No. 10-35000

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

S.P., by EDWARD PARKS, Her Next Friend and Parent, EDWARD PARKS, and EVELYN PARKS,

Plaintiffs-Appellants

v.

NATIVE VILLAGE OF MINTO, MINTO TRIBAL COURT, KEN SALAZAR, Secretary of the Interior, LARRY ECO HAWK, Assistant Secretary of the Interior for Indian Affairs, and U.S. DEPARTMENT OF THE INTERIOR,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ALASKA

BRIEF OF PLAINTIFFS-APPELLANTS

DONALD CRAIG MITCHELL
1335 F Street
Anchorage, Alaska 99501
(907) 276-1681

Attorney for Plaintiffs-Appellants

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JURISDICTIONAL STATEMENT

On May 12, 2009 the plaintiffs-appellants filed a complaint in the district court that alleged four claims for relief. Excerpts of Record (ER) 25-66. Each of those claims presents for decision by the district court federal questions of statutory, administrative, and constitutional law. Pursuant to Article III of the U.S. Constitution and 28 U.S.C. 1331 (federal question) the district court has jurisdiction to adjudicate the merits of the plaintiffs-appellants' claims.

On December 2, 2009 the district court granted the motion of the federal defendants-appellees to dismiss the plaintiffs-appellants' complaint, ER 7-24, and entered a final judgment. ER 6. On December 8, 2009 the plaintiffs-appellants filed a motion that requested the district court to alter, by reconsidering, its final judgment. ER 69-78. On December 11, 2009 the district court denied the motion. ER 3-5.

On December 31, 2009 the plaintiffs-appellants filed a notice of appeal. ER 1. Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B) and (4)(A)(iv), the notice of appeal was timely filed. 28 U.S.C. 1291 grants this court jurisdiction to review the district court's final judgment.

ISSUE PRESENTED FOR REVIEW

In its Order: Motion to Dismiss, ER 7-24, the district court assumed that the plaintiffs-appellants had properly invoked the court's Article III and 28 U.S.C. 1331 jurisdiction. Nevertheless, the district court dismissed the complaint on the ground that "Younger [v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971),] abstention applies in this case." ER 23. The issue presented for review is whether the district court erred when it concluded that, even though its jurisdiction had been properly invoked, it had discretion pursuant to Younger v. Harris to dismiss the plaintiffs-appellants' complaint.

STATEMENT OF THE CASE

Plaintiff-appellant S.P., born in 2007 in Fairbanks, Alaska, is the two-and-a-half-year-old daughter of plaintiff-appellant Edward Parks and Bessie Stearman. Although Edward Parks and Ms. Stearman are not married, subsequent to S.P.'s birth they were raising their daughter in Fairbanks.[1]

[1]This appeal requests the court to review a decision of a district court to grant a motion to dismiss. For the purposes of a motion to dismiss, the court must presume that the facts that a plaintiff has alleged in his complaint are true. See Warth v. Seldin, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). The facts set out in the Statement of the Case and the Statement of Facts are alleged in paragraph nos. 3-6, 36-45 of the plaintiffs-appellants' complaint. See ER 26-29, 48-55.

In May 2008 when Edward Parks was away from Fairbanks working in the North Slope oil fields, Ms. Stearman, who has a history of alcohol and substance abuse problems, was told by her probation officer that she would be incarcerated for a probation violation. Since Edward Parks was not available, when she was incarcerated Ms. Stearman left S.P. in the temporary physical custody of Rozella and Jeff Simmonds, two Fairbanks residents to whom Ms. Stearman is distantly related.

Unbeknownst to Edward Parks until he returned to Fairbanks, on June 2, 2008 Rozella and Jeff Simmonds obtained from the Minto Tribal Court an order that gave them physical custody of S.P. Since that date, over Edward Parks's continuous protestation, Rozella and Jeff Simmonds have refused to relinquish physical custody of S.P. to Edward Parks, citing Minto Tribal Court custody orders as the legal authority that allows them to retain physical custody. On May 7, 2009 the Minto Tribal Court issued an order, ER 79-82, in which it purported to terminate Edward Parks's parental rights to S.P.

In response to the order that purported to terminate his parental rights Edward Parks filed two civil actions. The first is S.P. v. Native Village of Minto, No. 3:09-cv-92 HRH, which S.P. (through her next friend and parent Edward Parks), Edward Parks, and Edward Parks's mother, Evelyn Parks, filed in the U.S.

