IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, PATRICK S. GALVIN, in his official capacity as the Commissioner of the Alaska Department of Revenue and JOHN MALLONEE, in his official capacity of Director of the Alaska Child Support Services Division, Appellants, v. CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA, on its own behalf and as *parens patriae* on behalf of its members, Appellee. Trial Court Case #: 1JU-10-00376 CI	Supreme Court No.: S-14935

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
HONORABLE JUDGE PHILIP PALLENBERG

BRIEF OF APPELLANTS STATE OF ALASKA, PATRICK GALVIN, AND JOHN MALLONEE

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Full Faith and Credit For Child Support Orders

28 USC § 1738B

(a) General rule.--The appropriate authorities of each State—

(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and

(2) shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i).

(b) Definitions.--In this section:

"child" means--

(A) a person under 18 years of age; and

(B) a person 18 or more years of age with respect to whom a child support order has been issued pursuant to the laws of a State.

"child's State" means the State in which a child resides.

"child's home State" means the State in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the 6-month period.

"child support" means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.

"child support order"--

(A) means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and

(B) includes--

(i) a permanent or temporary order; and

(ii) an initial order or a modification of an order.

"contestant" means--

(A) a person (including a parent) who--

(i) claims a right to receive child support;

(ii) is a party to a proceeding that may result in the issuance of a child support order; or

(iii) is under a child support order; and

(B) a State or political subdivision of a State to which the right to obtain child support has been assigned.

"court" means a court or administrative agency of a State that is authorized by State law to establish the amount of child support payable by a contestant or make a modification of a child support order.

"modification" means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.

"State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).

(c) Requirements of child support orders.--A child support order made by a court of a State is made consistently with this section if--

(1) a court that makes the order, pursuant to the laws of the State in which the court is located and subsections (e), (f), and (g)--

(A) has subject matter jurisdiction to hear the matter and enter such an order; and

(B) has personal jurisdiction over the contestants; and

(2) reasonable notice and opportunity to be heard is given to the contestants.

(d) Continuing jurisdiction.--A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order.

(e) Authority to modify orders.--A court of a State may modify a child support order issued by a court of another State if--

(1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

(2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant; or

(B) each individual contestant has filed written consent with the State of continuing,

exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

(f) Recognition of child support orders.--If 1 or more child support orders have been issued with regard to an obligor and a child, a court shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement:

(1) If only 1 court has issued a child support order, the order of that court must be recognized.

(2) If 2 or more courts have issued child support orders for the same obligor and child, and only 1 of the courts would have continuing, exclusive jurisdiction under this section, the order of that court must be recognized.

(3) If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized, but if an order has not been issued in the current home State of the child, the order most recently issued must be recognized.

(4) If 2 or more courts have issued child support orders for the same obligor and child, and none of the courts would have continuing, exclusive jurisdiction under this section, a court having jurisdiction over the parties shall issue a child support order, which must be recognized.

(5) The court that has issued an order recognized under this subsection is the court having continuing, exclusive jurisdiction under subsection (d).

(g) Enforcement of modified orders.--A court of a State that no longer has continuing, exclusive jurisdiction of a child support order may enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a modification of the order is made under subsections (e) and (f).

(h) Choice of law.--

(1) In general.--In a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply except as provided in paragraphs (2) and (3).

(2) Law of State of issuance of order.--In interpreting a child support order including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order.

(3) Period of limitation.--In an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation.

(i) Registration for modification.--If there is no individual contestant or child residing

in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.

What must a Tribe or Tribal organization include in a Tribal IV-D plan in order to demonstrate capacity to operate a Tribal IV-D program?

45 CFR § 309.65

(a) A Tribe or Tribal organization demonstrates capacity to operate a Tribal IV-D program meeting the objectives of title IV-D of the Act and these regulations by submission of a Tribal IV-D plan which contains the required elements listed in paragraphs (a)(1) through (14) of this section.

Alaska Statutes

25.25.101.

Definitions
(19) "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States; the term "state" includes an Indian tribe and a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders that are substantially similar to the procedures under this chapter or under the Uniform Reciprocal Enforcement of Support Act or the Revised Uniform Reciprocal Enforcement of Support Act;

25.25.201.

Bases for jurisdiction over nonresident.

In a proceeding to establish, enforce, or modify a support order or to determine parentage, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if

(1) the individual is personally served with a citation, summons, or notice within this state;

(2) the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

(3) the individual resided with the child in this state;

(4) the individual resided in this state and provided prenatal expenses or support for the child;

(5) the child resides in this state as a result of the acts or directives of the individual;

(6) the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;

(7) the individual acknowledged parentage in a writing deposited with the Bureau of Vital Statistics under AS 25.20.050 ; or

(8) there is another basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

25.25.205.

Continuing, exclusive jurisdiction.

(a) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a child support order

(1) as long as this state remains the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

(2) until each individual party has filed written consent with the tribunal of this state for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction.

(b) A tribunal of this state issuing a child support order consistent with the law of this state may not exercise its continuing jurisdiction to modify the order if the order has been modified by a tribunal of another state under a law substantially similar to this chapter.

(c) If a child support order of this state is modified by a tribunal of another state under a law substantially similar to this chapter, a tribunal of this state loses its continuing, exclusive jurisdiction with regard to prospective enforcement of the order issued in this state and may only

(1) enforce the order that was modified as to amounts accruing before the modification;

(2) enforce nonmodifiable aspects of that order; and

(3) provide other appropriate relief for violations of that order that occurred before the effective date of the modification.

(d) A tribunal of this state shall recognize the continuing, exclusive jurisdiction of a tribunal of another state that has issued a child support order under a law substantially similar to this chapter.

(e) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

(f) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation. A tribunal of this state may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state.

25.25.401.

Complaint to establish support order.

(a) If a child support order entitled to recognition under this chapter has not been issued, a responding tribunal of this state may issue a child support order if

(1) the individual seeking the order resides in another state; or

(2) the support enforcement agency seeking the order is located in another state.

(b) The tribunal may issue a temporary child support order if

(1) the respondent has signed a verified statement acknowledging parentage;

(2) the respondent has been determined under law to be the parent; or

(3) there is other clear and convincing evidence that the respondent is the child's parent.

(c) If a spousal support order entitled to recognition under this chapter has not been issued, a responding superior court of this state may issue a spousal support order if

(1) the individual seeking the order resides in another state; or

(2) the support enforcement agency seeking the order is located in another state.

(d) If, after providing an obligor with notice and opportunity to be heard, an appropriate tribunal finds that the obligor owes a duty of support, the tribunal shall issue a support order directed to the obligor and may issue other orders under AS 25.25.305 .

(e) Before issuing an order under (b) of this section, the child support services agency shall adopt regulations for issuing such an order.

25.25.611

Modification of child support order of another state.

(a) After a child support order issued in another state has been registered in this state, unless the provisions of AS 25.25.613 apply, the responding tribunal of this state may modify that order only if, after notice and an opportunity for hearing, it finds that

(1) the following requirements are met:

(A) the child, the individual obligee, and the obligor do not reside in the issuing state;

(B) a petitioner who is not a resident of this state seeks modification; and

(C) the respondent is subject to the personal jurisdiction of the tribunal of this state; or

(2) the child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal and all of the parties who are individuals have filed a written consent in the issuing tribunal providing that a tribunal of this state may modify the support order and assume continuing, exclusive jurisdiction over the order; however, if the issuing state is a foreign jurisdiction that has not enacted a law or procedure substantially similar to this chapter, the written consent of an individual residing in this state is not required for the tribunal to assume jurisdiction to modify the child support order.

(b) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state and the order may be enforced and satisfied in the same manner.

(c) A tribunal of this state may not modify any aspect of a child support order that may not be modified under the law of the issuing state. If two or more tribunals have issued child support orders for the same obligor and child, the order that is controlling and must be recognized under the provisions of AS 25.25.207 establishes the nonmodifiable aspects of the support order.

(d) On issuance of an order modifying a child support order issued in another state, a tribunal of this state becomes the tribunal of continuing, exclusive jurisdiction.

(e) *[Repealed, Sec. 148 ch 87 SLA 1997].*

25.25.613

Jurisdiction to modify support order of another state when individual parties reside in this state.

(a) If all of the individual parties reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order.

(b) A tribunal of this state exercising jurisdiction as provided in this section shall apply the provisions of AS 25.25.101 - 25.25.209 and 25.25.601 - 25.25.614 to the enforcement or modification proceeding. AS 25.25.301 - 25.25.507, 25.25.701, 25.25.801, and 25.25.802 do not apply, and the tribunal shall apply the procedural and substantive law of this state.

25.30.300

Initial child custody jurisdiction.

(a) Except as otherwise provided in AS 25.30.330 , a court of this state has jurisdiction to make an initial child custody determination only if

(1) this state is the home state of the child on the date of the commencement of the proceeding;

(2) this state was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(3) a court of another state does not have jurisdiction under provisions substantially similar to (1) or (2) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under provisions substantially similar to AS 25.30.360 or 25.30.370, and

(A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(4) all courts having jurisdiction under the criteria specified in (1) - (3) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under provisions substantially similar to AS 25.30.360 or 25.30.370; or

(5) no court of another state would have jurisdiction under the criteria specified in (1) - (4) of this subsection.

(b) The provisions of (a) of this section are the exclusive jurisdictional bases for making a child custody determination by a court of this state.

(c) Physical presence of or personal jurisdiction over a party or a child is not necessary or sufficient to make a child custody determination.

JURISDICTIONAL STATEMENT

The superior court entered final judgment in this case on September 24, 2012. The court issued its decision granting attorney's fees to the Central Council on December 19, 2012. [Exc 714-20] This Court has jurisdiction pursuant to AS 22.05.010(b).

STATEMENT OF THE ISSUES

1. Under *Montana*, tribes retain powers of self-government, but do not have the freedom to determine their external relations. The tribal powers of self-government include the subject matter jurisdiction to regulate internal domestic relations among members.

   The Central Council Tribe does not have a reservation and operates a tribal child support program in Juneau Alaska, outside of Indian country. It asserts jurisdiction over any child support case that involves a child who is a tribal member (or eligible for membership) even if the parents are not members and even though its child support order interferes with the State's interests. Under these circumstances does the Tribe have subject matter jurisdiction under federal law to issue child support orders outside of Indian country?

2. The superior court granted attorney fees to the Tribe as the prevailing party below. The State has shown that it is entitled to judgment in its favor on appeal. Because the Tribe is no longer the prevailing party, should the attorney's fees award be reversed?

INTRODUCTION

In 2007, the Central Council of Tlingit and Haida Indian Tribes ("the Tribe") began operating a tribal child support program in Juneau, Alaska. The Tribe asserts jurisdiction over child support for children who are, or are eligible to be members of the

Tribe. Although the Tribe operates outside of Indian country, it issues child support orders under tribal law against parents, regardless of the parents' lack of membership in the Tribe and regardless of the parents' rights under state law. The Tribe then requests the State Child Support Services Division ("CSSD") to enforce its tribal child support orders. By issuing these tribal child support orders outside of Indian country against nonmembers of the Tribe and interfering with the State's orderly administration of child support matters within the State, the Tribe has exceeded its limited inherent power off reservation to regulate internal domestic relations among members.

STATEMENT OF THE CASE

Child support programs generally set an absent parent's child support obligation, collect those funds from the absent parent, and distribute them to the custodial parent. State child support programs are largely funded by the federal government through Title IV-D of the Social Security Act.[1] Initially only states received federal child support program funding, but the federal government extended the IV-D program to tribes in 2004 because noncustodial parents were evading child support obligations by fleeing to Indian reservations where states could not enforce child support orders.[2] During the development of regulations for tribal IV-D programs, the federal Office of Child Support

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1 42 U.S.C. § 651.

