

**3/16/11
CONFIRMA-
TION
HEARING:
ATTORNEY
GENERAL
JOHN BURNS**

<TARGET><BILL></BILL><SUBJECT>3-16-11 CONFIRMATION
HEARING ATTORNEY GENERAL JOHN
BURNS</SUBJECT><COMM>SJUD27</COMM></TARGET>

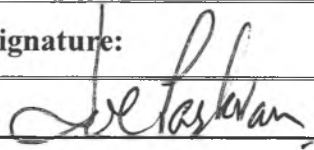
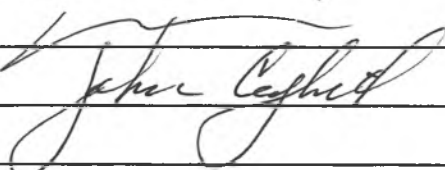
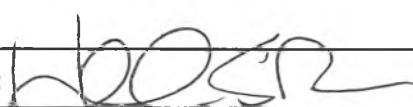
**SENATE
CONFIRMATION COMMITTEE REPORT**

Date: 3/16/11

In accordance with AS 39.05.080, the Judiciary Committee reviewed the following and recommends the appointment be forwarded to a joint session for consideration:

Attorney General – Department of Law
John. J. Burns

This does not reflect an intent by any of the members to vote for or against the confirmation of the individual during any further sessions.

Signature:	Printed Last Name
	PASKVAN
	wieleghowski
	Coghill
Chair: 	French

Please return to the Senate Secretary's Office (Room 213).



Alaska State Legislature

Senate


Official Business

Office of the Secretary

State Capitol, Room 211
Juneau, Alaska 99801-1182
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Email: senate_secretary@legis.state.ak.us

Memorandum

TO: Senator French, Chair
Judiciary Committee

FROM: Kirsten Waid 
Secretary of the Senate

DATE: February 2, 2011

SUBJECT: Confirmation of Governor's Appointment

Pursuant to AS 39.05.080, the President has referred the following name for legislative confirmation to your committee for a hearing, recommendation and report:

State of Alaska Attorney General

John Burns
Appointed: 11/30/2010

Resume(s) will be transmitted electronically.

KW:jcs
gl #2

Burns, John
State of Alaska Attorney General

John J. Burns

John J. Burns is Governor Parnell's appointee as Alaska's twenty-second Attorney General. Burns, age 51, is a life-long Alaskan, who grew up in Nome and Fairbanks, where his father was a marine mammal biologist with the Alaska Department of Fish and Game and his mother worked in the airlines industry. Burns graduated from West Valley High School in Fairbanks in 1976 and from the University of Alaska Fairbanks in 1982 with degrees in history and philosophy. In 1986, Burns received his JD degree from University of Puget Sound School of Law in Tacoma, Washington.

Burns spent the summer months of his high school, college, and law school years working as a fisheries technician for the Alaska Department of Fish and Game throughout Western Alaska and in Prince William Sound.

Burns was admitted to the Alaska Bar in 1986 and to the U.S. District Court of Alaska in 1987. He was a judicial extern for Justice Jay Rabinowitz of the Alaska Supreme Court and a law clerk for the Fairbanks Superior Court. Burns entered private practice with the law firm Birch Horton Bittner and Cherot in their Fairbanks office. In 1999, Burns and partner Cory Borgeson formed Borgeson and Burns, PC, providing a full range of legal services, including business law and litigation, public utility practice, property law, insurance defense, estate planning, and family law. Burns' practice focused primarily on business transactions and commercial litigation.

In addition to his legal practice, Burns commercial fished for a number of years in Bristol Bay and taught business law classes for 12 years as an adjunct professor at the University of Alaska Fairbanks. Burns was a member of the Fairbanks Chamber of Commerce, serving as its past president, and he has been active in many other community service organizations, including the Fairbanks Rotary Club, the University's Chancellor Advisory Committee, and Hospice of Alaska.

Attorney General Burns and his wife Christi have been married for twenty-four years. Together they have two daughters, Alissa, a senior at the University of Arizona, and Kate, a high school junior who is currently studying in Poland on a Rotary exchange fellowship.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595



Committee Members:
Senator Bill Wielechowski
Senator Lesil McGuire
Senator Joe Paskvan
Senator John Coghill

Senate Judiciary Committee

- UPS
1. Describe your law school experience. Where and when did you attend law school? Did you receive any honors? Did you participate in your school's law review? Moot court? Legal aid clinic? Any other details about that time in your life?
 2. Describe your legal employment after law school. What subject areas have you practiced in? How many other lawyers did you practice with? How many jury trials ^{6-10 jury trials} have you completed? How many appearances have you made before the Alaska [^] Supreme Court? Before the Ninth Circuit Court of Appeals? Have you published in any legal journals? [^]
 3. Which US President do you admire most? Why?
 4. What do you see as the primary mission of the Attorney General?
 5. What is the biggest challenge facing the civil division? What actions do you plan to take in reaction to that challenge?
 6. What is the biggest challenge facing the criminal division? What actions do you plan to take in reaction to that challenge?
 7. Are you satisfied with the turnover rates in the criminal division? If not, what actions do you plan to take to lower the turnover rates?
 8. Alaska suffers from some of the highest sex assault and sex abuse rates in the nation. Are prosecutions of this crime increasing? Are trials on these charges increasing? Please provide some statistics on this subject. What actions do you plan to take in this area?

Kesuyhe : Moore

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new blood

9. What will be your Department's approach to the issues of tribes and tribal sovereignty in Alaska? Please discuss the ruling in the recent "Tanana" case.

10. Regarding health care reform, please be prepared to discuss your advice to the Governor that Judge Vinson's ruling was "binding law" in Alaska. Please review the Legislative Legal memo from Dennis Bailey and be prepared to respond to his points.

MEMORANDUM

State of Alaska Department of Law

TO: John Burns
Attorney General
State of Alaska

DATE: March 15, 2011

SUBJECT: *Impact of decision
In Florida v. United
States, DHHS, 3:10-cv-91*

FROM: Joanne Grace
Alaska Department of Law

This memorandum addresses the issue of whether Judge Vinson's summary judgment ruling in *Florida v. United States, DHHS* is "binding law" in Alaska. It also responds to the points made in the Legislative Legal memo from Dennis Bailey.

Background. On January 31, 2011, Judge Roger Vinson of the United States District Court for the Northern District of Florida granted summary judgment to the 26 state plaintiffs challenging the Patient Protection and Affordable Care Act. Judge Vinson's order found unconstitutional the "individual mandate" provision of the Affordable Care Act, which would require that everyone, with certain limited exceptions, purchase federally-approved health insurance or pay a penalty. Judge Vinson held that the individual mandate is not severable from the rest of the Act, and he therefore declared the entire Act void.

Answer. Alaska is a party—a plaintiff—in the case, and the parties are bound by the court's judgment that the Act is void. That is black-letter law. As agents of the state, state officials must abide by the decision. For this reason, Dennis Bailey's point that Judge Vinson's order has precedential or stare decisis effect only "in the limited territory" of the Northern District of Florida is irrelevant. By filing this lawsuit, Alaska submitted to the jurisdiction of the court and must follow the court's decision. Thus, to the extent that the Affordable Care Act requires any action or implementation by the State of Alaska, it is "binding law" as to the State of Alaska. The state could not re-

challenge the constitutionality of the Act in either a state or federal court in Alaska or elsewhere.¹

Of course, the case is stayed pending a decision on appeal, so the parties are relieved of the injunctive effect of the decision until the Eleventh Circuit decides the appeal.

Response to points by Dennis Bailey.

Mr. Bailey reviewed three legal principles that he believed “may affect the application of the decision of the Florida...Court”:

1. The principles of claim preclusion or issue preclusion.

I disagree with Mr. Bailey’s conclusion that the Florida district court decision would not have preclusive effect in another lawsuit between the same litigants pending appeal in this case. “District court decisions ... are binding on the parties unless a stay pending appeal is granted.” *Mylan Pharmaceuticals, Inc. v. Shalala*, 81 F.Supp.2d 30, 37 n.10 (D.D.C. 2000) (citing *Pharmacia & Upjohn Co. v. Mylan Pharmaceuticals, Inc.*, 170 F.3d 1373, 1381 (Fed. Cir. 1999) and *Deering Milliken, Inc. v. FTC*, 647 F.2d 1128-29 (D.C. Cir. 1978)). An undecided appeal does not otherwise affect a judgment’s finality, which is still binding upon the parties while an appellate court reviews that order. “The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal.” *Jaffree v. Wallace*, 837 F.2d 1461 (11th Cir. 1988) (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4433, at 308. (1987 & Supp.); see also *Ross ex rel. Ross v. Board of Educ. of Tp. High School Dist. 211*, 486 F.3d 279, 284 (7th Cir. 2007) (“[T]he fact that an appeal was lodged does not defeat the finality of the judgment.”); *Collin v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Circ. 2007) (holding that a final judgment retains its

¹ Mr. Bailey relies on *Totemoff v. State*, 905 P.2d 954 (Alaska 1995) to suggest that Alaska could relitigate the same issue in another court. That case would not apply to a second case challenging the constitutionality of the Affordable Care Act, however. In *Totemoff*, the state relitigated the issue of whether navigable waters are “public lands” under ANILCA, which had earlier been decided by the Ninth Circuit. The Alaska Supreme Court found that the state was not precluded from litigating the issue again—against a different party—because it was a pure question of law and the subject matter of the second case (a criminal prosecution) was “substantially unrelated” to that of the first case (a declaratory judgment action). Thus, the holding of *Totemoff* is limited to a legal issue litigated in a second case in the context of substantially different facts than those in the first case.

collateral estoppel effect pending appeal).²

For this reason, I do not concur with Mr. Bailey's conclusion that the Florida district court decision would not have preclusive effect in another lawsuit between the same litigants pending appeal in this case. And Judge Vinson's clarification order made clear that the parties were legally required to follow the order immediately, and that they did not have discretion to ignore it pending appeal—until he issued a stay.

2 & 3. The doctrine of full faith and credit and the precedential effect of a decision.

Mr. Bailey's other points—that the Florida decision is not available for enforcement under the Full Faith and Credit Clause and would not have precedential effect in a different federal district court or state court in a case between other parties—have no relevance to the Florida Affordable Care Act litigation. It is clear that the Florida District Court will not have the final word on the constitutionality of the Act, as the United States has appealed the case to the Eleventh Circuit. It is therefore irrelevant whether another court would give “full faith and credit” to the decision while it is on appeal; the plaintiffs states will not attempt to enforce the judgment in a different court while the Eleventh Circuit or the Supreme Court reviews the district court decision. It also is irrelevant that a decision by one district court is not binding on another; in fact several district courts have considered the constitutionality of this Act and have rendered inconsistent decisions. This is one of the reasons why the issue is likely to be decided ultimately by the Supreme Court. The fact that a different court in a different case—brought by different parties—might decide the case differently does not relieve that parties in *this* case from the force of the judgment made by the Florida court.

² Mr. Bailey suggests that because claim preclusion and issue preclusion require a final judgment, courts will “most likely, require that the appeal process be exhausted.” In fact, the Eleventh Circuit follows the majority view that “[w]hen a judgment has been subjected to appellate review, the appellate court's disposition of the judgment generally provides the key to its continued force as res judicata and collateral estoppel. A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel.” See *Jaffree*, 837 F.2d at 1466 (quoting 1B *Moore's Federal Practice* Para. 0.416[2], at 517 (1984)).

