Temporary Custody); R. Doc. 64-5, at 16-17 (Temporary Custody Order); R. Doc. 64-5, at 80-125 (Records); R. Doc. 64-6, at 83 (Order Dismissing Challenge to Jurisdiction); R. Doc. 64-6, at 94-96 (Memorandum Opinion and Order); R. Doc. 64-7, at 7-8 (Letter); R. Doc. 64-7, at 9-39 (Forensic Report); R. Doc. 64-7, at 83-100 (Exhibits); R. Doc. 64-8, at 1-58 (Exhibits); R. Doc. 64-8, at 113-114 (Letter); R. Doc. 64-8, at 130-133 (Letter); R. Doc. 64-9, at 52-63, 78-82 (Exhibits); R. Doc. 64-10, at 43-48, 56-60 (Exhibits); R. Doc. 64-12, at 12-17 (Amicus Brief of Cheyenne River Sioux Tribe); R. Doc. 64-12, at 37-113, 118, 121-122 (Exhibits); R. Doc. 64-12, at 188, 193 (Order); R. Doc. 64-13, at 13-16 (Guardian ad Litem Report); R. Doc. 64-13, at 34 (Findings of Fact); R. Doc. 64-13, at 43-48 (Memorandum Opinion and Order); R. Doc. 64-13, at 63-71 (Concurring Opinion); R. Doc. 64-15, at 7 (Order), R. Doc. 64-15, at 102-104 (Memorandum Opinion and Order), R. Doc. 64-16, at 26-27 (Amicus Brief of Cheyenne River Sioux Tribe); R. Doc. 64-16, at 54 (Appellant's Brief), R. Doc. 64-16, at 122-123 (Appellants' Exhibits); R. Doc. 64-16, at 124-130 (Memorandum Opinion and Order); R. Doc. 64-16, at 145-153 (Concurring Opinion); R. Doc. 64-17, at 24 (Findings of Fact); R. Doc. 64-18, at 25 (Findings of Fact).

include the fathers and afford them a full opportunity to participate. R. Doc. 64-14, at 100.

In the spring of 2015, Mr. Nygaard and Mr. Stanley filed a motion to dismiss the petition for temporary custody for lack of jurisdiction. R. Doc. R. Doc. 64-5, at 28-42. They argued that the Parental Kidnapping Prevention Act ("PKPA"), Pub. L. 96-611, § 8(a), 94. Stat. 3569 (Dec. 28, 1980), *codified as amended at* 28 U.S.C. § 1738A, deprived the Tribal Court of jurisdiction. The PKPA requires state courts to give full faith and credit to child custody orders duly entered by the courts of other states. 28 U.S.C. § 1738A(a). The PKPA also provides, with some exceptions, that state courts may not modify a custody order duly entered by the court of another state. *Id*.[4]

Mr. Nygaard and Mr. Stanley asserted that they had secured orders from a North Dakota state court granting them custody of the minor children and that the Tribal Court did not have authority, under the PKPA, to enter a temporary custody order that would modify or disturb the state court orders.

The fathers noted that, in *Eberhard v. Eberhard*, 24 ILR 6059 (Chey. R. Sx. Tr. Ct. App. Feb. 18, 1997) (App. 1-10; R. Doc. 1-66, at 1-10), the Tribal Court of Appeals held that the Tribe is a "State," within the meaning of the PKPA, and thus, is bound by the full faith and credit mandate in the PKPA.

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[4] *See*, *infra* note 18 for a discussion of the exceptions.

Eberhard was motivated, in part, by aspirations of a reciprocal recognition and enforcement regime in which state and tribal courts would give full faith and credit to each other's orders. However, those aspirations were never realized. For example, North Dakota and South Dakota recognize tribal court orders under principles of comity, not full faith and credit. S.D.C.L. § 1-1-25; N.D.C.C. § 27-01-09; N.D. Ct. R. 7.2(b); *Fredericks v. Eide-Kirschmann Ford*, 462 N.W.2d 164, 169 (N.D. 1990) (state courts have "discretion to voluntarily recognize and enforce tribal court judgments as a matter of comity").

Eberhard was a common law decision that was subject to alteration by the Tribal Council, the legislative governing body of the Tribe. *See United States v. Lara*, 541 U.S. 193, 207 (2004). Shortly after *Eberhard* was decided, the Tribal Council enacted laws to establish comity, not full faith and credit, as the principle under which foreign orders, including foreign custody orders, would be recognized and enforced in the Tribal Court. *See* C.R.S.T. Executive Resolution E-233-97CR (Sep. 4, 1997) (R. Doc. 85-2, at 1-2), *amended by* C.R.S.T. Resolution No. 323-05-CR (Aug. 4, 2005) (R. Doc. 85-3, at 1-4). *See also* App. 184; R. Doc. 64-16, at 179, and App. 216-17, R. Doc. 85-4, at 4-5 (reciting the operative provisions of these resolutions). By making comity the express law of the Tribe, the Tribal Council effectively overrode *Eberhard*.

On December 22, 2015, the Tribal Court entered an order denying the fathers' motion to dismiss. R. Doc. 64-6, at 79-83. The fathers appealed, R. Doc. 64-14, at 2-10, and on September 1, 2016, the Tribal Court of Appeals entered an order, App. 161-168; R. Doc. 64-15, at 102-109, in which it held that the comity, not full faith and credit, would govern the Tribal Court's potential recognition and enforcement of the fathers' state court custody orders: "The central provision of Tribal law that speaks to the issue of the Cheyenne River Sioux Tribal Court potentially recognizing and enforcing a state court order is grounded in the principle of 'comity,' not full faith and credit." App. 165; R. Doc. 64-15, at 106. *See also* App. 165-167; R. Doc. 64-15, at 106-108.

The Tribal Court of Appeals remanded the case to the Tribal Court to "address the issue of comity." App. 168; R. Doc. 64-15, at 109. The Tribal Court of Appeals ruled 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," and the fathers "shall be entitled—if they so desire—to immediate visitation with their respective children …" App. 167; R. Doc. 64-15, at 108.

The fathers filed a habeas petition in the District Court for the District of North Dakota on November 10, 2016, R. Doc. 1-57, and thereafter sought a stay of all proceedings in the Tribal Court, R. Doc. 64-7, at 72-73, 77-82. The North Dakota

District Court dismissed the habeas action on May 24, 2017. App. 170-192; R. Doc. 64-16, at 165-187. The court held that the fathers were required to exhaust available Tribal Court remedies, specifically noting that tribal law allowed them to ask "the tribal court to grant comity to an order from another jurisdiction." App. 184; R. Doc. 64-16, at 179.

Following dismissal of the North Dakota habeas petition, the Tribal Court held a hearing on February 23, 2018, on the fathers' motion to dismiss and on the enforceability of foreign custody orders. Mr. Nygaard sought recognition of an interim *ex parte* state court order dated September 12, 2014. *See* App. 204-205; R. Doc. 64-12, at 195-196. *See also* R. Doc. 64-3, at 2-7 (Petition to Enforce Foreign Judgment of Custody and Visitation). By order dated April 18, 2018, the Tribal Court declined to grant comity to Mr. Nygaard's interim *ex parte* order, in part, because Ms. Taylor was not given notice or an opportunity to be heard prior to issuance of that order. App. 205; R. Doc. 64-12, at 196.

