No. 04-15477

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY DOE,
Plaintiff and Appellant,

v.

JOHN DOE I, et al.,
Defendants and Appellees

and

JANE DOE,
Intervenor.

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
HONORABLE MARILYN HALL PATEL
CASE NO. C 02-3448 MHP

PLAINTIFF-APPELLANT'S REPLY BRIEF

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I. PRELIMINARY STATEMENT

Appellees[1] assert that California's interpretation of ICWA is well-settled among PL-280 states and tribes, that Appellant's tribe is either indifferent to, or incapable of, providing custody proceedings, that reversing the District Court would "disturb the status quo which has obtained for approximately thirty years," and that such a decision would inflict permanent harm on Appellant's daughter, Jane Doe, and countless other Indian children. *See* State's Answer Brief ("State") at 25, 33-34, 38. None of this is true. In fact: (1) California's approach is a *minority* view that if adopted would unsettle expectations in most PL-280 states that have considered the issue, including Florida, Montana, Oregon, South Dakota, Wisconsin, and Washington; (2) California tribes, including Appellant's tribe, are fully willing and able to handle custody proceedings either independently or through compacts as contemplated in ICWA; and (3) reversing the lower court's decision would not jeopardize Jane's well-being, but rather would vindicate her right as an Indian to have the proper entity – her tribe – decide what is in her best interest.

The sole issue presented on appeal is whether the Elem Indian

[1] Appellant refers to Defendants-Appellees Arthur Mann, Robert Crone, Jr., and the Superior Court as the "State," Defendant-Appellee County of Lake Department of Social Services as the "County," and Intervenor Jane Doe as "Intervenor." Appellant refers to these parties collectively as "Appellees."

Colony has exclusive jurisdiction over the involuntary custody proceedings that resulted in the termination of Appellant's custody rights and the placement of her daughter for adoption with non-tribal parents over the Tribe's objection. The County and State abandon the basis for the District Court's ruling – that ICWA *expanded* the scope of PL-280 states' authority in custody proceedings – thereby implicitly acknowledging the flawed reasoning. Nevertheless, they urge this Court to affirm their theory that PL-280 places *no restrictions* on a state's exercise of civil jurisdiction – a patently unsupportable position. Alternatively, Appellees ask the Court to reverse the District Court's (unappealed from) decision that *Rooker-Feldman* does not bar federal jurisdiction over Appellant's claim. Neither position withstands scrutiny.

The District Court correctly held that *Rooker-Feldman* is inapplicable to Appellant's claim because Congress expressly provided for review of ICWA claims in "any court of competent jurisdiction." ER 26:3-7 (quoting 25 U.S.C. §1914 ("Section 1914")). The District Court's interpretation is supported by ICWA's plain language, as well as its policy of promoting prompt determination of issues relating to state encroachment of tribal sovereignty, and by rules of statutory construction that ambiguous statutes must be interpreted in favor of tribal sovereignty. Having

determined that *Rooker-Feldman* did not apply, the District Court ordered other matters now pending in the lower court to proceed. Appellees did not challenge this decision by way of appeal or cross-appeal or even seek to certify the issue. Appellees' attempt to defeat all claims, by raising these issues now through their opposition brief, is improper, and on that basis alone, should be denied.

In addition, *Rooker-Feldman* is inapplicable even if it was properly raised and is not resolved by Section 1914. Appellant's claim does not require a federal court to conduct a "de facto appeal" of the state's now-final custody proceedings – which *Rooker-Feldman* forbids – because the merits of the custody determinations are immaterial to the issue of whether the Tribe has exclusive jurisdiction over involuntary custody proceedings for resident Indian children. Without a de facto appeal, Appellant's claim cannot be "inextricably intertwined" with issues raised in the state court. *See Noel v. Hall*, 341 F.3d 1148, 1158 (9th Cir. 2003). Appellees' *Rooker-Feldman* argument fails.

On the merits, even Appellees themselves do not attempt to defend the District Court's unprecedented interpretation of ICWA. Instead, Appellees claim that PL-280 authorizes unchecked civil jurisdiction over reservation Indians, including regulatory proceedings concerning the

involuntary removal and placement of children. Appellees do not and cannot offer any support for this proposition because the Supreme Court expressly rejected it in *Bryan v. Itasca County*, 426 U.S. 373 (1976). Indeed, neither ICWA nor PL-280 justifies California's continued refusal to comply with ICWA's mandate and honor tribes' exclusive jurisdiction. Accordingly, the District Court's judgment should be reversed.

II. *ROOKER-FELDMAN* DOES NOT DEPRIVE THE FEDERAL COURTS OF JURISDICTION TO CONSIDER WHETHER THE ELEM INDIAN COLONY HAD JURISDICTION OVER JANE DOE'S INVOLUNTARY CUSTODY PROCEEDINGS

The Intervenor and the State contend that the District Court's decision recognizing jurisdiction over all claims – which was never appealed, or certified for appeal – must be reversed under *Rooker-Feldman*. Intervenor at 10-18; State at 10-17. That issue, however, is not properly before this Court and should not be considered. *See* Fed. R. App. P. 5(b)(2); *Hines v. United States*, 60 F.3d 1442, 1451 (9th Cir. 1995) (refusing to consider matters not appealed from the district court). To the extent Appellees challenge the District Court's jurisdiction over Appellant's remaining matters currently pending in that court, they would have had to raise those issues on cross-appeal. Having failed to do so, Appellant may not attempt to obtain relief indirectly from that ruling.