District Court for the District of Alaska and which named the Native Village of Minto, the Minto Tribal Court, two federal officials, and the U.S. Department of the Interior as defendants. The second is Parks v. Simmonds, No. 4FA-09-2508 CI, a custody action that Edward Parks filed in the Alaska Superior Court in Fairbanks and which named Rozella and Jeff Simmonds as the defendants.

The Alaska Superior Court and Rozella and Jeff Simmonds are not defendants in S.P. v. Native Village of Minto, and the prayer of the plaintiffs-appellants' complaint does not request the district court to involve itself in any way in the Alaska Superior Court's adjudication of the claim for physical custody of S.P. that Edward Parks has alleged against Rozella and Jeff Simmonds in Parks v. Simmonds. Nevertheless, on December 2, 2009 the district court granted the federal defendants-appellees' motion to dismiss and then issued a final judgment dismissing S.P. v. Native Village of Minto "on the basis of Younger abstention." ER 24. This appeal followed.

STATEMENT OF FACTS

This appeal has a back story.

Alaska Native Tribal Status

A majority of Alaska's 690,000 residents, including S.P., Edward Parks, Evelyn Parks, Bessie Stearman, and Rozella and Jeff

Simmonds, live in one city, Anchorage, and four towns, Fairbanks, Juneau, Sitka, and Ketchikan. But more than 100,000 Alaskans live in approximately 250 small rural communities scattered throughout the Alaska bush. In 1971 when it settled Alaska Native land claims by enacting the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. 1601 et seq.), Congress designated more than 200 of those communities, including Minto, as "Native villages" for the purposes of ANCSA. See 43 U.S.C. 1610(b)(1).[2]

In 1884 in the Alaska Organic Act, 23 Stat. 24 (1884), Congress decided that it would not designate Native residents of what today are ANCSA Native villages as "federally recognized tribes" whose governing bodies would possess the governmental authority and sovereign immunity that the governing bodies of "federally recognized tribes" whose members reside on reservations in the coterminous states possess. See Donald Craig Mitchell, Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts

[2]To be a "Native village" Congress required a community to be "not of a modern and urban character" and to on the 1970 census enumeration date have had twenty-five or more Native residents who collectively were a majority of community residents. See 43 U.S.C. 1610(b)(3). Congress defined the term "Native" as "a citizen of the United States who is a person of one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or combination thereof." See 43 U.S.C. section 1602(b).

[hereinafter "Why History Counts"], 14 Alaska Law Review 359-60 (1997)(Alaska Native policy codified in Alaska Organic Act described).

That was the jurisdictional situation in 1932 when Secretary of the Interior Ray Lyman Wilbur advised Congress:

> In the United States statutes Alaska has never been regarded as Indian country. The United States has had no treaty relations with any of the aborigines of Alaska nor have they been recognized as the independent tribes with a government of their own. The individual native has always and everywhere in Alaska been subject to the white man's law, both Federal and territorial, civil and criminal.

Letter from Ray Lyman Wilbur to the Hon. Edgar Howard (March 14, 1932), reprinted in Authorizing the Tlingit and Haida Indians to Bring Suit in the United States Court of Claims: Hearing on S. 1196 before the Senate Comm. on Indian Affairs, 72d Cong. 15-16 (1932). And that was the jurisdictional situation in 1988 when, after reviewing Congress's Alaska Native-related enactments, the Alaska Supreme Court concluded:

> In a series of enactments following the Treaty of Cession [in 1867] and extending into the first third of this century, Congress has demonstrated its intent that Alaska Native communities not be accorded sovereign tribal status. The historical accuracy of this conclusion was expressly recognized in the proviso to the Alaska Indian Reorganization Act [of 1936] . . . No enactment subsequent to the Alaska Indian Reorganization Act granted or recognized tribal sovereign authority in Alaska.

Native Village of Stevens v. A.M.P., 757 P.2d 32, 41 (Alaska 1988).

In the 1980s a group of predominantly young Alaska Natives, and the attorneys who advised them, began asserting that the Native residents of ANCSA Native villages had always been "federally recognized tribes" and that the land within and surrounding Native villages that the Secretary of the Interior had conveyed to ANCSA business corporations in fee title was "Indian country" within which the State of Alaska had no civil regulatory jurisdiction (including jurisdiction over matters relating to child welfare and custody). See Why History Counts 391-394 (birth of Alaska Native sovereignty movement described).