LEGAL SERVICES

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Juneau, Alaska 99801-1182
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MEMORANDUM

February 25, 2011

SUBJECT: Effect of Florida federal district court decision on Alaska
(Work Order No. 27-LS0536)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Dennis C. Bailey *DCB*
Legislative Counsel

You have asked for an opinion with respect to the legal effect on the State of Alaska of the recent decision by the Florida Federal District Court that declared the Patient Protection and Affordable Care Act unconstitutional. Florida v. U.S. Dept. Health and Human Svcs., No. 3:10-cv-91 RV/EMT (ND Fla. Jan 31, 2011). The court stated that the decision was the functional equivalent of an injunction but did not issue an injunction. The decision in the Florida case has not been appealed, but the government has expressed its intent to do so. The federal government has filed a motion to clarify the effect of the decision during appellate review. Defendants' Motion to Clarify, Feb. 17, 2011. [Docket No. 156].

This memorandum focuses on the question of the effect of the Florida District Court decision before a ruling by an appellate court. After appellate review is exhausted, the precedential or binding effect of an appellate decision may differ.

This memorandum describes, in broad terms, three closely related legal principles that may affect the application of the decision of the Florida Supreme Court: the doctrine of Full Faith and Credit, the principles of claim preclusion or issue preclusion, and the precedential effect of a decision. The decisions interpreting these principles are not necessarily consistent, and raise questions concerning the application of the principles to reach a definitive conclusion with respect to how they may be applied to the Florida decision. However, based on the following discussion, it is my opinion that the Florida decision is not available for enforcement under the Full Faith and Credit Clause, nor does it have preclusive effect in another litigation between the same litigants until the appeal process has been exhausted or the time limit for appeal has expired. The decision of a federal district court does not establish legal precedent, although decisions of an appeals court may establish broader legal precedent, and a decision of the United States Supreme Court has national effect.

FULL FAITH AND CREDIT

The Full Faith and Credit Clause of the Constitution, U.S. Const. art. IV, § 1, and its implementing statute, 28 U.S.C. § 1738, as well as interstitial federal common law, dictate that courts in the United States, both state and federal, must recognize and give effect to valid judgments rendered by other courts in the United States, including state and federal courts.^{1,2} Recognition of judgments requires both (1) the application of the doctrines of issue and claim preclusion and (2) the enforcement of judgments. 18-130 Moore's Federal Practice - Civil § 130.01. In order to qualify for full faith and credit, a judgment must be final, valid, and "on the merits." A "final judgment" is one that is conclusive of the proceeding before the court. Some courts read 28 U.S.C. § 1963 to require an appellate decision or expiration of the time for appeal before a judgment is considered final for purposes of registration in another court.³ Finality of a judgment is ascertained based on the law of the jurisdiction in which the judgment was rendered. 18-130 Moore's Federal Practice - Civil § 130.04. The Eleventh Circuit, which covers the State of Florida, requires that a judgment must be final by appeal or the expiration of the time for appeal. Urban Industries, Inc. v. Thevis, 670 F.2d 981 (11th Cir. 1982).

Although 28 U.S.C. 1963 only applies to judgments for the recovery of money or property, the Supreme Court has made it clear that the availability of full faith and credit does not depend on the form of relief sought. Thus, full faith and credit must be extended to actions for damages and for equitable relief. 18-130 Moore's Federal Practice - Civil § 130.07.⁴

¹ Article IV, § 1 of the U.S. Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

² Title 28 U.S.C. § 1738, in relevant part, provides:

The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

³ Cf., Conopco, Inc. v. Roll Int'l, 231 F.3d 82, 90 (2d Cir. N.Y. 2000), rejecting the proposition that a trial court's final judgment must have been upheld on appeal (or the time for appeal must have passed) before it will be entitled to full faith and credit.

⁴ See Baker v. General Motors Corp., 522 U.S. 222, 234, 118 S. Ct. 657, 139 L.Ed.2d 580 (1998) (We see no reason why the preclusive effects of an adjudication on parties and those "in privity" with them, i.e., claim preclusion and issue preclusion (res judicata and collateral estoppel), should differ depending solely upon the type of relief sought in a civil action.).

In essence, the decision of the Florida federal district court is probably not entitled to full faith and credit in other courts until the decision is final on appeal, i.e., when the appeal process has been exhausted (probably to the U.S. Supreme Court) or the time for appeal has occurred without an appeal being filed.

CLAIM PRECLUSION AND ISSUE PRECLUSION

The legal principles of claim preclusion (*res judicata*) or issue preclusion (collateral estoppel) prevent claims or issues from being relitigated after the claim or issue is finally decided. Claim and issue preclusion address the concerns of preserving the finality of a judgment. A court enforcing a judgment under the full faith and credit clause will apply claim preclusion and issue preclusion principles.

Claim Preclusion

The doctrine of claim preclusion, also referred to as *res judicata*, means that a final judgment on the merits of an action prohibits the parties or their privies from initiating subsequent litigation arising out of the same transaction or series of transactions. 3-30 Moore's Manual--Federal Practice and Procedure § 30.02. The denial of a summary judgment motion may be an adequate basis for claim preclusion if the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again. Kay-R Elec. Corp. v. Stone & Webster Constr. Co., 23 F.3d 55, 59 (2d Cir. 1994).

Issue Preclusion

The doctrine of issue preclusion, also referred to historically as collateral estoppel, essentially provides that when an issue of fact or law has been determined by a valid and final judgment, that issue may not again be litigated between the same parties in any subsequent legal action. 3-30 Moore's Manual--Federal Practice and Procedure § 30.02. Issue preclusion generally applies when the prior determination is based on a motion for summary judgment. 18-132 Moore's Federal Practice - Civil § 132.03, fn. 43.

The doctrine of full faith and credit discussed above involves the enforcement of a judgment in a different court than the court issuing the judgment. Claim preclusion or issue preclusion apply to both the court issuing a judgment and to a court where the full faith and credit of the judgment of another court is recognized. Both doctrines involve the enforcement of a valid final judgment. The effect of both doctrines is upon the parties involved. A party to an action is precluded from re-litigating a claim or issue if the party was a participant in the original litigation. Both require that the judgment in the original claim be a final judgment, which, in order to be considered a final judgment will, most likely, require that the appeal process be exhausted.

ESTABLISHING PRECEDENT / STARE DECISIS

Organization of the federal court system

The legal effect of a federal district court ruling depends, in part, on the authority of the court issuing the ruling within the structure of the federal court system. Federal courts are organized in three levels. Federal districts courts are the trial courts in the federal system, the 13 federal circuit courts of appeal are the intermediate appellate courts, and

the Supreme Court is the court of final appeal. The jurisdiction of each of 12 of the circuits and the district courts within each circuit is designated geographically. (The Federal Circuit Court of Appeal differs from the 12 geographic circuits. It is not limited geographically, but is limited by the subject and type of case it may consider.) Alaska is located in Ninth Circuit Court of Appeals. Florida is located in the Eleventh Circuit. The U.S. Supreme Court may hear cases appealed from a decision of any circuit court of appeals. One of the reasons the Supreme Court grants certiorari and hears a circuit court case is when decisions of different circuit courts of appeal conflict. A decision of the U.S. Supreme Court deciding questions of federal law is binding in federal and state courts located in all of the federal circuits.

Binding effect of a federal district court

A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case. 18-134 Moore's Federal Practice - Civil § 134.02 fn. 22. Further, a decision of a district court or a federal circuit court of appeal in one circuit does not have binding effect in another circuit. The decisions of the court of appeals for one circuit are not binding upon the courts of appeal for other circuits. 18-134 Moore's Federal Practice - Civil § 134.02 fn. 19.1. Frequently, the decisions of a district court or circuit court of appeal in one circuit conflict with similar decisions in another circuit.

The legal principle that defines the binding effect of a federal district court decision is described by one court as follows:

Stare decisis does not mandate that a district court in this circuit follow the decision of a district court in another circuit. According to Moore's Federal Practice,

Stare decisis, briefly stated, makes each judgment a statement of the law, or precedent, binding in future cases before the same court or another court owing obedience to its decisions.

1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE
P 0.401 (2d ed. 1996). . . .

Moore goes on to explain how stare decisis operates in the federal system:

The court of appeals in one circuit owes no obedience to decisions of a court of appeals in another circuit, though of course it may find the reasons given for such a decision persuasive, or may be influenced by the accumulation of authority. This freedom of the circuits to come each to its own conclusion is not only tolerated, but is an important feature in the operation of the Supreme Court's certiorari practice. The district courts, like the courts of appeals, owe no obedience to the decisions of their counterparts in other

districts, nor to the decisions of the courts of appeals in other circuits.

Id. P 0.402. Circuit precedent is consistent with this rule.

Northwest Forest Resource Council v. Dombeck, 107 F.3d 897, 900 (D.C. Cir. 1997).

The Alaska Supreme Court affirmed that it is not required to follow a federal district court decision in the context of a case involving Native rights, stating that it not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law. Totemoff v. State, 905 P.2d 954 (Alaska 1995), citing In re F.P., 843 P.2d 1214, 1215 n.1 (Alaska 1992), cert. denied, 113 S. Ct. 2441 (1993). In In re F.P. the court said:

Where a federal question is involved, the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme Court. The converse is also true; federal courts in Alaska are not bound by decisions of Alaska state courts on questions of federal law. . . .

Id. at 1215, citing Harrison v. State, 791 P.2d 359 (Alaska App. 1990).

In short, a ruling of a federal district court, the trial court, and the lowest level court in the federal system is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case. Further, the decision of a federal district court only has precedential effect in the limited territory. If it is appealed to the circuit court of appeals, a decision of the court of appeals is only enforceable within the territory of the circuit where the decision was issued. Only a decision of the U.S. Supreme Court is binding outside of the circuit where a decision is issued.

Following the above analysis it is implausible that the decision of the federal district court in Florida would have a binding precedential or binding effect on the state when appellate review has not been exhausted.

If I may be of further assistance, please advise.

DCB:ljw
11-120.ljw

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Parnell seeks advice on how to proceed on health care overhaul

The Associated Press

(02/05/11 23:42:15)

JUNEAU -- Gov. Sean Parnell is asking his attorney general to advise him on whether implementing the federal health care overhaul would put Parnell in violation of his oath of office.

A federal judge in Florida this week struck down the law as unconstitutional in a case joined by 26 states, including Alaska. A major point of contention is a provision requiring citizens to buy health insurance.

While Parnell concedes the issue is expected to be decided by the U.S. Supreme Court, he says he has a duty to uphold the law and wants the attorney general to advise him.

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Alaska to implement health care overhaul after losing \$1 million

By ERIKA BOLSTAD
Anchorage Daily News
(03/05/11 00:22:17)

WASHINGTON -- After allowing the application deadline to pass for \$1 million in federal health care assistance, Gov. Sean Parnell said Thursday he will begin implementing the new health care law after all, now that a Florida judge has told the states to do just that.

That same lower court Judge, U.S. District Judge Roger Vinson of Pensacola, Fla., had earlier found part of the new federal health care law unconstitutional, a decision cited by Parnell as justification for walking away from the federal money to assist the uninsured get health insurance. But Vinson stayed his order Thursday to give the Obama Administration time to appeal, leaving Parnell no choice but to begin putting the law into effect in Alaska.

"We will begin moving forward with state funds, rather than federal funds," said Parnell's spokeswoman, Sharon Leighow.

Federal judges in other jurisdictions have upheld the 2010 Affordable Care Act. But in any event, according to a legal analysis by the Alaska Legislature's legal division, neither Vinson's original ruling nor the rulings of any of the other lower court judges would have any force in Alaska.

