No. 10-35000

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

S.P., by EDWARD PARKS, *et al.*,

Plaintiffs-Appellants,

v.

NATIVE VILLAGE OF MINTO, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
The Honorable Judge H. Russel Holland

BRIEF FOR DEFENDANTS-APPELLEES NATIVE VILLAGE OF MINTO AND MINTO TRIBAL COURT

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STATEMENT OF JURISDICTION

The Tribal Appellees, Native Village of Minto and Minto Tribal Court, disagree with the Appellants' statement that the district court had jurisdiction of the Plaintiffs-Appellees' claims under Article III of the U.S. Constitution and 28 U.S.C. § 1331. As explained below, the Plaintiffs lacked standing, and some of their claims were moot.

The Tribal Appellees agree with Plaintiffs-Appellees' statement regarding this court's jurisdiction to review the district court's judgment.

STATEMENT OF THE ISSUES

The principal issue before this court is whether the district court properly dismissed the complaint on the grounds that abstention was appropriate under *Younger v. Harris*, 401 U.S. 37 (1971). The Tribal Appellees, the Native Village of Minto and the Minto Tribal Court, understand that this issue will be fully briefed by the Federal Appellees. Therefore we will focus on four other issues that provide alternative grounds for this court to affirm the dismissal of Plaintiffs-Appellants' claims:

(1) Whether Plaintiffs' claims that Minto is not a "federally recognized tribe" for all purposes were moot, given the uncontroverted fact that Minto is an "Indian tribe" for purposes of the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 et seq., and thus had the authority to issue the orders complained of in the custody dispute that formed the case or controversy below.

(2) Whether the Tribal Court orders complained of were entitled to full faith and credit by the district court under the ICWA, thus precluding the relief sought and warranting judgment on the pleadings.

(3) Whether Plaintiffs, whose relationship to the child at the center of this controversy is being litigated in state court, lacked standing under *Elk*

Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) ("*Elk Grove*"), which held that "it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute," *id*. at 17.

(4) Whether Plaintiffs' federal recognition claims present non-justiciable political questions committed to the political branches of government.

STATEMENT OF THE CASE

In this case, Plaintiffs-Appellants S.P., Edward Parks, and Evelyn Parks attempt to do two things, neither of which is properly before the federal courts: (1) regain for Edward Parks custody of a child, S.P.; and (2) obtain a declaratory judgment that the Native Village of Minto is not a "federally recognized tribe." The custody issue is one of domestic relations under state and tribal law, a realm in which federal courts generally do not interfere. The federal recognition issue is one committed to the political branches of the government. The disconnect between the narrow custody issue and the broad relief sought—which would include de-recognizing Minto and virtually every other Alaska tribe, or declaring unspecified acts of Congress and/or the Executive Branch unconstitutional—illustrates Appellants' (or their counsel's) attempt to use the federal courts to advance a political agenda more properly addressed to the executive and legislative branches.

Procedural History

S.P. became a ward of the Minto Tribal Court in 2008 when that court determined she was a Child in Need of Aid ("CINA"). The court awarded temporary custody of S.P. to Jeff and Rozella Simmonds, members of the Tribe and relatives of S.P.'s mother, Bessie Stearman. The court ultimately terminated the parental rights of Ms. Stearman and Edward Parks, who claimed to be the child's father. Excerpts of Record ("ER") 79-82.

Evelyn Parks, Mr. Parks' mother, then filed a CINA case in state court challenging S.P.'s placement with the Simmonds. The court dismissed the case, finding that S.P. was a member of the Native Village of Minto, that ICWA applied, that the Simmonds were providing adequate care, and that S.P. was not a child in need of aid. Tribal Appellees' Supplemental Excerpts of Record ("SER") at 6-11.

Parks then filed two more suits, first the federal case underlying this appeal, and then another action in state court seeking an order awarding Edward Parks physical custody of S.P. *See* SER at 12-25 (state court complaint).

Jurisdiction in the district court was premised on two federal questions: (1) whether Minto is a "federally recognized tribe," ER 56-58 (Claims One and Two); and (2) if Minto is a federally recognized tribe, whether that recognition creates

impermissible classes of Alaska children in violation of the Due Process Clause of the Fifth Amendment, *id*. 59-63 (Claims 3 and 4).