In 1988 in Native Village of Venetie IRA Council v. State of Alaska, 687 F. Supp. 1380 (D. Alaska 1988), District Judge Andrew Kleinfeld (now a senior judge of this court) held that, because the Athasbascan Indian residents of the Native Village of Venetie were not members of a "federally recognized tribe," a "tribal court" that the Athabascan Indian residents of Venetie had organized could involve itself in child custody matters only if it petitioned the Secretary of the Interior for jurisdiction pursuant to section 108 of the Indian Child Welfare Act (ICWA), 25 U.S.C. 1918, and the Secretary granted the petition. In Native Village of Venetie IRA Council v. State of Alaska, 944 F.2d 548 (9th Cir. 1991), a panel of this court reversed Judge Kleinfeld, holding:

> [I]f native groups in Alaska were sovereign prior to the incorporation of the land mass into the United States, they could lose their sovereignty only by express act of Congress or assimilation by the natives into non-native culture.
>
> Indian sovereignty flows from the historical roots of the Indian tribe. Tribal sovereignty exists unless and until affirmatively divested by Congress. Thus, to the extent that Alaska's natives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities. (citations omitted).

Id. 558.

The panel then announced that if they could demonstrate that they were the "modern-day successors" to a "sovereign historical band[] of natives" the Athabascan Indian residents of Venetie were a "federally recognized tribe" even though the Senate had not ratified a treaty, Congress had not enacted a statute, and the Secretary of the Interior (acting lawfully pursuant to authority delegated by Congress) had not conferred that legal status.[3]

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[3]The validity of the principal holding in Native Village of Venetie IRA Council v. Alaska is implicated in Hogan v. Kaltag Tribal Council, U.S. Supreme Court Petition for a Writ of Certiorari No. 09-960. See Brief of Edward Parks and Donielle Taylor as Amici Curiae in Support of Petitioners, http://www.scotusblog.com/wp-content/uploads/2010/04/Kaltag_Amicus-brief.pdf. On April 26, 2010 the Court invited the Solicitor General to file a brief expressing the views of the United States regarding the petition. See http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-960.htm.

On remand, District Judge H. Russel Holland issued two unpublished decisions. In the first, ER 92-145, after conducting an evidentiary hearing, Judge Holland held that - because they were the "modern-day successors" to a "sovereign historical band" of Alaska Natives - the Athabascan Indian residents of the Native village of Venetie were a "federally recognized tribe." In the second Judge Holland held that the fee title land within and surrounding Venetie was not "Indian country."

When the Native Village of Venetie appealed Judge Holland's "no Indian country" decision to this court, Alaska Governor Tony Knowles ordered his Attorney General not to appeal Judge Holland's tribal status decision. See Why History Counts 421 (Alaska Attorney General explaining to Alaska Legislature that "the decision of the Knowles Administration to withdraw the challenge to federal recognition of tribes in Alaska was not driven by litigation considerations").

In Yukon Flats School District v. Venetie Tribal Government, 101 F.3d 1286 (9th Cir. 1996), a panel of this court reversed Judge Holland on the "no Indian country" issue. In Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 118 S.Ct. 948, 140 L.Ed.2d 30 (1998), the U.S. Supreme Court then reversed the panel. But because the State of Alaska had not appealed Judge Holland's tribal status decision,

in so holding the Court simply assumed that the Athabascan Indian residents of the Native village of Venetie were a "federally recognized tribe."

A year later in John v. Baker I, 982 P.2d 738, 749-50 (Alaska 1999), the Alaska Supreme Court rejected the tribal status theory that the panel had announced in Native Village of Venetie IRA Council v. Alaska. The Court reaffirmed its prior holding in Native Village of Stevens v. A.M.P., supra at 41, that only Congress or the Secretary of the Interior (acting lawfully pursuant to authority delegated by Congress) could designate a group of Alaska Natives as a "federally recognized tribe." But the Court then announced that, in its view, Congress had intended its enactment of the Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, Title I, 108 Stat. 4791 (1994) (codified in part at 25 U.S.C. 479a et seq.), to delegate the Secretary of the Interior authority to create "federally recognized tribes" in Alaska in Congress's stead simply by publishing a list of "Native entities" in the Federal Register and that beginning in 1995 the Secretary had done so. See 60 Fed. Reg. 9250-55 (1995).