In the same order, the Tribal Court granted the fathers' motion to dismiss the petition for temporary custody, ruling that the court was bound by *Eberhard*. App. 194-206; R. Doc. 64-12, at 185-197. The court noted that "there is a valid argument that full faith and credit does not apply to Tribes," and there are "numerous arguments why *Eberhard* should be overturned," but the court found that *Eberhard* had not been formally overturned. App. 203; R. Doc. 64-12, at 194. Accordingly,

the court held that the PKPA applies to the Tribe and prevents the Tribal Court from modifying the North Dakota state court orders. App. 202-204; R. Doc. 64-12, at 193-195. (The court noted that the case involved "very serious allegations of abuse and neglect." App. 202; R. Doc. 64-12, at 193.)

Recognizing the confusion in the Tribal Court concerning the continuing vitality of *Eberhard*, the Tribal Council enacted C.R.S.T. Resolution 171-2018-CR (May 4, 2018), which states, in relevant part, that:

> after the Tribal Court made its decision in *Eberhard*, the Cheyenne River Sioux Tribal Council enacted laws … to establish comity, not full faith and credit, as the principle under which foreign orders or judgments may be recognized in the courts of the Tribe …
>
> these Tribal laws are inconsistent with the Tribal Court of Appeals' decision in *Eberhard* …
>
> by making the rule of comity the express law of the Cheyenne River Sioux Tribe, the Tribal Council indicated its view that the Tribe is not bound by the PKPA or subject to the full faith and credit provisions in the PKPA or any other Federal statute that does not expressly include[] Indian Tribes or Indian country, and in so doing, the Tribal Council effectively rendered *Eberhard* inapplicable to future cases …

App. 216-217; R. Doc. 85-4, at 3-4. To make its intent unmistakably clear, the Tribal Council formally declared that:

> the Cheyenne River Sioux Tribe is not a "State" within the meaning of the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, and is not subject to the Act's obligations ….
>
> the custody and visitation orders and judgments of foreign Tribal and State courts may be recognized and enforced by the Cheyenne River Sioux Tribal Courts under the principles of comity set forth in C.R.S.T.

> Res. No. E-233-97-CR (adopted by Executive Committee on Aug. 20, 1997, and approved by Tribal Council on Sept. 4, 1997), as amended by C.R.S.T. Res. No. 323-05-CR (Aug. 4, 2005), not under principles of full faith and credit ….

App. 217-218; R. Doc. 85-4, at 4-5.

Ms. Ducheneaux appealed the dismissal of the temporary custody petition. R. Doc. 64-16, at 2-7. The Tribal Court of Appeals ordered the Tribal Court to conduct an evidentiary hearing on certain jurisdictional facts. R. Doc. 64-16, at 48-51. The Tribal Court did so and entered its findings on December 20, 2018. R. Doc. 64-13, at 33-36. The Tribal Court noted, among other things, that: DSS was present to deal with the custody of C.S.N. and T.R.S. when their mother was arrested, *id*., at 34; DSS left the children in the custody of their uncle, Mr. Taylor, *id*., at 35; the alleged abuse of T.R.S. had been "substantiated" by North Dakota Social Services, but the local prosecutor found insufficient evidence to file a criminal charge, *id*., at 34; Ms. Ducheneaux has exercised actual physical custody of C.S.N. and T.R.S. since December 16, 2014, *id*., at 36; visitation for the fathers has been authorized by the Tribal Court, *id.*; and Mr. Stanley has exercised visitation, while Mr. Nygaard "has not exercised visitation even though it was available to him." *Id*.

The Tribal Court of Appeals also ordered the court-appointed guardian ad litem ("G.A.L.") for C.S.N. and T.R.S. to prepare a report as to the status and well-being of the children. App. 130, n.1; R. Doc. 64-16, at 125. *See also* R. Doc. 64-16, at 48-51. The G.A.L. did so, and according to the Tribal Court of Appeals, the G.A.L.

report indicates that, "the children are thriving … They are both currently enrolled in public school on the Reservation and performing well." App. 130, n.1; R. Doc. 64-16, at 125.[5]

The Tribal Court of Appeals entered an order on February 25, 2019. App. 129-218; R. Doc. 64-16, at 124-206. It held that the PKPA does not apply to the Tribe and, as a result, the custody orders of the North Dakota state court are not entitled to full faith and credit. App. 138-145; R. Doc. 64-16, at 133-140. The court noted that any construction of the PKPA as being applicable to Indian tribes "is quite strained and appears to readily exceed the bounds of its 'plain meaning.'" App. 139; R. Doc. 64-16, at 134.

> Nowhere in the [PKPA] does the term Indian or Indian tribe appear. Most importantly, the term is not mentioned in the definition of 'state' which appears at 28 U.S.C. § 1738A(b)(8). This 'plain meaning' approach is further supported by the well-known Indian canons of construction that hold that any federal law purporting to restrict the sovereign powers of an Indian nation should do so expressly so that reserved powers are retained in the absence of clear congressional intent to the contrary.

Id. (citations omitted).

[5] The G.A.L. report is set forth at R. Doc. 64-13, at 13-16. It discusses: the children's well-being, home life, and school performance; the alleged sexual abuse of T.R.S. by Mr. Nygaard, the on-going professional counseling T.R.S. receives relating to the alleged abuse, and the G.A.L.'s recommendations concerning the alleged abuse; alleged substance abuse; visitation of T.R.S. by Mr. Stanley; and the recommendations of the G.A.L. concerning future custody and visitation, among other things. *Id*.

The Tribal Court of Appeals noted that tribal law adheres to "the well-known principle of comity," not full faith and credit. App. 145; R. Doc. 64-16, at 140. The court noted that comity applies to "*all* 'foreign' judgments." *Id.* (emphasis in original). The court also noted that, "the most recent and updated Tribal Resolution on comity [Resolution 171-2018-CR-] includes the observation that the Tribe does not consider itself a 'state' within the meaning of the PKPA." *Id*.

The Tribal Court of Appeals noted that, "the relevant caselaw is virtually unanimous in holding that the PKPA does *not* apply to tribes." App. 139; R. Doc. 64-16, at 134 (emphasis in original). *See also* App. 139-141; R. Doc. 64-16, at 134-136 (collecting cases). The court also noted that states, like North Dakota, enforce tribal court orders under principles of comity, not full faith and credit. App. 145; R. Doc. 64-16, at 140.

The Tribal Court of Appeals formally overruled *Eberhard* and confirmed that *Eberhard*'s long-since-repudiated ruling on the applicability of the PKPA to the Tribe has no continuing force. App. 148; R. Doc. 64-16, at 143.