Regardless, the District Court correctly held that *Rooker-*

Feldman does not bar the federal courts from considering whether the Elem Indian Colony had exclusive jurisdiction over Jane Doe's custody proceedings. *Rooker-Feldman* is inapplicable for at least two reasons. First, the general jurisdictional bar of *Rooker-Feldman* must yield to ICWA's specific grant of federal jurisdiction. Indeed, this Court has already recognized that *Rooker-Feldman* does not apply in numerous analogous contexts. *See, e.g., Mozes v. Mozes,* 239 F.3d 1067, 1085 (9th Cir. 2001) (recognizing federal review of custody disputes arising under the Hague Convention).

Second, this case is neither a de facto appeal of the state court's decision, nor is it inextricably intertwined with that decision. As this Court made clear in *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007 (9th Cir. 1999), *Rooker-Feldman* is not implicated when a federal court reviews a state court judgment to protect its own jurisdiction.

A. *Rooker-Feldman* Is Inapplicable Because ICWA Section 1914 Authorizes Inferior Federal Courts to Review and Invalidate State Court Decisions

The District Court correctly held that Congress, through Section 1914, has vested district courts with jurisdiction to determine the parameters of state and tribal jurisdiction. Because the *Rooker-Feldman* doctrine "is one of congressional intent, not constitutional mandate, it follows that where

Congress has specifically granted jurisdiction to the federal courts, the doctrine does not apply." *Mozes*, 239 F.3d at 1085 n.55. Indeed, as this Court has recognized, Congress may authorize federal court review of matters initially brought in state court and has relied on language nearly identical to Section 1914's to do so. Congress has thus provided that Federal courts may review child custody disputes under the Hague Convention, *id.* (citing 42 U.S.C. §11603(a)); likewise, Congress has vested federal courts with original jurisdiction to avoid, modify, and discharge state judgments affecting automatic stays in bankruptcy proceedings (*Noel*, 341 F.3d at 1155), and to release state prisoners from unlawful confinement. *Sumner v. Mata*, 449 U.S. 539, 543-44 (1981).

As it did with international child custody cases, bankruptcy, and federal habeas, Congress has expressly provided for collateral review of certain child custody proceedings under ICWA:

> Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe *may petition any court of competent jurisdiction to invalidate such action* upon a showing that such action violated any provision of sections 1911, 1912, and 1913.

25 U.S.C. §1914 (emphasis added). Accordingly, ICWA creates a clear

exception to the *Rooker-Feldman* doctrine that allows for direct federal review of state court decisions. *See Dale v. Moore*, 121 F.3d 624, 627 (11th Cir. 1997) ("An exception to the *Rooker-Feldman* doctrine exists where a federal statute authorizes federal appellate review of final state court decisions.").

Appellees unsuccessfully attempt to distinguish ICWA's grant of jurisdiction from that of comparable statutes. Appellees suggest that Congress must have intended for only state courts to review unlawful state court proceedings because it did not use the same language employed in the federal bankruptcy statute, which vests the district courts with "'original and exclusive jurisdiction of all cases under title 11.'" Intervenor at 17 (quoting 28 U.S.C. §1334(a)). This Court, however, has determined that far more general statutory language is sufficient to permit federal court review of state judgments. For example, in *Mozes*, this Court concluded that *Rooker-Feldman* does not apply to child custody disputes arising under the Hague Convention because "Congress has expressly granted the federal courts jurisdiction to vindicate rights arising under the Convention." 239 F.3d at 1085 n.55 (citing 42 U.S.C. §11603(a)). Yet, the relevant Hague Convention language – "The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising

under the Convention." – is no more specific than Section 1914's, which authorizes review in "*any* court of competent jurisdiction." Section 1914's language is thus sufficiently clear and authorizes federal court jurisdiction over ICWA matters appealed from state courts.

In addition, Appellees mistakenly rely on *Confederated Tribes of Colville Reservation v. Superior Court*, 945 F.2d 1138 (9th Cir. 1991) ("*Colville*"). That case does not compel *Rooker-Feldman*'s application here because that court did not consider Section 1914, and was presented in the "unusual posture" of a "horizontal appeal from a state to federal court . . . by a non-party . . . of a [non-] final [state court] decision." *Id.* at 1141. This Court found that *Rooker-Feldman* applied to bar federal review in the "odd circumstances" of *Colville*, but as the District Court explained:

> [*Colville*] did not consider section 1914 or its relationship to the *Rooker-Feldman* doctrine; thus its decision is not necessarily applicable to the action at bar. Moreover, the court emphasized that it was loathe to "untangle this jurisdictional knot" when the parties in the custody proceeding were not before the court and the tribe brought an appeal "not of final decision, but one of the grounds mentioned by a state court to justify an interlocutory order that did not even dispose of the custody issue at hand." None of these "tangles" apply to this action.

