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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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ARGUMENT

A. The Plaintiffs-Appellants Have Standing.

The plaintiffs-appellants filed their complaint on May 12, 2009. Docket 1. The District Court concluded its involvement in this action on March 8, 2010. Docket 98. At no time during those ten months did the defendants-appellees suggest that the plaintiffs-appellants did not have standing to invoke the District Court's Article III jurisdiction to adjudicate the claims for relief alleged in their complaint. However, the defendants-appellees now do so. See Federal Defendants-Appellees Opposition Brief, at 23-26; Native Village of Minto (NVM) and Minto Tribal Court (MTC) Opposition Brief, at 17-23.

While this court has an "obligation to consider its jurisdiction at every stage of the proceedings," see Gros Ventre Tribe v. United States, 469 F.3d 801, 815 (9th Cir. 2006), the defendants-appellees' belated suggestion that the plaintiffs-appellants do not have standing borders on spurious.

The case and controversy requirement in Article III "requires federal courts to satisfy themselves that the plaintiff [in a civil action] has alleged such a personal stake in the outcome of the controversy [that is the subject of the action] as to warrant his invocation of federal court jurisdiction." (emphasis in original, internal quotation marks omitted).

Summers v. Earth Island Institute, __ U.S. __, 129 S.Ct. 1142, 1149, 173 L.Ed.2d 1 (2009).

In order to demonstrate that personal stake, a plaintiff must allege facts in his complaint which demonstrate that, as a consequence of the actions of the defendant, the plaintiff has suffered an "injury in fact" that is "concrete and particularized" and "actual and imminent." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Each of the plaintiffs-appellants has done so in the complaint that is the subject of this appeal.

1. S.P.

Plaintiff-appellant S.P. is now two years and eight months old. If any of the claims for relief that the plaintiffs-appellants have alleged in their complaint is valid, then, as a consequence of the actions of the NVM and the MTC, for more than two years S.P. has been unlawfully deprived of the companionship of her father, Edward Parks, and of her grandmother, Evelyn Parks. Being involuntarily separated from her family at such a young age is inflicting an "injury in fact" on S.P. that is "concrete and particularized," "actual," and psychologically damaging.

The Federal defendants-appellees do not contest that obvious fact. Instead, they suggest that her father, Edward Parks, is not

a proper person to represent S.P. in this action. According to the Federal defendants-appellees:

> The Federal Rules of Civil Procedure provide that an infant may be represented by a next friend or a guardian ad litem, either of whom must first be appointed by the court. Edward Parks seeks to proceed as S.P.'s next friend, but he never established his right to do so before either this Court or the district court. His parental rights were terminated by the order of the Minto Tribal Court. More recently, the Alaska Superior Court denied his motion for physical custody of S.P. and ordered the Native Village of Minto to retain legal custody of S.P. To our knowledge, no court has ruled on Edward Parks' claim to be S.P.'s biological father. He therefore has no (sic) established a right to bring suit on S.P.'s behalf in this litigation. (citations omitted, emphasis added).

Federal Defendants-Appellees Opposition Brief, at 24-25.

But the Federal defendants-appellees are four-times wrong.

First, in paragraph nos. 3 and 4 of the plaintiffs-appellants' complaint Edward Parks alleges that he is the father of S.P. See Excerpts of Record (ER) 26-27. For the purposes of this appeal, the court must assume that that factual allegation is true (which it is). See Warth v. Seldin, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975)("For the purposes of ruling on a motion to dismiss . . . courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party").

Second, contrary to the assertion of the Federal defendants-appellees, Federal Rule of Civil Procedure (FRCP) 17(c) does not

require a parent to be appointed by a District Court before that parent may appear as the next friend of the parent's minor child.