Sitton v. Native Village of Northway

Northway is an ANCSA Native village located on the Alaska Highway 250 miles southeast of Fairbanks. See Alaska Community

Database, http://www.commerce.state.ak.us./dca/commdb/CF_BLOCK.cfm. A majority of Northway's residents are of Athabascan Indian descent and in the 1980s those residents organized a "tribal court."

In 2003 Darrel Felix, and Mr. Felix's mother, Daisy Northway, both of whom are Athabascan Indians who are members of the Native Village of Northway, absconded with Mr. Felix's daughter and Ms. Northway's granddaughter, thirteen-year-old H.F., who had been living in Tok, Alaska, 50 miles west of Northway with her Caucasian mother, Andrea Sitton. At Mr. Felix and Ms. Northway's request, the Northway Tribal Court then issued an "order" that purported to give physical custody of H.F., first to Ms. Northway, and then to Mr. Felix.

In response, Ms. Sitton did procedurally exactly what plaintiff-appellant Edward Parks did in the custody dispute that has resulted in this appeal. In the Alaska Superior Court in Fairbanks Ms. Sitton (and H.F., through her next friend and parent, Andrea Sitton) filed a custody action, Sitton v. Felix, No. 4FA-03-1395 CI, against Mr. Felix and Ms. Northway. In the U.S. District Court for the District of Alaska Ms. Sitton and H.F. filed Sitton v. Native Village of Northway, No. A03-0134 CV, against the Native Village of Northway, the Northway Tribal Court, the Assistant Secretary of the Interior for Indian

Affairs, and the U.S. Department of the Interior. The complaint alleged the same four claims for relief that the plaintiffs-appellants have alleged in the complaint that is the subject of this appeal.

In its prayer, the complaint in Sitton v. Native Village of Northway requested the court to issue a declaratory judgment that the Athabascan Indian residents of the Native Village of Northway are not a "federally recognized tribe" and that, because they are not, the Native Village of Northway had no legal authority to create the Northway Tribal Court, and the Northway Tribal Court had no legal authority to involve itself in matters relating to the custody of H.F. Most particularly, the prayer did not request the district court to involve itself in any way in Sitton v. Felix, the custody action that was pending in the Alaska Superior Court.

The U.S. District Court for the District of Alaska assigned Sitton v. Native Village of Northway to District Judge H. Russel Holland. In response to a motion of the federal defendants to dismiss Sitton v. Native Village of Northway, in 2004 Judge Holland issued an order, ER 83-91, in which he stayed proceedings for one year. In so holding, Judge Holland acknowledged both that Ms. Sitton had properly invoked the district court's Article III and 28 U.S.C. 1331 jurisdiction and that "[p]laintiffs' state and

federal complaints very carefully separate the issues and relief sought. Plaintiffs' claims do not in any material respect duplicate one another as between state and federal court." ER 87.

Based on those conclusions, Judge Holland had a duty to adjudicate the merits of Ms. Sitton's claims for relief. See Willcox v. Consolidated Gas Co., 212 U.S. 19, 40, 29 S.Ct. 192, 195, 53 L.Ed. 382 (1908). However, instead of performing that duty, Judge Holland announced that he would not do so because:

> Plaintiffs' complaint, both as regards the question of the Native Village of Northway's governmental authority as well as plaintiffs' due process claims, raise extraordinarily important and politically sensitive issues which, if plaintiffs were to prevail on them, would have very far-reaching impact on the State of Alaska. For example, it is the court's impression that a determination that the Native Village of Northway lacks governmental authority to adjudicate custody disputes, as is contended by the plaintiffs, could impact or (sic) all or very nearly all of the more than 200 Native villages in the state of Alaska.

ER 90-91.

As authority for his conclusion that, even though Ms. Sitton and H.F. had properly invoked the district court's Article III and 28 U.S.C. 1331 jurisdiction, he had discretion not to exercise that jurisdiction, Judge Holland cited Wilton v. Seven Falls Co., 515 U.S. 277, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). See ER 90. But Wilton was a declaratory judgment action in which the district court had been requested to interpret an insurance

policy that, in a parallel action, a state court had been requested to interpret. Wilton is not a precedent related to the authority of a district court not to exercise jurisdiction that had been properly invoked.