The Tribal Court of Appeals held that the Tribal Court has jurisdiction, under tribal law, over the petition for temporary custody. Specifically, the court held that:

> Tribal law expressly grants jurisdiction to the Tribal Court over care and custody proceedings involving children who are members of the Tribe. The Children's Code of the Tribe provides that the Tribal Court "shall have jurisdiction over any child who is a member or eligible to become a member of the Cheyenne River Sioux Tribe no matter where domiciled, residing or found …" C.R.S.T. Children's Code § 7.01. The

> Children's Code further provides that the Tribal Court "may decline jurisdiction where a forum with concurrent jurisdiction is exercising its authority or in cases where neither the child nor either parent is a Reservation resident in cases where justice may require declination." *Id*.

App. 147; R. Doc. 64-16, at 142.

The Tribal Court of Appeals remanded the case to the Tribal Court for a hearing to "review the status of parental visitation and whether the current award of (temporary) custody of those minor children to … Ms. Jessica Ducheneaux, continues to be in the 'best interests of these native children." App. 148; R. Doc. 64-16, at 143.

E. The Federal District Court Proceedings in This Case

Mr. Nygaard and Mr. Stanley filed a habeas petition in the District Court for the District of South Dakota on August 28, 2019, and an amended habeas petition on July 2, 2020. App. 11-43; R. Doc. 8, at 1-33. They sought—and secured—a stay of all proceedings in the Tribal Court pending resolution of their federal habeas petition. R. Doc. 64-13, at 172.

Tribal Court Appellees filed a motion to dismiss the federal habeas petition. The District Court concluded that, "the Tribal Court and Tribal Court of Appeals have sovereign immunity and must be dismissed as named defendants in this suit." App. 81; R. Doc. 69, at 38. The motion was denied in all other respects. App. 88; R. Doc. 45.

In a subsequent order, the court identified as the "central issue in this case" the question of "whether 28 U.S.C. § 1738A(a) and (b)(8), portions of the Parental Kidnapping Prevention Act (PKPA), extend to tribes and tribal courts." App. 109; R. Doc. 73, at 1. The Court stated that the applicability of the PKPA is "strictly a legal issuefequal" that can be decided on cross-motions for summary judgment. *Id*. The court relieved the parties of the burden of filing statements of undisputed facts. App. 110; R. Doc. 73, at 2. The court precluded the parties from engaging in fact discovery. *See* R. Doc. 108, at 19 (ruling that the court is "not going to countenance discovery because there is a pure issue or clear issue of law that drives, if not all, a substantial part of this case").

The parties filed cross-motions for summary judgment, *see* App. 111-114; R. Doc. 77, at 1-4 and App. 219-221; R. Doc. 82, at 1-3, and the District Court issued an order and judgment granting the Tribal Court Appellees' motion for summary judgment. App. 261-293; R. Doc. 103, at 1-33; App. 294-295; R. Doc. 104, at 1-2. The court held that the PKPA does not apply to tribes, noting that "Congress did not write a definition of 'state' in the PKPA broadly enough to apply to Indian Tribes." App. 292; R. Doc. 103, at 32. By its express terms, the PKPA applies to states, and it defines the term "state" to include "a State of the United States … or a territory or possession of the United States." App. 284; R. Doc. 103, at 24 (citing 28 U.S.C. § 1738A(b)(8)). It does not mention Indian tribes.

The District Court noted that, "[t]he Supreme Court has long distinguished Indian tribes from territories and states." App. 291; R. Doc. 103, at 31.[6] The court noted that the fathers' "claim that 'a territory or possession of the United States' includes Indian tribes is belied by the common and longstanding use of these terms in statutes and case law." App. 292; R. Doc. 103, at 32. *See also* App. 283-291; R. Doc. 103, at 23-31 (discussing relevant statutes and cases).

The District Court held that that it was "bound to interpret and apply the PKPA as it is written, not as how it might or arguably should have been written." App. 292-293; R. Doc. 103, at 32-33 (citing *United States v. David*, 139 S. Ct. 2319, 2336 (2019)). The Court also noted that, "Congress can amend the PKPA if it wishes to extend it to Indian tribes." App. 293; R. Doc. 103, at 33 (citing *Bank Markazi v. Peterson*, 578 U.S. 212, 215 (2016)).

Finally, the District Court noted that, "Fathers still may seek enforcement of the North Dakota state custody orders from the Cheyenne River Sioux Tribal Court through comity principles." App. 293; R. Doc. 103, at 33 (citations omitted).

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[6] The District Court noted that the term "possessions" appears to be synonymous with the term "territories." App. 290; R. Doc. 103, at 30 (citing, among other authorities, *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979), in which the Court used the terms "unincorporated territories" and "possessions" interchangeably). ***Accordingly, throughout this brief, unless the context plainly requires otherwise, the term "territories" includes the term "possessions."***

SUMMARY OF THE ARGUMENT

The Cheyenne River Sioux Tribe has the inherent authority to enter custody orders concerning tribal member children, like C.S.N. and T.R.S., who are found in need of care and custody on the Cheyenne River Indian Reservation. That authority has been recognized and affirmed in treaties and statutes, including the Fort Laramie Treaties of 1851 and 1868, the Act of February 28, 1877, 19 Stat. 254, and the ICWA. The Tribe's authority also has been affirmed in *Ex parte Crow Dog*, 109 U.S., at 568, and other cases upholding the inherent authority of tribes to regulate domestic relations and domestic affairs.

The PKPA does not apply to the Tribe or limit its powers of self-government. By its express terms, the PKPA applies only to states and territories of the United States. The Supreme Court has held repeatedly that tribes are not states, *see*, *e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191–92 (1989), and in a series of modern cases, beginning with *Wheeler v. United States,* 435 U.S. 313, 328 (1978), and continuing with *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016), and *Denezpi v. United States*, 142 S. Ct. 1838 (2022), the Supreme Court has made it clear that Indian tribes are not territories.

Territories are federal instrumentalities whose powers derive exclusively from the federal government, while Indian tribes are "separate sovereigns" whose powers of tribal self-government are inherent and whose sovereignty predates that of the

United States. *Lara,* 541 U.S., at 197. Tribes have a treaty-based, government-to-government relationship with the United States. *Id.*at 202 (citing Executive Memorandum, *Government-to-Government Relations with Native American Tribal Governments*, 59 Fed. Reg. 22951 (Apr. 29, 1994)).

Against this backdrop, Congress knows that when it intends to include Indian tribes within the scope of its full faith and credit statutes, it must do so expressly. A mere reference to states, territories, or possessions will not suffice. Congress has enacted several full faith and credit statutes that expressly mention Indian tribes or Indian country, in addition to states, territories, and possessions. One such statute is the ICWA, which was enacted two years before the PKPA. "[T]he separate listing of territories, possessions and Indian tribes in the Indian Child Welfare Act provides an indication that Congress did not view these terms as synonymous." *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

Neither the text of the PKPA nor its legislative history make any reference to Indian tribes. It is a fundamental principle of Indian law that tribes retain "all inherent attributes of sovereignty that have not been divested by the Federal Government," and that "the proper inference from silence ... is that the sovereign power ... remains intact." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148–49 n.14 (1982). Accordingly, most courts have held that Indian tribes and tribal courts are not bound by the PKPA or by the full faith and credit mandates in other federal

laws that do not expressly include tribes. *See*, *e.g.*, *Marchington*, 127 F.3d, at 809; *Garcia v. Gutierrez*, 217 P.3d 591, 604 (N.M. 2009).