Disposition Below

The district court ultimately declined to interfere in a domestic relations dispute more properly resolved in the state and tribal courts. In granting the Federal Defendants' motion to dismiss on the pleadings under Federal Rule of Civil Procedure 12(c), the court applied the jurisprudential doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), which generally requires federal courts to abstain when state proceedings are "(1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims." ER at 22 (quoting *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1103 (9th Cir. 1998)) (internal quote marks omitted). The court found that the ongoing state case, like the federal case, is "aimed at affecting the custody of S.P." *Id*. The court noted that family relations are the province of state law, and that "this is a family law matter implicating important state interests." *Id*. at 23. Finally, the court pointed out that "Plaintiffs can litigate these claims in state court." *Id*.[1] Thus, rather than rule on Plaintiffs' claims and effectively preempt the

[1] In fact, Plaintiffs' claims are being litigated in the state court right now. Currently before the court is the Simmonds' motion to dismiss the custody action based on the tribal court's termination of parental rights. In his opposition, Parks argues exactly what he and the other Plaintiffs did in federal court: that Minto has not been federally recognized in lawful fashion, and thus lacks jurisdiction to issue the

state court, Judge Holland concluded that *Younger* abstention applied and dismissed the action. *Id*. at 23-24.

In so ruling, Judge Holland made a number of significant determinations relevant to this appeal. First, he noted that "[e]ven plaintiffs recognize that the facts of this case bring into play the provisions of ICWA." ER at 15. Second, he found that "the Native Village of Minto is an Indian tribe for purposes of ICWA," so the broader federal recognition claims were "irrelevant as regards the differences between the plaintiffs and the tribal defendants." *Id*. at 16. Third, he found that S.P., as a ward of the tribal court, may be an "Indian child" for purposes of ICWA. *Id*. at 17. Finally, based on these findings and the relevant case law, Judge Holland "conclude[d] that the Native Village of Minto, through its tribal court, has concurrent jurisdiction with the State of Alaska," and that this jurisdiction was properly exercised in entering the four orders affecting the custody of S.P. *Id*. at 20.

STATEMENT OF THE FACTS

The Native Village of Minto is a federally recognized Indian tribe. *Indian Entities Recognized and Eligible To Receive Services From the United States*

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custodial and termination decrees, *see Parks v. Simmonds*, No. 4FA-09-2508 CI (Alaska Superior Ct., 4th Dist.), Mem. in Opp. to Motion to Dismiss at 35-52 (March 26, 2010); and that ICWA does not authorize the Minto Tribal Court to initiate child custody proceedings and issue the decrees, *id*. at 9-27.

Bureau of Indian Affairs, 74 FED. REG. 40218, 40222 (Aug. 11, 2009). Both S.P. and her mother, Bessie Stearman, are enrolled members of the Native Village of Minto, as demonstrated by the enrollment documents Minto presented to the district court. SER at 26-30.

On June 2, 2008, with Mr. Parks working on the North Slope and Ms. Stearman incarcerated, the Minto Tribal Court issued an emergency order taking S.P. into tribal protective custody. The child was placed with Jeff and Rozella Simmonds. On July 9, 2008, the Tribal Court held a hearing and issued a second order declaring S.P. a child in need of aid and a ward of the court. On August 28, the Tribal Court held a hearing, attended by Mr. Parks, and issued an order retaining temporary custody and setting conditions for S.P.'s reunification with the parents. Those conditions were not met, and on May 7, 2009, following another hearing, the Tribal Court terminated the parental rights of Ms. Stearman and Mr. Parks. ER at 81.

Mr. Parks and his mother then began the series of legal actions described above. The state court dismissed Evelyn Parks' CINA action on September 17, 2009. *See* SER at 11. The U.S. District Court for the District of Alaska dismissed the Parks' claims on December 2, 2009. ER at 24. Still pending in state court is Mr. Parks' action against the Simmonds seeking an order awarding him physical custody of S.P. The Simmonds have moved to dismiss on the grounds that (1)

Parks is collaterally estopped from relitigating the federal court's determination that the Tribal Court had jurisdiction to issue its custody and termination orders; and (2) the Tribal Court's termination order is entitled to full faith and credit under ICWA. In opposition, Parks argues, as he did in federal court, that there are no federally recognized tribes in Alaska. *See supra* note 1.