2 [Exc. 517 (69 Fed. Reg. 16638 ("within much of Tribal territory, the authority of State and local governments is limited or non-existent," and "States have been limited in their ability to provide IV-D services on Tribal lands")]; *Howe v. Ellenbecker*, 8 F.3d 1258, 1260-61 (8th Cir. 1993), *abrogated on other grounds by Blessing v. Freestone*, 520 U.S. 329 (1997).

recognized that the regulations created a conflict in Alaska, given the absence of Indian country,[3] but it left the jurisdictional issues to be sorted out later.[4]

The federal government approved a child support program under Title IV-D for the Tribe in 2007. [Exc. 167; 62-164] The Tribe then began issuing child support orders for children who are, or are eligible to be, tribal members.[5] The Tribe's child support unit opens a child support case whenever a custodial parent applies either for tribal child support services directly or for tribal Temporary Assistance for Needy Families. [Exc. 170 at 12] Child support that is collected for a family on Temporary Assistance is used to reimburse the Tribe for the assistance paid to the custodial parent. [Exc. 170 at ¶ 13]

Alaska has had a federally funded child support program since 1976, implemented by the Alaska CSSD. In order to obtain federal child support funding, Alaska—like all participating states—had to adopt the Uniform Interstate Family Support Act (UIFSA).[6] UIFSA provides procedural rules for a state to enforce valid child support orders issued by other states.[7] It is not uncommon for a state that has issued a child support order to

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3 *See John v. Baker I*, 982 P. 2d 738, 747, 748, (Alaska 1999) (stating that "most Native land [in Alaska] I will not qualify for the definition of Indian country").

4 [Exc. 517, 519-20 (69 Fed. Reg. 16638, 16648-49]; [Exc. 268 (Admission 1; "plaintiff has not claimed that the federal government's approval of a child support plan for its IV-D tribal child support agency confers child support jurisdiction on the TCSU or the Tribe").

5 [Exc. 169, 118, 85-87, 61-165 (IV-D application)]; *see also* [Exc. 318, 354, 422, 464, 466, 480, 490].

6 42 U.S.C. § 666(f); 42 U.S.C. § 654(20)(A); AS 25.25.101-.903. In 2009, the State conformed its version of the UIFSA to the Uniform Act, and defined "state" to include "Indian Tribe." Sec. 3, ch. 45 SLA 2009.

7 AS 25.25.101-.903.

present it to another state for enforcement—for example, to revoke the debtor's driver's license for non-payment of child support, or to garnish Permanent Fund Dividends, unemployment benefits, or tax refunds. [Exc. 171 at 22] Only states can provide these enforcement services. [Exc. 174 38, 40; 524] [R. 2383-88 (IRS counsel letter)]

Since the Tribe set up its tribal child support unit, CSSD has been processing the Tribe's enforcement requests for child support orders issued by Alaska or other states. [Exc.173 at ¶34], The State has questioned, however, whether the Tribe has jurisdiction to issue child support orders itself.[8]

The Tribe defines its jurisdiction broadly. It asserts territorial jurisdiction over "lands in Alaska conveyed under the Alaska Native Claims Settlement Act" and "[a]ll persons, property and activities within the Tribe's territory and jurisdiction."[9] The Tribe also asserts broad claims of personal jurisdiction that includes anyone who is in business in Southeast, violates the tribal laws, owns real property within its jurisdiction, is subject to federal public laws, causes injury to persons or property, or is engaged in substantial activity in Southeast. [Exc. 86-87 (§ 06.01.030(A)-(B))] It asserts personal jurisdiction over all persons "served within the territorial jurisdiction of the Court" and those who consent by "entry within the territorial jurisdiction of the Court."[10]

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[8] *See John v. Baker III*, 125 P.3d 323 (Alaska 2005) (declining to address issue of tribal jurisdiction over child support).

[9] CCTHITA Constitution art. I; [Exc. 85 (§06.01.020(A)), 79];[R. 1169].

[10] [Exc. 85-86 (§ 06.01.020(B)(2))]; *see also* [Exc.86 (§ 06.01.030 (personal jurisdiction over any person committing acts within the Tribe's ANCSA lands))].

The Tribe expressly asserts jurisdiction over any child support matter involving a child who is a member or eligible for membership in the Tribe.[11] The Tribe summons parties to tribal court under threat of contempt proceedings or arrest (for failure to answer or take a paternity test).[12] Disobeying a tribal child support order is punishable by contempt, interception of income tax refunds and PFDs, liens against real property, and attachment of assets.[13]

The Tribal Child Support Unit began presenting tribal support orders to CSSD for enforcement in late 2009 and early 2010.[14] While the State was examining the orders and determining whether to process them, the Tribe filed this lawsuit. [Exc. 1-9] [R. 227-28, 231, 2399, 2401]

Both the Tribe and the State moved for summary judgment. [Exc. 23-60, 179-267, 584-600, 601-51] The superior court granted summary judgment to the Tribe, finding that child support is intertwined with child custody, and that "*John v. Baker* clearly established that the tribal court has jurisdiction to decide issues of custody and visitation as to children who are members of the tribe." [Exc.664] The court thus held that tribes have jurisdiction over child support for children who are members or eligible for

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11 [Exc. 87 (§ 06.01.030(A)(8))]; *see also* [Exc. 106-07 (§ 06.21.004 (asserting long arm jurisdiction over anyone with ties to region, including parent of member child))]

12 *See, e.g.*, [Exc. 428-29, 419-20, 406-07, 495-96, 509] [R. 1201, 1203, 1206, 1716, 2114]

13 *See, e.g.*, [Exc. 432, 462]; [R. 1716, 1638-39, 1925-26]

14 [Exc.172-73 at ¶ 26-31] [R.417-74] On March 5, 2010, after it had filed suit against the State, the Tribe submitted another order for processing. [Exc. 173 ¶31] During the suit, the State did not process any of these pending orders. [R. 222]

membership in the Tribe. [Exc. 666, 668, 669] The court did not limit this jurisdiction to any set geographical area. [Exc. 667-68].

The court issued an injunction requiring the State to recognize the Tribe as "a state" under UIFSA, so that the State must recognize and enforce tribal child support orders as it would the orders of another state. It also required the State to provide full IV-D services to the tribal program. [Exc. 676-77]

STANDARD OF REVIEW

The scope of tribal jurisdiction is reviewed de novo. Under de novo review, the Court applies "the rule of law that is most persuasive in light of precedent, reason, and policy."[15] "[T]he burden rests on the tribe to establish one of the exceptions to *Montana's* general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land."[16] Attorney fee awards are reviewed for abuse of discretion.[17]

ARGUMENT

Under the superior court's order, 229 federally recognized tribes within Alaska can operate separate child support programs involving precisely the same people that are subject to the State's child support program as long as a Native child is involved. This is inconsistent with federal law, which controls Indian jurisdictional issues.[18] Congress has

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15 *State v. Native Village of Tanana*, 249 P.3d 734, 737 (Alaska 2011).

16 *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008).

17 *Rosenblum v. Perales*, 303 P. 3d 500, 503 (Alaska 2013).

18 *Plains Commerce*, 554 U.S. at 324 (tribal jurisdiction is federal question); *Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985) (same).

not expressly delegated child support jurisdiction to the tribes. The Tribe does not have jurisdiction over child support because of territory. And child support is not a matter of internal domestic relations among members. As such, the Court should reverse the trial court's grant of summary judgment to the Tribe.

I. The Tribe does not have authority to issue child support orders.

Tribal sovereign authority is limited.[19] "[B]y virtue of their incorporation into the United States, the tribe's sovereign interests are now confined to managing tribal land, protecting tribal self-government and controlling internal relations."[20] "Tribal sovereign powers center[s] on the land held by the tribe and on tribal members within the reservation."[21]Thus, as a general matter there are three sources of tribal authority: express congressional delegation,[22] territorial jurisdiction, and inherent powers. [23] None of those sources give the Tribe authority to issue child support orders.

A. Congress did not expressly delegate child support jurisdiction to the Tribe.

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19 *Plains Commerce*, 554 U.S. at 340 (stating "sovereign authority of Indian tribes is limited in ways state and federal authority is not"); *Montana v. United States,* 450 U.S. 544, 563 (1981) ("Indian tribes have lost many of the attributes of sovereignty"); *Nevada v. Hicks,* 533 U.S. 353, 367 (2001) (tribal courts are not courts of general jurisdiction).

20 *Plains Commerce*, 554 U.S. at 334(citations and quotations omitted); *Montana*, 450 U.S. at 564.

21 *Plains Commerce,* at 327.

22 *See Duro v. Reina*, 495 U.S. 676, 684-85(1990), *superceded by statute as stated in, Strate v. A-1 Contractors*, 520 U.S. 438, 446 n.5 (1997) (noting congressional power over tribal jurisdiction); *United State v. Lara*, 541 U.S. 193, 200-07 (2004) (Congress has plenary authority over tribes and could relax restrictions on the tribal powers); *Strate,* 520 U.S. at 445("absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances).

23 *Plains Commerce*, 554 U.S. at 327.

The State and the Tribe agree that Congress has not expressly delegated child support jurisdiction to the Tribe and that neither Title IV-D nor UIFSA create jurisdiction in the Tribe.[24] While Congress has authority to define tribal jurisdiction,[25] it has not done so under Title IV-D—a funding mechanism for child support programs.[26] Congress extended funding to tribal child support agencies to address a jurisdictional loophole caused by limited state authority on *reservations*, and to facilitate the provision of IV-D services and the enforcement of child support orders within Indian country.[27] Thus, the tribal IV-D program was created to prevent noncustodial parents from avoiding state child support obligations by retreating to Indian Country. Notably, this jurisdictional disconnect never existed in Alaska because Alaska has virtually no Indian country.[28] Alaska child support orders could be, and are, enforced statewide.[29]

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[24] [Exc. 585-92]; *but see* [Exc. 4, 6, 7 (complaint at ¶¶ 21, 33-39, 42, 47, 48 claiming jurisdiction under both Title IV-D and UIFSA)].

[25] *See, e.g.*, William C. Canby, *American Indian Law in a Nutshell* 100 (5th ed. 2009).

[26] 42 U.S.C. § 655(f) (funding); 42 U.S.C. § 651 (appropriations); 42 U.S.C. § 655, 658a (payments to states); 45 C.F.R. § 309.1(a), (b) ("direct grants to Indian Tribes").

[27] [Exc. 517 (69 Fed. Reg. 16638)] *see, e.g., Howe v. Ellenbecker,* 774 F. Supp. 1224, 1228, 1232 n.5 (D. S.D. 1991) (jurisdiction issues prevented state enforcement of state child support orders on reservation).

[28] 43 U.S.C. § 1618(a) (2009) (revoking all Alaska Native reservations with exception of Annette Island Reserve); *Alaska v. Native Village of Venetie*, 522 U.S. 520, 524 (1998) (*quoting* 43 U.S.C. §§ 1603, 1618(a)) (recognizing ANCSA's revocation of reservations); *see also* 18 U.S.C. § 1151 (defining "Indian country" as reservations, "dependent Indian communities," and certain Indian allotments).

[29] *See* AS 25.27.020(a)(1) (CSSD duty to obtain, enforce and administer child support orders in the state); AS 25.27.020(a)(3) (CSSD duty to administer UIFSA).