State Sen. Hollis French, an Anchorage Democrat who sought the legal analysis, said Parnell should attempt to seek a waiver for his missed deadline.

Alaska, one of 26 states challenging the law's constitutionality, had held back on putting in place some aspects of health care, including turning down federal money to help set up a state insurance exchange. Alaska was the only state to refuse the money, which funds the preparations for an online exchange. Failing to apply for the grant also meant Alaska would be ineligible for an Exchange Establishment Grant, which would fund the exchange's operations through 2014.

In his order Thursday, Vinson reiterated his decision that it's unconstitutional for the law to mandate that individuals buy insurance. But Vinson also said that states must go forward with implementation, as long as the Justice Department files an appeal of his decision within seven days. Nearly everyone, including Vinson, believes the case will be decided by the Supreme Court.

"It would be extremely disruptive and cause significant uncertainty" to stop implementation of the health care act, the judge wrote. "The sooner this issue is finally decided by the Supreme Court, the better off the entire nation will be."

Parnell said Thursday in a statement that his administration "will treat the federal health care law as being in place, as we are directed by the judge in the lawsuit to which our state was a party."

The Justice Department had asked Vinson to clarify his ruling so that states would know whether they should proceed with the Affordable Care Act. A spokeswoman said they will promptly appeal Vinson's ruling.

Alaska appeared to be the only state that was deliberately holding off on implementation, and many questioned the legal backing for Parnell's move. Democrats in the Alaska legislature asked for a legal opinion on the matter; they were told Monday that a court decision by a federal judge in Florida was not binding in Alaska, which is in a different judicial circuit.

French was elated by the Florida judge's latest ruling.

"This is a good day for Alaska," said French, who like Parnell is an attorney. "The Governor can no longer evade the issue." He said it was time for Parnell to help the estimated 115,000 Alaskans who don't have health insurance.

"I hope the governor takes the opportunity to work with his administration and the legislature to implement what are some very good insurance reforms," French said.

Earlier this week, Parnell said he has moved to implement some aspects of the federal health care law into health insurance plans for state employees, including the requirement that children up to age 26 be allowed to stay on their parents' insurance policy.

But he wouldn't say whether he would pursue waivers for Alaska to design its own health care program, an option that opened up to all states earlier this week. On Monday, President Barack Obama told Parnell and other governors at their winter meeting in Washington that he supports a move to let states use waivers to design their own health care systems starting in 2014. Those state systems must meet the goals of the president's health care law, which previously wouldn't allow state waivers until 2017.

Parnell on Monday said he wouldn't apply for waivers because that would be an acknowledgment that the "the law is currently in place."

But Thursday, he said that Alaska will make decisions on a case-by-case basis about how to proceed with health-care reform. That means he'll decide whether the state "will undertake with our own money or with federal money how to implement the provisions of the law," Parnell said.

"My sole responsibility is to act in Alaska's best interests and we will do so," he said. "I continue to strongly prefer to use state resources for state-based health care solutions to increase access and improve affordability, rather than become more entangled."

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Parnell won't implement federal health overhaul in Alaska

By BECKY BOHRER
The Associated Press
(02/18/11 15:37:29)

JUNEAU -- Gov. Sean Parnell took a defiant stand Thursday against the federal health care overhaul Congress passed last year, declaring that he will refuse to implement a law he views as blatantly unconstitutional.

Parnell is the latest Republican governor to lash out against the law as the courts weigh the constitutionality of the overhaul. More than half of all states, including Alaska, have sued or joined lawsuits against the government over the health care plan pushed by President Barack Obama.

It's not immediately clear what impact Parnell's move will have on Alaskans, an estimated 14 percent of whom are uninsured year-round.

Several experts believe Parnell is on shaky legal ground and that his comments are little more than symbolic. The law won't fully take effect until 2015 — just after his first term will have ended — and the constitutionality question will not get settled until the U.S. Supreme Court decides it.

Until then, in Parnell's view the decision by a federal district judge in Florida, striking down the law as unconstitutional, "is the law of the land, as it pertains to Alaska."

Alaska was one of 26 states party to that case. On Thursday, the Justice Department asked the Florida judge to clarify his ruling and tell states that they must continue to enact the Obama administration's health care overhaul while appeals are pending. Alaska Attorney General John J. Burns said Thursday he had not yet seen the filing and could not immediately comment on it.

The Florida court isn't the only one that is looking at the constitutionality of the new health law.

Two other federal judges have upheld the law and another judge ruled a provision requiring citizens to buy health insurance or face penalties — a major point of contention in the Florida case — is unconstitutional but did not strike down the rest of the law.

"This is one renegade judge that has reached this decision," said Timothy S. Jost, a professor at the Washington and Lee University School of Law. He called the opinion "extremist" and likely to be reversed on appeal. In refusing to participate in the law, he said, Alaska "is really the outlier" among states.

PARNELL SHUNS FEDERAL MONEY

Parnell sought Burns' advice on whether enforcing and enacting the law would violate his oath to uphold the state and U.S. constitutions.

Parnell disputed the contention by Jost and others that any refusal by the states to participate in the law is an invitation to the federal government to step in and implement it for them. He reads

U.S. District Judge Roger Vinson's decision as a court order blocking implementation. Vinson is the Florida judge.

"The state of Alaska will not pursue unlawful activity to implement a federal health care regime that has been declared unconstitutional by a federal court," Parnell told the Juneau Chamber of Commerce, to applause, Thursday.

Parnell said the state will pursue lawful, market-based solutions of its own. That includes looking at the potential for a health insurance exchange without the "shiny but poisonous apple" of federal dollars and mandates "that create federal dependency and control."

He faced a Friday deadline for applying for federal funds to help set up an exchange and faced pressure from seven Democratic state senators to do so. He refused.

LAWMAKERS CRITICIZE

Parnell said several of the state lawmakers who petitioned him are attorneys like he is and considering the Florida ruling, they should know better.

Sen. Bill Wielechowski, an attorney from Anchorage who signed the letter, said 49 other states accepted the federal funding for a program that he said is meant to allow for residents to get lower-cost insurance.

"For the governor to stake his flag in the ground and say, 'This is the fight I want,' over this provision, which is really a conservative provision, indicates to me that the governor, I think, is maybe placing politics over what's best for Alaskans," Wielechowski said.

Sen. Hollis French, a supporter of the federal overhaul who has introduced legislation to establish a health benefit exchange, questioned whether Parnell would be open to "meaningful reform."

Parnell said there were four areas of the law where, before the judge's decision, he had taken action. Those areas include setting up a state-run high-risk pool providing a coverage option for Alaskans previously denied insurance for pre-existing conditions. He said about 28 people are on the program list, and he believes the state should continue funding.

Alaska will work to provide more affordable, accessible health care "as a matter of state policy, not as a mandate of the federal government," he told The Associated Press.

Ron Pollack, executive director of Families USA, said currently states have an "enormous amount of discretion" in how they implement provisions of the law. If the governor refuses to exercise that, the federal government will have the say, he said.

Neither he nor Jost knew of any other state taking action similar to Parnell.

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Department of Law Determines Alaska Not Required to Follow Health Care Legislation

Mon, February 14, 2011

Posted in [Alaska News](#), [Alaska Politics](#), [Top Stories](#)

Dave Donaldson, [APRN](#) – Juneau

The Department of Law has advised Governor Sean Parnell that Alaska is not required to follow the national Health Care legislation that went into effect last year.

The governor plans to follow that advice.

Last month, a Florida federal district court found the act unconstitutional, and Attorney General-designee John Burns told House and Senate Judiciary Committees Monday that he has advised the governor that – unless overturned by the U.S. Supreme Court – the Florida decision is binding in Alaska.

Burns argues the decision leaves compliance up to the states.

But Senate Judiciary Chairman Hollis French disagreed with Burns' advice, saying that without an injunction from the Florida Court, or a confirming opinion by the U.S. Supreme Court, the decision leaves the law in place.

The governor's staff says in an e-mail response, "The governor will not implement a law that has been ruled unconstitutional. He is committed to working to find ways to increase accessibility and improve affordability of health care for Alaskans."

The Florida case has not yet been appealed to the U.S. Supreme Court, however the Justice Department – and the state's challenging the law – have indicated that a national decision is needed.

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Fla. judge strikes down health care overhaul; Alaska one of 26 states in lawsuit

by Christopher Eshleman / ceshleman@newsminer.com

01.31.11 - 11:48 am

• AUDIO: [Gov. Parnell reaction to health care ruling](#)

JUNEAU — Gov. Sean Parnell, emboldened by a federal judge's order Monday, has asked federal agencies to pause health care reform.

Parnell's request came hours after the state found itself on the winning side of the court decision, which called last year's health care reform unconstitutional.

The reform law, which requires all able U.S. citizens to obtain health insurance, has been rejected twice and upheld twice in the lower courts. All sides say it'll fall to the U.S. Supreme Court to decide.

"Because the authority of Congress to enact the mandatory health insurance provisions has been ruled unconstitutional, I urge the federal government to voluntarily suspend all efforts to implement these provisions until the U.S. Supreme Court decides the issue," said Parnell.

Critics have accused the governor of dragging his feet in implementing the reforms and on Monday said he was throwing stones rather than offering solutions.

Rep. David Guttenberg, D-Fairbanks, said escalating drug and medical costs threaten to injure the state's relatively healthy financial position. Guttenberg, who has pitched a handful of bills aimed at lowering prescription drug costs here, challenged Parnell to take a more constructive approach toward health care issues at the state and national levels.

"All I've seen is, 'We don't want national health care reform,'" he said. "I want to know when he's going to tackle that problem" — high health care costs — "because as far as I can tell he's not doing it."

The governor said while he was "concerned about rising health care costs, solutions have to be constitutional."

Parnell announced last April the state would join others in the lawsuit. He called the issue a key point in the historic debate about the power-sharing relationship between states and Washington, D.C.

Parnell called the individual mandate a case of inappropriate "federal encroachment."

Florida's U.S. District Judge Roger Vinson, in his decision Monday, said he "reluctantly" rejected Congress' decision to mandate insurance. The mandate is a

linchpin of the 2010 health care reform.

“At a time when there is virtually unanimous agreement that health care reform is needed in this country, it is hard to invalidate and strike down a statute titled ‘The Patient Protection and Affordable Care Act,’” Vinson wrote.

U.S. Sen. Lisa Murkowski said in a statement the ruling “confirms what many of us have been saying about the constitutionality of the individual mandate in the law. Clearly, this is not the final word on the matter, and ultimately the U.S. Supreme Court will be the final arbitrator.”

Alaska filed suit with 20 other states in April 2010, and six more joined later.

The Alaska Department of Law, in a 49-page memorandum on April 19, said the state should reject Congress’ decision to “shortcut” the federal separation of powers through its insurance mandate.

Vinson’s decision said the mandate applied the federal government’s power to regulate commerce too broadly. He pointed to the states’ argument that “not even in the context of insurance under the National Flood Insurance Program did Congress mandate that all homeowners buy flood insurance directly from a private company.”

A judge in Virginia also rejected the mandate, but two judges in other states have upheld it.

In his ruling, Vinson went further than the Virginia judge and declared the entire health care law unconstitutional, The Associated Press reported Monday.

“This is obviously a very difficult task. Regardless of how laudable its attempts may have been to accomplish these goals in passing the act, Congress must operate within the bounds established by the Constitution,” Vinson wrote in his 78-page ruling.

At issue is whether the government is reaching beyond its constitutional power to regulate interstate commerce by requiring citizens to purchase health insurance or face tax penalties.

Attorneys for President Barack Obama’s administration argued the health care system was part of the interstate commerce system. They said the government can levy a tax penalty on Americans who decide not to purchase health insurance because all Americans are consumers of medical care.