SUMMARY OF THE ARGUMENT

The district court correctly dismissed the complaint on the grounds that abstention was appropriate under *Younger v. Harris*, 401 U.S. 37 (1971). The Native Village of Minto and the Minto Tribal Court support the United States' arguments on appeal related to the district court's reliance on the *Younger* case. Minto will focus on alternative grounds for this court to affirm the district court's decision.[2]

First, the federal recognition claims are moot. Minto is an "Indian tribe" for purposes of ICWA, which is all that matters with respect to the custody dispute which provides the case or controversy giving the court jurisdiction under Article III. As Judge Holland found below, ICWA applies and the Minto Tribal Court had the authority to issue the orders of which plaintiffs complained. Appellants' claims that Minto is not a "federally recognized tribe" for all purposes are academic.

[2] An appeals court "may affirm the district court on any basis fairly presented by the record." *Childs v. Local 18, Int'l Bhd. of Elec. Workers*, 719 F.2d 1379, 1384 (9th Cir. 1983) (citing *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982)).

Second, the Minto Tribal Court's custody and termination orders were entitled to full faith and credit by the district court, so the Plaintiffs' requests for declaratory and injunctive relief from those orders failed to state a claim upon which relief could be granted, thus justifying dismissal on the pleadings under Rule 12(c).[3]

Third, the district court lacked jurisdiction because none of the plaintiffs have standing to seek the relief sought. In essence, the Parks seek an advisory opinion on federal recognition of Alaska tribes. Because their standing to raise the federal questions depends on a disputed issue of domestic law, the Plaintiffs lack standing under *Elk Grove*.

Fourth, the federal recognition claims present non-justiciable political questions committed to the Legislative and Executive branches. The district court was without authority to countermand the Secretary's recognition of Minto, an action Congress was well aware of and has assented to for seventeen years.

ARGUMENT

I. Minto Is an "Indian Tribe" for the Purposes of ICWA, which Renders the Broader Claims About Federal Recognition Moot.

The Parks asked the district court to declare that the Minto Tribal Court lacked "authority to involve itself in matters regarding, or in any way affecting, the

[3] A motion under Rule 12(c) is generally treated in the same manner as a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See, e.g.*, *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009).

legal or physical custody of plaintiff S.P." because Minto is not a "federally recognized tribe." ER at 64. As the Parks conceded in their complaint, however, ICWA "designates Minto and other communities that are ANCSA 'Native villages' as 'Indian tribes' for the purposes of ICWA." ER at 36 (Complaint, ¶ 20); *id*. at 15 (court noting that "[e]ven plaintiffs recognize that the facts of this case bring into play the provisions of ICWA."). Under ICWA, Minto has jurisdiction, concurrent with the State, to conduct child custody proceedings involving Indian children such as S.P., and thus to enter the orders of which the Plaintiffs below complained. This being the case, the Parks' claims about Minto's federal recognition in the abstract are of purely academic interest and present no case or controversy. Therefore the district court lacked jurisdiction under Article III.[4]

A. Minto Is an "Indian Tribe" for Purposes of ICWA.

ICWA defines "Indian tribe" to include "any Alaska Native village as defined in section 1602(c) of Title 43." 25 U.S.C. § 1903(8). The referenced section of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1602(c), defines "Native village" as "any … village, community, or association in Alaska listed in sections 1610 and 1615." Section 1610(b)(1), in turn, lists "Minto,

[4] Jurisdictional issues may be raised at any stage of the proceedings; even if not raised by a party, the district court or appeals court may consider jurisdiction sua sponte. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2005), *afff'd* 128 S. Ct. 750 (2008).

Tanana" as a Native village. Therefore, Minto is an ANCSA village and thus an Indian tribe for the purposes of ICWA.