Title IV-D requires pre-existing jurisdiction, and only child support orders that are "issued by a court of competent jurisdiction" are enforceable.[30] *The Final Rule on the* tribal IV-D regulations found that "it is not appropriate or necessary in this regulation to define the territorial limits of a Tribe's authority."[31] The jurisdiction of tribes is independent of the tribal IV-D program, and "[w]ithout proper jurisdiction, a tribunal cannot proceed to establish, enforce, or modify a support order or determine paternity, and "the proper action" is "to refer the case for enforcement by a State or another Tribe" that does."[32]

Nor does UIFSA create tribal jurisdiction over child support. UIFSA "is a procedural statute" that "merely establishes the method for enforcing a right."[33] UIFSA

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30 42 U.S.C. § 654(9)(C) (stating that order must be "issued by a court of competent jurisdiction"); *see also* 45 C.F.R. § 309.05 (child support order is one "issued by a court of competent jurisdiction"); 45 C.F.R. § 309.65(a)(1) (tribe must have a "population subject to the jurisdiction of the Tribal court"); [Exc 519 (69 Fed. Reg. 16648; "legal authority to take actions in child support matters"; cmt. 2 on § 309.05)].

31 [Exc. 519-20 (69 Fed. Reg. 16648-49 (jurisdiction more appropriately determined "by applicable federal law, not by child support enforcement regulations"; cmt. 7 on § 309.05)); *see also* [Exc. 519 (69 Fed. Reg. 16648 (cmt. 6 on § 309.05) ("definition [of 'Tribe'] is not intended to have any effect on the exercise of Tribal or State jurisdiction")]

32 [Exc. 526 (69 Fed. Reg. 16655 (cmt. 1 on §§ 309.70 and 309.75)]; *accord* [Exc. 524 (69 Fed. Reg. 16653 (cmt. 10 on § 309.55; if "no jurisdiction, the State can refer the applicant to an agency in the appropriate jurisdiction"; "there may be circumstances under which the only appropriate service [for a Tribal IV-D program] will be to request assistance from another Tribal or State IV-D program with the legal authority to take actions on the case")]; *see also* [Exc. 522 (69 Fed. Reg. 16651 cmt. 2 on 309.60; recognizing that "unique circumstances and challenges" in Alaska may require tribe to "[c]ontract[] with the State or with other Native entities . . . for delivery of IV-D services")]

33 *Goddard v. Heintzelman*, 875 A.2d 1119, 1122 (Pa. Super. Ct. 2005); *see also Child Support Enforcement Div. of Alaska v. Brenckle*, 675 N.E.2d 390, 393 (Mass. 1997) (UIFSA "provides the procedural framework for enforcing one State's support

only makes the collection of child support across jurisdictional boundaries easier. It "does not create jurisdiction where it does not otherwise exist, and § 305(b) of UIFSA still requires the court's support order be 'otherwise authorized by law.'"[34]

In 2009, when the State's version of UIFSA was amended to include "an Indian tribe" in the definition of "state,"[35] the legislature specifically recognized that "UIFSA does not determine the authority of an Indian tribe to enter, modify, or enforce a child support order."[36] This definition change brings tribes that do have jurisdiction (*e.g.*, some Lower 48 tribes with Indian country[37]) within the State's UIFSA procedural rules; it does not make the State's UIFSA applicable to tribes that otherwise lack jurisdiction.

B. The Tribe does not possess Indian country and therefore lacks territorial jurisdiction.

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order in another jurisdiction" and does "not affect[] substantive rights"); *Thrift v. Thrift*, 760 So.2d 732, 736 (Miss. 2000) (UIFSA does not affect substantive rights, "but merely provides a procedure whereby child support orders may be enforced in foreign states").

[34] *Office of Child Support v. Lewis*, 882 A.2d 1128, 1133 (Vt. 2004) (interpreting UIFSA registration provisions identical to (Alaska's); *see also id.* ("UIFSA enforcement procedures cannot overcome [jurisdictional] defect and expand a court's jurisdiction"); *In re Marriage of Owen*, 108 P.3d 824, 829 (Wash. Ct. App. 2005) ("validity of order to be registered . . . is the paramount concern of the statute governing registration of out-of-state orders"); AS 25.25.603(c) (registered foreign orders are enforced only "if the issuing tribunal had jurisdiction"); 15 AAC 125.900(a)(13) (defining support order as issued by a "court . . . of competent jurisdiction"); 15 AAC 125.500(2) (stating that tribunal has to be of "competent jurisdiction").

[35] Sec. 3, ch. 45, SLA 2009 (also including "United States Virgin Islands" in the definition of "state"); AS 25.25.101(19) (2009).

[36] Sec. 1, ch. 45, SLA 2009 (at (b)); *see also* Sec. 1, ch.45, SLA 2009 (at (b)(1) & (b)(2)) (legislative intent "to remain neutral" on tribal child support jurisdiction "if any"); *id.* at (b)(3) (expressing no opinion on tribal child support jurisdiction).

[37] *See* 28 U.S.C. § 1738B(a)(1) (Full Faith and Credit for Child Support Orders Act; requiring full faith and credit to orders issued in "Indian country").

Tribal powers are greater on-reservation than off-reservation.[38] How and in what manner the tribes operate child support programs on a reservation is left to the tribes.[39] "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."[40] Even for a nonmember on-reservation, a state cannot necessarily assert jurisdiction—rather the court makes a "particularized inquiry into the nature of the state, federal and tribal interests at

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[38] *See Cohen's Handbook of Federal Law* at § 6.01[1] at page 489(Nell Jessup Newton ed. 2012) ("absent a controlling congressional statute, Indian tribes retain jurisdiction over persons, property and events in Indian country"; "*tribal autonomy in Indian country*"); *Cohen's* at § 6.01[1] at page 491 (when a dispute arises on non-Indian land, "the Supreme Court has curtailed tribal civil jurisdiction over non-Indians" and "reverses the ordinary presumption in favor of tribal jurisdiction"); *Cohen's* at § 6.02[2][a]-[b] at pages 506-07 (tribal jurisdiction over nonmembers may turn on whether the nonmember is in or out of Indian country).

[39] *See, e.g., Jackson County v. Smoker*, 459 S.E. 2d 789, 790 (N.C. 1995) (all-member on reservation case); *State ex. rel. Flammond v. Flammond*, 621 P.2d 471 (Mont. 1980) (holding that district court had no jurisdiction over on-reservation Indian father in child support action because no acts had occurred off-reservation in Montana); *State ex rel. Three Irons v. Three Irons*, 621 P.2d 476, 477 (Mont. 1980) (holding that Montana did not have jurisdiction to enforce child support over member dad who lived on-reservation because there were no off-reservation contacts in Montana).

[40] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980); *id.* at 143 (noting "tradition of Indian sovereignty over the reservation and tribal members"); *see also Fisher v. Dist. Court of the Sixteenth Judicial Dist. of Montana*, 424 U.S. 382, 387-88 (1976) (holding that tribes should be allowed to resolve disputes "arising on the reservation among reservation Indians"); Canby at 251-52 (showing generally that on-reservation tribes have exclusive jurisdiction, but off-reservation, states have exclusive (or in some cases concurrent) jurisdiction); *Cohen's* § 6.03[1][a] at page 512 (stating that on-reservation there is "no room for state regulation" and tribal sovereignty prevails "unless Congress legislates to the contrary"); *id.* at § 6.01[5] at page 503 ("pervasiveness of tribal governing authority and the preclusion of state jurisdiction are manifested primarily within Indian country. With respect to events occurring outside of Indian country, however, nondiscriminatory state laws have been held to apply unless federal law provides otherwise.").

stake."[41] Thus, generally, tribes have the authority to exercise self-government as they see fit within their land-based boundaries,[42] which may include issuing child support orders or running child support programs for tribal members living on the reservation.

But tribes do not enjoy the same autonomy off-reservation. Off-reservation the general rule is that state—*not* tribal—law governs.[43] "Indian tribes and their members, when outside of Indian country, are subject to nondiscriminatory state laws unless federal law provides otherwise."[44] And while the "Supreme Court has generally upheld tribal regulatory authority over non-Indians in Indian country,"[45] when a tribe attempts to

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41 *Bracker*, 448 U.S. at 145; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 343 (1983) (examining state interest in imposing fish and game laws on nonmembers on reservation); *Bracker*, 448 U.S. at 152-53 (examining state interest in imposing license and fuel taxes on nonmember activity on reservation).

42 And states are severely restricted in their ability to operate on-reservation. *See Howe*, 8 F.3d at 1261, *abrogated on other grounds by Blessing v. Freestone*, 520 U.S. 329 (1997) ("State has had little success in its efforts to enforce state court orders on the reservations because of jurisdiction barriers"; case involving child support from on-reservation fathers); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603-04 (1977) (state jurisdiction on reservation "quite limited"); *Howe*, 774 F. Supp. at 1228 & 1232 n.5 (noting lack of state enforcement authority on reservations).

43 *Mescalero Apache,* 411 U.S. at 148-49 (unless Congress has spoken, Indians outside the reservation are subject to non-discriminatory state law); *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95 112-13 (2005) (presumptive state off-reservation jurisdiction); *Philip Morris*, 569 F.3d 932, 938 (9th Cir. 2009) (citing *Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 658 n.12 (2001)) *USA, Inc. v. King Mt. Tobacco Co.*, ("jurisdiction of tribal courts does not extend beyond tribal boundaries"); *Maxa v. Yakima Petroleum, Inc.*, 924 P.2d 372, 374 (Wash. App. 1996) (exclusive state jurisdiction off-reservation); Chris Seldin, Comment, *Interstate Marketing of Indian Water Rights: The Impact of the Commerce Clause*, 87 Cal. L. Rev. 1545, 1575 (1999) (within state boundaries on non-Indian land, state jurisdiction over tribal activities is "virtually unhindered").

44 *Cohen's* at § 7.03[1][a][i], page 607; s*ee also id.* at § 6.01[5] at page 503.

45 *Cohen's* at § 6.02[2][1] at page 506.

exercise jurisdiction over nonmembers on non-Indian land, the "tribe's power . . . over nonmember conduct is more limited."[46]

Here the Tribe asserts jurisdiction over child support outside of Indian country.[47] The U.S. Supreme Court has repeatedly emphasized that land matters in the jurisdictional equation and "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction."[48] And Congress has specifically stated that land matters when determining child support jurisdiction. That is, Congress determined that all states and tribes must give full faith and credit to child support orders if they are issued in "Indian country."[49] Congress does not require full faith and credit to child support orders

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46 *Cohen's* at § 6.02[2][b] at page 507.

47 CCTHITA Const. art. I, §4 (claiming jurisdiction over "[a]ll persons, property and activities" within the entirety of Southeast Alaska); [Exc. 269-70 (Interrogatory, 24 referring to map of Southeast); 275 (describing territorial jurisdiction of tribal child support program); 278 (map)]; *see also* [R. 1128 (RFA4)]; 43 U.S.C. § 1618 (ANCSA § 19); *Native Village of Venetie*, 522 U.S. at 526-28, 532 (ANCSA lands are not Indian country); 43 U.S.C. § 1603 (ANCSA §4) (extinguishing aboriginal title).

48 *Hicks*, 533 U.S. at 360; *Plains Commerce*, 554 U.S. at 327 (stating that tribal authority "centers on the land held by the tribe and on tribal members within the reservation"); *Atkinson Trading*, 532 U.S. at 653 (stating that tribe's power to tax "reaches no further than tribal land."); *id.* at 655 ("territorial restriction upon tribal power"); *Hicks*, 533 U.S. at 359 ("Both *Montana* and *State* rejected tribal authority to regulate nonmembers' activities on land over which the tribe could not 'assert a landowner's right to occupy and exclude'"); *Wagnon v. Prairie Band Potawatomi Nation,* 546 U.S. 95, 112-13 (2005) (discussing "special geographic sovereignty concerns" that gave rise to interest balancing test on-reservation); *see also State v. Zaman*, 946 P.2d 459, 463 (Ariz. 1997) (stating that off-reservation jurisdiction of tribes is an "uncertain proposition at best" even in case involving Indian mother and Indian child).