But attorneys for the states said the administration was essentially coercing the states into participating in the overhaul by holding billions of Medicaid dollars hostage. The states also said the federal government is violating the Constitution by forcing a mandate on the states without providing money to pay for it.

Florida’s former Republican Attorney General Bill McCollum filed the lawsuit just minutes after Obama signed the 10-year, \$938 billion health care bill into law

in March. He chose a court in Pensacola, one of Florida's most conservative cities. The nation's most influential small business lobby, the National Federation of Independent Business, also joined.

Other states that joined the suit are Alabama, Arizona, Colorado, Georgia, Indiana, Idaho, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin and Wyoming.

The Associated Press contributed to this report.

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The Washington Post

Judge clears way for implementation of health-care law in states that are challenging it

By N.C. Aizenman
Washington Post Staff Writer
Thursday, March 3, 2011; 9:22 PM

A federal judge in Florida who earlier ruled the new health-care law unconstitutional said Thursday that implementation can proceed in the 26 states that mounted the legal challenge while the Obama administration pursues an appeal.

However, U.S. District Court Judge Roger Vinson attached two conditions to the "stay" of his ruling: The administration must file its appeal within seven days and it must request an expedited review from either the Court of Appeals or the Supreme Court.

"Almost everyone agrees that the Constitutionality of the Act is an issue that will ultimately have to be decided by the Supreme Court of the United States," Vinson wrote. "It is very important to everyone in this country that this case move forward as soon as practically possible."

Justice Department spokeswoman Tracy Schmalzer said the administration would seek fast-track consideration from the 11th Circuit, just as it has with other challenges to the law that have reached circuit courts.

However, a direct appeal to the Supreme Court is highly unlikely. The administration has opposed an effort by Virginia to do so in

a similar but separate case. And the states party to the Florida suit have made clear they do not intend to pursue that avenue, either.

The suit is one of 20 pending against the law. Vinson's original Jan. 31 decision was one of two to rule against it. Like the judge in Virginia's suit, Vinson found the law's requirement that virtually all Americans obtain health insurance beginning in 2014 to be unconstitutional.

But Vinson, who like the Virginia judge was a Republican appointee, went a step further, ruling that the insurance mandate was so inextricably linked to the rest of the law that the entire statute should be invalidated.

Three other federal judges, all Democratic appointees, have upheld the law, most

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The Washington Post

Judge clears way for implementation of health-care law in states that are challenging it

recently Judge Gladys Kessler in the District of Columbia.

Technically, the administration had not requested a stay of Vinson's order voiding the law, but rather a clarification of whether he had intended to halt the law's rollout pending appeals.

The confusion stemmed from Vinson's decision not to formally enjoin the law in his original order; instead he suggested that it was "the functional equivalent" of an injunction because it's presumed the federal government automatically complies with such judgements.

This formulation provoked a flurry of conflicting interpretations from lawyers for both sides as well as among legal scholars.

Republican governors and attorneys general of three states party to the suit - Alaska, Florida and Wisconsin - immediately declared that in their states, at least, the law is now "dead."

In the weeks since, they have also returned some state planning funds provided through the law. But they have kept other funds, and they did not take steps to undo provisions of the law that had already taken effect.

By contrast, governors of several other states that are also part of the challenge said they

believed that until the appeals process is completed, the statute remains in effect and they must comply with it.

In his opinion Thursday, Vinson rebuked the administration for suggesting that his original order was ambiguous, writing that he clearly meant for it to have the "practical" effect of an injunction that could only be lifted if the government requested a stay.

"It was not expected that [the government] would effectively ignore the order and declaratory judgement for two-and-one-half weeks, continue to implement the Act, and only then file a belated motion to 'clarify,' " the judge wrote.

In an example of scathing language he employed throughout the decision, Vinson added that the administration's claim that its delay was due to the need for careful



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The Washington Post

Judge clears way for implementation of health-care law in states that are challenging it

analysis, "seems contradictory to media reports that the White House declared within hours after entry of my order that 'implementation will proceed apace.' " And, at another point he wrote that one of the administration's arguments "borders on misrepresentation."

Still, since administration lawyers had made clear that if the judge responded that they needed a stay, they intended to request one, Vinson said he would "save time" by treating the government's motion for clarification as one also requesting a stay.

In granting it, the judge pointed to the other cases pending against the law and the conflicting opinions from other courts.

Alaska Gov. Sean Parnell (R) issued a statement saying that although he now considers the law back in effect, he would still be reluctant to apply for federal implementation funds.

"I continue to strongly prefer to use state resources for state-based health-care solutions to increase access and improve affordability, rather than become more entangled," he said.

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Judge asked to clarify health ruling

By MELISSA NELSON
The Associated Press
(02/17/11 16:31:55)

PENSACOLA, Fla. -- The Justice Department asked a federal judge in Florida on Thursday to tell states that they must continue to enact the Obama administration's health care overhaul despite the judge's ruling that the law is unconstitutional.

In a motion to clarify, administration attorneys asked U.S. District Judge Roger Vinson to make clear that states cannot ignore the new health care laws while his ruling is being appealed.

At stake, according to the government's motion, are provisions of the new law that would create chaos if ignored by the states.

Those provisions include 2011 changes in Medicare payment rates. Delaying those changes "could cause major delays and errors in the payment of the roughly 100 million Medicare claims processed each month," the motion states.

Florida, Alaska and 24 other states filed the lawsuit that said Congress exceeded its authority by requiring all citizens to purchase health insurance or face tax penalties.

Vinson agreed, ruling on Jan. 31 that President Barack Obama's entire health care overhaul law is unconstitutional. The broad challenge seems certain to be resolved only by the Supreme Court.

He declared the law "a plain case of judicial overreaching." Some states, citing Vinson's ruling, have refused to cooperate with the health care law.

For example, earlier Thursday in Alaska, Gov. Sean Parnell said he would not implement the new law because Vinson ruled it was unconstitutional.

"The state of Alaska will not pursue unlawful activity to implement a federal health care regime that has been declared unconstitutional by a federal court," Parnell told the Juneau Chamber of Commerce, to applause.

Parnell said the state would pursue lawful, market-based solutions of its own. That includes planning for a health insurance exchange, meant to offer a choice of health plans, without the "shiny but poisonous apple" of federal dollars and mandates "that create federal dependency and control."

A spokeswoman for Florida Attorney General Pam Bondi said Vinson's ruling indeed does mean the states need not move forward with the health overhaul.

Vinson "clearly stated" that the order equaled an injunction, Jennifer Meale said in an e-mailed statement. An injunction legally halts or forbids something.

But in the filing, the Justice Department said the opposite.

Even though Vinson declared the law unconstitutional, all states in the lawsuit already have an obligation to comply with all the provisions of the Affordable Care Act while the case is being appealed, Justice lawyers argued.

"We believe it is important to put to rest any doubts about the ability of states and other parties to continue to implement these critical programs and consumer protections provided under this statute," said Justice Department spokeswoman Tracy Schmalzer.

The issue is expected to be resolved by the Supreme Court. Two other U.S. district judges previously upheld the law, both Democratic appointees to the federal bench.

A Republican appointee in Virginia also ruled against the law. Vinson's ruling is considered the most sweeping against the health overhaul. He was appointed by Republican President Ronald Reagan.

AP Writer Brendan Farrington in Tallahassee and Becky Bohrer in Juneau contributed to this report

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- Relocated with family from Raleigh, North Carolina to Fairbanks, Alaska in 1960, to Nome, Alaska in 1961, and back to Fairbanks, Alaska in 1970

- Commercial fisherman (drift net) Bristol Bay (approximately 10 seasons)
 - Fisheries Technician, Alaska Department of Fish and Game, worked throughout Western Alaska and in Prince William Sound (approximately 10 seasons)
 - Married to Christi Burns, 1986
 - Two daughters, Alissa, age 22, a senior at the University of Arizona and Kate, age 17, high school junior studying abroad in Poland on a Rotary Exchange fellowship
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 - Rotary Club of Fairbanks, Past Member
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 - Hospice of Alaska, Member of the Board of Directors
 - Big Brothers/Big Sisters of Fairbanks – "Big Couple"
 - Former member of University of Alaska Fairbanks Hockey Team during college
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INTERESTS

- Fly fishing, photography, outdoor activities, and sports (UAF hockey)

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 - Former member of University of Alaska Fairbanks Hockey Team during college
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INTERESTS

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Posted on Wed, Jan. 12, 2011

Ballot proposal to ban abortion in Alaska ruled unconstitutional

Sean Cockerham | The Anchorage Daily News

last updated: January 12, 2011 06:42:43 AM

Alaska attorney general John Burns has found unconstitutional a proposed ballot initiative that was essentially seeking to outlaw abortion in Alaska.

"The proposed bill meets the 'clearly unconstitutional' standard because it would supersede a woman's constitutional right to privacy," said the opinion, released late Monday. "This right is a federal constitutional right recognized by the U.S. Supreme Court in *Roe v. Wade*."

Burns, who started work as the new attorney general last month, is recommending that the lieutenant governor refuse to certify the "Natural Right to Life" initiative.

The initiative tries to make it Alaska law that "the natural right to life and body of the unborn child supersedes the statutory right of the mother to consent to the injury or death of her unborn child."

To read the complete article, visit www.adn.com.

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MEMORANDUM

February 25, 2011

SUBJECT: Effect of Florida federal district court decision on Alaska
(Work Order No. 27-LS0536)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: Dennis C. Bailey ^{DCB}
Legislative Counsel

You have asked for an opinion with respect to the legal effect on the State of Alaska of the recent decision by the Florida Federal District Court that declared the Patient Protection and Affordable Care Act unconstitutional. Florida v. U.S. Dept. Health and Human Svcs., No. 3:10-cv-91 RV/EMT (ND Fla. Jan 31, 2011). The court stated that the decision was the functional equivalent of an injunction but did not issue an injunction. The decision in the Florida case has not been appealed, but the government has expressed its intent to do so. The federal government has filed a motion to clarify the effect of the decision during appellate review. Defendants' Motion to Clarify, Feb. 17, 2011. [Docket No. 156].

This memorandum focuses on the question of the effect of the Florida District Court decision before a ruling by an appellate court. After appellate review is exhausted, the precedential or binding effect of an appellate decision may differ.

This memorandum describes, in broad terms, three closely related legal principles that may affect the application of the decision of the Florida Supreme Court: the doctrine of Full Faith and Credit, the principles of claim preclusion or issue preclusion, and the precedential effect of a decision. The decisions interpreting these principles are not necessarily consistent, and raise questions concerning the application of the principles to reach a definitive conclusion with respect to how they may be applied to the Florida decision. However, based on the following discussion, it is my opinion that the Florida decision is not available for enforcement under the Full Faith and Credit Clause, nor does it have preclusive effect in another litigation between the same litigants until the appeal process has been exhausted or the time limit for appeal has expired. The decision of a federal district court does not establish legal precedent, although decisions of an appeals court may establish broader legal precedent, and a decision of the United States Supreme Court has national effect.