The district court reached the same conclusion. *See* ER at 16 (concluding that "the Native Village of Minto is an Indian tribe for purposes of ICWA"). As noted above, the Parks' complaint also concedes that ICWA "designates Minto and other communities that are ANCSA 'Native villages' as "Indian tribes' for the purposes of ICWA." *Id*. at 36.

B. S.P. Is an "Indian Child."

S.P. is an "Indian child," defined by the statute as a child who is either "(a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). A fundamental tenet of federal Indian law is that a tribe decides who is a member or eligible for membership, both for ICWA and for other purposes. Nell Jessup Newton, et al., eds., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 827 (2005 ed.) ("COHEN") (citing *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989)); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Since the beginning of the case, Minto and its Tribal Court have identified S.P. as a member of the Tribe. SER at 32 (stating, in Minto Answer, ¶ 61, that "Tribal Defendants admit[] that S.P. is a member of the Native Village of Minto, a federally recognized Indian tribe organized under the terms of the Indian

Reorganization Act."); *id*. at 33 (same in ¶ 66). Minto provided the enrollment documents of S.P. and her mother to establish this legal status in the context of the competing motions for summary judgment. *Id*. at 26-30.

In the CINA case, the state court agreed with the Minto Tribal Court that S.P. is a member for purposes of ICWA, remarking that "state courts may not second-guess the internal decision-making processes of the tribe in regard to its membership." SER at 5-6. Judge Holland was correct in concluding that S.P. is an "Indian child" for purposes of ICWA. ER at 17.[5]

C. The Case Involves a "Child Custody Proceeding."

Judge Holland also correctly concluded that the Minto Tribal Court initiated a lawful "child custody proceeding" under ICWA and that the court had jurisdiction to enter the orders of which Plaintiffs complained. ER 18-20. The orders involved foster care placement and termination of parental rights, both of which fall squarely within the statutory definition of "child custody proceedings." *See* 25 U.S.C. §§ 1903(1)(i) & (ii).

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[5] Attempting to avoid ICWA, the Parks in their Complaint allege that S.P. "is not a member of, and is not eligible for membership in, defendant Native Village of Minto." ER at 27. But neither the district court, in determining its jurisdiction, nor this court is required to accept legal conclusions cast as factual allegations. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (affirming dismissal for lack of standing). Tribal membership or eligibility for membership, of course, is a legal question determined principally by tribal law. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 72 n.32.

Plaintiffs argued that the Tribal Court lacked jurisdiction to initiate its own child custody proceedings since Minto has not petitioned the Secretary to reassume jurisdiction under § 1918. Following this court's precedent, however, Judge Holland rejected that argument. Order at 18-22 (applying *Kaltag Tribal Council v. Jackson*, No. 08-35343, 2009 WL 2736172 (9th Cir. Aug. 28, 2009) and *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991)). The Minto Tribal Court had concurrent jurisdiction and properly initiated child custody proceedings involving S.P.

D. Because ICWA Applies, the "Federal Recognition" Claims Are Moot.

The case or controversy presented in this case is a challenge to the Minto Tribal Court's "authority to involve itself in matters regarding, or in any way affecting, the legal or physical custody of plaintiff S.P." ER at 26 (Complaint ¶ 1). The Plaintiffs asked the district court to declare that the tribal court had no such authority, and enjoin the tribal court from exercising such purported authority, because Minto is not a "federally recognized tribe." *Id*. at 64. Because Minto is an "Indian tribe" for purposes of ICWA, however, the broader question whether it is a "federally recognized tribe" in general is merely academic. As Judge Holland said, "Whether or not the Native Village of Minto is a federally recognized tribe having a government-to-government relationship with the United States is irrelevant as regards the differences between the plaintiffs and the tribal defendants." *Id*. at 16;

cf. Joint Tribal Council of the Passamoquoddy Tribe v. Morton, 528 F.2d 370, 378-79 (1st Cir. 1975) (holding that Tribe is "tribe" for purposes of Nonintercourse Act, notwithstanding absence of broader federal recognition).