Ms. Sitton and H.F. appealed the stay order to this court. See Sitton v. Native Village of Northway, Ninth Circuit No. 04-35461. But as Judge Holland had hoped it might, the custody dispute between Ms. Sitton and Mr. Felix and Ms. Northway was resolved when Ms. Sitton regained physical custody of H.F. and the Northway Tribal Court agreed that it would never again attempt to involve itself in matters relating to the custody of H.F.[4]

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[4]After this court established a briefing schedule, the federal defendants-appellees filed a motion that requested the court to dismiss the appeal on the ground that the stay order was not an appealable order. The defendants-appellees knew when they did so that, pursuant to Circuit Rule 27-11, the filing of the motion automatically stayed the briefing schedule, and that, by the time the court denied the motion and the appeal was briefed, the stay would have expired. Consistent with that understanding of the federal defendants-appellees' understanding, the court did not deny the motion to dismiss until almost two months after the date on which the briefing schedule had required the plaintiffs-appellants to file their reply brief. For that reason, Ms. Sitton and H.F. moved the court to dismiss their appeal on the ground that "it is not an appropriate expenditure of plaintiffs-appellants' limited financial resources or of the [circuit] court's finite judicial resources for plaintiffs-appellants to continue to prosecute an appeal that time will moot before plaintiffs-appellants are afforded [a] decision . . . ." This court then granted that motion.

S.P. v. Native Village of Minto

Plaintiff-appellant Edward Parks is thirty-eight-years-old. His father is Caucasian. His mother is an Athabascan Indian. Mr. Parks was raised in, and until recently has always been a resident of, Fairbanks, Alaska. In 2006 Mr. Parks began a relationship in Fairbanks with Bessie Stearman, an Athabascan Indian who was raised in Minto but who in 2001 relocated to Fairbanks.

Minto is a cluster of houses on the Tolovana River 130 air miles northwest of Fairbanks. In 2000 Minto had a population of 258 persons, 237 of whom were of Athabascan Indian descent. See ER 67-68. Minto is an ANCSA Native village. Edward Parks is not, and has never been, a resident of Minto or a member of any Native organization affiliated with Minto.

In 2007 in Fairbanks Ms. Stearman gave birth to Mr. Parks's daughter, S.P., who Mr. Parks and Ms. Stearman began raising together. Ms. Stearman has a history of alcohol and substance abuse problems. In May 2008 when Mr. Parks was working in the North Slope oil fields, unbeknownst to Mr. Parks, Ms. Stearman was incarcerated in Fairbanks on a probation violation. When he returned to Fairbanks Mr. Parks discovered that in his absence the Minto Tribal Court had convened sua sponte in Minto, had issued an "order" that purported to give the Native Village of

Minto legal custody of S.P., and then had given physical custody of S.P. to Fairbanks residents Rozella and Jeff Simmonds, to whom Ms. Stearman is distantly related and to whom, when she was incarcerated, Ms. Stearman had given temporary physical custody of S.P.

Over Mr. Parks's repeated protestation, for the past twenty months Rozella and Jeff Simmonds have refused to relinquish physical custody of S.P. to Mr. Parks. In May 2009 the Minto Tribal Court issued an "order," ER 79-82, in which it purported to terminate Mr. Parks's parental rights to S.P.

In September 2009 Mr. Parks filed a custody action against Rozella and Jeff Simmonds in the Superior Court in Fairbanks, Parks v. Simmonds, No. 4FA-09-2508 CI. Four months earlier, in May 2009 S.P. (through her next friend and parent Edward Parks), Edward Parks, and Edward Parks's mother, Evelyn Parks, filed S.P. v. Native Village of Minto, No. 3:09-cv-92 HRH, in the U.S. District Court for the District of Alaska. The defendants in that action are the Native Village of Minto, the Minto Tribal Court, two federal officials, and the U.S. Department of the Interior. Adjusted for differences in factual circumstance, the complaint in S.P. v. Native Village of Minto alleges the same four claims for relief (all of which present federal questions) as the four claims for relief that Andrea Sitton and H.F. had alleged in

their complaint in Sitton v. Native Village of Northway. Its adjudication of the first and second claims for relief will require the district court to determine whether the Athabascan Indian residents of Minto are a "federally recognized tribe."[5]

The U.S. District Court for the District of Alaska assigned S.P. v. Native Village of Minto to District Judge Timothy Burgess. However, by agreement of the judges, see Docket 17, Judge Burgess transferred S.P. v. Native Village of Minto to District Judge H. Russel Holland.