ER 26:25 (quotations omitted). Here, by contrast, the federal litigants are (1) the same parties involved in the state court custody proceedings, (2)

contesting the validity of a *final* state court decision, and (3) expressly raising Section 1914's relationship to *Rooker-Feldman*.[2]

Finally, the purpose and intent of Section 1914 support the District Court's *Rooker-Feldman* holding. Congress enacted ICWA in response to the States' failure to "recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. §1901(5). Declaring "the policy of

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[2] The case on which *Colville* principally relies, *Atlantic Coast Line Railrod v. Locomotive Engineers*, 398 U.S. 281 (1970), further demonstrates that *Rooker-Feldman* is not applicable. *Atlantic Coast Line* actually supports the District Court's decision. *Atlantic Coast Line* did not concern *Rooker-Feldman*, but rather interpreted the Anti-Injunction Act ("AIA"), which forbids federal courts from enjoining state courts on any ground other than those expressly set forth by Congress in the AIA. *Id.* at 294-96. The Court reasoned that in the limited context of the injunction at issue, federal rights were not impaired because federal courts still had concurrent jurisdiction over the parties' claims, so the "state court's assumption of jurisdiction over the state law claims and the federal preclusion issue did not hinder the federal court's jurisdiction so as to make an injunction necessary to aid that jurisdiction." *Id.* at 296.

The issue here, unlike in *Atlantic Coast Line*, is whether California lacked jurisdiction from the very outset, and thus encroached on the tribal court's exclusive authority over custody proceedings involving Appellant's child. Moreover, Section 1914 favors review of the state court's custody orders in order to "aid" Appellant's access to a tribal forum.

Appellees reliance on *Morrow v. Winslow*, 94 F.3d 1386 (10th Cir. 1996) and *Comanche Indian Tribe of Oklahoma v. Hovis*, 53 F.3d 298 (10th Cir. 1995) is similarly misplaced. State at 15. These cases do not deal at all with the *Rooker-Feldman* doctrine, but rather grapple with collateral estoppel and the *Younger* abstention – two doctrines which, this Court has cautioned, are separate from and must not be confused with *Rooker-Feldman*. *Noel*, 341 F.3d at 1159-61.

this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," ICWA aimed to preserve tribal existence and integrity by shifting control of Indian child custody proceedings to the Tribes and away from the states. *Id.* §1902; *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 32-36 (1989).

Plainly, requiring an Indian parent or tribe to appeal an adverse custody ruling solely through a state court system – one traditionally hostile to tribal interests – and sacrificing custody for years with only a remote hope of federal review in the U.S. Supreme Court, is inimical to ICWA's goal. Moreover, children whose custody is challenged face potentially great harm from the uncertainty that arises during a protracted appellate process. These same interests arise under the Hague Convention, in which this Court held Congress provided for judicial oversight of international child custody disputes. Given the longstanding general federal policy of overseeing tribal interest, and ICWA's specific aim of ensuring the well-being of the tribes and their children, the District Court properly interpreted Section 1914 to authorize federal court review of state court decisions rendered in violation of ICWA.

Finally, ICWA's legislative history does not support the State's cabined interpretation of Section 1914. The State contends, based on a

house report, "Congress did not intend to authorize lower federal courts to entertain collateral attacks against final state court judgments," but rather intended to limit tribal and family participation to intervention in pending state proceedings. State at 16. Indian Child Welfare Act of 1978, H.R. Rep. No. 95-1386, at 19 (July 24, 1978), *reprinted in* 1978 U.S.C.C.A.N. 7558. The Report says no such thing. While the House Report assumes that ICWA does not "oust states of their jurisdiction," H.R. Rep. No. 95-1386, that language merely recognizes that in areas outside the tribes' inherent sovereignty, the state courts may initiate proceedings. To protect areas exclusively and traditionally within the tribes' jurisdiction, Congress elected not to limit federal court review of ICWA violations by state courts. 25 U.S.C. §1914. In fact, the same passage in this House Report serves to emphasize that even in areas where the tribes have not been traditionally sovereign, such as in child custody proceedings involving children living *off* of reservations, the tribes and the Indian families should be given a prominent role. *See* H.R. Rep. No. 95-1386, at 19.

B. ***Alternatively, Rooker-Feldman* Does Not Bar Appellant's Suit Because Her Claim is Not a De Facto Appeal of the State Court's Judgment Nor is It Inextricably Intertwined With an Issue Resolved by the State Court**

1. **Appellant's Claim That the Elem Indian Colony Had Exclusive Jurisdiction Under ICWA of Jane Doe's Custody Proceedings Is Not A De Facto Appeal**

Even putting aside Section 1914, *Rooker-Feldman* is still not applicable to this case. *Rooker-Feldman* "prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004). A federal claim is not barred under *Rooker-Feldman*, however, merely because it seeks to set aside a state court judgment. *Maldonado v. Harris*, No. 03-15007, 2004 U.S. App. LEXIS 10983, at *10 (9th Cir. June 4, 2000). Rather, the doctrine deprives Appellant of a federal forum only if she "asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision." *Noel*, 341 F.3d at 1164. *See also Bianchi v. Rylaarsdam*, 334 F.3d 895, 896 (9th Cir. 2003) (*Rooker-Feldman* prohibits suit requiring the federal court "to review and invalidate the state court decision"); *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1029 (9th Cir. 2001) (recognizing federal jurisdiction over cases that "do[] not require review of a final state court decision in a particular case").