49 28 USC 1738B(b) ("'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18)").

issued by tribes outside of Indian country.[50] Congress's limited definition of "state" excludes child support orders issued by 228 landless Alaska tribes—over 40% of all the 566 federally-recognized tribes in the United States and all but one tribe in Alaska.[51] Congress has spoken and land clearly matters with regard to child support orders.[52]

Even the exceptions that the Supreme Court articulated in *Montana* —which govern when a tribe can exercise jurisdiction over nonmembers—are tied to land status.[53] *Montana* described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: tribal jurisdiction will lie (1) in the context of consensual business relationships between a nonmember and a tribe (or a member of a tribe),or (2) where necessary to preserve tribal self-government.[54] Examples given in *Montana* of consensual business relationships each occurred "on the reservation."[55]

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50 28 USC 1738B(a)-(b).

51 28 USC 1738B(b); Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47868 (Aug. 10, 2012).

52 If Alaska tribes truly do have subject matter jurisdiction, one might wonder why Congress excluded the Alaska tribal orders from the full faith and credit provisions of the Full Faith and Credit for Child Support Orders Act.

53 *Montana*, 450 U.S. at 565 ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."); *see also Plains Commerce*, 554 U.S. at 329-30, 332 (stating that *Montana* exceptions allow tribal jurisdiction over nonmember conduct on the reservation); *In re J.D.M.C.*, 739 N.W.2d 796, 810 (S.D. 2007) (stating that "absent a clear federal directive, tribal authority does not extend to conduct off the reservation" and *Montana* exceptions do not apply).

54 *Montana, 450* U.S. at 565-66.

55 *Plains Commerce*, 554 U.S. at 332-33; *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1071-72 (10th Cir. 2007) (finding that first *Montana* exception applied "within the

Similarly, in applying the second *Montana* exception in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, the Court found that "unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually 'imperil[s]' the political integrity of the Indian tribe, there can be no assertion of civil authority *beyond tribal lands*."[56]

In this case, all events, all parties, and even the Tribe's child support program are off-reservation. Because all events occur off-reservation "the existence of any tribal court jurisdiction, much less exclusive tribal court jurisdiction, is questionable."[57] And while tribes have some jurisdiction outside of Indian country,[58] off-reservation tribal jurisdiction must fall within the recognized tribal powers set out in *Montana* and *Plains Commerce*. For example, tribes determine their own membership regardless of whether members are inside or outside of Indian country. Similarly, tribes have the power of self-government and the State cannot dictate the governing body of the tribe or how tribal leaders are chosen. But if the tribe wants to assert jurisdiction over domestic relations

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confines of the reservation"); *In re J.D.M.C.*, 739 N.W.2d at 810 (*Montana* "generally applies to conduct *within the reservation"*).

[56] *Atkinson Trading*, 532 U.S. at 657 n.12 (emphasis added); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-42 (1982) (tribal inherent power to tax transactions on trust land).

[57] *Roe v. Doe*, 649 N.W.2d 566, 576 (N.D. 2002) (citing William C. Canby, Jr., American Indian Law, 194-95 (1998)) (finding that state court paternity action by nonmember against member residing on reservation, where all events occurred off reservation, did not infringe on tribe's right to self-government).

[58] *See Plains Commerce*, 554 U.S. at 334-35 (stating that to the extent "activities on non-Indian fee land . . . intrude on the internal relations of the tribe or threaten tribal self-rule," they may be regulated).

matter, then it must be, in the very least, internal to the tribe.[59] That is, it must involve only members of the tribe and if the exercise is off-reservation it must not infringe on the State's programmatic interests.

C. Child support jurisdiction does not fall within the Tribe's inherent power to regulate "internal domestic relations among members."

The Tribe asserts that child support is internal to the Tribe. It argues that since it has jurisdiction over child custody— a domestic relations matter— then its jurisdiction must extend to the financial support of the child. This argument fails to recognize that tribal jurisdiction is determined by rules set out in federal case law, and that law limits tribal jurisdiction to *internal* domestic relations.[60]To the extent that domestic relations involve individuals or matters external to the Tribe, it does not have inherent jurisdiction.[61] And as discussed below, even if child support is in general a matter of domestic relations, it is not a matter *internal* to the Tribe. On the contrary, the Tribe's child support program significantly interferes with important state interests. The State's necessary, continuous and ongoing involvement in Alaska child support matters precludes categorization of child support as an inherent power of the Tribe. And more

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59 *Montana*, 450 U.S. at 564 (finding that where tribe seeks to exercise jurisdiction over matters outside the scope of internal governmental authority, must have express congressional delegation); *John I*, 982 P.2d at 752 (same).

60 *Montana*, 450 U.S. at 564 ("implicit divestiture" over areas "involving the relations between an Indian tribe and nonmembers of the tribe"; authority over "relations among members of a tribe"; "domestic relations among members"; "control internal relations").

61 *Id.* ("the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations"; domestic relations among members).

often than not, the Tribe's assertion of jurisdiction over child support will involve parents who are not members of the Tribe. Child support therefore is not within the Tribe's subject matter jurisdiction.

1. **Child support is not an "internal" tribal matter because it directly impacts the State and requires continuous state involvement.**

Child support is not an internal tribal matter, and the Tribe has no off-reservation jurisdiction over child support in Alaska—even for a member child. Alaska tribes issuing child support orders will directly and unavoidably impact the State and require continuous state involvement. CSSD would necessarily be a direct or silent partner in every tribal child support program, potentially up to 229 different programs. Tribal interference with these off-reservation matters of considerable state interest runs afoul of the U.S. Supreme Court law.[62]

CSSD runs a highly successful child support program that touches the lives of one in six Alaskans (roughly 44,000 child support cases). *See* [Exc 528-30 at ¶¶ 5-12)] CSSD's program provides a broad range of services to Alaskans, including intake; paternity establishment; child support order establishment and modifications; and

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62 *Hicks*, 533 U.S. at 364 (stating that tribal interference with off-reservation matters where the State has a "considerable" interest is not allowed); *Wagnon*, 546 U.S. at 112-13 (reaffirming presumptive off-reservation state jurisdiction, and rejecting balancing-of-interest test for off-reservation state activities). Here, the State's interest in enforcement of child support for all its citizens, Native and non-Native alike, is as strong or stronger than the state interest in the service of process on reservation in *Nevada v. Hicks*. [Exc. 528 ¶6, 533 ¶19]; AS 25.27.100.

enforcement of domestic and foreign child support orders. [Exc. 528 at ¶ 3] Its primary mission is to collect child support—something it does very well.[63]

Allowing multiple child support programs in the State will have an inevitable negative impact on CSSD operations and the State's child support program. The State has an overriding interest in simple, uniform, predictable child support rules,[64] and this Court has demanded strict adherence to Civil Rule 90.3 to advance these goals.[65] In practical effect, these goals would be upended if the State must contend with many separate sovereigns in Alaska that set child support orders based on individual tribal standards. Parents would be denied a "simple, uniform, predictable" set of child support rules, and could face up to three different potential child support awards—the two tribes in which the child is eligible for membership and the State.

The Tribe asserts that this fractured system is justified because the State must provide child support services under UIFSA and the Tribe's federally-approved IV-D program. [Exc. 32-36, 49-56, 584] But the impacts to the State occur independent of Title IV-D funding. If tribal child support jurisdiction is in fact based on inherent authority as the trial court found, all 229 Alaska tribes could issue child support orders regardless of

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63 [Exc. 528 at ¶¶ 4, 7 (State CSSD is far more efficient at collecting child support than Central Council)];[Exc. 529 at ¶¶ 8, 9 (CSSD operations exceed all but one federal performance benchmark)]; [Exc. 529 at ¶ 10 (in 2009, CSSD was second in the nation for enforceable child support orders)].

64 Alaska R. Civ. P. 90.3 commentary I(B); [Exc. 533-34 ¶ 21 ("Tribal child support orders can affect the State's interest in uniform child support awards and enforcement for all of Alaska's children and parents")].

65 *See, e.g., State, Dep't of Revenue v. Schofield*, 993 P.3d 405, 408 (Alaska 1999) (actions which undermine Rule 90.3's goal of "predictability" not allowed).

whether they have a IV-D program.[66] The fact of multiple child support programs operating within the same geographic area and governing the same people will impact state operations. [Exc. 652 at ¶ 2, 654 at ¶ 10] Because of the jurisdictional overlap, the Tribe's IV-D program has a far greater impact on state child support operations than do other states' IV-D programs. Requests from other state IV-D programs do not create potentially competing child support orders from up to three different sovereigns, which requires significant additional monitoring and coordination. [Exc. 652-54 at ¶¶ 2-10] And other states in which tribes have IV-D programs are not impacted in the same way as Alaska, because those tribes have separate jurisdiction well defined by Indian country.

The Tribe's IV-D program has already affected the State's child support program. CSSD has redirected two staff positions to address multiple Central Council requests, costing about $109,000 per year. [Exc. 653 at ¶ 3] Because the Tribe (like other Alaskan tribes) has virtually no independent enforcement capability,[67] it must ask the State to perform these services, further burdening the State's system. [Exc. 530-34 at ¶¶ 14, 18-22; 652-54 at ¶¶ 2-10]

Under the superior court's order, all Alaska tribes have inherent authority to issue child support orders. This undermines the State's interest in uniformity. Non-IV-D tribes could set orders on an ad-hoc basis or could allow lower minimum payments than

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66 [Exc. 9 (complaint asserting child support jurisdiction based on tribal "self-governance"); 660-61, 666 (court decision based on inherent tribal powers)]

67 [Exc. 532-33 ¶ 18 (cannot garnish unemployment benefits, workers' compensation benefits, PFD dividend payments, or IRS tax refunds; tribe cannot suspend occupational or drivers licenses); [Exc. 027 ("certain support services . . . can only be obtained with CSSD cooperation")].

imposed by Civil Rule 90.3, thus reducing Alaska's rate of state TANF/welfare reimbursement. It would even allow tribes to order payment with in-kind goods and services instead of money. [Exc. 530-31 ¶ 14; 533 ¶ 21]. This will directly impact CSSD because any parent can ask CSSD to enforce a child support order, including the tribal orders. [Exc. 528 at ¶ 6; 533 at ¶ 19]

The fact that most Alaska tribes do not have IV-D programs will make the *intra*-state situation extraordinarily complex. Because all fifty states operate IV-D programs, with the same underlying federal minimum requirements,[68] some degree of uniformity is ensured with *inter*-state applications.[69] The inter-state system operates more or less seamlessly, with the opportunity to mutually address cross-jurisdictional problems in accordance with IV-D regulations. This certainty is absent outside the sphere of IV-D programs. And when a problem arises with a tribally-issued child support order, "CSSD has no authority to file motions in tribal court, a completely separate and distinct sovereign."[70] The State's interest in uniform and predictable child support simply cannot be accomplished in the fractured jurisdictional scheme created by 229 tribes operating child support programs alongside CSSD within the State of Alaska.

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68 [Exc. 530 at ¶ 13]; 42 U.S.C. §§ 651-669b; 42 U.S.C. § 667 (state guidelines); 42 U.S.C. § 666 (administrative processes for review/modification of orders); 45 C.F.R. §§ 302.36, 303.7 (required state cooperation in establishing/enforcing support orders).

69 *See, e.g.*, 45 C.F.R. Part 302 (State Plan Requirements).

70 [Exc. 531 at ¶ 16]; *see generally Plains Commerce*, 554 U.S. at 337 (noting that tribal sovereignty is outside the constitutional structure and tribal courts "differ from traditional American courts in a number of significant respects") (citations omitted).