This approach respects the inherent, pre-existing sovereignty and right to self-government of Indian tribes and limits encroachments to those cases where Congress has expressly mandated the application of full faith and credit in Indian country.

ARGUMENT

I. THE CHEYENNE RIVER SIOUX TRIBE HAS INHERENT AUTHORITY OVER THE PETITION FOR TEMPORARY CUSTODY OF C.S.N. AND T.R.S.

The Cheyenne River Sioux Tribe is a "self-governing political communit[y] that was formed long before Europeans first settled in North America." *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 851 (1985). It is a "separate sovereign[] pre-existing the Constitution." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978). The Tribe possesses sovereignty over both its members and its territory. *See Jicarilla Apache Tribe*, 455 U.S., at 140; *United States v. Mazurie*, 419 U.S. 544, 557 (1975). It has the right to make its own laws and be ruled by them. *Williams,* 358 U.S., at 220.

In *Ex parte Crow Dog*, the Supreme Court held that, through the Fort Laramie Treaties of 1851 and 1868 and related statutes, the Great Sioux Nation and its constituent tribes reserved to themselves the highest and best form of government, that of self-government:

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all,—that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.

109 U.S., at 568.

The protection of tribal member children found in need of care and custody on the Reservation is an essential aspect of the Tribe's self-government and regulation of its "domestic affairs." Congress has declared that, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." *See* 25 U.S.C. § 1901(3). *Accord, Miss. Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 35, 37 (1989).

In the ICWA, Congress vested exclusive jurisdiction in tribal courts over "child custody placements," including foster care placements, involving tribal member children who reside or are domiciled on the Reservation. 25 U.S.C. § 1911(a). The term "foster care placement," as used in the ICWA, includes the protective placement of an Indian child with a non-parent relative. *See*, *supra*, n.1.

In this case, the minor children, C.S.N. and T.R.S., are enrolled members of the Tribe who reside and are present on the Reservation. They were found by DSS to be in need of care, custody, and protection on the Reservation. DSS left the

children in the custody of their uncle, a tribal member and a non-parent relative, who petitioned the Tribal Court for protective custody. The children's aunt, also a tribal member, joined in the petition. There are allegations of abuse, neglect, and incapacity by one or more of the parents of the children.

When tribal member children are found in need of care, custody, and protection on the Reservation, 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. That authority is recognized and affirmed in tribal law, including the Tribe's Constitution, R. Doc. 54-1, at 6, By-Laws, *id., at* 17, and Children's Code, R. Doc. 85-1, at 24-27.

II. THE PARENTAL KIDNAPPING PREVENTION ACT DOES NOT APPLY TO THE CHEYENNE RIVER SIOUX TRIBE.

The PKPA provides, with some exceptions, that a custody or visitation order made by a state court with jurisdiction is entitled to full faith and credit in the courts of other states. 28 U.S.C. § 1738A(a). The PKPA defines the term "State" to include "a State of the United States … or a territory or possession of the United States." 28 U.S.C. § 1738A(b)(8). There is no reference to Indian tribes, tribal courts, or Indian country in the PKPA, and the Act's legislative history lacks any suggestion that Congress intended the statute to apply to tribes.

Indian tribes are not states, territories, or possessions, and the overwhelming weight of authority holds that tribes are not included within the full faith and credit

mandate of the PKPA (or any other federal full faith and credit law that does not expressly mention them).

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

To put this case in proper perspective, it is helpful to examine the Full Faith and Credit Clause ("FFCC"), U.S. Const., art. IV, § 1, and the Full Faith and Credit Act ("FFCA"), 1 Stat. 122, ch. 11 (May 26, 1790), *codified as amended at* 28 U.S.C. § 1738, and the prevailing view among the federal, state, and tribal courts that Indian tribes are not states, territories, or possessions within the meaning of either the FFCC or the FFCA. The logic and reasoning of these cases applies with equal force to the PKPA.

The FFCC provides, in relevant part that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const., art. IV, § 1.

The Framers intended the FFCC to:

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

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

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

Tribes, unlike states, are not "part of the constitutional framework that allocates sovereignty between the State and Federal Governments." *Lara*, 541 U.S., at 218 (Thomas, J., concurring). Tribes were not parties to the constitutional convention, and it would be "absurd to suggest that the tribes surrendered" an aspect of their inherent sovereignty "in a convention to which they were not even parties." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991).

Nothing in the Constitution provides that tribes are to be treated as states. To the contrary, "the Commerce Clause draws a clear distinction between 'States' and 'Indian Tribes.'" *Cotton Petroleum*, 490 U.S., at 191–92. *See* U.S. Const., art. I, § 8, cl. 3. "The objects, to which [Congress'] power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct." *Cherokee Nation,* 30 U.S. 1, 18 (1831). Further, the Supremacy Clause distinguishes tribes from states by affirming that tribes are "capable of making treaties." *Worcester v. Georgia*, 31 U.S. 515, 559–60 (1832). U.S. Const., art. VI, ¶ 2.

The Supreme Court has held repeatedly that tribes are not states. *See*, *e.g.*, *Cotton Petroleum*, 490 U.S., at 191–92 (tribes are not "states" within the scope of the Commerce Clause); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("Tribal reservations are not States"); *Arizona v. California*, 373 U.S. 546, 597 (1963) ("An Indian Reservation is not a State"); *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641, 653 (1890) ("The proposition that the Cherokee Nation is sovereign ... in the sense that the several states are sovereign … finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of congress defining the relations of that people with the United States."); *United States v. Kagama*, 118 U.S. 375, 381–82 (1886) ("[Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, but as a separate people, with the power of regulating their internal and social relations")

Because tribes are not states, they are not subject to the FFCC. *See*, *e.g.*, *Desjarlait v. Desjarlait*, 379 N.W.2d 139, 144 (Minn. Ct. App. 1985); *Lohnes v. Cloud*, 254 N.W.2d 430, 433 (N.D. 1977); *Begay v. Miller*, 222 P.2d 624, 628 (Ariz. 1950).

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

The FFCA extends the full faith and credit doctrine to territories and possessions of the United States. It states in relevant part that:

> [t]he records and judicial proceedings of any court of any such State, Territory or Possession shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738. Indian tribes are not "Territories" or "Possessions" and, therefore, are not subject to the FFCA.