An "Indian tribe" under ICWA has jurisdiction, concurrent with the State, over child custody proceedings involving Indian children domiciled outside of a reservation. *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 555 (9th Cir. 1991) (citing 25 U.S.C. § 1911(b) and *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 35 (1989)). The Minto Tribal Court properly exercised its concurrent jurisdiction under ICWA by initiating child custody proceedings and issuing the custody and termination orders at issue in this case. *See* ER at 17-21; *Kaltag Tribal Council v. Jackson*, No. 08-35343, 2009 WL 2736172 (9th Cir. Aug. 28, 2009). The case or controversy in the underlying action arises from tribal court foster care placement and parental termination orders that fall squarely within the definition of "child custody proceedings" under ICWA. *See* 25 U.S.C. §§ 1903(1)(i) & (ii). The only issue in this case is Minto's authority as an "Indian tribe" under ICWA; there is no allegation that Minto or its court asserted any authority deriving from any broader federal recognition other than that provided in ICWA. Since Minto is an "Indian tribe" under ICWA—as found by Judge Holland and as shown above—the broader federal recognition claims are moot.

Thus an alternative basis for affirming the district court's decision as to Claims One and Two is that they present no case or controversy. Federal courts have no authority "to give opinions upon moot questions or abstract propositions, or to declare principles of rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). Therefore the district court lacked jurisdiction under Article III.

II. ICWA Required the District Court to Give Full Faith and Credit to the Orders of the Tribal Court, So the Parks' Challenge to those Orders Failed As a Matter of Law.

ICWA requires federal and state courts to grant full faith and credit to the "judicial proceedings of any Indian tribe applicable to Indian child custody proceedings." 25 U.S.C. § 1911(d). Parks asked the district court for declaratory and injunctive relief from the Minto Tribal Court's custody and termination orders, but the district court was required to honor those orders. Therefore, the district court's dismissal may be affirmed on the ground that Plaintiffs failed to state a claim upon which relief could be granted and Defendants are entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 12(c).[6]

[6] The Federal Defendants below moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). SER at 35 n.1. "A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Dunlap v. Credit Protection Ass'n, L.P.*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005) (quoting *Owens v.*

ICWA implements "a Federal policy that, where possible, an Indian child should remain in the Indian community." *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 37 (1989) (quoting H.R. Rep. No. 95-1386, at 23 (1978)). A key provision implementing this policy is the requirement that tribal court decisions in child custody proceedings be given full faith and credit by other courts:

> The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of **any Indian tribe applicable to Indian child custody proceedings** to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

25 U.S.C. § 1911(d) (emphasis added). The Minto Tribal Court's custody and termination orders, which formed the basis of the case or controversy below, are entitled to full faith and credit if, for purposes of ICWA, (1) Minto is an "Indian tribe," (2) S.P. is an "Indian child," and (3) the orders were issued in "child custody proceedings." *Id*.

As shown above, these three legal conditions were met because (1) Minto is an "Indian tribe" for purposes of ICWA, as Judge Holland found and as the

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Kaiser Foundation Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001)). Again, however, the court need not accept as true Plaintiffs' legal conclusions—such as S.P.'s non-membership or ineligibility for membership in the Native Village of Minto—cast as factual allegations. *Supra* note 5; *Warren*, 328 F.3d at 1139; *id*. at 1141 n.5.

Plaintiffs conceded, ER at 15-16; (2) S.P. is an "Indian child," as determined conclusively by Minto; and (3) the orders derive from a "child custody proceeding." 25 U.S.C. § 1911(d); *id*. §§ 1903(8), (4), & (1); *supra* pp. 10-13. Since these legal conditions are met, the Plaintiffs' requested declaratory and injunctive relief was foreclosed as a matter of law.

Because the custody and termination orders of which the Plaintiffs complained were issued by the tribal court of an "Indian tribe" in a "child custody proceeding" involving an "Indian child," ICWA required the district court to give full faith and credit to those orders and precluded the district court from granting the requested relief. 25 U.S.C. § 1911(d); *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 555 (9th Cir. 1991) ("[A]ll courts in the United States must give full faith and credit to the child-custody determinations of tribal courts…."). Therefore the district court could have dismissed the claims under Rule 12(c), providing an alternative ground for affirmance.