This Court's decision in *Alpine Land* illustrates that Appellant's jurisdictional challenge does not operate as a de facto appeal. In *Alpine Land*, Churchill County, Nevada filed a state court action appealing a state engineer's grant of a water rights transfer application. 174 F.3d at 1010. The engineer moved to dismiss for lack of jurisdiction, arguing that the federal district courts had exclusive appellate jurisdiction over such water rights decisions. The state court determined it had jurisdiction to hear the Churchill's appeal and denied the motion. The engineer sought an injunction in federal district court against further state court proceedings on the ground that the federal courts had exclusive jurisdiction over the Churchill's appeal. *Id.* The district court agreed and granted the motion, which was appealed, in part, on *Rooker-Feldman* grounds. *Id.* at 1011.

In affirming the district court, this Court rejected Churchill's claim that the district court was exercising de facto appellate review of a state court judgment:

> [T]he district court's decision amounted to a determination that it had exclusive jurisdiction over the matter at issue and that it needed to protect its exclusive jurisdiction. That is, *the district court's decision rested on its own determination that it had exclusive jurisdiction, not on any error on the part of the state court in asserting jurisdiction.*

Id. at 1016 (emphasis added). Because the engineer's federal action did not

require the court to revisit the merits of the state court's decision, *Rooker-Feldman* was not implicated.

Alpine Land compels the same result here. Appellant seeks relief in her certified appeal to protect the Tribe's exclusive subject matter jurisdiction to decide custody matters. This issue was not even addressed by the state court.[3] The matters addressed in the state court's rulings – e.g., Appellant's fitness as a parent, the interests of the child, and its adoption placement recommendation – are immaterial to the outcome of the current dispute. As in *Alpine Land,* the issue presented in the federal court here is

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[3] Bringing a federal court challenge to California's exercise of jurisdiction – as Appellant has done here – is entirely proper because the state court did not "fully and fairly litigate[] and finally decide[]" the issue of jurisdiction. *Durfee v. Duke*, 375 U.S. 106, 108, 111 (1963); *Morgan Stanley Mortgage Capital Inc. v. Ins. Comm'r*, 18 F.3d 790, 793 (9th Cir. 1994) (jurisdiction may be attacked collaterally unless "the first court *expressly rules* that it has subject matter jurisdiction" and "the parties had a full and fair opportunity to be heard in the first court"). Indeed, as this Court has determined in the context of examining the scope of PL-280, the jurisdiction of the state court over PL-280 issues may be litigated in a separate federal action, so long as the State court did not explicitly rule on the jurisdictional issue. *See also U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 250 (9th Cir. 1992) ("We should decline to give res judicata effect to the state court judgment if we determine that the state court lacked jurisdiction [under PL-280] to hear the action" unless the parties "contested jurisdiction[] and lost" in the state court.).

Here, Appellees concede that "[n]o challenge to Superior Court jurisdiction was ever raised" in the state court. State at 6. Accordingly, the issue of subject matter jurisdiction could not have been "expressly" or "fully and fairly litigated" in the Superior Court, and Appellant may properly challenge jurisdiction here.

not the substance of the state court's decision, but the identity of the appropriate decision maker. This issue does not require the district court to review whether the state court – which did not even consider whether the Tribe had exclusive jurisdiction – made an erroneous decision. Accordingly, as a matter of law, the claim on appeal does not constitute a de facto appeal.

2. The Inextricably Intertwined Test is Inapposite to This Case

The State attempts to finesse the lack of any de facto appeal in this proceeding by asserting that "Appellant's claim is certainly 'inextricably intertwined' with the Superior Court's decision" and thus barred under *Rooker-Feldman*. State at 11. The State's theory, however, puts the cart before the horse. As this court recently explained:

> The federal suit is not a forbidden de facto appeal because it is "inextricably intertwined" with something. Rather, it is simply a forbidden de facto appeal. *Only where there is already a de facto appeal in federal court does the "inextricably intertwined" test come into play*[.]

Noel, 341 F.3d. at 1158 (emphasis added); *see also Maldonado*, 2004 U.S. App. LEXIS at *9-10 (following *Noel*).[4] Appellees' failure to demonstrate

[4] In holding correctly that *Rooker-Feldman* did not bar Appellant's suit, the District Court relied on this Court's formulation of the inextricably intertwined test in *Bianchi*. ER at 25:11. This Court's more recent decisions in *Noel*, *Khourian*, and *Maldonado* clarify *Bianchi*'s formulation and confirm the correctness of the District Court's ruling.

the *sine qua non* of any *Rooker-Feldman* argument – the existence of a de facto appeal – is fatal to the state's inextricably intertwined analysis. *Noel*, 341 F.3d at 1158 ("The premise for the operation of the inexplicably intertwined test in Feldman is that the federal Appellant is seeking to bring a forbidden de facto appeal.").