Because tribal issuance of child support orders within Alaska will require CSSD enforcement of those orders, tribal courts essentially will dictate state child support enforcement efforts in one or more respects,[71] and will impact CSSD's mission, day-to-day operations, and finances.

a. Because the Tribe lacks enforcement authority off-reservation, CSSD will act as a virtual arm of the Tribe.

The U.S. Supreme Court has held that tribes have inherent power to "regulate domestic relations among members."[72] The Tribe fails to address the fundamental disconnect between these rules of limited tribal sovereignty and the fact that Alaska's CSSD has to fulfill a key role in all tribal child support orders or programs. While the Tribe asserts that this is just a function of the State complying with UIFSA and the IV-D regulations, it arises from the Tribe claiming jurisdiction off-reservation in the exact same geographic area and over the same.[73] Because the tribes have limited enforcement authority, the State CSSD will inevitably be involved in Alaska tribal child support efforts (whether for the Central Council or any other federally recognized tribe in Alaska).[74] Alaska's unique tribal/state jurisdictional overlap and over 200 tribes will cause distinct problems for child support in Alaska.[75]

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71 [Exc. 531 at ¶ 16 (describing how tribes could direct state enforcement)].

72 *Montana*, 450 U.S. at 564.

73 UIFSA clearly presumes different operating areas for different "states," and many of the rules cannot be applied to the Central Council situation. *See* AS 25.25.201; [Exc. 654 at ¶ 10].

74 [Exc. 532-33 at ¶ 18 ("highly likely" that CSSD would be involved in enforcement of tribal child support orders; processing orders from up to 229 separate sovereigns

CSSD would act as a crucial, virtual arm for any Alaska tribe that enters child support orders. CSSD's virtual arm status does not remotely resemble an "internal" matter where a tribe controls "only the relations among members."[76] Yet, if the Central Council—or any other federally recognized tribe in Alaska—issues child support orders, it will necessarily involve CSSD and therefore unavoidably affects "external relations." When other sovereign entities begin *intra-state* Alaska child support operations involving the same land and the same people, it will affect state sovereignty, state child support law, and the state child support program. [Exc. 527-34; 652-54]

Situations involving children in state custody, or where the state pays public assistance, highlight the implausibility of treating tribal child support in Alaska as being "domestic relations among members." In either scenario, the State has a direct interest in the child support. If a child is taken into state custody, the obligor is liable to the State for the cost of providing foster care services.[77] When the tribe then sets the support order, it is inserting itself into the State's business.[78] This is not mere hypotheticals. The Central

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within Alaska with different child support procedures will be complicated); 533 at ¶ 19 ("any parent can request CSSD's assistance, regardless of who issued the order")].

75 *See* [Exc. 652-54 at ¶¶ 2-10 (explaining problems associated with State/tribal jurisdictional overlap; unlike for other states, or tribes located outside Alaska)].

76 *United States v. Wheeler*, 435 U.S. 313, 326 (1978), *superseded by statute as stated in U.S. v. Weaselhead*, 156 F. 3d 818 (8th Cir. 1998); *see id.* (noting that dependent status of tribes is "necessarily inconsistent with their freedom independently to determine their external relations").

77 AS 25.27.120(b).

78 Under the Full Faith and Credit for Child Support Orders Act, the Tribe (the Indian country issue aside) would have to have *personal jurisdiction over the State* in

Council disregarded that the State was the child's legal and physical custodian under a state court order, and set its own child support order—even though all child support was owed to the State. *See* [Exc. 530-31 ¶ 14] [R. 1137-38, 1165-68, 825]

Similarly, State interests are impacted when the State pays public assistance for the child. In that case, child support is owed to the State, not the child's custodian.[79] Thus, when a tribe issues a child support order and the State is paying public assistance for the child, the tribal child support order will determine the State's reimbursement rights. The Central Council's child support program directly affects the State and is not a matter of internal domestic relations.

b. Tribal child support jurisdiction will cripple CSSD's mission.

The "primary mission of CSSD is to collect and distribute child support." [Exc. 528 at ¶ 4] The CSSD is required by law to serve all Alaskans, Native and non-Native.[80] The State of Alaska's ability to set public welfare rules even for tribes off-reservation has long been recognized.[81] Under its public welfare authority, the State requires parents to

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order to receive full faith and credit of its tribal order. 28 U.S.C. § 1738B (b) ("contestant"); 28 U.S.C. § 1738B (c) (personal jurisdiction over contestant).

[79] AS 25.27.120; *see* AS 25.27.130 (State has right of subrogation to recover public assistance paid); AS 47.27.040 (obligee assigns right to child support to the State as condition of receiving public assistance benefits). Even if no public assistance is currently being paid, the child may be eligible for future state public assistance—making the State an unacknowledged third party to every child support action.

[80] AS 25.27.100 (all persons may use agency); 42 U.S.C. § 654 (l) (state plan must be in effect for whole state); [Exc. 528 ¶ 6]; *see also* Alaska Const. art. VII, § 4 ("The legislature shall provide for the promotion and protection of public health"); Alaska Const. art. VII, § 5 ("legislature shall provide for public welfare").

[81] *Metlakatla Indian Cmty. v. Egan*, 362 P.2d 901, 915 (Alaska 1961), *vacated on other grounds*, 369 U.S. 45 (1962).

be responsible for their children,[82] including providing support.[83] The importance of child support in the State is clear and unequivocal: "Parents have a paramount duty to support their children."[84] These constitutionally-driven child support mandates will be impossible to follow if all 229 federally recognized tribes have jurisdiction over child support.[85] If that is the case, Alaska Courts or CSSD will *only* be able to set child support in those cases where a tribal court has not already done so.

This will undermine CSSD's overall goal in the uniform enforcement of child support in the State. [Exc. 530-34 ¶¶ 13-22] Alaska citizens—neighbors even—could end up with differing child support awards based only on whether a tribal-eligible child is involved. In some cases, up to three different child support amounts could be in play (mother's tribe, father's tribe, and State). No one benefits from this patchwork of uncertainty. *See* [Exc. 533-34 ¶ 21]

Part of the broader, overall CSSD mission includes maintaining a comprehensive registry of child support orders in the State. [Exc. 533 ¶ 20] The registry is intended to "improve child support establishment, collection and disbursement." [Exc. 533 ¶ 20] Information is transmitted to the federal government, and is shared with other IV-D

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82 AS 25.20.030 (duty of parent).

83 AS 25.24.160(a)(1) (requiring child support in divorce actions); AS 25.24.200(a)(2), (b)(2) (requiring same in dissolution proceedings); *see also* Alaska Civil Rule 90.3 (setting child support requirements).

84 *Kestner v. Clark*, 182 P.3d 1117, 1122 (Alaska 2008) (recognizing parents' statutory and common law duty to support children).

85 Although the Tribe couches its complaint in terms of its own tribal authority, the court's decision recognized the tribal inherent authority over child support thus recognizing the authority of all Alaska tribes—with far-reaching impacts.

agencies. [Exc. 533 ¶ 20] Tribes who are not IV-D eligible (227 such tribes exist in Alaska) do not need to participate in the registry. This means that CSSD will have no control over the status of child support obligations in Alaska, which could result in duplicate or conflicting orders. [Exc. 533 ¶ 20] The resulting uncertainty over who is (or is not) subject to orders and in what amounts will cause State CSSD operations to be inefficient and difficult to perform. This is the opposite of what Congress intended when it required the "State case registry," which was "intended to improve the overall efficiency of the States' child support enforcement scheme."[86]

c. Tribal child support jurisdiction will strain CSSD's day-to-day operations.

CSSD day-to-day operations will necessarily be impacted because the tribes (i.e., the 229 separate child support regimes) lack enforcement authority in the State.[87] The tribe (or the parties to the tribal order) would have to request enforcement services from the State.[88] The extent of these services will not be inconsequential. Many custodial parents need enforcement services—by some estimates fifty percent—against the noncustodial parents who do not support their families.[89] It is CSSD that will carry the full weight of tribal child support order enforcement.

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86 *Blessing v. Freestone*, 520 U.S. 329, 345 (1997); *see* 42 U.S.C. 654a.

87 *See Mescalaro Apache*, 411 U.S. at 148-49 ("[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law").

88 [Exc. 533 ¶ 19 ("any parent can request CSSD's assistance, regardless of who issued the order")]

89 Laura W. Morgan, *Child Support Guidelines: Interpretation and Application* § 1.02 (2010) (citing 1995 U.S. Census Bureau statistics).

The precise operational impact is uncertain,[90] but it is "highly likely" that the State will have to be involved. [Exc. 532-33 ¶ 18] CSSD already has garnished PFDs based on Central Council child support orders. Other enforcement services will include requiring employers to follow income withholding orders, garnishing unemployment and workers compensation benefits, Internal Revenue Service tax refund intercepts, and taking action against driver or occupational licenses.[91]

These requests for CSSD services will negatively impact the State's day-to-day operations in providing child support services to all Alaskans, and have detrimental effects for custodial parents.[92] Given these state operational impacts, CSSD's required involvement in enforcement, the fact that child support regulates parents' debt relationships as part of a national/state welfare program, and that tribal child support orders impact both Natives and non-Natives alike, running an off-reservation child support program is not within the tribe's inherent authority as a matter of internal domestic relations.

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90 [Exc. 533 ¶ 19] The impact will depend on the number of tribes issuing child support orders; the number of orders requiring clarification, amendment, or enforcement; and whether the orders are based on in-kind services (or a set money amount).

91 [R. 2383-88 (IRS memo on intercept services; taxpayer information can't be released to tribe)]

92 [Exc. 532-33 ¶ 18 (noting difficulties of running a de-centralized child support program with up to 230 different sovereigns issuing child support orders); ¶ 19 (detrimental effects)]

d. Tribal child support jurisdiction will financially burden the State and Alaskan families.

Tribal child support programs will directly impact state finances by limiting its recoupment for state public assistance or foster care services. The "primary mission of CSSD is to collect and distribute child support." [Exc. 528 ¶4] It can do so on behalf of a custodial parent, but may also recoup state public assistance that was paid to the family or for the cost of state custody in a child-in need of aid case.[93] In order to recoup public assistance paid, the State would normally modify the child support order. [Exc. 530 ¶ 13] The State would not be able to modify a tribal support order (unless the tribe runs a IV-D program, which almost no tribes in Alaska do), resulting in "direct financial harm." [Exc. 530 ¶ 13] The State will also suffer direct financial harm if it takes State custody of a child (in a child-in-need-of-aid or juvenile delinquency case) and the Tribe issues a child support order for that child, thereby limiting the State's recoupment. [Exc. 530-31 ¶ 14] The State would also be limited by a tribal order that allowed "in kind" services —such as food in lieu of monthly payments—as the State would not be able to either enforce or modify the order. [Exc. 531 ¶ 15]

Obtaining clarification or a modification to make a tribal order enforceable would be difficult to impossible. Where it is a state order, CSSD can simply go to court to have it clarified. [Exc. 531 ¶ 16] But CSSD has no authority or ability to obtain a clarification or modification from separate sovereigns; cases with unenforceable orders would have to

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93 [Exc. 528 ¶ 5 (in public assistance case, parent assigns the right to child support in exchange for the public assistance; State has independent right to recoup money paid)]; AS 25.27.120(b) (obligor is liable to state for cost of foster home).

be closed. [Exc. 531 ¶ 15] This will harm the parent entitled to child support, as well as the State (by preventing recoupment).

Further, because interpretation of tribal court orders is in the sole discretion of the tribe, a tribe could order that money be returned from the State (after it was issued to the custodial parent). [Exc. 531-32 ¶17] This and numerous other possibilities (that will result when child support rules proliferate from just the State's to 229-plus for the same land base) do not support an efficient, smoothly operating child support program.