III. The District Court Lacked Jurisdiction Because None of the Plaintiffs Had Standing.

Federal courts may exercise jurisdiction only over live "Cases" and "Controversies." U.S. CONST., art. III, § 2, cl. 1. To satisfy this requirement, plaintiffs must demonstrate "the irreducible constitutional minimum" of standing: that (1) he or she has suffered "injury in fact"; (2) the injury is "fairly traceable" to

the actions of the defendant; and (3) the injury will likely be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

There is also a prudential dimension to the standing doctrine, closely related to Article III concerns, under which federal courts refuse "to decide abstract questions of wide public significance [when] other governmental institutions may be more competent to address the questions and [when] judicial intervention may be unnecessary to protect individual rights." *Elk Grove*, 542 U.S. 1, 12 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

Standing is a jurisdictional requirement and is open to review at all stages of the litigation, including for the first time on appeal. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994); *Newdow v. U.S. Congress*, 328 F.3d 466, 484 (9th Cir. 2003), *rev'd on other grounds*, *Elk Grove*, 542 U.S. 1 (2004).

The alleged injuries to the Plaintiffs stem from the custody and termination rulings of the Minto Tribal Court. The Parks' standing to raise the broad federal questions on which their suit is premised depends on the accuracy of Edward Parks' contention that he is the father of S.P., a fact at issue in both the district court case and in the related state court case. *See* SER at 32, 33 (denying Parks' assertion of paternity due to lack of sufficient information to either admit or deny).

Even if Parks was the biological father, his parental rights have been terminated by the Minto Tribal Court. ER at 81. At issue in the state court proceeding is whether the tribal termination order is entitled to full faith and credit by the state. *See* SER at 11-12 (Parks' complaint challenging Tribal Court termination and custody decrees).

Where standing is based on the status of a disputed domestic relationship, the plaintiff lacks prudential standing to invoke the jurisdiction of a federal court. As the U.S. Supreme Court has stated, "it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute…." *Elk Grove*, 542 U.S. at 17.

Elk Grove is analogous to the present case. Newdow, on his own behalf and that of his daughter, whom he represented as "next friend,"[7] challenged the school district's policy of requiring elementary school students to recite the pledge of allegiance to the flag once each day. Newdow asked the federal courts to strike down this policy as violating the Establishment Clause of the Constitution. *Id*. at 8. The Supreme Court began its analysis by pointing out that the prudential standing doctrine prevents courts from being "called upon to decide abstract

[7] *See Newdow v. United States Congress*, 2000 WL 35505916 (E.D. Cal. 2000) (Complaint, ¶ 9) (including among parties to action "Plaintiff's daughter, an unnamed plaintiff whom he represents as 'next friend'"); *id*. (Complaint, ¶ 3 n.1) (describing action as one to compel Congress and others to perform duties to Plaintiff "[a]nd his daughter, whom he represents as 'next friend'").

questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Id*. at 12 (quoting *Warth v. Seldin*, 422 U.S. at 500).

The Court then noted that federal courts are particularly reluctant to recognize the standing of parties seeking to entangle federal courts in domestic relationships. "Domestic relations are preeminently matters of state law." *Id*. at 12 (quoting *Mansell v. Mansell*, 490 U.S. 581, 587 (1989)). Even when the remedy sought does not strictly involve divorce, alimony, or a child support decree, federal courts must decline to decide "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," when the suit depends on the determination of the familial status of the parties. *Id*. at 13 (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 705-06 (1992) (internal quotation marks omitted).

Newdow's standing to raise his constitutional claims depended on his parental status under state law. *Id*. at 16. The Court found that a state court order granting Newdow's ex-wife sole legal custody of their daughter deprived him of the right to raise these claims on the daughter's behalf: "Newdow's standing derives entirely from his relationship with his daughter, but he lacks the right to

litigate as her next friend." *Id*. at 15. Thus, the Court held, Newdow lacked prudential standing to bring his suit in federal court. *Id*. at 17-18.

Like Newdow, Parks and his mother also lack prudential standing to pursue their political agenda through S.P. in federal court. The Parks bring broad constitutional claims affecting Alaska children, and broad questions involving the federal-tribal-state relationship. Their standing to raise these questions depends on Edward Parks' parental status under state law. That issue was, and is, being litigated in state court, and was a fact in dispute in the federal district court in both the pleadings and the parties' respective motions for summary judgment, as noted above.