Rozella and Jeff Simmonds are not defendants in S.P. v. Native Village of Minto. And the Native Village of Minto, the Minto Tribal Court, the two federal officials, and the U.S. Department of the Interior who are the defendants in S.P. v. Native Village of Minto are not defendants in Parks v. Simmonds. Nevertheless, on December 2, 2009 Judge Holland granted the federal defendants' motion to dismiss and then issued a final judgment dismissing S.P. v. Native Village of Minto "on the basis of Younger abstention." ER 24.

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[5]Unlike the present day Athabascan Indian residents of Venetie, the present day Athabascan Indian residents of Minto are not the "modern-day successors" to a "sovereign historical band[] of natives." Rather, Minto was founded by several Athabascan Indian families whose members settled subsequent to 1902 at a location called Old Minto in order to be proximate to the new economic activity that a gold strike in the area had created. See ER 67.

In response, the plaintiffs filed a Motion to Alter, by Reconsidering, Judgment, ER 69-78, in which inter alia they pointed out to Judge Holland that:

> The procedural situation vis-a-vis the federal action and the state custody action in Sitton [v. Native Village of Northway] is identical to the procedural situation in this action (with the added factor that, unlike the Northway Tribal Court in Sitton, in this action the Minto Tribal Court issued an "order" in which it purports to permanently terminate plaintiff Edward Parks's parental rights).
>
> . . .
>
> Whether the stay order in Sitton was an appropriate or an inappropriate exercise of judicial discretion is of no moment. The Sitton stay order is relevant here only because the court's analysis of the federal action and the state custody action in Sitton is directly contrary to the analysis the court employed to reason to its conclusion that Younger instructs that the court should dismiss this action. (emphasis in original).

Id. 76, 78.

On December 11, 2009 Judge Holland denied the motion. ER 7-24.[6] This appeal followed. ER 1.

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[6]The order in which Judge Holland granted the motion to dismiss contains an extensive dictum in which Judge Holland expresses his views about the intent of Congress embodied in ICWA. See ER 15-22. In their Motion to Alter, by Reconsidering, Judgment, the plaintiffs-appellants pointed out that, because the federal defendants-appellees first mentioned ICWA in their reply memorandum, it was patently unfair for the district court to have expressed a view about a question of law that the plaintiffs-appellants had not been afforded an opportunity to brief. In his order denying the Motion to Alter, by Reconsidering, Judgment, Judge Holland responded by informing the plaintiffs-appellants that, in his view, the oral argument the district court held on the motion to dismiss had provided the plaintiffs-appellants a

STANDARD OF REVIEW

The standard of review is de novo. See Gilbertson v. Albright, 381 F.3d 965, 982 (9th Cir. 2004)("Our review of the district court's decision that Younger applies is de novo"). Accord San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose, 546 F.3d 1087, 1991 n. 2 (9th Cir. 2008); Equity Lifestyle v. County of San Luis Obispo, 548 F.3d 1184, 1189 (9th Cir. 2008).

SUMMARY OF THE ARGUMENT

The prayer of the complaint that is the subject of this appeal does not request the district court to enjoin the Alaska Superior Court from adjudicating the custody dispute that is the subject of Parks v. Simmonds. Nor would the district court granting the declaratory and injunctive relief requested in the prayer have the practical effect of enjoining the Alaska Superior Court. As a consequence, the district court had no authority pursuant to Younger v. Harris to dismiss the plaintiffs-appellants' complaint.

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procedural opportunity to address the federal defendants-appellees' contentions regarding ICWA. See ER 3-5. With all due respect to Judge Holland, his inclusion of the aforementioned dictum in the order in which he granted the motion to dismiss was fundamentally unfair to the plaintiffs-appellees.

ARGUMENT

"When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction." Willcox v. Consolidated Gas Co., supra at 40, 29 S.Ct. at 195. Accord, United States v. Adair, 723 F.2d 1394, 1400-01 (9th Cir. 1983).