III. JANE'S CUSTODY PROCEEDINGS WERE INVALID BECAUSE THE ELEM INDIAN COLONY POSSESSES EXCLUSIVE JURISDICTION OVER SUCH MATTERS

A. Public Law 280 Did Not Divest Tribes Within Public Law 280 States Of Exclusive Jurisdiction Over Involuntary Child Custody Proceedings

Appellees tacitly concede that the District Court erred in holding that ICWA expanded the scope of state authority to decide child custody under PL-280. Instead, Appellees argue that ICWA merely adopted a pre-existing status quo in which PL-280 "places no restrictions whatsoever upon the kind or nature of civil actions over which state courts may preside." State at 18-19; *see also id.* at 24-25 ("[T]he plain language and legislative history of [PL-280 indicate] that state courts were vested with jurisdiction over *all civil disputes*.") (emphasis added). Appellees also contend that a decision in Appellant's favor would be contrary to the other PL-280 jurisdictions and thereby upset the status quo. Both claims are refuted by longstanding case law in this court and practice in other PL-280

jurisdictions.

1. The Prevailing View Among Other PL-280 Jurisdictions is That Tribes Retain Exclusive Jurisdiction Over Involuntary Custody Disputes Involving Reservation Indians

Appellees' claims that a ruling in Appellant's favor would "disturb the status quo which has obtained for approximately thirty years" grossly misrepresents the status of ICWA in the majority of PL-280 states. In fact, it is Appellees' view that is contrary to most other PL-280 jurisdictions. As the State admits, Wisconsin has recognized exclusive tribal jurisdiction over involuntary custody proceedings since 1981. *See* State at 25 n.11 (discussing 70 Op. Atty Gen. Wis. 237 (1981)). But Wisconsin is not alone. South Dakota distinguishes off-reservation custody matters from "case[s] of Indian children who are domiciled or residing on an Indian Reservation and as a result *are subject to the exclusive jurisdiction of the tribal court.*" *In re K.D.*, 630 N.W.2d 492, 494 (S.D. 2001) (quotation omitted) (emphasis added). Washington tribes "enjoy[] exclusive jurisdiction over all issues relating to 'child dependency' – such as the Minor-in-Need-of-Care proceedings." *Confederated Tribes of the Colville Reservation v. Superior Court*, 945 F.2d 1138, 1140 n.3 (9th Cir. 1991) ("*Colville*"); *see also Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233, 1245 (E.D. Wash. 1999) (recognizing that state's grant of adoption would

constitute "infringement of [tribe's] jurisdiction and sovereignty over child custody proceedings"). Florida also embraces its tribes' exercise of exclusive jurisdiction over custody proceedings involving children domiciled on the reservation. *Fletcher v. Florida*, 858 F. Supp. 169, 173 (M.D. Fla. 1994). And both Oregon and Montana have longstanding policies of recognizing tribal sovereignty over these issues. Thus, the majority of PL-280 jurisdictions that have addressed the issue have rejected California's position, leaving the State out of step with the status quo.

2. California's View on the Scope of a State's Civil Jurisdiction Under PL-280 Cannot be Reconciled With *Bryan* and *Cabazon*.

For the reasons stated in the district court's opinion and Appellant's opening brief, *Bryan* makes clear that PL-280 does not vest California with jurisdiction over Jane's involuntary custody proceedings. *E.g.*, Appellant's Opening Brief ("AOB") at 20-22. To avoid *Bryan*'s obvious implications, the State attempts to restrict *Bryan*'s holding to one solely about a PL-280 state's power to tax reservation Indians. State at 21-23. While the *Bryan* Court's immediate concern was Montana's ability to tax the personal property of a reservation Indian, its holding that Congress did not intend to "subordinate [tribal governments and reservation Indians] to the full panoply of civil regulatory powers, *including taxation*, of state

and local governments" demonstrates the opinion's broader application. *Id.* at 388 (emphasis added); *see also id.* at 390 ("[I]f Congress had intended to confer upon the states general civil regulatory powers, *including taxation*, over reservation Indians, it would have expressly said so.") (emphasis added).

Any doubts that PL-280 restricted state civil jurisdiction over reservation Indians to private legal disputes were erased by *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) – the Supreme Court's watershed decision analyzing PL-280's scope and a case completely ignored by the State. *Cabazon* reiterated that *Bryan* "interpreted [PL-280] to grant states jurisdiction over *private civil litigation* involving reservation Indians in state court, but not to grant general civil regulatory authority." *Id.* at 208 (emphasis added). Accordingly, "[w]hen a state seeks to enforce a law within an Indian reservation under the authority of Pub. L. 280, it must be determined whether the law is . . . civil in nature, and thus . . . applicable *only as* [*it*] *may be relevant to private civil litigation* in state court." *Id.* (emphasis added). The Supreme Court made clear that PL-280's grant of civil jurisdiction is "limited," *id.* at 207, and not, as the State claims, unrestricted.