Parties invoking federal court jurisdiction bear the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The elements of standing "are not mere pleading requirements" and must be supported by the evidence appropriate to the particular stages of the litigation. *Id*. Although the order on appeal granted a motion to dismiss, for purposes of which Parks' mere allegation of paternity may have sufficed to establish standing,[8] also before the court were Plaintiffs' motion for summary judgment and Defendants' opposition to that motion, as well as Minto's cross-motion for summary judgment. ER at 149

[8] Thus the district court accepted as true the allegation in Plaintiffs' complaint that S.P. was the daughter of Edward Parks. ER at 9.

(Docket #18); *id*. at 150 (#34); *id*. at 152 (#53, #54). Paternity aside, the very essence of the Plaintiffs' claims is that the Minto Tribal Court's order terminating Mr. Parks' parental rights is invalid. Even if the district court's dismissal on *Younger* abstention grounds is reversed, the district court will still be faced with the disputed issue of Parks' paternity and parental rights, issues of state (and tribal) law. Under *Elk Grove*, Parks lacks prudential standing to challenge federal Indian policy via a domestic relations dispute.[9]

In *Elk Grove*, the Supreme Court clarified that its holding on Newdow's standing did not depend on either the "domestic relations exception" to federal jurisdiction, *see Ankenbrandt*, 504 U.S. at 703, or on the abstention doctrines discussed by the district court in the order on appeal. In *Elk Grove*, the Court said, "the disputed family law rights are entwined inextricably with the threshold standing inquiry…. The *merits* question undoubtedly transcends the domestic relations issue, but the *standing* question surely does not." 542 U.S. at 13 n.5. Just so in this case: Parks raises important federal concerns that arguably make the domestic relations exception inapplicable, but the threshold standing question

[9] As the Federal Defendants point out in their response brief, under these circumstances federal courts may dismiss under the abstention principles developed in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The district court did not reach this argument, but it too provides a sound basis for affirming the district court's dismissal.

depends on disputed issues of state and tribal law. Thus Parks and his mother lacked prudential standing to bring their federal claims.

Without standing to bring the claims on his own behalf, Parks also lacked standing to assert the same claims on behalf of S.P. *See Elk Grove*, 542 U.S. at 15 ("Newdow's standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend."). As in *Elk Grove*, "the interests of this parent and this child are not parallel and, indeed, are potentially in conflict." *Id*. Indeed, the Minto Tribal Court has found that S.P.'s best interests *are* in conflict with Parks' asserted right to her custody, and accordingly granted custody to the Simmonds and terminated Parks' parental rights. ER at 81. Like Newdow, Parks cannot cure his standing problem simply by asserting his status as his daughter's "next friend" when that status is lacking or disputed under state law.[10]

Thus an alternative ground for affirming the district court's dismissal is that the Plaintiffs lacked prudential standing to raise the federal questions that form the basis of their claims, and thus the district court lacked jurisdiction.

[10] Still less can Evelyn Parks, at one further remove from S.P. than her son, claim standing through her putative granddaughter. To the extent she would have standing at all as a grandparent, it would derive from her relationship to her son, whose standing in turn "derives entirely from his relationship with his daughter." *Elk Grove*, 542 U.S. at 15. Thus she, like her son, lacks prudential standing under *Elk Grove*.

IV. Claims One and Two Present Non-Justiciable Political Questions.

In their first two claims for relief, Plaintiffs asked the district court to declare that Minto is not a federally recognized tribe. ER at 64. The plaintiffs admit, however, that (1) Congress has authorized the Secretary of the Interior to compile and publish annually a list of federally recognized tribes, ER at 47; 25 U.S.C. § 479a-1; and (2) the Secretary has done so each year since 1995, ER at 47-48. The 1995 list and subsequent lists include the Native Village of Minto,[11] as plaintiffs acknowledge.