Third, the Alaska Superior Court has never "ordered the Native Village of Minto to retain legal custody of S.P." On September 19, 2009 in the Alaska Superior Court, Edward Parks filed Parks v. Simmonds, No. 4FA-09-2508 CI. The defendants in that action are Rozella and Jeff Simmonds, two residents of Fairbanks, Alaska, who over Mr. Parks's repeated protestation have had physical custody of S.P. since May 2008. See Defendants-Appellees NVM and MTC Supplemental Excerpts of Record 13.

The NVM is not a defendant in Parks v. Simmonds. And as of the date of the filing of this brief, Alaska Superior Court Judge Paul Lyle, who is presiding in Parks v. Simmonds, has not ruled on the merits in the action. Nor has Judge Lyle "ordered the Native Village of Minto to retain legal custody of S.P." (emphasis added). Among other reasons, because Judge Lyle has never recognized that the NVM ever has had legal custody of S.P. What Judge Lyle has done is deny a motion that Edward Parks filed that requested Judge Lyle to grant Mr. Parks physical custody of S.P. during the pendency of Parks v. Simmonds. See Federal Appellees' Supplemental Excerpts of Record 1.

Fourth, the Federal defendants-appellees are correct that on May 7, 2009 the MTC issued an "order" in which it purported to terminate Edward Parks's parental rights to S.P. ER 79. But the validity of that "order" is the subject of this action. The assertion that, as a consequence of MTC's "order," S.P. cannot appear in this action though her father for the purpose of obtaining a decision from the District Court regarding the validity of that same "order" is a defense that the Federal defendants-appellees have concocted whose circularity is exceeded only by its cynicism.

For the reasons set out above, S.P. has standing to prosecute this appeal.

2. Edward Parks.

As stated above, this court must assume that Edward Parks is the father of S.P. Because he is, defendants-appellees NVM and MTC are inflicting an "injury in fact" on Mr. Parks by purporting to have terminated his parental rights. As a consequence, Mr. Parks has standing to invoke the Article III jurisdiction of the District Court and of this court for the purpose of determining whether the NVM is a "federally recognized tribe" that, as a consequence of that legal status, has governmental authority to establish the MTC, and, if it does, whether the MTC has jurisdiction to disrupt Mr. Parks's and S.P.'s parent-child

relationship, as well as issue an "order" terminating Mr. Parks's parental rights.

3. Evelyn Parks.

According to the Federal defendants-appellants, plaintiff-appellant Evelyn Parks had no standing to invoke the District Court's Article III jurisdiction because - since she had not been appointed as S.P.'s representative pursuant to FRCP 17(c) and since she is not "personally subject" to the "order" in which the MTC purported to terminate Edward Parks's parental rights - Mrs. Parks "has demonstrated no injury-in-fact that allows her to appear [in this action] on her own behalf." See Federal Defendants-Appellees Opposition Brief, at 25.

But Evelyn Parks is the paternal grandmother of S.P. See Complaint, para. no. 5; ER 27.

The Alaska Legislature has recognized that grandparents have a statutorily protected interest in the welfare of - and in their relationships with - their grandchildren. See A.S. 25.20.060 (when it resolves a custody dispute the Alaska Superior Court is authorized to "provide visitation by a grandparent . . . if that is in the best interests of the child"); A.S. 25.20.065 (grandparent authorized to petition the Alaska Superior Court for an order establishing reasonable rights of visitation between grandparent and child); A.S. 47.10.030(d)(grandparents entitled

to notice of a proceeding of the Alaska Superior Court at which the court may terminate parental rights to grandchild).

Evelyn Parks has repeatedly tried to assert that interest by repeatedly requesting the MTC and Rozella and Jeff Simmonds to give her physical custody of S.P. See ER 81 (MTC "order" noting that "Evelyn Parks Lundeen, paternal grandmother, stated that she is interested in having S.P. placed with her as an emergency placement, and she is available to bring her to her home in Anchorage immediately"). But not only has the MTC repeatedly refused to instruct Rozella and Jeff Simmonds to transfer physical custody of S.P. to Mrs. Parks, for more than two years the NVM and the MTC have intentionally interfered with, and disrupted, Mrs. Parks's relationship with her granddaughter.