Likewise, this Court has refused to interpret PL-280 as a blank

check for civil jurisdiction over reservation Indians. In *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146, 147 (9th Cir. 1991) ("*Confederated Tribes*"), this Court observed that "[i]n marked contrast [to PL-280's grant of criminal jurisdiction], the scope of the provision relating to civil matters is very limited. . . . [I]t was not the Congress' intention to extend to the States the 'full panoply of civil regulatory powers,' but essentially to afford Indians a forum to settle *private disputes among themselves*." *Id.* (quoting *Cabazon*, 426 U.S. at 388) (emphasis added). Indeed, as this Court put it more recently: PL-280 conferred jurisdiction over "'civil causes of action on Indian reservations,' but 'left civil regulatory jurisdiction in the hands of the Tribes.'" *Coyote Valley Band of Pomo Indians v. California*, 331 F.3d 1094, 1096 (9th Cir. 2003) (quoting *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 539 (9th Cir. 1994)).

3. The Cases Relied Upon By Appellees Do Not Support Their Position That PL-280 Places No Restrictions On a State's Civil Jurisdiction.

Rather than address *Bryan* and *Cabazon*, the State suggests that pre-*Bryan* cases *Fisher v. District Court*, 424 U.S. 382 (1976) (per curiam), *Wakefield v. Little Light*, 347 A.2d 228, 236 (Md. App. 1975), and *Wisconsin Potowatomies v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973) reveal that some PL-280 states did exercise civil jurisdiction over

involuntary custody proceedings. State at 26-27. That reliance is misplaced. Indeed, these cases are significant, for precisely the opposite reasons advanced by the State.

Fisher, Wakefield, and *Houston* are all pre-ICWA cases that hold respectively that the relevant tribes retained exclusive jurisdiction over custody matters involving Indian children domiciled on their reservation. What makes these pre-ICWA cases particularly noteworthy is their uniform recognition that permitting state jurisdiction over child custody issues arising on the reservation would infringe on an essential aspect of tribal sovereignty.[5] *Fisher*, 424 U.S. at 387-88; *Wakefield*, 347 A.2d at 234-35; *Houston*, 393 F. Supp. at 730-31. In this respect, these decisions foreshadowed the federal recognition of inherent tribal sovereignty that was ultimately codified in ICWA. *See* H.R. Rep. No. 95-1386, at 21 (citing *Wakefield* and *Houston*).

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[5] The State's contention that "jurisdiction over child custody matters . . . do[es] not implicate an 'inherent attribute of sovereignty" (State at 23) is absurd. *See, e.g., Duro v. Reina*, 495 U.S. 676, 685-86 (1990) ("[T]he retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order."); *In re Marriage of Skillen*, 956 P.2d 1, 16 (Mont. 1998) ("If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a sine qua-non to the preservation of its identity.")

The State is wrong to divine importance from these decisions' observations that the respective states had failed to assume jurisdiction under PL-280. *Fisher*, *Wakefield*, and *Houston* were decided before the Supreme Court made clear that PL-280's grant of civil jurisdiction did not extend to state-instituted regulatory proceedings of the sort at issue here, so any references to the potential scope of state civil jurisdiction under PL-280 were resolved and mooted by *Bryan* and *Cabazon*.

B. Appellees' Citations to Inflammatory and Inadmissible "Facts" Are Irrelevant to the Issue of the Tribe's Exclusive Jurisdiction

The County admits that "[t]he single issue raised by Appellant in this appeal is whether the district court erred in ruling that the Superior Court had jurisdiction over the underlying [involuntary child custody] action." County at 3. Appellees nevertheless attempt to distract attention from this purely jurisdictional issue by improperly citing, as "facts," unproved and demeaning allegations about Appellant that are not in the record and which she had no opportunity to address or rebut below. *See, e.g.*, *id.* at 5 ("Jane said she was 'afraid' to live with Appellant"); *id.* at 4 ("Jane was sexually molested by her mother's boyfriend"); Intervenor at 4, 6 (Appellant "knew of the harm or should have known of the risk of such harm to Jane," and Jane "wanted to remain in [Mr. & Mrs. D's] home.").

These so-called "facts" are irrelevant because the present issue is only whether the tribe has the exclusive authority to review those issues.

In any case, no admissible evidence in the record supports these purported facts. On the contrary, it was undisputed in the District Court proceedings that Appellant has maintained custody of her other two children and is a fit parent. ER 102-150. Appellees attempt to color the record by citing to their "Supplemental Excerpts of Record," the contents of which were not in the record below and contain nothing other than unsubstantiated allegations and inadmissible hearsay. *See* Appellant's Objections To, And Motion To Strike, Excerpts of Record (filed concurrently herewith). As such, Appellees' Supplemental Excerpts of Record – and any portion of their briefs that cite to that "record" – should be stricken and not considered by this Court. *Id.*

Moreover, Appellees' allegations are irrelevant. ICWA's operation does not turn on the issues of any particular custody case. Rather, the issue is whether the Tribe has the exclusive authority to sit in judgment on those issues. Accordingly, Appellees' inclusion of inadmissible, irrelevant, and pejorative allegations regarding Appellant have no bearing on the resolution of the question on appeal.