The concept of territories and possessions is rooted in the Constitution and embraces lands belonging to the United States that have not yet achieved the status of independent sovereign states. *See* U.S. Const., art. IV, § 3. Currently, the United States has one incorporated territory, Palmyra Island,[7] and thirteen unincorporated territories, some of which are organized under federal organic acts or covenants and some of which are not.[8] Puerto Rico, Guam, and the Virgin Islands are unincorporated territories that are organized under organic acts,[9] and the Northern Mariana Islands is an unincorporated territory that is organized under a covenant.[10]

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[7] *See* Hawaii Admission Act, Pub. L. 86-3, § 2, 73 Stat. 4 (Mar. 18, 1959) (excluding Palmyra Island, once part of the Territory of Hawaii, from the new State of Hawaii, thus preserving its status as an incorporated territory of the United States).

[8] *See generally* U.S. Dept. of Interior, Office of Insular Affairs, *Definitions of Insular Area Political Organizations*, https://www.doi.gov/oia/islands/politicatypes (last visited October 28, 2022); 46 C.F.R. § 308.504 (maritime regulation defining "territories and possessions" to include the thirteen unincorporated territories).

[9] *See*, *e.g.*, Organic Act of Puerto Rico, ch. 191, 31 Stat. 77 (Apr. 2, 1900); Organic Act of Guam, ch. 512, 64 Stat. 384 (Aug. 1, 1950); and Revised Organic Act of the Virgin Islands, ch. 558, 68 Stat. 497 (Jul. 22, 1954).

[10] 48 U.S.C. § 1801.

The Supreme Court has referred to organized territories, like Puerto Rico, as "a portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but organized under the laws of Congress with a separate legislature, under a territorial governor and other officers appointed by the President and Senate of the United States." *Puerto Rico v. Shell Co.*, 302 U.S. 253, 258 (1937) (internal citation and quotation marks omitted).

Territories are instrumentalities of the federal government whose authority derives from the federal government:

> The government of the Territories of the United States belongs, primarily, to Congress; and secondarily, to such agencies as Congress may establish for that purpose … Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government.

Snow v. United States, 85 U.S. 317, 319–20 (1873).

The Supreme Court has never squarely addressed the question of whether tribes constitute "Territories" under the FFCA. The Court held in *United States ex. rel Mackey v. Coxe*, 59 U.S. 100 (1855), that a now-repealed, narrower, statute required full faith and credit to be given to a decree of a Cherokee Nation court because the Cherokee Nation constituted a "domestic territory—a territory which originated under our constitution and laws." *Id*., at 103. However, the reasoning of *Mackey* is undermined by subsequent cases in which the Court held that Indian tribes are prior sovereigns whose inherent powers of self-government predate, and do not

originate under, the Constitution or laws of the United States. *See*, *e.g.*, *Talton v. Mayes*, 163 U.S. 376, 384 (1896) ("the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution"); *McClanahan*, 411 U.S., at 172 (tribal sovereignty "long predates" that of the United States). Further, in a case decided after *Mackey*, the Court discussed with approval a lower federal court case holding that tribes are not territories within the meaning of a federal extradition statute. *New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 475 (1909) (discussing *Ex parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883)).

Accordingly, the Supreme Court has been careful to emphasize the limited reach of its precedents in this areas: "Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded *in some circumstances* as entitled to full faith and credit in other courts." *Santa Clara Pueblo*, 436 U.S., at 65-66 n.21 (emphasis added; citing, *e.g.*, *Standley v. Roberts*, 59 F. 836, 845 (8th Cir. 1894), which construed the Act of May 2, 1890, concerning the jurisdiction of federal and Indian courts in the Indian Territory).[11] The Supreme Court has never

[11] *Standley* is one of a few late nineteenth century cases in which the Eighth Circuit stated that the judgments of Indian tribes are "on the same footing with the proceedings and judgments of the courts of the territories of the Union, and are entitled to full faith and credit." *Mehlin v. Ice*, 56 F. 12, 19 (8th Cir. 1893). However, the District Court correctly noted that the Court's statements in cases like *Standley* and *Mehlin* were *dicta*, and that, recently, the Eighth Circuit has not followed the *Mehlin* line of cases. App. 285, n.13; R. Doc. 103, at 25, n.13 (citation omitted). Commentators caution against reliance on these nineteenth century cases. *See*, *e.g.*, Stoner & Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path That*

held that tribal court judgments are entitled to full faith and credit in *all circumstances*—a result that would be required if the Court considered tribes to be territories under 28 U.S.C. § 1738.

In a series of modern cases, the Supreme Court has eliminated any doubt about the status of Indian tribes, making it clear that tribes are not territories. In *Wheeler*, the Court held that, unlike territories, Indian tribes have a "right of internal self-government," and "[t]he powers of Indian tribes are, in general, *inherent powers of a limited sovereignty which has never been extinguished*." *Id*., at 322 (emphasis in original; citation omitted). The Court held that Indian tribes' "primeval sovereignty … is attributable in no way to any delegation to them of federal authority," and when a tribe exercises its authority, "it does so as part of its retained sovereignty and not as an arm of the Federal Government." *Id*., at 328. In contrast, "a territorial government is entirely the creation of Congress, and its judicial tribunals exert all their powers by authority of the United States." 435 U.S., at 321 (citations omitted). "When a territorial government enacts and enforces criminal laws to govern its

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Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders, 34 N.M. L. REV. 381, 385 (2004) ("[I]n closely examining the opinions of the [Eighth Circuit], it is quite clear that none have ever conclusively determined that tribes are indeed 'Territories'...."). The Supreme Court's modern pronouncements in *Wheeler*, *Sanchez Valle*, and *Denezpi* control over the *dicta* in the prior nineteenth century cases.

inhabitants, it is not acting as an independent political community like a State, but as an agency of the federal government." *Id.* (citation omitted).

The *Wheeler* Court held that when an Indian tribe, in the exercise of its inherent powers of self-government, prosecutes a tribal member for violating tribal law, it does so as an independent sovereign, rather than as an arm of the federal government, so that a subsequent federal prosecution for a federal crime arising out of same incident is not barred by the Double Jeopardy Clause. In contrast, the Court noted that "successive prosecutions by federal and territorial courts are impermissible because such courts are 'creations emanating from the same sovereignty.'" 435 U.S., at 318 (quoting *Shell*, 302 U.S., at 264-66).

The Supreme Court affirmed the distinction between tribes and territories in *Sanchez Valle* (2016). The Court emphasized that territories differ from both states and Indian tribes in that they "are not sovereigns distinct from the United States." 579 U.S., at 78. The Court noted that:

> States are separate sovereigns from the Federal Government (and from one another). The States' powers … do not derive from the Federal Government. Instead, the States rely on authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.

Id., at 69 (citations and quotation marks omitted; cleaned up). Similarly, the Court noted that:

> Indian tribes also count as separate sovereigns … Originally, … the tribes were self-governing sovereign political communities … After the formation of the United States, the tribes became domestic dependent nations … But unless and until Congress withdraws a tribal power … the Indian community retains that authority in its earliest form. The ultimate source of a tribe's power … thus lies in its primeval or, at any rate, pre-existing sovereignty.