FULL FAITH AND CREDIT

The Full Faith and Credit Clause of the Constitution, U.S. Const. art. IV, § 1, and its implementing statute, 28 U.S.C. § 1738, as well as interstitial federal common law, dictate that courts in the United States, both state and federal, must recognize and give effect to valid judgments rendered by other courts in the United States, including state and federal courts.^{1,2} Recognition of judgments requires both (1) the application of the doctrines of issue and claim preclusion and (2) the enforcement of judgments. 18-130 Moore's Federal Practice - Civil § 130.01. In order to qualify for full faith and credit, a judgment must be final, valid, and "on the merits." A "final judgment" is one that is conclusive of the proceeding before the court. Some courts read 28 U.S.C. § 1963 to require an appellate decision or expiration of the time for appeal before a judgment is considered final for purposes of registration in another court.³ Finality of a judgment is ascertained based on the law of the jurisdiction in which the judgment was rendered. 18-130 Moore's Federal Practice - Civil § 130.04. The Eleventh Circuit, which covers the State of Florida, requires that a judgment must be final by appeal or the expiration of the time for appeal. Urban Industries, Inc. v. Thevis, 670 F.2d 981 (11th Cir. 1982).

Although 28 U.S.C. 1963 only applies to judgments for the recovery of money or property, the Supreme Court has made it clear that the availability of full faith and credit does not depend on the form of relief sought. Thus, full faith and credit must be extended to actions for damages and for equitable relief. 18-130 Moore's Federal Practice - Civil § 130.07.⁴

¹ Article IV, § 1 of the U.S. Constitution provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

² Title 28 U.S.C. § 1738, in relevant part, provides:

The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

³ Cf., Conopco, Inc. v. Roll Int'l, 231 F.3d 82, 90 (2d Cir. N.Y. 2000), rejecting the proposition that a trial court's final judgment must have been upheld on appeal (or the time for appeal must have passed) before it will be entitled to full faith and credit.

⁴ See Baker v. General Motors Corp., 522 U.S. 222, 234, 118 S. Ct. 657, 139 L.Ed.2d 580 (1998) (We see no reason why the preclusive effects of an adjudication on parties and those "in privity" with them, i.e., claim preclusion and issue preclusion (res judicata and collateral estoppel), should differ depending solely upon the type of relief sought in a civil action.).

In essence, the decision of the Florida federal district court is probably not entitled to full faith and credit in other courts until the decision is final on appeal, i.e., when the appeal process has been exhausted (probably to the U.S. Supreme Court) or the time for appeal has occurred without an appeal being filed.

CLAIM PRECLUSION AND ISSUE PRECLUSION

The legal principles of claim preclusion (*res judicata*) or issue preclusion (*collateral estoppel*) prevent claims or issues from being relitigated after the claim or issue is finally decided. Claim and issue preclusion address the concerns of preserving the finality of a judgment. A court enforcing a judgment under the full faith and credit clause will apply claim preclusion and issue preclusion principles.

Claim Preclusion

The doctrine of claim preclusion, also referred to as *res judicata*, means that a final judgment on the merits of an action prohibits the parties or their privies from initiating subsequent litigation arising out of the same transaction or series of transactions. 3-30 Moore's Manual--Federal Practice and Procedure § 30.02. The denial of a summary judgment motion may be an adequate basis for claim preclusion if the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again. Kay-R Elec. Corp. v. Stone & Webster Constr. Co., 23 F.3d 55, 59 (2d Cir. 1994).

Issue Preclusion

The doctrine of issue preclusion, also referred to historically as *collateral estoppel*, essentially provides that when an issue of fact or law has been determined by a valid and final judgment, that issue may not again be litigated between the same parties in any subsequent legal action. 3-30 Moore's Manual--Federal Practice and Procedure § 30.02. Issue preclusion generally applies when the prior determination is based on a motion for summary judgment. 18-132 Moore's Federal Practice - Civil § 132.03, fn. 43.

The doctrine of full faith and credit discussed above involves the enforcement of a judgment in a different court than the court issuing the judgment. Claim preclusion or issue preclusion apply to both the court issuing a judgment and to a court where the full faith and credit of the judgment of another court is recognized. Both doctrines involve the enforcement of a valid final judgment. The effect of both doctrines is upon the parties involved. A party to an action is precluded from re-litigating a claim or issue if the party was a participant in the original litigation. Both require that the judgment in the original claim be a final judgment, which, in order to be considered a final judgment will, most likely, require that the appeal process be exhausted.

ESTABLISHING PRECEDENT / STARE DECISIS

Organization of the federal court system

The legal effect of a federal district court ruling depends, in part, on the authority of the court issuing the ruling within the structure of the federal court system. Federal courts are organized in three levels. Federal districts courts are the trial courts in the federal system, the 13 federal circuit courts of appeal are the intermediate appellate courts, and

the Supreme Court is the court of final appeal. The jurisdiction of each of 12 of the circuits and the district courts within each circuit is designated geographically. (The Federal Circuit Court of Appeal differs from the 12 geographic circuits. It is not limited geographically, but is limited by the subject and type of case it may consider.) Alaska is located in Ninth Circuit Court of Appeals. Florida is located in the Eleventh Circuit. The U.S. Supreme Court may hear cases appealed from a decision of any circuit court of appeals. One of the reasons the Supreme Court grants certiorari and hears a circuit court case is when decisions of different circuit courts of appeal conflict. A decision of the U.S. Supreme Court deciding questions of federal law is binding in federal and state courts located in all of the federal circuits.

Binding effect of a federal district court

A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case. 18-134 Moore's Federal Practice - Civil § 134.02 fn. 22. Further, a decision of a district court or a federal circuit court of appeal in one circuit does not have binding effect in another circuit. The decisions of the court of appeals for one circuit are not binding upon the courts of appeal for other circuits. 18-134 Moore's Federal Practice - Civil § 134.02 fn. 19.1. Frequently, the decisions of a district court or circuit court of appeal in one circuit conflict with similar decisions in another circuit.

The legal principle that defines the binding effect of a federal district court decision is described by one court as follows:

Stare decisis does not mandate that a district court in this circuit follow the decision of a district court in another circuit. According to Moore's Federal Practice,

Stare decisis, briefly stated, makes each judgment a statement of the law, or precedent, binding in future cases before the same court or another court owing obedience to its decisions.

1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE
P 0.401 (2d ed. 1996). . . .

Moore goes on to explain how stare decisis operates in the federal system:

The court of appeals in one circuit owes no obedience to decisions of a court of appeals in another circuit, though of course it may find the reasons given for such a decision persuasive, or may be influenced by the accumulation of authority. This freedom of the circuits to come each to its own conclusion is not only tolerated, but is an important feature in the operation of the Supreme Court's certiorari practice. The district courts, like the courts of appeals, owe no obedience to the decisions of their counterparts in other

Senator Hollis French

February 25, 2011

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districts, nor to the decisions of the courts of appeals in other circuits.

Id. P 0.402. Circuit precedent is consistent with this rule.

Northwest Forest Resource Council v. Dombeck, 107 F.3d 897, 900 (D.C. Cir. 1997).

The Alaska Supreme Court affirmed that it is not required to follow a federal district court decision in the context of a case involving Native rights, stating that it not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law. Totemoff v. State, 905 P.2d 954 (Alaska 1995), citing In re F.P., 843 P.2d 1214, 1215 n.1 (Alaska 1992), cert. denied, 113 S. Ct. 2441 (1993). In In re F.P. the court said:

Where a federal question is involved, the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme Court. The converse is also true; federal courts in Alaska are not bound by decisions of Alaska state courts on questions of federal law. . . .

Id. at 1215, citing Harrison v. State, 791 P.2d 359 (Alaska App. 1990).

In short, a ruling of a federal district court, the trial court, and the lowest level court in the federal system is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case. Further, the decision of a federal district court only has precedential effect in the limited territory. If it is appealed to the circuit court of appeals, a decision of the court of appeals is only enforceable within the territory of the circuit where the decision was issued. Only a decision of the U.S. Supreme Court is binding outside of the circuit where a decision is issued.

Following the above analysis it is implausible that the decision of the federal district court in Florida would have a binding precedential or binding effect on the state when appellate review has not been exhausted.

If I may be of further assistance, please advise.

DCB:ljw
11-120.ljw

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THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, JOEL)
GILBERTSON in his official capacity)
as Alaska Commissioner of Health &)
Social Services, MARCIA KENNAI, in)
her official capacity as Deputy)
Commissioner of the Office of Children's)
Services, PHILLIP MITCHELL, in his)
official capacity as Chief of the Alaska)
Bureau of Vital Statistics, and GREGG)
RENKES, in his official capacity as)
Attorney General,)

Appellants,)

v.)

NATIVE VILLAGE OF TANANA,)
DAN SCHWIETERT, THERESA)
SCHWIETERT, NULATO VILLAGE,)
VILLAGE OF KALSKAG, AKIAK)
NATIVE COMMUNITY, VILLAGE OF)
LOWER KALSKAG, and KENAITZE)
INDIAN TRIBE,)

Appellees.)

) Supreme Court No. S-13332

) Superior Court No. 3AN-04-12194 CI

) OPINION

) No. 6542 - March 4, 2011

Appeal from the Superior Court of the State of Alaska, Third
Judicial District, Anchorage, John Suddock and Sen K. Tan,
Judges.

Appearances: Peter K. Putzier, Assistant Attorney General,
Anchorage, Talis J. Colberg, Attorney General, Juneau, for

Appellants. Heather Kendall-Miller, Native American Rights Fund, Anchorage, Lloyd B. Miller, Sonosky, Chambers, Sachse, Miller & Munson, LLP, Anchorage, and Andy Harrington, Alaska Legal Services Corporation, Fairbanks, for Appellees.

Before: Carpeneti, Chief Justice, Fabe, Winfree, and Christen, Justices. [Stowers, Justice, not participating.]

WINFREE, Justice.

I. INTRODUCTION

In this case we revisit ripeness and tribal sovereignty decisions intersecting in a dispute between the State of Alaska and a number of Alaska Native tribes. Procedurally, we are asked whether the narrowed view of ripeness announced in *Brause v. State, Department of Health & Social Services*¹ and recently applied in *State v. ACLU of Alaska*² requires dismissal of this case without reaching its merits. Substantively, we are asked (1) whether the inherent sovereign jurisdiction of Alaska Native tribes recognized over a decade ago in *John v. Baker*³ includes the initiation of “child custody proceedings” as that term is used in the Indian Child Welfare Act (ICWA), and (2) if so, whether tribal court judgments in those proceedings are entitled to full faith and credit by the State.

We conclude that this dispute is ripe for a limited decision, acknowledging that further refinements and qualifications must arise from future adjudications based on specific factual scenarios. Today we decide that (1) federally recognized Alaska Native tribes are not necessarily precluded from exercising inherent sovereign jurisdiction to

¹ 21 P.3d 357 (Alaska 2001).

² 204 P.3d 364 (Alaska 2009).

³ 982 P.2d 738 (Alaska 1999).

initiate “child custody proceedings” as ICWA defines that term, and (2) judgments issued in those proceedings may be entitled to full faith and credit by the State under ICWA. But lack of specific facts precludes us from defining the extent of any individual Alaska Native tribe’s inherent sovereign jurisdiction to initiate “child custody proceedings” or the standards for determining which judgments would be entitled to full faith and credit by the State.

II. PROCEEDINGS

Native Village of Tanana (Tanana), Nulato Village (Nulato), Akiak Native Community (Akiak), Village of Kalskag (Kalskag), Village of Lower Kalskag (Lower Kalskag), and Kenaitze Indian Tribe (Kenaitze) are recognized as Indian tribes by the United States Department of the Interior,⁴ and all but Kenaitze are listed as “Alaska Native villages” under the Alaska Native Claims Settlement Act (ANCSA).⁵ In this opinion, we refer to the tribal appellees collectively as “the Tribes.”⁶

The Tanana Tribal Court, the Nulato Tribal Council, and the Kenaitze Tribal Court all hear children’s proceedings initiated by their tribes or transferred from state court, and they issue decrees establishing protection, guardianship, and custody of

⁴ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,368-69 (Oct. 21, 1993) (listing federally recognized tribes); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 68 Fed. Reg. 68,180, 68,183-84 (Dec. 5, 2003) (same).