C. Finding Exclusive Tribal Jurisdiction Over Involuntary Child Custody Proceedings Does Not Result in a Jurisdictional "Void"

Appellees contend that recognizing exclusive tribal jurisdiction in these circumstances would "lead to a jurisdictional void in which child custody proceedings could be left without a forum." State at 9. This argument fails for two reasons. First, in enacting ICWA, Congress chose not to condition a tribe's exercise of jurisdiction on its possession of a tribal court system. Thus, the possible nonexistence of a tribal forum is legally irrelevant to the existence of exclusive tribal jurisdiction. Second, Appellees concerns are unfounded. Since 1999, the Department of Justice has overseen the Tribal Courts Assistance Program, 25 U.S.C. §3689(a), which administers grants "to help tribal governments develop, enhance, and continue operation of tribal judicial systems." *About the Tribal Courts Assistance Program*, available at http://www.ojp.usdoj.gov/BJA/grant/TribalCts04/page3.html (last visited on July 15, 2004). This Program provides valuable resources and guidance to tribes that lack internal mechanisms to adequately handle custody matters. And even assuming that certain tribes cannot take advantage of the DOJ's program, Congress envisioned and planned for the possibility of a jurisdictional void by authorizing tribes to enter into jurisdiction-sharing

agreements with states and/or other tribes to reduce the burdens associated with custody proceedings. 25 U.S.C. §1919; *see also id.* §1918(b)(2); AOB at 52-53. Given that Congress gives tribes the flexible tools to address any jurisdictional contingencies, there is no need for this Court to do so.[6]

D. ICWA's Provisions Are Consistent With and Confirm Tribes' Exclusive Jurisdiction Over Involuntary Child Custody Proceedings In PL-280 States

Appellees propose a construction of ICWA that defies the plain language of the statute, is unsupported by the legislative history and if adopted, would significantly undermine ICWA's objective of prohibiting state interference with involuntary custody proceedings involving Indian children domiciled on their reservations. This Court should reject that construction, particularly in light of the "vital canon . . . that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in [their] favor." *Bryan*, 426 U.S. at

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[6] The County urges this Court to ignore the Tribe's jurisdiction because it lacks the ability to protect its children from "child abuse and sexual molestation." County at 1. This argument too is legally and factually incorrect. *See* Elem Amicus Br. at 21-24; Morongo Amicus Br. at 4-6, 10-14; AOB at 52-54. PL-280 vests California with jurisdiction over criminal matters, including molestation, on tribal land. Further, ICWA permits the "emergency removal of an Indian child who is a resident of or is domiciled on a reservation . . . to prevent imminent physical damage or harm to the child." 25 U.S.C. §1922. Thus, Appellees' concerns that California is powerless to protect children or punish their abusers are unfounded and inflammatory. *Cf.* County at 27.

392; AOB at 34, 61.

1. Congress Never Intended to Exclude Tribes in Public Law 280 States From the Exclusive Jurisdiction Confirmed by Section 1911(a)

Without citing any relevant authority, Appellees assert that ICWA "makes clear" that "(1) PL-280 conferred upon state courts jurisdiction over Indian child custody proceedings and (2) such state court jurisdiction survived the passage of ICWA." State at 28; *see also* County at 40. In fact, the exact opposite is true. As the plain language of ICWA and its legislative history reveal, in enacting ICWA, Congress sought to prevent states from encroaching upon the jurisdiction already possessed by PL-280 tribes over involuntary child custody proceedings; Congress did not address the scope of the tribes' sovereignty for those matters. *See* AOB at 35-38.

In the County's view, Congress narrowed the scope of tribes' exclusive jurisdiction over involuntary child custody matters (as that jurisdiction existed under PL-280) through ICWA, but did so without any explicit reference to PL-280 and without any discussion of the supposedly new jurisdictional changes. County at 42-49. Tellingly, however, the legislative history cited by Appellees highlights that Congress did not intend ICWA to restrict further the jurisdiction of PL-280 tribes. Appellees identify places in the legislative record where various interests encouraged

Congress to adopt language explicitly limiting the sovereignty of PL-280 tribes, but omits that Congress *rejected* that language. *See, e.g.,* State at 30 (citing suggested language rejected by Congress; 124 CONG. REC. H38103 (daily ed. Oct. 14, 1978) (statement of Rep. Udall) (recommendations had "little legal support"); AOB at 36. Accordingly, Appellees' interpretation of ICWA is unsupported and unsupportable.

2. The Only Reasonable Reading Of ICWA Confirms the Tribe's Exclusive Jurisdiction Over Jane's Custody Proceedings

The only reasonable reading of ICWA confirms that tribes in PL-280 states retain exclusive jurisdiction over involuntary custody proceedings involving Indian children domiciled on their reservations. AOB at 45-50.

The State argues that Appellant's logic fails because if the definition of "child custody proceeding" under ICWA can include both voluntary and involuntary child custody proceedings, this definition somehow "belies the argument advanced by Appellant that [PL-280] state courts only have jurisdiction over 'voluntary' and/or 'private' child custody proceedings." State at 28 n.14. This conclusion, however, simply ignores PL-280's long-standing distinction between voluntary and involuntary proceedings. Section 1911(a) confirms that all tribes have jurisdiction over

voluntary and involuntary "child custody proceedings," "except where such jurisdiction is otherwise vested in the State by existing Federal law." Nothing about that reading of the statute is inconsistent with Appellant's arguments. Appellant's position is merely that, to the extent that the jurisdiction referred to in ICWA is limited by "Public Law 280" as an applicable "existing federal law," the limitation applies to the same extent as PL-280, i.e., to "voluntary" or "private" child custody proceedings. *See* AOB at 20-22.