That intentional interference has inflicted, and is continuing to inflict, an "injury in fact" on Evelyn Parks.

B. The District Court Abused Its Discretion When It Dismissed This Action Pursuant to Younger v. Harris.

In their opening brief the plaintiffs-appellants pointed out both that the prayer of their complaint does not request the District Court to enjoin either Alaska Superior Court Judge Paul Lyle, who is presiding in Parks v. Simonds, supra, or any party in Parks v. Simmonds. The plaintiffs-appellants also pointed out that - while paragraph no. 3 of their prayer, ER 66, requests the

District Court to enjoin the NVM and the MTC "from taking any action regarding, or in any way affecting, the legal and physical custody of plaintiff S.P" - the NVM and the MTC are not parties in Parks v. Simmonds. See Opening Brief, at 27. As a consequence, the District Court's reliance on Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), as the authority for dismissing this action was an abuse of discretion and clear error.

In response, the Federal defendants-appellees concede that the District Court disregarded the fact that the prayer of the plaintiffs-appellants' complaint does not request the District Court to enjoin Judge Lyle from deciding Parks v. Simmonds. But they then argue that

> The Parks' request that the district court enjoin the Native Village of Minto and the Minto Tribal Court from "taking any action regarding, or in any way affecting, the legal or physical custody of S.P.," would clearly prevent the Tribe's participation as amicus in the ongoing state court litigation over the physical custody of S.P. Additionally, it would interfere with the Tribe's role as S.P.'s legal custodian, which the Alaska Superior Court has ordered the Tribe to perform. (emphasis added).

Federal Defendants-Appellees Opposition Brief, at 34.[1]

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[1]In their opposition brief, the NVM and the MTC make no effort whatsoever to argue that the prayer of the plaintiffs-appellants' complaint requests the District Court to enjoin Judge Lyle from deciding Parks v. Simmonds. Rather, the brief simply informs the court that "[t]he Native Village of Minto and the

As a threshold matter, requesting a District Court to enjoin the participation of an amicus curiae is not a request to a District Court that it enjoin a state court judge from adjudicating a civil action over which that judge has jurisdiction. Of equal importance, the District Court will not issue the injunction that the plaintiffs-appellants have requested in paragraph no. 3 of their complaint, unless, as paragraph no. 1 of the prayer of the complaint requests, the District Court first finds that

> neither Congress nor defendants Ken Salazar and George Skibine [now Larry Eco Hawk], or their predecessors as Secretary of the Interior and Assistant Secretary of the Interior for Indian Affairs (acting lawfully pursuant to authority delegated by Congress) has recognized the Athabascan Indian residents of defendant Native Village of Minto to be a "federally recognized tribe" whose governing body possesses governmental authority to establish defendant Minto Tribal Court and to grant defendant Minto Tribal Court authority to involve itself in matters regarding, or in any way affecting, the legal or physical custody of plaintiff S.P.

ER 64-65.

If the NVM and the MTC have no legal authority to involve themselves "in matters regarding, or in any way affecting, the legal or physical custody of plaintiff S.P.," why should they be

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Minto Tribal Court support the United States' arguments on appeal related to the district court's reliance on the Younger case," see NVM and MTC Opposition Brief, at 8, and then spends the remainder of its pages discussing other arguments.

participating in Parks v. Simmonds either as an amicus curie or in any other guise?

Finally, the Federal defendants-appellees have represented to this court, not only that the NVM is S.P.'s "legal custodian," but that "the Alaska Superior Court has ordered the Tribe to perform [that role]." See Federal Defendants-Appellees Opposition Brief, at 34.