⁵ 43 U.S.C. §§ 1602(c), 1610(b) (2000).

⁶ The individual appellees, Dan and Theresa Schwietert, adopted a special-needs Alaska Native child through the Tanana Tribal Court in June 2004 and received a birth certificate from the State. Although plaintiffs below, the Schwieterts participated in the litigation in a collateral supporting role to the Tribes, and the final judgment does not mention the Schwieterts.

children.⁷ Akiak's Quanerceraarviat Tribal Court hears children's cases, including tribally initiated child protection cases, and issues orders and adoption decrees. The Kalskag Traditional Council initiates child protection proceedings. The Lower Kalskag Tribal Court hears matters involving allegations of child abuse or neglect.

In late October 2004 the Tribes⁸ sued the State of Alaska and — in their official capacities — the Attorney General and heads of the Office of Children's Services (OCS), Bureau of Vital Statistics (BVS), and Department of Health and Social Services (DHSS), collectively "the State." The Tribes alleged that based on an October 1, 2004 opinion letter from then-Attorney General Gregg Renkes (2004 Attorney General Opinion), the State adopted a policy and began taking official action to interfere with tribal rights under ICWA and to deny full faith and credit to tribal adoption decrees and orders issued in tribally initiated child protection cases. The Tribes sought declaratory relief recognizing that Alaska Native tribes "possess inherent and concurrent jurisdiction to adjudicate children's proceedings and issue tribal court decrees" and injunctive relief forcing "the [S]tate and its agencies to grant full faith and credit to tribal court decrees as required by law."

In late December 2004 the State moved to dismiss the suit on ripeness grounds. In response the Tribes moved for leave to file an amended complaint in early January 2005, which the State opposed on ripeness and futility grounds. The superior court granted the Tribes' motion in early March 2005 and accepted the amended

⁷ ICWA defines "tribal court" in relevant part as "a court with jurisdiction over child custody proceedings and which is . . . established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings." 25 U.S.C. § 1903(12) (2000).

⁸ The original five plaintiff tribes were Tanana, Nulato, Kalskag, Akiak, and Lower Kalskag. The Tribes amended their complaint twice to add plaintiffs: first to add the Schweiterts and second to add Kenaitze.

complaint. After oral argument Superior Court Judge John Suddock subsequently denied the State's dismissal motion from the bench, stating in part:

[A]s the pleading[] says, the tribal courts are behaving as if they have original jurisdiction in these matters. They are actually adjudicating them and they are placing children based on them and the [S]tate is here saying . . . [“]that’s void. Those courts are [a] nullity. Any of those parents could go get those children back and not be in violation of a binding court order because it’s void ab initio.[”] Strikes me that that’s a bad situation, that there is a very ripe question for a review: whether or not the Attorney General ever put pencil to paper . . . there is a network of tribal courts out there that has assumed a jurisdiction beyond . . . what the [S]tate contends is proper. Ordinary citizens are being affected. Children are being affected. It seems to me that there is a ripe question for declaratory judgment.

In November 2005 the Tribes moved for partial summary judgment on the legal issue of Alaska Native tribes’ “inherent sovereign authority . . . to adjudicate children’s proceedings.” The State opposed the Tribes’ motion and cross-moved for summary judgment, arguing that the 2004 Attorney General Opinion accurately interpreted existing Alaska case law and that the Tribes “do not possess the inherent authority to initiate child protection cases.”

Superior Court Judge Sen K. Tan granted the Tribes’ motion for partial summary judgment in May 2007, ruling that “tribes retain concurrent jurisdiction to legislate, to initiate, and to adjudicate [child in need of aid] cases in tribal courts.” Upon the State’s urging that the partial summary judgment granted the Tribes all the relief requested in their amended complaint, Judge Tan issued a final judgment on August 26, 2008.

The relevant language from the declaratory judgment portion of the final judgment is as follows:

1. [The Tribes] possess inherent [sovereign] jurisdiction to initiate child custody proceedings. . . . The [Tribes] share concurrent jurisdiction with the State . . . over child custody proceedings as the term is defined by the ICWA[,] 25 U.S.C. § 1903.

2. [The Tribes] are entitled to access . . . confidential reports and other documents in the possession of [OCS] concerning their member children.

3. [The Tribes] are entitled to full faith and credit under 25 U.S.C. § 1911(d) for their public acts, records, and judicial proceedings to the same extent that the State . . . gives full faith and credit to the public acts, records[,] and judicial proceedings of any other [s]tate.

The final judgment also enjoined the State from: (1) implementing the 2004 Attorney General Opinion by adopting policies or regulations; (2) relying on, enforcing, or carrying out any mandate based on the 2004 Attorney General Opinion that is contrary to the superior court's decision; (3) denying full faith and credit to the Tribes' determinations in ICWA-defined child custody proceedings; (4) refusing to notify the Tribes of reports of harm and provide such reports of harm for investigation; and (5) denying the Tribes information they otherwise are entitled to receive under ICWA.

The State appeals.

III. STANDARD OF REVIEW

We evaluate de novo the issue of ripeness.⁹ We evaluate de novo the scope of tribal jurisdiction and the meaning of federal statutes.¹⁰ Under de novo review, we

⁹ *ACLU of Alaska*, 204 P.3d at 367-68 (clarifying standard of review and rejecting abuse of discretion standard suggested in earlier decisions).

¹⁰ *John v. Baker*, 982 P.2d at 744.

apply “the rule of law that is most persuasive in light of precedent, reason, and policy.”¹¹

IV. DISCUSSION

Today’s decision requires a review of: ICWA; Alaska and federal decisions regarding Alaska Native tribal sovereignty over ICWA-defined “child custody proceedings”; *John v. Baker*; and the State’s reaction to *John v. Baker* both prior to and after October 1, 2004. This backdrop provides the necessary context for us to address both the procedural ripeness and substantive sovereignty questions before us.

A. ICWA And Relevant Authorities

1. Relevant ICWA provisions

In 1978 Congress enacted ICWA with the goal of:

protect[ing] the best interests of Indian children and . . .
promot[ing] the stability and security of Indian tribes and
families by the establishment of minimum Federal standards
for the removal of Indian children from their families and the
placement of such children in foster or adoptive homes which
will reflect the unique values of Indian culture, and by
providing for assistance to Indian tribes in the operation of
child and family service programs.^[12]

Congress found “that there is no resource . . . more vital to the continued existence and integrity of Indian tribes than their children”¹³ and “that an alarmingly high percentage

¹¹ *Glamann v. Kirk*, 29 P.3d 255, 259 (Alaska 2001) (quoting *Philbin v. Matanuska-Susitna Borough*, 991 P.2d 1263, 1266 (Alaska 1999)).

¹² Indian Child Welfare Act, Pub. L. No. 95-608, § 3, 92 Stat. 3069 (1978) (codified at 25 U.S.C. § 1902 (2000)); accord *A.B.M. v. M.H.*, 651 P.2d 1170, 1172 (Alaska 1982).

¹³ 25 U.S.C. § 1901(3) (2000); see also *John v. Baker*, 982 P.2d at 747 (“[T]he statute ‘seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.’ ” (quoting H.R. Rep. No. 95-1386, at 23 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7546)).

of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”¹⁴ Congress further found that when “exercising their recognized jurisdiction over Indian child custody proceedings” states “have often failed to recognize the essential tribal relations of Indian people and [their] cultural and social standards.”¹⁵

In short, ICWA “constructs a statutory scheme to prevent states from improperly removing Indian children from their parents, extended families, and tribes.”¹⁶ “Its most important procedural elements include establishing tribal courts as the required or preferred forum for adjudication of Indian child custody proceedings.”¹⁷ The United States Supreme Court declared over 20 years ago that “Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. More specifically, [ICWA’s] purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings.”¹⁸

ICWA § 1911, titled “Indian tribe jurisdiction over Indian child custody

¹⁴ 25 U.S.C. § 1901(4); accord *John v. Baker*, 982 P.2d at 746.

¹⁵ 25 U.S.C. § 1901(5).

¹⁶ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 11.01[1], at 820 (Nell Jessup Newton ed., 2005 ed.) (hereinafter COHEN’S HANDBOOK).

¹⁷ CONFERENCE OF W. ATT’YS GEN., AMERICAN INDIAN LAW DESKBOOK 571 (4th ed. 2008) (hereinafter INDIAN LAW DESKBOOK); see also B.J. JONES, MARK TILDEN & KELLY GAINES-STONER, THE INDIAN CHILD WELFARE ACT HANDBOOK 5 (2d ed. 2008) (hereinafter ICWA HANDBOOK) (identifying one of ICWA’s primary objectives as “encourag[ing] tribal court adjudication of child custody proceedings involving Indian children”).

¹⁸ *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989) (emphasis in original) (footnote omitted).

proceedings,” limits state jurisdiction over ICWA-defined child custody proceedings in two ways.¹⁹ First, § 1911(a) provides that Indian tribes have exclusive jurisdiction of child custody proceedings involving Indian children residing or domiciled in Indian country, unless federal law otherwise vests jurisdiction in the state.²⁰ Tribes also retain exclusive jurisdiction over tribal court wards regardless of residence or domicile.²¹

¹⁹ 25 U.S.C. § 1911 (2000). For ICWA’s purposes, “child custody proceeding” means and includes foster care placements, actions to terminate parental rights, preadoptive placements, and adoptive placements. 25 U.S.C. § 1903(1). ICWA generally does not apply to divorce or divorce-like child custody proceedings. *See id.*; *John v. Baker*, 982 P.2d at 746-47; INDIAN LAW DESKBOOK, note 17, above, at 574-75; ICWA HANDBOOK, note 17, above, at 27-28.

²⁰ “Indian child” means “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4).

An “Indian tribe” is “any Indian tribe . . . recognized as eligible for the services provided to Indians by the [Secretary of the Interior],” including “any Alaska Native village” defined in 43 U.S.C. § 1602(c) of ANCSA. *Id.* § 1903(8), (11).

The term “reservation” in ICWA means, in pertinent part, “Indian country” as defined in 18 U.S.C. § 1151. 25 U.S.C. § 1903(10). “Indian country” is defined as “(a) all lands within the limits of any Indian reservation . . . , (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished.” 18 U.S.C. § 1151 (2000).

²¹ 25 U.S.C. § 1911(a). Although “ward” is not defined in ICWA, and there is very little guidance in the legislative history or [Bureau of Indian Affairs] guidelines as to its import[,] . . . [t]he most commonly accepted understanding of wardship is that when a tribal court, or a tribal governing council, has exercised legitimate jurisdiction over an Indian child in a child custody proceeding and continues to exercise that jurisdiction, a state court’s exercise of jurisdiction is precluded, except, of course, on an emergency basis.

(continued...)

Second, § 1911(b) provides that state courts must transfer foster care placement and parental right termination proceedings involving Indian children not residing or domiciled within Indian country to tribal courts upon petition, except in specific circumstances.²²

ICWA § 1918(a) provides that “[a]ny Indian tribe which became subject to [s]tate jurisdiction pursuant to the provisions of . . . any . . . [f]ederal law, may reassume jurisdiction over child custody proceedings.”²³ To reassume jurisdiction, a tribe must petition the Secretary of the Interior and provide a suitable plan for exercising jurisdiction.²⁴

ICWA § 1911(d) provides that states “shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian

²¹ (...continued)
ICWA HANDBOOK, note 17, above, at 58 (footnote omitted).