Id., at 71 (citations and quotation marks omitted; cleaned up).

Conversely, the *Sanchez Valle* Court held that territories "'derive [their] powers from the United States,'" and "'exert all their powers by authority' of the Federal Government." *Sanchez Valle*, 579 U.S., at 71 (quoting *Grafton v. United States,* 206 U.S. 333, 355 (1907)). "'[T]erritorial and federal laws [are] creations emanating from the same sovereignty.'" *Id*. (quoting *Shell,* 302 U.S. 253, 264 (1937)).

The Supreme Court once again distinguished tribes from territories in *Denezpi* (2022). The Court upheld successive prosecutions for an offense defined by an Indian tribe and an offense defined by the United States, even though both offenses were prosecuted by the federal government. 142 S. Ct., at 1842-1843. The Court noted that a "Tribe and the United States are separate sovereigns," and the "'two entities derive their power to punish from wholly independent sources.'" *Id*., at 1845 (quoting *Sanchez Valle*, 579 U.S., at 68). The Court explained that:

> before Europeans arrived on this continent, tribes "were self-governing sovereign political communities" with "the inherent power to prescribe laws for their members and to punish infractions of those laws." While "Congress has in certain ways regulated the manner and extent of the

> tribal power of self-government," Congress did not "*creat[e]*" that power. When a tribe enacts criminal laws, then, "it does so as part of its retained sovereignty and not as an arm of the Federal Government."

Id., at 1845 (2022) (emphasis in original; quoting *Wheeler*, 435 U.S., at 322-23, 328).

In contrast, the *Denezpi* Court noted that a territory, like Puerto Rico, is not "an independent sovereign from the United States." 142 S. Ct., at 1848, n.4 (citing *Sanchez Valle*, 579 U.S., at 77). Because a territory's "'authority to enact and enforce criminal law ultimately comes from Congress, … it cannot follow a federal prosecution with its own.'" *Id*., at 1847 (quoting *Sanchez Valle*, 579 U.S., at 77).

Wheeler, *Sanchez Valle* and *Denezpi* are consistent with the longstanding distinction Congress has drawn between Indian tribes and territories. For example, in the Dakota Territory Act, 12 Stat. 239 (Mar. 2, 1861), Congress made clear that Great Sioux Nation and its lands constituted no part of the Territory:

> [N]othing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Dakota, until said tribe shall signify their assent to the President of the United States to be included within the said Territory …

Dak., Act. Mar. 2, 1861, ch. 86, § 1, 12 Stat. 239, *codified at* R.S. § 1839.[12]

In *Ex parte Crow Dog*, 109 U.S., at 559, the Court noted that, "[t]he reservation of the Sioux Indians, lying within the exterior boundaries of the territory of Dakota, was defined by article 2 of the [Fort Laramie] treaty concluded April 29, 1868, (15 St. 635,) and by section 1839 Rev. St., it *is excepted out of and constitutes no part of that territory*." (Emphasis added.)[13]

In this case, the District Court correctly held that Indian tribes are not territories. App. 290-292; R. Doc., 103, at 30-32. Recognizing the importance of *Wheeler* and *Sanchez Valle*, the court noted Indian tribes exercise inherent sovereign authority, including the "inherent power" to make and enforce their own laws, and "unlike territories, Indian tribes possess inherent sovereignty from their existence before the creation of the federal government." App. 291; R. Doc. 103, at 31 (citing *Wheeler*, 435 U.S., at 322-23; *Sanchez Valle*, 579 U.S., at 70).

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[12] *See also* Act to Organize the Territories of Nebraska and Kansas, 10 Stat. 277 (May 30, 1854) (same principle applies to Territory of Nebraska); 48 U.S.C. § 1451 (same principle applies to "any Territory" created by any Territory Act codified in Title 23 of the Revised Statutes).

[13] Similarly, when South Dakota was admitted to statehood, the people of the state agreed and declared "that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes." Enabling Act of North Dakota, South Dakota, Montana, and Washington, 25 Stat. 676, ch. 180, § 4 (Feb. 22, 1889).

The District Court also relied on *Marchington*, a case in which the Ninth Circuit held that tribes are not territories within the meaning of the FFCA. 127 F.3d*., at* 809. *Marchington* held that Congress knows how to "expressly extended full faith and credit to … tribal proceedings," and has done so on many occasions, but it did not do so in the FFCA. *Id., at* 808-09. "In absence of a Congressional extension of full faith and credit, the recognition and enforcement of tribal judgments in federal court must inevitably rest on the principles of comity." *Id*. *Accord*, *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006), *cert. denied*, 549 U.S. 1167 (2007); *Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co.*, No. 04-22774-CIV, 2006 WL 8433224, at *9-10 (S.D. Fla. Jan. 19, 2006).

Most state courts that have considered the question have concluded that Indian tribes are not "Territories" within the meaning of the FFCA and have instead "opted for comity." Clinton, et al., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 294 (4th ed. 2003) (citing *John v. Baker*, 982 P.2d 738 (Alaska 1999); *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985)). *Accord, Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 693 (Ariz. Ct. App. 1977).

Mr. Nygaard notes that, in *Jim v. C.I.T. Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975), the New Mexico Supreme Court held that Indian tribes are "Territories," within the meaning of 28 U.S.C. § 1738. App. Br. 28. However, in

Garcia—a case involving the PKPA—the New Mexico Supreme Court retreated from its position in *Jim*:

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

Garcia, 217 P.3d, at 606–7 (internal citations omitted).

Similarly, in *Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho 1982), the Idaho Supreme Court held that the phrase "Territories and Possessions," as used in 28 U.S.C. § 1738, is "broad enough to include Indian tribes, at least as they are

presently constituted under the laws of the United States." The court was motivated, in whole or in part, by a belief that, "this holding will facilitate better relations between the courts of this state and the various tribal courts within Idaho." *Id*. However, in *Coeur d'Alene Tribe v. Johnson*, 162 Idaho 754 (2017), the Idaho Supreme Court overruled *Sheppard*:

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

Id., at 758.

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

Many states have adopted comity as the rule by which they will recognize and enforce tribal court decisions, including Arizona, Connecticut, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota,

Washington, Wisconsin, and Wyoming.[14] "No federal court has ever stricken a state [comity] enforcement statute on supremacy grounds as inconsistent with some federal rule," including 28 U.S.C. § 1738. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.07[2][b].

Most tribal courts have concluded that the FFCA does not apply to Indian tribes. *See*, *e.g.*, *In re Guardianship of Chewiwi*, 1 Navajo Rptr. 120, 125 (Navajo 1977) (holding that Indian tribes "stand beyond the bounds" of the rule of full faith and credit).