2. Child support is not an "internal" tribal matter where it involves nonmember parents.

Relying on *John v. Baker I*, the Tribe asserts that it has inherent jurisdiction over child support in *any* case involving a child who is a member (or eligible for membership) in the Tribe, regardless of the parents' membership status.[94] This was not *John I*'s holding.

In *John I*, this Court held that "Native tribes . . . possess the inherent sovereign power to adjudicate child custody disputes between tribal members in their own courts."[95] It did not hold that tribes have jurisdiction over nonmember parents based on the membership of the child. Because the issue of jurisdiction over a nonmember parent

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[94] *See* [Exc. 42-46] The Tribe is already exercising child support jurisdiction when the child is in the custody of the *State*, a non-consenting, nonmember. [Exc. 530-31 ¶ 14] Additionally, the Central Council has even asserted jurisdiction in cases where no one (mother, father or child) is a member. [Exc. 498, 502]

[95] *John I,* 982 P.2d at 743; *see also Tanana*, 249 P.3d at 750 (setting out four primary decisions of *John I*, none of which is that tribes have jurisdiction over nonmembers).

was not raised,[96] *John I* made the unremarkable conclusion that the tribal court had jurisdiction only if the children were members of the tribe.[97] The context of that statement is significant to its meaning: the father had argued that the tribe did not have jurisdiction over his nonmember children.[98] The Court thus recognized that the child's membership was a jurisdictional prerequisite to the tribe having jurisdiction over the child. The case did not establish the all-encompassing jurisdictional rule advanced by the Tribe: that the only relevant factor in all tribal proceedings is the involvement of a member child.[99] Indeed, this Court itself has characterized *John I* as a case among members.[100] And this Court has specifically stated that the issue of "tribal jurisdiction

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96 *See John I*, 982 P.2d at 744 (the father, a member of Northway, raised two arguments: the proceedings in tribal court violated due process, and his children were not members of Northway Village).

97 *Id.* at 759, 764 ("Northway court had jurisdiction over this case *only if* the children are members or are eligible for membership in the village" (italics added)).

98 *John v. Baker I, Suppl. Ae. Br.*, 1998 WL 35172673, at *31-32 (May 4, 1998); *Suppl. Ae. R. Br.*, 1998 WL 35241864, at *8-13 (May 24, 1998).

99 [Exc. 42-44, 592-94]. The cases relied on by *John I* also do not support this child-as-sole-jurisdictional-factor standard. *See e.g., Duro v. Reina*, 495 U.S. 676, 698 (1990) (rejecting tribal criminal jurisdiction over nonmember); *Fisher v. District Court*, 424 U.S. 382, 386, 389 n.14 (1976) (noting adoption case involved only nonmembers).

100 *John I*, 982 P.2d at 759 (recognizing tribal "jurisdiction to adjudicate child custody disputes *between village members*"); *Malabed v. N. Slope Borough*, 70 P.3d 416, 427 n.51 (Alaska 2003) (referring to *John I* as holding that Alaska "tribes retain "jurisdiction to adjudicate disputes between tribal members"); *Tanana*, 249 P.3d at 742-43, 750 (recognizing *John I* as dispute "between village members"; "internal domestic relations among its members").

over non-member parents of Indian children" was one of the questions that *John I* left unanswered.[101] That question must be answered by federal case law.

The Tribe's position violates the presumption that tribes do not have jurisdiction over nonmembers and the *Montana* exceptions to that general rule. The *Montana* exceptions allow tribal jurisdiction over nonmembers in only very limited circumstances. Those circumstances are not met here.

a. Tribes are presumed to not have jurisdiction over nonmembers.

Because the authority of tribes is founded on their "right to make their own laws and be ruled by them," that authority does not normally extend to nonmember conduct, unless expressly granted by Congress.[102] Congress has not granted jurisdiction to the tribes (see section I.A. above), and therefore the Tribe's efforts to regulate nonmembers are "presumptively invalid."[103]

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101 *Tanana*, 249 P.3d 751-52.

102 *Wheeler*, 435 U.S. at 323 (implicit divestiture of sovereignty over member-nonmember relations); *Montana*, 450 U.S. at 564 ("power beyond what is necessary . . . to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation"); *Plains Commerce*, 554 U.S. 327-28 (inherent sovereign powers do not extend to nonmembers); *id.* at 337 ("nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory"); *Atkinson Trading*, 532 U.S. at 650 ("inherent sovereignty of Indian tribes was limited to 'their members and their territory'"); *see also American Indian Law Deskbook* 203 (Clay Smith ed., 4th ed. 2008) ("tribes possess inherent civil regulatory authority over nonmembers only in extraordinary instances").

103 *Plains Commerce*, 554 U.S. at 330 (*quoting Atkinson Trading*, 532 U.S. at 659); *Hicks*, 533 U.S. at 378 (Souter, J., concurring) (*Montana* "underscore[d] the distinction between tribal members and nonmembers, and seems clearly to indicate . . . that the inherent authority of the tribes has been preserved over the former but not the latter"); *see also Duro v. Reina*, 495 U.S. 676, 695 (1989), *abrogated on other grounds by* 25 U.S.C. § 1301(2) (membership is determined on a tribe by tribe basis); *Washington v.*

In line with this clear presumption, the trend of the U.S. Supreme Court has been to unequivocally limit tribal authority over nonmembers.[104] The Court has held that tribes do not have inherent power to exercise criminal jurisdiction over non-Indians,[105] to regulate the sale of nonmember-owned fee land within the reservation,[106] or to tax nonmember activity on non-Indian fee land.[107] And tribal courts did not have jurisdiction over a tort suit involving an accident by nonmembers on non-tribal land,[108] or over claims against state officials who entered tribal land to execute a state search warrant against a tribal member suspected of having violated state law outside of the reservation,[109] or over a case brought by a tribal corporation against a nonmember cigarette company.[110]

In addition to the presumption against tribal jurisdiction over nonmembers, the Supreme Court has found that the "absence of tribal ownership has been virtually

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Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 161(1980) (Indian nonmembers "stand on the same footing as non-Indians"). Eligibility for membership is not enough. *See* www.kictribe.org/contact/enrollment/index.html (members of the Ketchikan Indian Community cannot also be Central Council members, even though they may be eligible); [Exc. 502 (KIC members are not Central Council members)]

104 *See, e.g., Plains Commerce,* 554 U.S. at 327-30 (limiting tribal jurisdiction to on-reservation and over domestic relations among members); *see also Merrion*, 455 U.S. at 142 ("tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe"); *Montana*, 450 U.S. at 565 ("inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe").

105 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) *superceded by statute as stated in U.S. v. Weaselhead*, 36 F. Supp. 2d 908, 911 (D. Neb 1997), *cited in Montana*, 450 U.S. at 565.

106 *Plains Commerce*, 554 U.S. 316.

107 *Atkinson Trading*, 532 U.S. at 659.

108 *Strate*, 520 U.S. at 454.

109 *Hicks*, 533 U.S. at 364.

110 *Philip Morris*, 569 F.3d 932.

conclusive of the absence of tribal civil jurisdiction."[111] Indeed, the Court "with only 'one minor exception, . . . [has] never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*."[112] And, that "one minor exception" involved land "isolated in 'the heart of [a] closed portion of the reservation.'"[113]

Given the Central Council's lack of territorial based jurisdiction, restrictions on jurisdiction over nonmembers, and the absence of an express delegation by Congress over child support, the presumption is that the Tribe does not have jurisdiction over child support cases involving nonmembers.[114] The Tribe suggests reversal of this "bedrock principle" that "Tribal jurisdiction . . . generally does not extend to nonmembers"[115] and asserts jurisdiction over nonmember parents based on the membership of the child. This suggested reversal of the presumption against nonmember jurisdiction is not supported by governing federal law.

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111 *Hicks,* 533 U.S. at 360 (stating also that whether the activities occurred on Indian land is "one factor to consider in determining whether regulation of activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations'").

112 *Plains Commerce*, 554 U.S. at 333 (quoting with emphasis *Hicks*, 533 U.S. at 360).

113 *Id.* at 333 (quoting *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 440 (1989)).

114 *Id.* at 330 ("effort by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid'").

115 *Id.* at 340.

Under the governing case law, the Tribe can only regulate nonmembers if it can show that it meets one of the two *Montana* exceptions.[116] Under the first exception "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[117] These activities may only "be regulated to the extent necessary 'to protect tribal self-government [and] to control internal relations.'"[118] Under the second *Montana* exception "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[119] "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community.'"[120] These two exceptions to the presumptive rule of no tribal jurisdiction

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116 *Montana*, 450 U.S. at 565 (*Montana* exceptions set the extent to which "Indian tribes [have] retain[ed] inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations"); *Plains Commerce*, 554 U.S. at 330 (tribe has burden to establish *Montana* exception exists); *see* William C. Canby, *American Indian Law in a Nutshell* 91 (5th ed. 2009) (unless a "narrowly construed" *Montana* exception applies, tribal jurisdiction "does not extend to the activities of nonmembers of the tribe").

117 *Montana*, 450 U.S. at 565; *see Strate,* 520 U.S. at 457 (consensual relationships of the qualifying kind are business relationships).

118 *Plains Commerce*, 554 U.S. at 332.

119 *Montana*, 450 U.S. at 566 (nonmember hunting and fishing on non-Indian land was not a threat to political integrity).

120 *Plains Commerce*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566).

over nonmembers "are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule' or 'severely shrink' it."[121]

Despite having the "burden . . . to establish one of the exceptions . . . that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land,"[122] the Tribe has not made any attempt to meet its burden. *See* [Exc. 1-9, 23-60, 584-600]

While policy arguments might be made as to why Central Council jurisdiction over child support cases would be good,[123] tribal jurisdiction is governed by rules, not policy. The "bedrock principle [i.e., that 'tribal jurisdiction . . . does not extend to nonmembers'] does not vary depending on the desirability of a particular regulation."[124] The governing federal case law and the failure to meet the *Montana* exceptions leads to one conclusion: the Tribe does not have jurisdiction over child support cases involving nonmembers.

b. The Central Council does not have jurisdiction over nonmembers under the first *Montana* exception—because they have no business relationship.

Under the first *Montana* exception "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual

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121 *Id.* at 330 (quoting *AtkinsonTrading*, 532 U.S. at 654, 647, 655; and *Strate*, 520 U.S. at 458).

122 *Plains Commerce*, 554 U.S. 330.

123 *See* [Exc. 44, 585].

124 *Plains Commerce*, 554 U.S. at 340 (Court rejecting Justice Ginsburg's suggestion that tribe had jurisdiction as a matter of policy); *Wagnon*, 546 U.S. at 113, 128 (rejecting tribal "self-sufficiency, and strong tribal governments" as an independent basis to limit state jurisdiction)

relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,"[125] but only "to the extent necessary 'to protect tribal self-government [and] to control internal relations.'"[126] The first *Montana* exception applies to consensual *business* relationships,[127] and only if there is a "nexus" between that business relationship and the events giving rise to the tribal action.[128] The Central Council offered no evidence to support and made no effort to even argue that the first exception applied.[129]

The consensual business relationship requirement is not met by the existence of the child-tribe relationship and the parent-child relationship[130] because they are not

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125 *Montana*, 450 U.S. at 565; *Merrion,* 455 U.S. at 142 ("[A] tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe").

126 *Plains Commerce*, 554 U.S. 332; *see Montana*, 450 U.S. at 564 (general limitation that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations . . . cannot survive without express congressional delegation").

127 *Philip Morris*, 569 F.3d at 941; *Hicks*, 533 U.S. at 372; *Strate,* 520 U.S. at 457.