²² 25 U.S.C. § 1911(b). Section 1911(b) “creates three checks on tribal transfer jurisdiction”: (1) either parent’s objection; (2) the tribe’s declination of jurisdiction; and (3) the state court’s finding of good cause to deny transfer. *In re C.R.H.*, 29 P.3d 849, 853 (Alaska 2001); *see generally* ICWA HANDBOOK, note 17, above, at 59-69. ICWA does not address tribes’ power to receive adoptive or preadoptive cases, “nor is there much discussion of this apparent discrepancy in case law.” *Id.* at 60.

²³ 25 U.S.C. § 1918(a) (2000).

²⁴ 25 U.S.C. §§ 1903(11), 1918(a). Of Alaska’s approximately 230 federally recognized tribes, only two have successfully petitioned to reassume jurisdiction: Native Village of Barrow and Native Village of Chevak both reassumed exclusive jurisdiction over child custody proceedings involving member children residing or domiciled within their respective villages by petition in 1999. Approval of Petition for Reassumption of Exclusive Jurisdiction for Native Village of Chevak, 64 Fed. Reg. 36,391 (July 6, 1999); Approval of Petition for Reassumption of Exclusive Jurisdiction for Native Village of Barrow, 64 Fed. Reg. 36,391 (July 6, 1999); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553, 18,556-57 (Apr. 4, 2008).

child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.”²⁵

2. Early Alaska precedent regarding ICWA and Alaska Native tribal sovereignty

In our 1986 decision *Native Village of Nenana v. State, Department of Health & Social Services*, we held that Public Law 280 (P.L. 280) divested Alaska Native tribes of any jurisdiction under ICWA § 1911(a) and (b).²⁶ *Nenana* concerned a superior court’s denial of Native Village of Nenana’s petition for transfer of a child protection proceeding to its jurisdiction.²⁷ Because ICWA § 1918(a) specifically mentions P.L. 280 as a federal law that extends state jurisdiction over some Indian tribes, we concluded that “Congress intended that [P.L.] 280 give certain states, including Alaska, exclusive [rather than concurrent] jurisdiction over matters involving the custody of Indian children, and that those states exercise such jurisdiction until a particular tribe petitions to reassume jurisdiction . . . and the Secretary of the Interior approves [the] tribe’s petition.”²⁸ We also noted that § 1911(b) transfer jurisdiction “may actually grant Indian tribes greater authority than they had prior to the Act” because “[r]egardless of whether [P.L.] 280 vests exclusive or concurrent jurisdiction in the applicable states, *prior* to [ICWA], Indian tribes may not have had jurisdiction over custody proceedings . . . where the child

²⁵ 25 U.S.C. § 1911(d).

²⁶ 722 P.2d 219, 221 (Alaska 1986). Provisions of P.L. 280 give enumerated states both criminal and civil jurisdiction in Indian country, with the exception of specified reservations. Act of Aug. 15, 1953, Pub. L. No. 83-280, §§ 2, 4, 67 Stat. 588, 588-89 (codified at 18 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000), respectively). Alaska has been enumerated as a state under P.L. 280 since 1958. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545.

²⁷ 722 P.2d at 220.

²⁸ *Id.* at 221.

was domiciled off the reservation.”²⁹

In 1987³⁰ and again in 1992³¹ we confirmed *Nenana*’s holding that Alaska Native tribes could not exercise jurisdiction under ICWA § 1911(a) or (b) until they had successfully petitioned for reassumption.

Our 1987 decision *In re K.E.* concerned the superior court’s denial of a tribe’s request for § 1911(b) transfer of a parental rights termination proceeding from state court to tribal court.³² The tribe argued it had exclusive § 1911(a) jurisdiction based on the child’s domicile “within the dependent [I]ndian community of Nenana,”³³ a reference to “Indian country.”³⁴ We recognized *Nenana* as “controlling authority” and held that regardless of whether an Indian child resides or is domiciled in Indian country, the tribe must successfully petition to reassume jurisdiction over child custody proceedings before it can exercise § 1911(a) or § 1911(b) jurisdiction.³⁵

Our 1992 decision *In re F.P.* concerned tribal jurisdiction under § 1911(a).³⁶ After DHSS took emergency protective custody of three Indian children, Native Village of Circle unsuccessfully argued to the superior court that the state court proceeding should be dismissed in light of the tribe’s exclusive § 1911(a) jurisdiction over the

²⁹ *Id.* (emphasis in original).

³⁰ *In re K.E.*, 744 P.2d 1173 (Alaska 1987).

³¹ *In re F.P.*, 843 P.2d 1214 (Alaska 1992).

³² 744 P.2d at 1173.

³³ *Id.* at 1174.

³⁴ See note 20, above.

³⁵ *In re K.E.*, 744 P.2d at 1174-75.

³⁶ See 843 P.2d at 1215 (noting tribe claimed exclusive jurisdiction).

children as tribal court wards.³⁷ On appeal Circle asked us to review *Nenana* and *K.E.* in light of then-recent Ninth Circuit Court of Appeals cases, particularly one in which the Ninth Circuit concluded that if the two Alaska Native villages involved “were ‘modern day successors to sovereign historical bands of [N]atives,’ ” then those villages had concurrent jurisdiction in child custody matters because they were “entitled to ‘the same rights and responsibilities as . . . sovereign bands of [N]ative Americans in the continental United States.’ ”³⁸ We concluded the Ninth Circuit opinion was contrary to our prior holding that “Congress intended that most Alaska Native groups not be treated as sovereigns” and held that *F.P.* was controlled by *Nenana*.³⁹ We reiterated *Nenana*’s holding that ICWA § 1918(a) indicated Congress intended P.L. 280 to give Alaska and certain other states exclusive and not concurrent jurisdiction over matters involving custody of Indian children, unless tribes successfully petitioned to reassume jurisdiction.⁴⁰ Chief Justice Rabinowitz was persuaded by the Ninth Circuit’s analysis and dissented, asserting that *Nenana* and *K.E.* should be overruled because P.L. 280 is not a divestiture statute, but rather an extension of states’ jurisdiction to be exercised concurrently with tribes.⁴¹

3. Federal precedent regarding ICWA and Alaska Native tribal

³⁷ *Id.*; Brief of Appellee at 2, *In re F.P.*, 843 P.2d 1214 (No. S-04742), 1991 WL 11666111, at *2.

³⁸ *In re F.P.*, 843 P.2d at 1215 (quoting *Native Vill. of Venetie I.R.A. Council v. Alaska (Venetie)*, 944 F.2d 548, 558-59 (9th Cir. 1991)).

³⁹ *Id.* (quoting *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32, 34 (Alaska 1988)).

⁴⁰ *Id.* at 1215-16.

⁴¹ *Id.* at 1216, 1218-19 (Rabinowitz, C.J., dissenting) (quoting *Venetie*, 944 F.2d at 560-62).

sovereignty

As we observed in *F.P.*, Ninth Circuit case law has held that Alaska Native tribes can have inherent sovereign jurisdiction concurrent with the State in ICWA-defined child custody matters.⁴² The 1991 decision *Native Village of Venetie I.R.A. Council v. Alaska* concerned the State's refusal to recognize two adoption decrees issued by Native Villages of Venetie and Fort Yukon.⁴³ The Ninth Circuit analyzed two substantive issues in resolving the dispute: "whether the [N]ative [V]illages are inherently sovereign, at least insofar as domestic relations or child-custody issues are concerned"; and, if so, "whether Congress has stripped the [V]illages of that aspect of sovereign authority which encompasses child-custody determinations."⁴⁴ As to inherent sovereignty, the Ninth Circuit determined "to the extent that Alaska's [N]atives formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare," then "modern-day successors to [those] sovereign historical bands of [N]atives . . . are to be afforded the same rights and responsibilities as are sovereign bands of [N]ative Americans in the continental United States."⁴⁵ As to whether Congress stripped Alaska Native tribes of their inherent sovereignty over domestic relations and child-custody issues, the Ninth Circuit rejected the divestiture interpretation of P.L. 280 and held neither ICWA nor P.L. 280 "prevent[ed] [sovereign Alaska Native villages] from exercising concurrent jurisdiction."⁴⁶

The Ninth Circuit directed that if on remand the district court determined

⁴² *Venetie*, 944 F.2d at 558-59, cited in *In re F.P.*, 843 P.2d at 1215.

⁴³ *Id.* at 550-51.

⁴⁴ *Id.* at 556.

⁴⁵ *Id.* at 558-59.

⁴⁶ *Id.* at 559-62.

either Native Village was “the modern-day successor[] to an historical sovereign band of [N]ative Americans,” then the State of Alaska must afford “full faith and credit to adoption decrees issued by [that Native Village’s] tribal courts.”⁴⁷ On remand the District Court for the District of Alaska determined that Venetie was “a sovereign tribe as a matter of law” exercising adoption authority over its members, and accordingly that “the State of Alaska must afford full faith and credit to adoption decrees issued by [its]

⁴⁷ *Id.* at 562. The Ninth Circuit recently relied on *Venetie*’s holding in *Kaltag Tribal Council v. Jackson*, an unpublished opinion. 344 Fed. Appx. 324 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 66 (2010). There the Ninth Circuit relied on *Venetie* in affirming that under ICWA § 1911(d) the State must accord full faith and credit to an adoption decree issued by the Native Village of Kaltag’s tribal court. *Id.* at 325. The Ninth Circuit stated that “[r]eservation status is not a requirement of jurisdiction because ‘[a] [t]ribe’s authority over its reservation or Indian country is incidental to its authority over its members.’ ” *Id.* (quoting *Venetie*, 944 F.2d at 559 n.12). The Ninth Circuit further held that “neither the ICWA nor [P.L.] 280 prevented the Kaltag court from exercising jurisdiction.” *Id.*

Even more recently, the District Court for the District of Alaska treated *Venetie* as persuasive authority. In *S.P. v. Native Village of Minto*, the district court concluded P.L. 280 did not divest Native Village of Minto’s concurrent inherent sovereign jurisdiction to make a former village resident’s child a tribal court ward and to terminate the parents’ rights. No. 3:09-cv-0092-HRH, slip op. at 4-5, 12, 14 (D. Alaska Dec. 2, 2009) (“The Native Village of Minto has never petitioned the Secretary to reassume exclusive jurisdiction over Indian child custody proceedings; but the fact that the Native Village . . . does not have exclusive jurisdiction over child custody matters of Indian children who are wards of the tribe does not preclude concurrent jurisdiction with the [S]tate.”). The district court relied on *Venetie* and the *Kaltag Tribal Council* district court order in reaching this conclusion. *Id.* at 12-14 (discussing *Venetie*, 944 F.2d at 550, 555-56, 561-62; *Kaltag Tribal Council v. Jackson*, No. 3:06-cv-0211-TMB, slip op. at 10-11 (D. Alaska Feb. 22, 2008)). The district court expressly rejected the argument that tribal courts cannot initiate child custody proceedings as ICWA uses that term. *Id.* at 14-16 (relying in part on *Kaltag Tribal Council*, No. 3:06-cv-0211-TMB, at 7-8). Based in part on its jurisdiction ruling, the district court ultimately dismissed the case on abstention grounds. *Id.* at 16-18.

tribal courts.”⁴⁸ According to a subsequent Ninth Circuit opinion, the State “later stipulated that Fort Yukon could also meet the requirements for tribal status.”⁴⁹

B. *John v. Baker* And Its Aftermath

1. *John v. Baker*

In our September 1999 *John v. Baker* decision, issued when *Nenana, F.P.*, and *K.E.* still controlled, we recognized concurrent inherent tribal jurisdiction outside the confines of Indian country to adjudicate non-ICWA child custody disputes between tribal members.⁵⁰ In *John v. Baker* a Northway Village member unsuccessfully sought sole custody of his children in the Northway Tribal Court before bringing an identical custody suit in superior court.⁵¹ The children’s mother moved to dismiss the superior court case based on the tribal court proceeding, but the superior court awarded the father primary custody of the children.⁵² In an amicus brief filed in the ensuing appeal, the State urged us to hold that “Alaska tribes retained concurrent jurisdiction with the [S]tate over civil matters involving the domestic relations of their members” even after the enactment of P.L. 280.⁵³ The State expressed an interest in “cooperat[ing] more closely with tribes, avoiding duplicative programs and stretching . . . combined resources further than . . .