Pursuant to that blackletter rule, once the district court satisfied itself that in the action that is the subject of this appeal the plaintiffs-appellants had properly invoked the court's Article III and 28 U.S.C. 1331 jurisdiction, the court had a duty to adjudicate the merits of the claims for relief that the plaintiff's-appellants have alleged in their complaint.

The reason the district court had that duty is that every plaintiff who has properly invoked a district court's jurisdiction has a right to have his federal question claims decided by the district court, rather than by a state court. As the U.S. Supreme Court held in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 417, 84 S.Ct. 461, 465-66, 11 L.Ed.2d 440 (1964): "The possibility of appellate review by t[he U.S. Supreme] Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts."

For that reason, in the action that is the subject of this appeal, when the plaintiffs-appellants properly invoked the Article III and 28 U.S.C. 1331 jurisdiction of the district court, as the U.S. Supreme Court instructed in Colorado River Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the district court had a "virtually unflagging obligation" and a "heavy obligation " to exercise its jurisdiction because

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest. It was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it. Our decisions have confined the circumstances appropriate for abstention to three general categories.
>
> (a) Abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.
>
> . . .
>
> (b) Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.
>
> . . .

> (c) Finally, abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, Younger v. Harris . . . . (quotation marks and citations omitted).

Id. 813-16, 96 S.Ct. at 1244-45.

Relying on Colorado River Conservation District category (c), instead of exercising jurisdiction that had been properly invoked, the district court invoked Younger v. Harris as its rationale for not doing so.

In Younger v. Harris Harris was indicted in a state court for allegedly violating the California Criminal Syndicalism Act (CCSA). He then filed a civil action in the U.S. District Court that named the Attorney General of California as a defendant, alleged that the CCSA was unconstitutional, and requested the district court to enjoin the Attorney General from proceeding with Harris's prosecution. Over the Attorney General's objection, the district court declared the CCSA unconstitutional and enjoined the Attorney General.

In Younger v. Harris the U.S. Supreme Court vacated the injunction. In so holding, the Court instructed that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it" unless a plaintiff has made a "showing of bad faith, harassment, or any other unusual circumstance that would call for

equitable relief." Younger v. Harris, supra at 54, 91 S.Ct. at 755.

In Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982), the U.S. Supreme Court extended Younger v. Harris by holding that a district court had discretion to apply Younger criteria and dismiss a federal action when the prayer of the complaint in the federal action requested the district court to enjoin a state civil judicial proceeding. The Younger criteria the Court identified in Middlesex are:

(1) Is there an "ongoing state judicial proceeding?"

(2) Does that proceeding "implicate important [state] interests?"

(3) Does the plaintiff in the federal action have an "adequate opportunity" in the state judicial proceeding to raise his federal claims?

In San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose, supra, this court identified the Younger and Middlesex factors a district court should consider when deciding whether to exercise its power in equity and enjoin a state court action.

In San Jose Silicon Valley Chamber of Commerce PAC two political action committees filed an action in the U.S. District

Court against the City of San Jose and its election commission to obtain a declaratory judgment that the city's campaign finance ordinance was unconstitutional. The prayer of the complaint also requested the district court to grant "temporary, preliminary, and permanent injunctive relief" enjoining the election commission from continuing to enforce the city's ordinance. When the district court issued the injunction, this court, invoking Younger v. Harris, vacated the district court's action. When it did so, the court explained:

> Younger abstention is a jurisprudential doctrine rooted in overlapping principles of equity, comity, and federalism. We must abstain under Younger if four requirements are met: (1) a state-initiated proceeding is ongoing; (2) the proceeding implicated important state interests; (3) the federal plaintiff is not barred from litigating federal constitutional issues in the state proceeding; and (4) the federal court action would enjoin the proceeding or have the practical effect of doing so, i.e., would interfere with the state proceeding in a way that Younger disapproves. (citations omitted).

Id. 1091-92.

In the order, ER 7-24, that is the subject of this appeal, the district court cited San Jose Silicon Valley Chamber of Commerce PAC and then applied the first three criteria of the four criteria this court announced in that decision. ER 22-24. The district court then invoked Younger v. Harris and dismissed the plaintiffs-appellants' complaint. However, when it did so, the district court made the same error that this court corrected

in AmerisourceBergen Corporation v. Roden, 495 F.3d 1143 (9th Cir. 2007).