128 *See Plains Commerce*, 554 U.S. at 338 (general business dealings do not create jurisdiction on another matter; "it is not 'in for a penny, in for a pound'"); *Atkinson Trading,* 532 U.S. at 656 (no tribal jurisdiction because hotel–tribe business license relationship did not have required nexus to guest–tribe); *Strate*, 520 U.S. at 457 (no tribal jurisdiction over traffic accident just because nonmember worked on the reservation); *Phillip Morris,* 569 F.3d at 941-42

129 [Exc.23-60, 584-600 (no *Montana* exceptions argument in summary judgment briefing)]; *Plains Commerce,* 554 U.S. at 330 (tribe's burden of proof).

130 The Central Council (in a white paper on child support) suggested that these relationships might provide the basis for meeting the first *Montana* exception. [R. 2394]

relationships "of the qualifying kind."[131] "[M]arrying a tribal member, allowing children to be enrolled members of the tribe and receiving tribal services do not qualify under the consensual relationship exception in *Montana*."[132] In addition, the child–tribe and parent–child relationships do not have the required nexus to the tribe requiring the nonmember parent to pay child support (tribe–obligor parent relationship). As such, the Central Council does not meet the first *Montana* exception and has not met its burden. The Tribe does not have jurisdiction over nonmember parents.

c. The Central Council does not have jurisdiction over nonmembers under the second *Montana* exception because no conduct imperils the Tribe's existence.

Under the second *Montana* exception "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[133] To meet the second *Montana* exception, the conduct must "'imperil the subsistence' of the tribal community,'"[134] and jurisdiction must "be necessary to avert catastrophic consequences."[135] The U.S. Supreme Court "has never found the second exception applicable."[136]

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131 *See* page 33 and footnote 117 above *American Indian Law Deskbook* 204 (Clay Smith ed., 2008 edition) ("*Atkinson* and *Hicks* . . . strongly support the proposition that the first exception is limited to commercial relationships between private persons").

132 *In re J.D.M.C.*, 739 N.W.2d at 809-10 & n.21.

133 *Montana*, 450 U.S. at 566.

134 *Plains Commerce*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566).

135 *Id.* at 341 (quoting Cohen, §4.02[3][c] at 232 n.220).

136 *American Indian Law Deskbook* 209-10 (Clay Smith ed., 2008).

The Central Council made no argument that it met the second *Montana* exception and offered no concrete evidence to support it.[137] Therefore it did not meet its burden. The Tribe (in making its arguments that *John I* grants tribal jurisdiction over all child support matters involving a tribal child) did pay lip service to the second *Montana* exception, claiming generally that "parent's failure to provide adequate financial support to an Indian child has a direct effect on the political integrity, the economic security, and the health and welfare of the Tribe." [Exc. 38] But generalized threats are not what the second *Montana* exception is intended to capture.[138] "The [second] exception is only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered necessary to self-government."[139] Under this exception, "the drain of the nonmember's conduct upon tribal services and resources [must be] so severe that it actually 'imperil[s]' the political integrity of the Indian tribe."[140] The Tribe's general "impact" arguments regarding how

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137 *See* [Exc. 23-60, 584-600] [R. 2395 (Central Council asserted in white paper that it met second exception because it needed to protect the welfare of its children and to "protect the Tribes' political integrity, economic security, or health or welfare")].

138 *See Philip Morris*, 569 F.3d at 943 (generalized threats posed by torts by/against tribal members do not fall within second exception).

139 *Atkinson*, 532 U.S. at 657 n.12 (internal quotations omitted) (operation of hotel on non-Indian fee land did not imperil existence of tribe even though taxation might be considered "necessary" for tribal government).

140 *Id.* (citing *Montana*, 450 U.S. at 566); *Plains Commerce*, 554 U.S. at 341 (must "'imperil the subsistence' of the tribal community"; *see also Hicks*, 533 U.S. at 394 (tribal interests under second exception are "far more likely to be implicated where . . . the nonmember activity takes place on land owned and controlled by the tribe") (O'Connor, J., concurring).

child support is important to tribal families are not sufficient to establish tribal jurisdiction over nonmembers.[141]

In any case, the Tribe does not *need* jurisdiction (to order a nonmember parent to pay child support); it is not "necessary to avert catastrophic consequences."[142] The lack of tribal jurisdiction does not deny children support. The Central Council's interest in child support for tribal children is readily supported through CSSD services. The State has statewide jurisdiction over child support and already provides child support services to all citizens throughout the State, including Southeast Alaska (where the Central Council predominantly operates).[143] The availability of the "plain, speedy, and adequate remedies" of the state system undermines any argument that tribal interests are jeopardized by the tribe's lack of jurisdiction over child support.[144]

To construe the second exception so broadly as to cover jurisdiction over nonmember parents who owe child support for member children would "construe[] [it] in

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141 *See, e.g.*, *Wagnon*, 546 U.S. at 113 (rejecting argument that tribal interests in economic development, tribal self-sufficiency, or strong tribal government should be considered); *Atkinson*, 532 U.S. at 654-55 (rejecting hotel occupancy tax over nonmembers even though hotel was served by tribal police, medical and fire).

142 *See Plains Commerce*, 554 U.S. at 341 (quoting Cohen § 4.02[3][c] at 232 n.220).

143 [Exc. 528-30 ¶3-12, 654 ¶ 10]; *see, e.g.*, *Ford Motor Co. v. Todecheene*, 221 F. Supp.2d 1070, 1084 (D. Ariz. 2002) ("remedies are available in state and federal court"; "[m]embers are protected by existing state laws and state remedies. Thus, it is not necessary to provide a forum for claims against non-Indians in order to protect the health or welfare of tribal members as a whole or the tribe's interest in tribal self-government").

144 *Wilson v. Marchington*, 127 F.3d 805, 815 (9th Cir. 1997); *Philip Morris*, 569 F.3d at 943 (finding that pursuit of federal and state trademark claims hardly poses a direct threat to tribal sovereignty).

a manner that would 'swallow the rule' or 'severely shrink it.'"[145] While the Tribe might desire to have control over child support matters involving tribal children, the second *Montana* exception does not compel that result.

3. **A parent's consent does not give the Tribe subject matter jurisdiction**

The Tribe requires participation in tribal court hearings under threat of contempt and attachment of real and personal property.[146] Participation in tribal proceedings to avoid these coercive measures is not "consent,"[147]and can hardly be considered voluntary relinquishment of a state citizen's constitutionally protected right of access to state courts.

The United States Supreme Court "has repeatedly demonstrated its concern that tribal courts not require 'defendants who are not tribal members' to 'defend [themselves

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145 *Plains Commerce*, 554 U.S. at 330 (quoting *Atkinson*, 532 U.S. at 655; *Strate*, 520 U.S. at 458).

146 [Exc. 429 (contempt of court, arrest, default judgment, lien against real property, garnishment or seizure of property, intercept of IRS refunds or other income), 495-96 (same), 509 (default, money judgment, lien against real property, garnishment, seizure of property, IRS intercept)]

147 See *McCaffery v. Green*, 931 P. 2d 407, 409 (Alaska 1997) (noting that parent forced into court to enforce visitation order that wife had refused to comply with did not create court's jurisdiction in child support matter); *but see* [Exc. 269-70 (Interrogatories 20, 25)] [R. 1882-83 (Tribal claims that, voluntary participation in hearing provides jurisdiction); [Exc. 85 (CCTHITA sec. 06.01.020B.2.; claiming service within Tribe's "territorial jurisdiction" is consent to court's personal jurisdiction); 87 (CCTHITA sec. 06.01.030C.; service); [R. 1670 (Default Order; service of summons was enough for personal jurisdiction even though Respondent failed to appear)] [Exc. 502 (nonmember-nonmember case; tribal jurisdiction because petitioner assigned child support rights to Tribe and respondent owed duty of support)]

against ordinary claims] in an unfamiliar court."[148] As discussed above, the presumptive rule is that the Tribe does not have jurisdiction over nonmembers. Even if a nonmember parent consents,[149] the jurisdictional rules are the same. While tribal "laws and regulations may fairly be imposed on nonmembers *only if* the nonmember consented, either expressly or by his actions," "*[e]ven then* the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations."[150]"[A] nonmember cannot create 'residual' tribal authority through consent; the nonmember can merely consent to the application of such authority when it otherwise exists."[151] Thus, under governing law, a tribe can have jurisdiction over a nonmember only under circumstances that fall within the tribe's inherent powers (or within the *Montana* exceptions), regardless of whether parties say they consent.

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148 *Smith v. Salish Kootenai College*, 434 F.3d at 1131 (suit by nonmember counter-plaintiff against school located on reservation allowed); *see also Philip Morris*, 569 F.3d at 940 (no tribal jurisdiction over nonconsenting nonmember defendant; primary consideration is "whether a nonmember is being haled into tribal court against his will"); *Hicks*, 533 U.S. at 358 n.2 (Court has "never held that a tribal court had jurisdiction over a nonmember defendant").

149 Under its statutes, the Tribe claims jurisdiction over any case involving an "Indian child with the consent of all parties." CCTHITA Statute sec. 04.01.005 A.1.b.; *see also* CCTHITA Statute sec. 10.03.001 (claiming broad child support jurisdiction).

CCTHITA finds consent where nonmembers "accepted the jurisdiction" by voluntarily participating, or not filing an objection. *See, e.g.* [R. 1882-83, 2012] Even if consent to jurisdiction was possible, a nonmember's failure to object to jurisdiction can be a manifestation of many things: not knowing that objection was an option, or simply forgetting to object. Even assuming consent could somehow confer subject matter jurisdiction on the Tribe, it should be affirmative consent, with full knowledge of the law and possible consequences.

150 *Plains Commerce,* 554 U.S. at 337 (emphases added).

151 *American Indian Law Deskbook* 209 (Clay Smith ed., 4th ed. 2008).

Child support matters that are off-reservation and that impact state operations and decide the rights of nonmember parents are not within the Tribe's jurisdiction. As discussed above, the Tribe's child support orders do not fall within the "inherent power ...to regulate domestic relations among members" and neither *Montana* exception (consensual business relations or threat to the tribe's political integrity) is met. Thus, while a parent could consent to the personal jurisdiction of a tribe, that consent could not create subject matter jurisdiction in the Tribe's improper tribal forum (because of the lack of subject matter jurisdiction over nonmembers under federal case law).This lack of subject matter jurisdiction is not cured by the parents' consent. That is, "no action of the parties can confer subject-matter jurisdiction."[152]

Because the Tribe lacks subject matter jurisdiction over child support, the Tribe "is 'without power to decide a case,' and its judgment would be void."[153] The Tribe's child support orders also "substantially infringe on the authority of another tribunal"—the State and its operation of the CSSD program—and as such, the tribal child support

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152 *Insurance Corp. of Ireland, Ltd. v. Compangnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (consent, estoppel, and waiver are never sufficient to establish subject matter jurisdiction).

153 *Dewey v. Dewey*, 969 P.2d 1154, 1159 (Alaska 1999) (quoting *Wanamaker v. Scott*, 788 P.2d 712, 713 n.2 (Alaska 1990)); *DeNardo v. State*, 740 P.2d 453, 456-67 (Alaska 1987) ("A judgment rendered by a court without subject-matter jurisdiction is void); *Perry v. Newkirk*, 871 P.2d 1150, 1155 (Alaska 1994) (superior court's termination order was void for want of subject matter jurisdiction); *Wall v. Stinson*, 983 P.2d 736, 741 (Alaska 1999) (applying the Restatement (Second) of Judgments (1982) to case contesting validity of foreign child support order); *see also* AS 09.30.120 (a foreign judgment is not conclusive if the foreign court did not have subject matter jurisdiction).

order could be voided on this ground, as well.[154] Without the required subject matter jurisdiction, the Tribe is simply without power to decide these child support matters, regardless of whether a party gives their consent, or not.