Those are troubling misrepresentations. Neither the District Court nor the Alaska Superior Court has designated the NVM as S.P.'s "legal custodian." And even more troubling, the Alaska Superior Court has never "ordered" defendant-appellee NVM to "perform [that role]." Why the Federal defendants-appellees would present those misrepresentations to this court is inexplicable.[2]

C. There Is No Other Basis for Affirming the Decision of the District Court.

Implicitly conceding that the District Court abused its discretion when it concluded that it had discretion to dismiss

[2]The Federal defendants-appellants' principal counsel serve in the Appellate Section of the Environment & Natural Resources Division of the U.S. Department of Justice in Washington, D.C. So their lack of familiarity with the record in Parks v. Simmonds may have caused them to negligently misrepresent that record. But the Federal defendants-appellees also are represented by an Assistant Solicitor who serves in the Anchorage, Alaska, office of the Solicitor of the U.S. Department of the Interior. That counsel could have, and should have, informed himself regarding whether in Parks v. Simmonds Judge Lyle has "ordered" the NVM to serve as S.P.'s "legal custodian."

this action pursuant to Younger v. Harris, supra, the defendants-appellees devote the majority of the pages of their opposition briefs to presenting alternative legal rationales on which they suggest that this court can affirm the District Court. See Perfect 10, Inc. v. Visa International Service Association, 494 F.3d 788, 794 (9th Cir. 2007)("The court may . . . affirm on any ground supported by the record even if the district court did not consider the issue").

But none of those rationales are availing.

1. The Merits.

Defendants-appellees NVM and MTC suggest that this court should affirm the District Court because the NVM and the MTC are right, and the plaintiffs-appellants are wrong, regarding the merits of the claims for relief that the plaintiffs-appellants have alleged in their complaint. See NVM and MTC Opposition Brief, at 9-17, 24-27. On remand,[3] the plaintiffs-appellants will refute each of those arguments. But the legal issue that this appeal presents for decision has nothing to do with the merits.

That said, there is one merits-related argument that

[3]The Federal defendants-appellees have suggested that, when the plaintiffs-appellants prevail in this appeal, the appropriate remedy is "to remand to give the district court an opportunity to address the merits of the legal questions raised by the Parks' complaint." See Federal Defendants-Appellees Opposition Brief, at 46. The plaintiffs-appellants agree.

deserves mention: the argument that the District Court has no jurisdiction to adjudicate the first and second claims for relief that the plaintiffs-appellants have alleged in their complaint because whether the NVM is a "federally recognized tribe" is a "non-justiciable political question." See NVM and MTC Opposition Brief, at 24.

In Director, Office of Workers' Comp. v. Newport News, 514 U.S. 122, 135, 115 S.Ct. 1278, 1288, 131 L.Ed.2d 160 (1995), Justice Scalia observed that the "last redoubt of losing causes" is the proposition that, when the plain meaning of its text does not allow the reader to reach the result he desires as a matter of policy, a statute "should be liberally construed to achieve its purposes." In the same vein, the last redoubt of losing causes in an action that challenges tribal status is the rote assertion that whether a group whose members are of Native American descent is a "federally recognized tribe" is a non-justiciable political question.

The Indian Commerce Clause of the U.S. Constitution grants Congress "plenary and exclusive power over Indian affairs." Washington v. Yakima Indian Nation, 439 U.S. 463, 470, 99 S.Ct. 740, 746, 58 L.Ed.2d 740 (1979). That plenary power includes the power to enact a statute that designates a group whose members are of Native American descent as a "federally recognized tribe."

See e.g., Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, Sec. 9, 97 Stat. 851, 855 (1983)("Federal recognition is extended to the Tribe").

In a particular case, whether, as a matter of policy, it was unwise for Congress to have exercised its plenary power by enacting a statute that created a new "federally recognized tribe" is a non-justiciable political question. But whether Congress has intended a particular statute to confer recognition is a question of statutory construction that is as subject to judicial review as any other question of statutory construction.