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

"[T]he preeminent canon of statutory interpretation requires [courts] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Bedroc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). By its express terms, the PKPA applies to states, territories, and possessions, not Indian tribes. 28 U.S.C. §§ 1738A(a) & 1738(b)(8). There is no reference to Indian tribes, tribal courts, or Indian country in the PKPA, and the Act's "legislative history lacks any suggestion that Congress intended the statute to apply to tribes." *Garcia*, 217 P.3d, at 604

[14] *See* Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 338-45 (2000) (collecting cases, statutes, and court rules).

(noting that, "the legislative history of the PKPA contains no discussion of tribal custody decrees," because "Congress was manifestly concerned with reducing jurisdictional competition between state courts") (citation omitted). *Accord*, *John*, 982 P.2d, at 762.[15]

Furthermore, the Supreme Court "generally assumes that, when Congress enacts statutes, it is aware of this Court's relevant precedents." *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1940 (2022). Congress enacted the PKPA two years after the Supreme Court decided *Wheeler*, the leading case distinguishing between Indian tribes from territories. *Wheeler* "was not only *a* relevant precedent" on the distinction between tribes and territories; "it was *the* precedent." *Cf.*, *Ysleta Del Sur Pueblo*, 142 S. Ct., at 1940 (emphasis in original). This Court must assume that Congress was aware of *Wheeler* and knew, when it enacted the PKPA, that its reference to territories or possessions in the PKPA did not include Indian tribes.

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[15] Indian tribes, tribal courts, and Indian country are not mentioned in the salient legislative history of the PKPA. *See*, *e.g.*, *Parental Kidnaping Prevention Act of 1979, S. 105, Joint Hearing of Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources*, 96th Cong., 2nd Sess., Serial No. 96-54 (Jan. 30, 1980); *Parental Kidnaping Prevention Act of 1979, S. 105, Addendum to Joint Hearing Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources*, 96th Cong., 2nd Sess., Serial No. 96-54 (Jan. 30, 1980); Congressional Record, *Proceedings and Debates of the 96th Congress*, 125 Cong. Rec. S374-395 (daily ed. Jan. 23, 1979). *See also Implementation of the Parental Kidnaping Prevention Act of 1980, Oversight Hearing of Subcomm. on Crime of the Comm. on the Judiciary*, 97th Cong., 1st Sess., Serial No. 99 (Sept. 24, 1981).

Congress knows how to include Indian tribes within the scope of its full faith and credit statutes, and it has done so by express mandate on several occasions. At least seven full faith and credit statutes expressly apply to Indian tribes, tribal courts, or Indian country.[16] One of these statutes—the Maine Indian Claims Settlement Act, Pub. L. 96–420, 94 Stat. 1785 (Oct. 10, 1980)—was adopted by the same (96th) Congress that adopted the PKPA, and it expressly provides that the State of Maine and select Indian tribes "shall give full faith and credit to the judicial proceedings of each other." *Id*., at § 6(g). Because the two Acts were passed by the same Congress, they "must therefore be considered *in pari materia*." *Cf., Menominee Tribe v. United States*, 391 U.S. 404, 411 (1968). Read together, the two Acts make clear that when Congress intends to extend full faith and credit to Indian country, it does so expressly, not by mere reference to states or territories.

Another statute—the ICWA—was adopted two years before the PKPA and expressly provides that, "[t]he United States, every State, every territory or possession of the United States, and *every Indian tribe* shall give full faith and credit

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

to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity." 25 U.S.C. § 1911(d) (emphasis added). In *Marchington,* the court held that, "the separate listing of territories, possessions and Indian tribes in the Indian Child Welfare Act provides an indication that Congress did not view these terms as synonymous." *Wilson v. Marchington*, 127 F.3d, at 809.

Still another statute—the Federal Full Faith and Credit for Child Support Orders Act—mandates full faith and credit between States for child support orders, 28 U.S.C. § 1738B(a), and it expressly defines the term "State" to mean "a State of the United States, … the territories and possessions of the United States, *and Indian country (as defined in section 1151 of title 18)*," 28 U.S.C. § 1738B(b)(9) (emphasis added).

These statutes are "cogent proof that Congress [knows] well how to express its intent directly," *Bryan v. Itasca Cnty*., 426 U.S. 373, 389-90 (1976), when it intends to subject Indian tribes to a federal full faith and credit mandate. It did not do so in the PKPA.

Congress understands that the terms "territories" and "possessions" do not include Indian tribes or Indian country. Otherwise, the inclusion of the term "every tribe" in the ICWA, 25 U.S.C. § 1911(d), and its inclusion of the term "Indian

country" in 28 U.S.C. § 1738B(b)(9), would be superfluous, since these laws already included territories and possessions.

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

The omission of Indian tribes from the PKPA is clear evidence that Congress did not intend the PKPA to apply to Indian tribes:

> The explicit inclusion of tribes in these [other] statutes strongly suggests that Congress not only considers it necessary to specify when legislation is meant to apply to tribes, but also that Congress is capable of doing so when it desires. The most telling example is Section 1738(B), which immediately follows the PKPA in the United States Code. Section 1738(B) mandates full faith and credit between "states" for child-support orders, and it defines "state" as "a state of the United States, … the territories and possessions of the United States, *and Indian country (as defined in section 1151 of title 18*)." 28 U.S.C. § 1738(B) (emphasis added). The PKPA employs a virtually identical definition of "state," except that it does not include the phrase "and Indian country."
>
> We also observe the fundamental principle of Indian law that tribes retain "all inherent attributes of sovereignty that have not been divested by the Federal Government," and that "the proper inference from

> silence ... is that the sovereign power ... remains intact." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148–49 n.14 (1982). Applied here, this principle strongly suggests that if Congress intends to dictate to tribal courts principles of full faith and credit, it must do so explicitly.

Garcia, 217 P.3d, at 605 (emphasis in original).

In *Garcia*, the court noted that, "the view of tribes as 'territories' for the purposes of full faith and credit statutes appears to have fallen out of favor with most contemporary courts.... [R]eading 'territories' to mean 'tribes' [in the PKPA] would render superfluous the explicit inclusion of 'Indian tribes' in Section 1738(B) and other statutes that on their terms apply to 'territories' and also to 'tribes.'" 217 P.3d, at 605-606. *Accord*, *Marchington*, 127 F.3d, at 808-809 (engaging in the same analysis and reaching the same conclusion with respect to FFCA).

This Court should not strain to include tribes within the PKPA's full faith and credit mandate. Mr. Nygaard's argument about the Indian canons of construction is simply misplaced. App. Br. 29-33. If the PKPA were applied to tribes, it would restrict tribal sovereignty and self-governance, limiting the Tribal Court's ability to regulate its domestic affairs and to protect tribal member children found to be in need of care and custody on the Reservation.