In AmerisourceBergen a former employee of a corporation filed a state court action in which he alleged that the corporation had unlawfully breached its employment contract with the employee. After the former employee and the corporation negotiated a settlement agreement, the former employee filed a new state court action to enforce the settlement agreement in several of its particulars. After that state court action was filed, the corporation's successor corporation filed an action in the U.S. District Court in which it sought to litigate two claims for relief, one of which was the employee's original breach of contract claim. Citing Younger v. Harris, the district court dismissed the successor corporation's complaint because "resolving [the successor corporation's] claims at the federal level would interfere with ongoing state court proceedings regarding almost-entirely overlapping issues." Id. 1146.

On appeal, this court reversed.

Citing Gilbertson v. Albright, supra at 978, as authority for the proposition, this court first admonished the district court that "abstention is only appropriate in the narrow category of circumstances in which the federal court action would actually enjoin the ongoing state proceeding, or have the practical effect

of doing so." (emphasis added, quotation marks and internal punctuation omitted). The court then determined that the district court had had no discretion to abstain from adjudicating the successor corporation's federal claims because in the prayer of its complaint the successor corporation had not requested the district court to enjoin the state court proceeding or take any other action that might have the same practical effect. The court explained the district court's error as follows:

> [T]here are actually four elements that must be satisfied before the Younger doctrine requires abstention. The district court recognized only three of them, apparently taking cues from a number of our cases that have focused on only the three "Middlesex elements" . . . . According to the district court, abstention is required whenever (1) there are ongoing state judicial proceedings; (2) the proceedings implicate important state interests; and (3) the state proceedings provide the plaintiff with an adequate opportunity to raise federal claims, even if the federal action does not enjoin the ongoing state court proceedings or have the practical effect of doing so.
>
> This is incorrect. As Gilbertson makes clear, while there are only three "threshold requirements" to application of Younger, there is a vital and indispensable fourth element: the policies behind the Younger doctrine must be implicated by the actions requested of the federal court. In the language of the Gilbertson court:
>
> > If a state-initiated proceeding is ongoing, and if it implicates important state interests . . . , and if the federal litigant is not barred from litigating federal constitutional issues in that proceeding, then a federal court action that would enjoin the proceeding, or have the practical effect of doing so, would interfere in a way that Younger disapproves.

> Thus, once the three Middlesex elements are satisfied, the court does not automatically abstain, but abstains only if there is a Younger-based reason to abstain - i.e., if the court's action would enjoin, or have the practical effect of enjoining, ongoing state court proceedings. (emphasis in original and citations omitted).

AmerisourceBergen, supra at 1148-49.

AmerisourceBergen is controlling in the instant appeal.

Plaintiff-appellant Edward Parks filed Parks v. Simmonds. So why would he request the district court to enjoin the Alaska Superior Court from adjudicating the claim for relief relating to the custody of S.P. that he has alleged in the complaint he filed in that action? But more importantly, paragraph no. 3 of the prayer of the plaintiffs-appellants' complaint in S.P. v. Native Village of Minto requests the district court to

> Enter both a preliminary and a permanent injunction prohibiting defendants Native Village of Minto and Minto Tribal Court from taking any action regarding, or in any way affecting, the legal or physical custody of S.P. (emphasis added).

ER 66.

Paragraph no. 3 of the prayer does not request the district court to enjoin the Alaska Superior Court or to enjoin Rozella and Jeff Simmonds who, unlike defendants-appellees Native Village of Minto and Minto Tribal Court, are defendants in Parks v. Simmonds. As a consequence, as this court instructed in AmerisourceBergen, the decision of the district court that it had

discretion pursuant to Younger v. Harris to dismiss the plaintiffs-appellants' complaint was clear error.

CONCLUSION

For the reasons set forth above, the plaintiffs-appellants request the circuit court to vacate the Judgment in a Civil Case, ER 6, in which the district court dismissed the plaintiffs-appellants' complaint and remand this action to the district court with the instruction that the district court exercise its jurisdiction pursuant to Article III and 28 U.S.C. 1331 and adjudicate the merits of the claims for relief that the plaintiffs-appellants have alleged in their complaint.

Respectfully Submitted,

s/ DONALD CRAIG MITCHELL

Attorney for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

The plaintiffs-appellants have no knowledge of any related cases pending in this court.

s/ DONALD CRAIG MITCHELL

Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 3, 2010. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ DONALD CRAIG MITCHELL

Attorney for Plaintiffs-Appellants