In the first and second claims for relief in their complaint the plaintiffs-appellants allege that Congress has not enacted a statute that has designated the Athabascan Indian residents of Minto as a "federally recognized tribe," nor has Congress enacted a statute that delegates the Secretary of the Interior authority to, by final agency action, designate the Athabascan Indian residents of Minto as a "federally recognized tribe." Those questions are subject to judicial review.

2. The Domestic Relations Exception to the Exercise of Federal Jurisdiction Is Not Applicable in This Action.

The Federal defendants-appellees suggest that the District Court correctly dismissed this action because "[t]he Federal courts lack jurisdiction entirely over claims for divorce, child

custody, and other domestic relations decrees." See Federal Defendants-Appellees Opposition Brief, at 29. And, although they conflate it with their standing argument, the NVM and the MTC make the same domestic relations-based argument. See NVM and MTC Opposition Brief, at 20, 22.

The Federal defendants-appellees base their argument on Ankenbrandt v. Ricards, 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). But what Ankenbrant holds is that Congress did not intend 28 U.S.C. 1332 (diversity) to grant a District Court subject matter jurisdiction to issue a divorce or alimony decree or a child custody order. Id. 703, 112 S.Ct. at 2215. And most importantly, Ankenbrandt instructs that, even if a claim for relief filed pursuant to 28 U.S.C. 1332 involves a child custody dispute, the District Court has jurisdiction to adjudicate that claim as long as the relief for which the plaintiff prays does not require the court to issue a divorce or alimony decree or a child custody order.[4]

In this appeal, the court can read the plaintiffs-appellants' complaint without assistance from the plaintiffs-appellants.

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[4]Seven years before the U.S. Supreme Court decided Ankenbrandt, this court reasoned to the same result in McIntyre v. McIntyre, 771 F.2d 1316 (9th Cir. 1985).

That reading will demonstrate that the complaint requests the District Court to decide whether, as a matter of federal law (rather than of state law), the MTC has any legal authority to exercise jurisdiction related to the custody of S.P. and to Edward Parks's and Evelyn Parks's parent-child and grandparent-child relationship with S.P.

In other words, its adjudication of the plaintiffs-appellants' claims for relief will require the District Court to decide a question of jurisdiction (or, in the case of the MTC, the lack thereof). That adjudication will not require the District Court to decide the dispute between Edward Parks and Rozella and Jeff Simonds regarding the custody of S.P. Alaska Superior Court Judge Paul Lyle will decide that dispute in Parks v. Simmonds, supra. And Judge Lyle will decide that dispute by applying Alaska law, not Federal law.[5]

Because the claims for relief in the plaintiffs-appellants' complaint present questions of federal law that relate exclusively to jurisdiction, rather than questions of state law

[5]In Harvey v. Cook, 172 P.3d 797, 798 (Alaska 2007), the Alaska Supreme Court has instructed Judge Lyle that when he adjudicates the custody dispute between Edward Parks, S.P.'s parent, and Rozella and Jeff Simmonds, non-parents, "the parental preference requires that a non-parent seeking custody show by clear and convincing evidence that the parent is unfit or that the welfare of the child requires the child to be in the custody of the non-parent."

that relate to the custody of S.P., Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988), is the controlling authority.

In Sanders, the 28 U.S.C. 1331 (federal question) jurisdiction of the District Court had been invoked to decide whether a tribal court had jurisdiction to issue a divorce decree and child custody orders that related to a non-Indian husband, Indian wife, and their three children, all of whom resided on the reservation of the "federally recognized tribe" that had established the court. On appeal, this court held that 28 U.S.C. 1331 gave the District Court jurisdiction to decide "the question of tribal jurisdiction." Id. 632. In so holding, the court noted:

> Appellees argue that federal courts lack jurisdiction because this is a "domestic relations" case. This argument is meritless. The primary issue in this case does not concern the parties' martial status. Rather, the federal question presented concerns the propriety of tribal jurisdiction over a non-Indian.