Congress must "unequivocally" express its intent to abrogate inherent tribal powers and immunities. *See Bay Mills Indian Cmty.*, 572 U.S., at 790 (citation omitted). It is "an enduring principle of Indian law" that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.*

(citations omitted). Accordingly, out of "proper respect both for tribal sovereignty," the courts must "tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S., at 60.[17]

Nothing in the PKPA's text or legislative history reflects an "unequivocal," "express," or "clear" congressional intent to subject Indian tribes to the full faith and credit mandate of the PKPA. The District Court correctly noted that, "a court is 'not at liberty to rewrite [a] statute to reflect a meaning [it] deem[s] more desirable. Instead, [it] must give effect to the text Congress enacted,'" App. 282-283; R. Doc. 103, at 22-23 (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008)), and "courts are 'to apply statutes on the basis of what Congress has written, not what Congress might have written,'" App. 283; R. Doc. 103, at 23 (quoting *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952)).

Mr. Nygaard cites *In re Larch*, 872 F.2d 66, 68 (4th Cir. 1989), for the proposition that Indian tribes are territories within the meaning of the PKPA. However, the court's treatment of the issue was limited, largely because the court concluded that there is no private right of action under the PKPA, citing *Thompson v. Thompson*, 484 U.S. 174 (1988), and its holding must give way to the greater

[17] Further, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (citations omitted).

weight of authority that Indian tribes are not "territories or possessions," within the meaning of the PKPA or the FFCA.

Numerous state courts have determined that the PKPA does not apply to Indian tribes or tribal courts. For example, in *Garcia*, the court noted that there is a "growing chorus of cases holding that tribes are not 'states' for full faith and credit purposes unless Congress explicitly designates them as such, and that tribes are not 'territories or possessions' within the meaning of the PKPA." 217 P.3d, at 606. *See also id*., at 603-606 (collecting cases).

In *John*, the Alaska Supreme Court held that because, "Congress does not view Indian tribes as 'states, territories, or possessions,' the PKPA does not accord full faith and credit to tribal judgments." 982 P.2d, at 763. Similarly, in *In re Custody of Sengstock*, 477 N.W.2d 310 (Wis. App. 1991), the court rejected the view that an Indian tribe is a "state" or "territory" under the PKPA, but nonetheless recognized a tribal court custody order under principles of comity. The court held that, "because [a] tribe is not a state, territory, possession or commonwealth, the judgments and orders of its tribal court are not entitled to 'full faith and credit' under ... 28 U.S.C. §§ 1738, 1738A." *Id*., at 314.

Numerous tribal courts have held that the PKPA does not apply to Indian tribes or tribal courts. For example, in *Miles* v. *Chinle Family Court*, 7 Am. Tribal Law 6708, 2008 WL 5437146 (Navajo 2008), the court held that the PKPA does not

include Indian tribes in its definition of "State" and, consequently, does not apply to tribes or bind their courts. Similarly, in *In re Custody of C.M.A.*, 3 Am. Tribal Law 336, 2001 WL 36152576 (Fort Peck Ct. App. 2001), the court held that the PKPA does not apply to Indian tribes and opined that Congress deliberately omitted Indian country from the PKPA because of the special relationship and interest Indian tribes have with their children, as recognized in the ICWA, including 25 U.S.C. § 1911. *See also Tupling v. Kruse*, 15 Am. Tribal Law 23, 2017 WL 2443081 (Colville Ct. App 2017) (PKPA does not apply to tribes); *Mother H v. Father H*, 6 Mash. Rep. 424, 2017 WL 3039105 (Mash. Pequot Tr. Ct. 2017) (same).

Mr. Nygaard's reliance on *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989), is misplaced. *See* App. Br. 27. The District Court correctly noted that *DeMent* "declined to reach whether the PKPA applies to Indian tribes and suggested that it remained an open question." App. 290, n.14; R. Doc. 103, at 30.

Mr. Nygaard's reliance on *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), is also misplaced. *See* App. Br. 32. *Castro-Huerta* dealt with state authority to prosecute crimes committed by non-Indians in Indian country. *Id*., at 2494. The Court held that states possess such authority unless it is preempted. *Id*. *See also id*., at 2504-2505. The Court noted that Indian country is included within the limits of surrounding states or territories, *id., at* 2497, 2502, but it did not hold that Indian tribes *are* states or territories, and that is the question before this Court.

Mr. Nygaard's citation to *United States v. White*, 237 F.3d 170 (2d Cir. 2001), is inapposite, since that case dealt with a tax exemption for transactions that take place "outside the United States," and the court simply held that Indian reservations are not located "outside the United States." *Id*., at 173. The court noted that, "the question is not whether an American Indian reservation *is* one of the fifty states … or a possession or territory of the United States, but whether an American Indian reservation is *located* 'outside the United States.'" *Id*.

Other cases cited by Mr. Nygaard are equally inapposite. For example, *Kansas v. Wakole*, 945 P.2d 421 (Kan. 1997), was modified by *Kansas v. Wakole*, 959 P.2d 882, 885 (Kan. 1998), which resolved the case on reciprocity grounds and declined to address question of whether an Indian tribe is a state, territory, or possession under K.S.A. 74-4305. In addition, *Martinez v. Superior Ct.,* 731 P.2d 1244, 1248 (Ariz. Ct. App. 1987), dealt with the Uniform Child Custody Jurisdiction Act ("UCCJA"), as enacted by Arizona, and the court's holding was based solely on the "intention of the legislature which enacted it." That intent cannot be transposed to the Congress that enacted the PKPA. Furthermore, most courts have held that the UCCJA does not apply to Indian tribes or tribal courts. *See*, *e.g.*, *Desjarlait,* 379 N.W.2d, at 144; *Malaterre v. Malaterre,* 293 N.W.2d 139, 144 (N.D. 1980).

In the final analysis, it is clear that the Cheyenne River Sioux Tribe is not a state or territory within the meaning of the PKPA and, therefore, the PKPA does not

apply to the Tribe or its courts. As a result, the child custody and visitation orders and judgments of foreign courts are not entitled to full faith and credit in the Tribal Court, but they may be recognized and enforced under principles of comity.[18]

CONCLUSION

For the foregoing reasons, the District Court's judgment should be affirmed.

Respectfully submitted this 4th day of November 2022.

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[18] Even assuming, *arguendo*, that the PKPA did apply to the Tribe, it contains exceptions that, if met, would allow the Tribal Court to enter a custody order concerning the minor children. One of those exceptions concerns children who are in immediate need of care and custody. 28 U.S.C. § 1738A(c)(2)(C). This case involves allegations of abandonment, abuse, neglect, and incapacity by one or more of the parents of the minor children. *See* note 3, *supra*. Another exception concerns children over whom a court has exclusive jurisdiction. 28 U.S.C. § 1738A(f). The ICWA provides exclusive jurisdiction to tribal courts over child custody proceedings, including foster care placements, involving Indian children who reside or are domiciled on the reservation. 25 U.S.C. § 1911(a). Foster care placements may be maintained by state agencies or other custodians and guardians, including non-parent relatives, like Ms. Ducheneaux. *See* 25 U.S.C. § 1903(1)(a). *See* note 1, *supra*. The District Court did not rule on these exceptions or permit the parties to engage in discovery related to the exceptions. *See* R. Doc. 108, at 19. Resolution of these issues would require the development and determination of relevant facts in the District Court.

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