Likewise, the County's efforts to create supposed incongruities in Appellant's reading of ICWA fail. The County argues that because ICWA requires states to adopt cultural safeguards in proceedings it handles, Congress must have intended the state to retain concurrent jurisdiction in all cases. *See* County at 42-44 (*e.g.*, "Had the ICWA been intended to completely restore exclusive jurisdiction in all tribes ... there would have been no need to impose ... cultural standards. Obviously, such cultural preserving procedures in the ICWA were enacted to be imposed on state governments, courts and agencies to significantly impact how they exercised state jurisdiction over Indians on or off a reservation."). This argument again ignores that states do possess some concurrent jurisdiction, but only as to private adoptions and termination proceedings involving Indian children

who do not reside on any reservation. ICWA's provisions regarding application of cultural standards, therefore, are consistent with the majority of states' interpretations, and properly govern the states' resolution of those cases over which they do have jurisdiction.

3. Section 1918 Does Not Mandate a Conclusion That Congress Intended Tribes In PL-280 States to Reassume Jurisdiction Over Involuntary Reservation Indian Child Custody Proceedings

Finally, Appellees incorrectly insist that in enacting Section 1918, Congress intended to direct tribes located in PL-280 states to petition for jurisdiction if they sought to exercise authority over involuntary child custody proceedings. *See, e.g.,* State at 31, County at 47-49. As noted in Appellant's Opening Brief, however, Section 1918 actually confirms Congress's conclusion that tribes were already entitled to determine for themselves the appropriate level of tribal control over custody proceedings involving Indian children who reside or are domiciled on the reservation. *See* AOB at 49-53; *see also* Amicus Br. of the AAIA, *et al.* at 20. Accordingly, in cases in which states have obtained jurisdiction over some types of child custody cases by virtue of PL-280 (*e.g.*, private, voluntary placements), Section 1918(a) provides that tribes may petition the Secretary of the Interior for reassumption of jurisdiction over those types of child placement matters. *See* AOB at 51. Conversely, Section 1918(b) allows

tribes to retrocede or relinquish part of their jurisdiction over non-private child custody proceedings, if they so desire. *Id.* This reading of Section 1918 is consistent with PL-280, the presumed sovereignty of Indian tribes, and the remainder of ICWA.[7]

IV. CONCLUSION

Through ICWA, Congress acknowledged that the Elem Indian Colony – like all tribes – is entitled as a sovereign to determine the best interests of its children. Appellees deprived the Tribe of this right when it instituted involuntary custody proceedings over Jane. A finding that the Elem Indian Colony has exclusive jurisdiction over Jane's custody proceedings will vindicate that right and permit the Tribe to make an appropriate determination regarding Jane Doe's custody. That ultimate decision may or may not include a change in Jane Doe's placement. While the fact that Jane's adoption is now four years old may be a factor in the

[7] The County's suggestion that "[t]he process for PL-280 states to reassume jurisdiction [under Section 1918] appear to be Congress' way of addressing the concerns expressed by Pat Wald" (County at 47) is contradicted by the legislative history. Section 1918's reassumption provisions were already in the ICWA bill before Pat Wald expressed concerns in a letter to Congress. *See* H.R. 12533 (May 8, 1978) (included in Amicus Brief of AAIA, *et al.* at Appendix 4-A). Accordingly, it is evident that Wald did not, in fact, believe that the then-existing reassumption provisions of the bill (which became Section 1918) "put to rest" any doubt that "ICWA retained state court jurisdiction over child custody proceedings in Public Law 280 states." State at 31.

Tribe's determination, it should not be one for this Court. As the United States and Utah Supreme Courts have observed, the potential for domestic uncertainty created by vindicating ICWA rights is a necessary consequence of protecting Tribal sovereignty. *See Holyfield*, 490 U.S. at 53-54; *In re Adoption of Halloway*, 732 P.2d at 971-72 (Utah 1986).:

> It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe – and perhaps the children themselves – in having them raised as part of the Choctaw community. Rather, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy."

Holyfield, 490 U.S. at 54 (alteration in original) (quoting *Halloway*, 732 P.2d at 972). Accordingly, this Court should reverse the District Court and hold that the Tribe, as confirmed by ICWA, retains its inherent sovereignty to exercise exclusive jurisdiction over Jane's involuntary custody proceedings.

Dated: July 15, 2004

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32 (a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 04-15477

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached reply brief by Appellee is proportionally spaced, has a typeface of 14 points or more and contains 6951 words.

Dated: July 15, 2004

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I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 33 New Montgomery Street, Nineteenth Floor, San Francisco, California 94105-9781.

On July 15, 2004, I served the foregoing document described as

PLAINTIFF-APPELLANT'S REPLY BRIEF

on the interested party in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 15, 2004, at San Francisco, California.

_____

Milvi Giesinger

SERVICE LIST

Mary Doe v. John Doe I, et al.
U.S. Court of Appeals for the Ninth Circuit Case No. 04-15477

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