Id. 632 n. 2. And see also accord Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed. 29 (1989)(District Court had jurisdiction pursuant to 28 U.S.C. 1331 to determine whether the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 et seq., gave a "federally recognized tribe" exclusive jurisdiction to issue an adoption decree for children who were members of a tribe and domiciled on, but not residents of, the tribe's reservation); c.f. Fisher v. District Court,

424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976)(decision by U.S. Supreme Court that, pre-ICWA, the court of the state in which the reservation of a "federally recognized tribe" is located does not have jurisdiction to issue an adoption decree regarding an Indian child who is domiciled on, and is a resident of, the tribe's reservation when the natural mother and the putative adoptive parents also are domiciled on, and are residents of, the reservation).

Simply put, for the reasons explained above, the domestic relations exception to the exercise of the 28 U.S.C. 1331 (federal question) jurisdiction of the District Court is not applicable in this action.

3. The Doctrine of Equitable Abstention Did Not Grant the District Court Discretion to Dismiss This Action.

Assuming arguendo that it was error for the District Court to have relied on Younger v. Harris, supra, as its rationale for dismissing this action, the Federal defendants-appellees argue that the District Court could have invoked the Doctrine of Equitable Abstention as its rationale. See Federal Defendants-Appellees Opposition Brief, at 31-32.

The Doctrine of Equitable Abstention grants a District Court discretion to dismiss a civil action that it has subject matter jurisdiction to decide if it determines that adjudicating the

plaintiff's claim for relief will require the District Court to entangle itself in a state court custody action.

At a threshold matter, it should be noted that the District Court's failure to invoke the Doctrine of Equitable Abstention is evidence that the court did not think that the doctrine was applicable in this action. In any case, the Federal defendants-appellees base their argument regarding the Doctrine of Equitable Abstention on Coats v. Woods, 819 F.2d 236 (9th Cir. 1987).

But Coats is unavailing.

In Coats an ex-wife who had lost custody of her minor children to her ex-husband in a state custody action in which she had fully participated filed a 42 U.S.C. 1983 action in the District Court, naming as defendants not only her ex-husband, but also the state court judges who had issued the decrees that had given the ex-husband custody of the ex-wife's children. Unlike the plaintiffs in Ankenbrandt v. Ricards, supra, and McIntyre v. McIntyre, supra, the ex-wife was not seeking an award of money damages for a tort based on a prior custody dispute. Rather, she wanted the District Court to substitute its judgment for that of the state court judges and issue its own custody decree awarding her custody of her children.

The District Court declined the invitation and dismissed the ex-wife's complaint. This court affirmed that exercise of

discretion, noting when it did so that "Federal courts traditionally decline to exercise jurisdiction in domestic relations cases when the core issue involves the status of parent and child or husband and wife" (emphasis added) and the District Court was "aptly reluctant to put itself in the position of having to review the state court's custody decision." (emphasis added). Coats v. Woods, supra at 237.

By contrast, because in this action the "core issue" is the jurisdiction (or lack thereof) of the MTC (and not the custody of S.P.), the Doctrine of Equitable Abstention is not applicable.

4. The Plaintiffs-Appellants Have an Absolute Right to Have Their Federal Claims Decided by the District Court.

Finally, a point previously made that merits reiteration.

The Federal defendants-appellants suggest that because the Alaska Superior Court has concurrent jurisdiction with the District Court to decide questions of federal law, "[n]othing prevented the Parks (sic) from raising [their federal law] claims before the Alaska Superior Court, and the Parks have made no argument that they were foreclosed from making those arguments." See Federal Defendants-Appellants Opposition Brief, at 38.

But in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), the U.S. Supreme Court squarely held that, even if a state court has

jurisdiction to decide questions of federal law, a litigant has an absolute right to have those questions decided by a District Court. That is what the plaintiffs-appellants' complaint that the District Court wrongfully dismissed requested. And that is the adjudication to which the plaintiffs-appellants are entitled.

CONCLUSION

For the reasons set forth both in their opening brief and 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

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 August 31, 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