Federal recognition of Indian tribes has long been considered a non-justiciable political question. *See, e.g., United States v. Rickert*, 188 U.S. 432, 442-43 (1903); *United States v. Holliday*, 70 U.S. 407, 419 (1865). The political question doctrine prohibits courts from deciding issues committed to another branch of government. *Baker v. Carr*, 369 U.S. 186, 210-11 (1962). As Appellants recognize, the Constitution reserves to Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., art. I, § 8, cl. 3; *see also* 25 U.S.C. § 2 (authorizing Commissioner of Indian Affairs, under direction of Secretary of

[11] *See, e.g., Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 74 FED. REG. 40218, 40222 (Aug. 11, 2009); *see also John v. Baker*, 982 P.2d 738, 750 (Alaska 1999) (discussing Federally Recognized Tribe List Act and concluding that through that Act "the federal government has recognized the historical tribal status of Alaska Native villages").

Interior and regulations of the President, to manage Indian affairs and "all matters arising out of Indian relations"); *id*. § 9 (authorizing the President to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs").

As the Indian Commerce Clause recognizes, tribes are not mere commercial entities but governments analogous to nations and states, a proposition still central to federal Indian law. *See, e.g., United States v. Lara*, 541 U.S. 193, 204-05 (2004) (affirming Supreme Court's "traditional understanding" of each tribe as "a distinct political society, separated from others, capable of managing its own affairs and governing itself") (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (recognizing tribes as "separate sovereigns" with the powers of self-government). As governments, tribes' political recognition and relations with the United States fall within the Executive's diplomatic powers under Article II. *See* COHEN at 140 (discussing "executive branch authority to undertake diplomatic and administrative actions consistent with federal recognition"); *cf. Baker v. Carr*, 369 U.S. 186, 212 (1962) ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called ‘a republic of whose existence we know nothing.'") (quoting *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 149 (1820)).

Thus courts generally seek not to insert themselves into political questions of tribal recognition. In *United States v. Holliday*, for example, the Supreme Court addressed whether a particular group of Indians was to be regarded as a tribe. The Court held that "it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same." *Holliday*, 70 U.S. 407, 419 (1865); *cf. United States v. Rickert*, 188 U.S. 432, 445 (1903) (holding that status of Indians for purposes of county property tax law "is a political question, which the courts may not determine").

The Alaska Supreme Court has recognized this fundamental principle of federal Indian law and applied it to Alaska Native Villages. "[T]ribal status is a non-justiciable political question. We therefore will defer to the determinations of Congress and the Executive Branch on the question of tribal status. If Congress or the Executive Branch recognizes a group of Native Americans as a sovereign tribe, we must do the same." *John v. Baker*, 982 P.2d 738, 749 (Alaska 1999) (citations and internal quote marks omitted); *see also id*. at 790 (Matthews, C.J., dissenting) ("tribal recognition by the Department of the Interior is given conclusive deference as a non-justiciable political question"); *In the Matter of C.R.H.*, 29 P.3d 849, 851 n.5 (Alaska 2001) ("In *John*, we affirmed the Native Village of Northway's

sovereignty based on the village's inclusion in the Department of the Interior's 1993 tribe list and the 1994 Tribe List Act.").

The Executive and Legislative branches' exercise of the tribal recognition authority entrusted them by the Constitution must itself be within constitutional and statutory bounds. As this court has said, "In the absence of explicit governing statutes or regulations, we will not intrude on the traditionally executive or legislative prerogative of recognizing a tribe's existence." *Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985) (citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913)). Claims One and Two do not allege any constitutional or statutory infirmity in the political branches' recognition of Minto. They ask the court to declare, contrary to the express determination of the Executive Branch and Congress, that Minto is not a federally recognized tribe. The court lacked jurisdiction to entertain such a political question dedicated to the Executive and Legislative branches, providing an alternative ground to affirm the court's dismissal of Claims One and Two.

CONCLUSION

The district court correctly dismissed the action below based on *Younger* abstention. In the event this court rules that *Younger* abstention was not warranted, the court should still affirm the district court's dismissal on one or more of the alternative grounds discussed above.

Respectfully submitted this 16th day of July, 2010.

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STATEMENT OF RELATED CASES

The Tribal Appellees are not aware of any related cases pending in this court.

s/ Geoffrey D. Strommer
Geoffrey D. Strommer

9th Circuit Case Number(s) 10-35000

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