4. Tribal child support jurisdiction is not analogous to tribal custody jurisdiction.

The Tribe claims inherent jurisdiction over child support because it is as a matter of domestic relations and is often determined in the child custody context. [Exc. 585, 662-67] In agreeing with the Tribe, the superior court relied on *McCaffery v. Green.*[155] The court held that child support is intertwined with child custody and is therefore a domestic relations matter over which the tribes have jurisdiction. [Exc. 662-63] *McCaffery* does not provide a legal basis for finding tribal jurisdiction over child support and is distinguishable on its facts.

Foremost, *McCaffery* is distinguishable because it addressed the State's *personal* jurisdiction over the noncustodial parent.[156] "*Personal jurisdiction* is the ability of a court to require a particular defendant to defend a lawsuit and be bound by the court's judgment."[157] Subject matter jurisdiction, in contrast, "is the ability of a court to hear a particular kind of case, either because it involves a particular subject matter or because it

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154 *See Wall v. Stinson*, 983 P.2d at 741.

155 *McCaffery v. Green*, 931 P.2d 407 (Alaska 1997).

156 *McCaffery*, 931 P.2d at 407-13.

157 *F. Cohen's, Handbook of Federal Indian Law* § 7.01 at 597 (Nell Jessup Newton ed., 2012).

is brought by a particular type of plaintiff or against a particular type of defendant."[158] The question here is whether the Tribe has adjudicatory authority over child support and over nonmembers under federal law, a question of subject matter jurisdiction.[159] The Tribe's subject matter jurisdiction is determined by governing federal case law.[160]

Additionally, the Tribe has asserted jurisdiction over citizens of the State, not individuals that have "moved across the continent" (as in *McCaffery*).[161] The State retains a significant interest in these local state child support matters. And even if a tribe determines a custody issue, the tribal court and the state court can always communicate as necessary to ensure consistency in the decisions. In setting child support, the state court can rely on a tribal custody order to the same extent it relies on its own or other states' custody orders. There is no reason that child support and custody must or should be decided by one court.

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158 *Cohen's* § 7.01 at 597.

159 *Cohen's* § 7.01 at 605-06 (noting that a tribe might have subject matter jurisdiction under the *Montana* exceptions, but not have personal jurisdiction); *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (holding that "the Tribal Court lacked subject-matter jurisdiction over the dispute"); *Nevada v. Hicks*, 533 U.S. 353, 368 n.8 (2001) (referring to limitation on tribal jurisdiction over nonmembers as "pertain[ing] to subject-matter, rather than merely personal, jurisdiction"); *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985) (referring to tribal civil authority as subject matter jurisdiction question).

160 *See Plains Commerce*, 554 U.S. at 324, 327-35 (noting that question of tribe's adjudicative authority is a federal question and applying federal case law in making that determination); Cohen § 2.01[2] at 111 (federal supremacy over Indian law); Cohen § 7.02[1][a] at 599 (tribal adjudicative jurisdiction is a federal question).

161 *McCaffery*, 931 P.2d at 412.

Different jurisdictional rules apply to custody and support, and it is not uncommon for one state to determine custody and a different state to determine support. Under the Uniform Child Custody Jurisdiction and Enforcement Act, the child's "home state" (i.e., where the child resides) is pivotal in determining jurisdiction.[162] In contrast, child support is determined by state law and the Uniform Interstate Family Support Act (UIFSA). Child support jurisdiction generally focuses on the parent's state of residence.[163] So while child support might sometimes be determined in the custody context, the two are not inextricably intertwined, and they are often determined by separate jurisdictions, the case here being on point.[164]

McCaffery was decided under the former child support enforcement statutes—URESA,[165] and has been superseded by UIFSA. *McCaffery* focused on the weaknesses of the now abandoned URESA (which, in the court's opinion, cast doubt on the Supreme Court's decision in *Kulko v. Superior Court*, 436 U.S. 84 (1978)).[166] The court did not discuss UIFSA, which became effective in January 1996.[167] In fact, if *McCaffery* was decided under UIFSA (now in effect in Alaska), the result would be different. In

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162 AS 25.30.300.

163 *See* AS 25.25.301; AS 25.25.401.

164 *See* [Exc. 307-09 (state court setting custody, but allowing tribe to set child support); 468 -70 (state court divorce and custody determination); 459-62 (tribe setting child support order)].

165 *McCaffery*, 931 P.2d at 408 n.2. URESA stands for The Uniform Reciprocal Enforcement of Support Act. *Id.*

166 *McCaffery*, 931 P.2d at 411-12.

167 *McCaffery*, 931 P.2d at 408 n.2, 413 & n.16 (noting UIFSA's promulgation and that it might bring different results).

McCaffery, after Texas issued a support order, the mother and children moved to Alaska, and the father moved to Oregon. The mother then filed a motion in Alaska to modify visitation and support. Under UIFSA, Alaska could modify the Texas child support order only if the non-moving party (or both parties) lived in Alaska.[168] Because the non-moving party (the father) lived in Oregon, the Alaska court would lack jurisdiction to modify the Texas order and the mother would have to seek a modification in Oregon. By requiring that modification occur in the non-moving party's state, UIFSA requires custody and support to be decided by different courts when the moving party is the custodial parent living in another state.

Thus, the UIFSA rules for continuing, exclusive jurisdiction will often result in bifurcation of custody and support issues, depending on whether one or more of the parties have moved to another state after custody was determined.[169] The purpose of UIFSA is simply to achieve the cooperation and deference between jurisdictions needed to assure a one-order system - that is, a system where there is only one valid support order at any given time. It is not designed to keep child custody and child support in one court.

Further, *McCaffery* did not say that custody and child support must be decided by the same court. The court only found that Alaska should address both issues in that case because both parties had left the original issuing state, no other court could hear both

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168 AS 25.25.611(a); AS 25.25.613.

169 *See* AS 25.25.205.

issues, and the URESA did not provide an effective means of dealing with interstate issues.[170] The *McCaffery* decision was based on practicalities.

Notably, the U.S. Supreme Court has held that practicalities do not determine tribal jurisdiction under federal law.[171] That is the bedrock tribal jurisdictional principles set out in *Montana* and *Plains Commerce* do not vary depending on the desirability of an outcome.[172]

5. All citizens of the State of Alaska have a constitutional right of access to the state courts.

All Alaskans, including tribal members, enjoy a right (under the due process and equal protection clauses) of access to the state courts.[173] The Alaska Constitution establishes "a system of uniform laws applied equally to all citizens" and "a unified judicial system."[174] This right of access to state courts is "an important one."[175] Even if

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170 *McCaffery*, 931 P.2d at 412-13.

171 *Plains Commerce*, 554 U.S. at 340

172 *Id.*

173 *John I*, 982 P.2d at 760 (recognizing tribal custody jurisdiction "while preserving the right of access to state courts"); *id.* at 759 ("[o]utside Indian country, all disputes arising within the State of Alaska, whether tribal or not, are within the state's general jurisdiction."); *Sands v. Green*, 156 P.3d 1130, 1134 (Alaska 2007) (statute preventing minors' access to courts violated due process); *Bush v. Reid*, 516 P.2d 1215, 1217 (Alaska 1973) (statute barring felon's access to court violated due process and equal protection clauses); *see also* U.S. Const. 14th amend. (state may not deprive person of "property, without due process of law" or "equal protection of the laws"); Alaska Const. art. I, § 1 (equal protection); *id.* at § 7 (no deprivation of property "without due process of law"); *id.* at § 3 (no denial of rights based on "race, color, creed").

174 *John v. Baker I*, 982 P.2d at 805 (Matthews, J., dissenting).

175 *Sands*, 156 P.3d at 1134 (quoting *Patrick v. Lynden Transport, Inc.*, 765 P.2d 1375, 1379 (Alaska 1988)).

the Tribe had jurisdiction over child support matters involving all tribal members, the State retains concurrent jurisdiction.[176]

While the *John I* majority assured that "Alaska Natives who for any reason do not wish to have their disputes adjudicated in a tribal court will retain complete and total access to the state judicial system,'"[177] the problems are in the application. For example, despite the right of access to the state courts, members and nonmembers alike who find themselves in tribal court on child support matters will be denied state access. The Tribe's statutes do not allow for removal to state court.[178] And, requiring nonmembers who have no ties to the Tribe to have their child support matters heard in tribal court (because of the unilateral activity of a tribal member)[179] denies them due process.[180] The Tribe's assertion of authority over these cases that are otherwise within the State's

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176 *John v. Baker I*, 982 P.2d at 761; *id.* at 759 ("tribe's inherent jurisdiction does not give tribal courts priority, or presumptive authority).

177 *Id.* at 761.

178 *See* CCTHITA statutes Title 6; Title 10 (no provisions for transfers of child support cases). CCTHITA sec. 10.02.004 (once tribal court enters paternity finding, it has "exclusive jurisdiction over the parties"); [R. 2129-2382 (parties in tribal child support cases were not notified of any possibility of removal to state court)]. *compare* CCTHITA sec. 04.01.005D. (allowing transfer to other courts in child protection cases).

179 When tribal members apply for Tribal TANF benefits they must agree to cooperate with the Tribe to establish a child support order and assign their rights to child support to the Tribe. [R. 1882, 1181, 1194, 1141] Thus, by applying for TANF, the tribal member forces the other parent (nonmembers and members alike) into tribal court.

180 *See Kulko v. Superior Court*, 436 U.S. 84, 91 (1978) (personal jurisdiction depends on reasonable notice and sufficient connection between defendant and forum State to make it fair); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17, 319 (1945) (defendant must have "certain minimum contacts" with the forum state so that it is "reasonable" and "fair" to require him to conduct a defense in that forum); *see In re Defender*, 435 N.W.2d 717 (S.D. 1989) (fathers' membership status not enough to establish jurisdiction over the nonmember mother living off reservation).

jurisdiction "erects a direct and 'insurmountable barrier' in front of the courthouse doors."[181] Under this scheme parents who are similarly situated[182] (all living within the territorial jurisdiction of the State of Alaska) will be subjected to differing treatment. This denial of access to state courts "rends the fabric of justice."[183]

II. The superior court's fee award should be reversed.

The superior court granted summary judgment to the Central Council. [Exc. 655-70] The court also granted an enhanced 50% fee award to the Central Council because of "the relationship between the amount of work performed and the significance of the work performed." [Exc. 719]. In order to avoid the situation that arose in *Kalenka v. Taylor*,[184] the State has appealed the fee award. In the event the State is successful on appeal and is therefore the prevailing party, this Court should reverse the superior court's attorney fee award.

CONCLUSION

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181 *Sands*, 156 P.3d at 1134 (under due process clause, the court balances "the private interest affected by the official action," "the risk of an erroneous deprivation of such interest," "the probable value, if any, of additional or substitute procedural safeguards," and "the government's interest").

182 "A threshold question in [an] equal protection analysis is whether similarly situated groups are being treated differently. *Black v. Municipality of Anchorage*, 187 P.3d 1096, 1102 (Alaska 2008). If the groups are not similarly situated then the different legal treatment is justified by the differences in the groups. *Id.*

183 *Bush*, 516 P.2d at 1218.

184 896 P.2d 222, 229 (Alaska 1995) (stating that Court would not review fee award despite partial success on appeal because the plaintiffs had failed to include attorney's fee award in points on appeal and thus were precluded from raising the fee issue on appeal).

Child support is not in any meaningful sense "internal" to a tribe. Therefore, the Tribe does not have subject matter jurisdiction over child support. The State is entitled to summary judgment, and the award of attorney's fees to the Tribe should be reversed.