⁴⁸ *Native Vill. of Venetie I.R.A. Council v. Alaska*, Nos. F86-0075 CIV (HRH) & F87-0051 CIV (HRH), 1994 WL 730893, at *21-22 (D. Alaska Dec. 23, 1994).

⁴⁹ *Native Vill. of Venetie I.R.A. Council v. Alaska*, 155 F.3d 1150, 1151 (9th Cir. 1998).

⁵⁰ *John v. Baker*, 982 P.2d at 748-49, 759.

⁵¹ *Id.* at 743. The children’s mother was a member of Mentasta Village, but consented to the Northway Tribal Court’s jurisdiction. *Id.*

⁵² *Id.*

⁵³ Amicus Brief of the State of Alaska at 45, *John v. Baker*, 982 P.2d 738 (No. S-8099), 1998 WL 35180190, at *45.

could [be] manage[d] separately, particularly in the under-served regions of Alaska.”⁵⁴

We examined the Department of the Interior’s 1993 list of federally recognized tribes, which “included Northway Village and most of the other Native villages in Alaska,” and the list’s preamble that the “villages and regional tribes listed . . . have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States.”⁵⁵ We also looked to the Federally Recognized Tribe List Act of 1994, which directs the Department to publish annual lists of tribes eligible for special programs and services because of their status as Indians,⁵⁶ and to the recognition in that act’s text and legislative history of these tribes’ “sovereignty,”⁵⁷ “quasi-sovereign status,”⁵⁸ and “government-to-government relationship [with] the United States . . . as . . . domestic dependent nation[s].”⁵⁹ We noted the Department lists published for 1995 through 1998 all included Alaska Native villages such as Northway.⁶⁰ In deference to recognition by Congress and the Executive Branch that particular Native American groups are sovereign tribes, we recognized that “Alaska Native tribes, by virtue of their

⁵⁴ *Id.* at 1.

⁵⁵ *John v. Baker*, 982 P.2d at 749-50 (emphasis omitted) (citing and quoting Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. at 54,365-66).

⁵⁶ *Id.* at 750 (citing 25 U.S.C. § 479a, 479a-1).

⁵⁷ *Id.* (citing Pub. L. No. 103-454, § 103, 108 Stat. 4791 (1994) (codified at 25 U.S.C. § 479a note (2000))).

⁵⁸ *Id.* (quoting H.R. Rep. No. 103-781, at 2-3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3768, 3769).

⁵⁹ *Id.* (quoting H.R. Rep. No. 103-781, at 2).

⁶⁰ *Id.*

inherent powers as sovereign nations,” possess “inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members.”⁶¹ Because “villages like Northway presumably do not occupy Indian country,” we held “Northway’s jurisdiction to adjudicate child custody disputes between village members” was concurrent with that of state courts.⁶²

Although ANCSA extinguished all aboriginal title and claims to Alaska land and revoked all existing Indian reservations except for that of the Metlakatla Indian Community on the Annette Islands,⁶³ we held that ANCSA’s elimination of nearly all Indian country in Alaska did not divest Alaska Native villages of their sovereign powers to adjudicate child custody disputes between village members.⁶⁴ We employed “the established principle under federal law that ‘Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe’s dependent status.’ ”⁶⁵ We then noted that “internal functions involving tribal membership and domestic affairs” are within the “core set of sovereign powers that remain intact even though Indian nations are dependent under federal law.”⁶⁶

⁶¹ *Id.* at 748-49.

⁶² *Id.* at 759.

⁶³ *Id.* at 747-48 & n.43 (citing 18 U.S.C. § 1151; *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 530-33 (1998)).

⁶⁴ *Id.* at 748-59.

⁶⁵ *Id.* at 751 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982)).

⁶⁶ *Id.* (citing *Montana v. United States*, 450 U.S. 544, 564 (1981); *United States v. Wheeler*, 435 U.S. 313, 326 (1978), *superseded on other grounds by* Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93 *and* Act of Oct. 28, (continued...)

We acknowledged that “the character of the power that the tribe seeks to exercise, not merely the location of events,” determines “whether tribes retain their sovereign powers.”⁶⁷ We determined that ANCSA did not “express any intent to force Alaska Natives to abandon their sovereignty,” particularly “their powers to adjudicate domestic disputes between members,”⁶⁸ and that post-ANCSA congressional actions, including passage of ICWA seven years later, indicated Congress did not intend ANCSA to prevent Alaska Natives from continuing to regulate their internal affairs.⁶⁹ We concluded that “federal tribes derive the power to adjudicate internal domestic matters, including child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy.”⁷⁰

Because we concluded that neither ICWA nor P.L. 280 applied,⁷¹ we

⁶⁶ (...continued)
1991, Pub. L. No. 102-137, § 1, 105 Stat. 646).

⁶⁷ *Id.* at 752.

⁶⁸ *Id.* at 753.

⁶⁹ *Id.* at 753-54 (discussing Federally Recognized Tribe List Act of 1994; ICWA; and Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601-31).

⁷⁰ *Id.* at 754; *see also id.* at 748-49.

⁷¹ We held ICWA did not apply because child custody disputes between parents fall under ICWA’s divorce exception, even if the parents never married. *Id.* at 746-47; *see note 19, above.*

We held rulings interpreting P.L. 280 did not apply because P.L. 280’s text states that it applies only to Indian country and because Northway Village, like most Alaska Native land, ceased to qualify for the “dependent Indian community” definition of Indian country after ANCSA extinguished most Indian country in Alaska. *John v. Baker*, 982 P.2d at 747-48 (quoting 18 U.S.C. § 1151 and citing *Native Vill. of Venetie* (continued...)

determined it was “neither necessary nor appropriate . . . to reach the question of whether *Nenana* and its progeny were wrongly decided.”⁷² Although we recognized that “generally, Indian nations possess greater powers in Indian country than they do outside it” and that we would “create[] a disjunction in Indian law jurisprudence” by recognizing that Northway had greater powers outside Indian country than the tribal community inside Alaska’s only reservation, we concluded “this inconsistency d[id] not create a justification to address issues . . . not squarely before us.”⁷³

Chief Justice Matthews, joined by Justice Compton, dissented, concluding that “inherent tribal jurisdiction over custody applies only to cases arising within Indian country.”⁷⁴ Chief Justice Matthews looked to what he termed the “allocative principle”⁷⁵ and *Nenana* and *F.P.* in concluding that “if Alaska has exclusive jurisdiction to decide private custody cases which arise in Indian country, it has, by necessary implication, exclusive jurisdiction to decide private custody cases which arise outside of Indian country.”⁷⁶

⁷¹ (...continued)
Tribal Gov’t, 522 U.S. at 530-33).

⁷² *Id.* at 748.

⁷³ *Id.* at 748 n.46.

⁷⁴ *Id.* at 766 (Matthews, C.J., dissenting).

⁷⁵ The chief justice explained that under the allocative principle, unless Congress clearly provides otherwise, (1) state laws generally do not apply to tribal Indians within Indian country and (2) tribal authority does not apply outside of Indian country. *Id.* at 772 (citing *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995)).

⁷⁶ *Id.* at 767-68 (citing *In re F.P.*, 843 P.2d at 1215-16; *Nenana*, 722 P.2d at 221). Chief Justice Matthews determined the United States Supreme Court used
(continued...)

2. The State's initial position after *John v. Baker*; *In re C.R.H.*

In September 2000, then-Governor Tony Knowles issued an administrative order “acknowledg[ing] the legal and political existence of the federally recognized [t]ribes within the boundaries of Alaska.”⁷⁷ In addition to expressing “recogni[tion] and respect[.]” for the tribes’ “governmental status,” the governor articulated a policy of “acknowledg[ing] any additional [t]ribes in Alaska that may be recognized by the federal

⁷⁶ (...continued)

language indicating that P.L. 280 gave certain states full jurisdiction over Indian country to the exclusion of tribal jurisdiction. *Id.* at 808-09 (discussing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987); *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 475, 488-89 n.32, 498 (1979); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 383 (1976); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 74 (1962)). He also determined that the 1970 amendment to § 2 of P.L. 280, which the House Report explained was intended to “permit[] the Metlakatla Indian [C]ommunity on the Annette Islands in Alaska to exercise jurisdiction over minor offenses concurrent with . . . Alaska,” indicated that prior to 1970 the State exercised criminal jurisdiction exclusive of tribal jurisdiction in all Indian country in Alaska. *Id.* at 808, 810 (quoting H.R. Rep. No. 91-1545 (1970), reprinted in 1970 U.S.C.C.A.N. 4783, 4783). The chief justice noted that the 1970 amendment also added language to § 2(c) of P.L. 280 referring to the § 2(a) areas of Indian country as “areas over which the several States have *exclusive jurisdiction.*” *Id.* at 810 (emphasis added in dissenting opinion). The chief justice concluded that the amendment demonstrated the 91st Congress’s belief that P.L. 280 granted states exclusive jurisdiction. *Id.* at 810-11. Based on parallel language in §§ 2 and 4 of P.L. 280, the chief justice extended the divestiture determination to the civil realm, stating “it is impossible to conclude that Congress intended to confer on the states exclusive criminal jurisdiction, but only concurrent civil jurisdiction.” *Id.* at 810.

⁷⁷ Administrative Order No. 186 (Sept. 29, 2000); see generally DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 430-31 & n.409 (2d ed. 2002) (hereinafter CASE & VOLUCK) (describing Governor Knowles’s actions and noting change from former Governor Walter J. Hickel’s Administrative Order No. 125 (Aug. 16, 1991), generally opposing tribal sovereignty expansion, which in turn had overturned former Governor Steve Cowper’s Administrative Order No. 123 (Sept. 10, 1990), recognizing existence of Alaska Native tribes).

government in the future”⁷⁸ and “foster[ing] a constructive and harmonious relationship between the [t]ribal and State governments.”⁷⁹ He acknowledged the value of the “services that Alaska’s [t]ribes contribute to the state’s economic and social well-being by virtue of their direct [t]ribal authority and responsibility for the delivery of social, economic, cultural, and other programs and services.”⁸⁰ The governor explained that in December 1999 he had invited Alaska Native tribes “to enter into a government-to-government dialogue with the State for the purpose of establishing a framework for ongoing State-[t]ribal relations.”⁸¹ In furtherance of the “promot[ion] and enhance[ment] [of] [t]ribal self-government . . . and social, cultural, spiritual, and racial diversity,” among other things, Governor Knowles committed the State “to working with [t]ribes to further strengthen Alaska’s ability to meet the needs of Alaska’s communities and families.”⁸²

In April 2001 Governor Knowles and various federally recognized Alaska Native tribes signed the Millennium Agreement, “a framework for the establishment of lasting government-to-government relationships and an implementation procedure to assure that such relationships are constructive and meaningful and further enhance cooperation between the parties.”⁸³ This agreement reflects the State’s recognition that

⁷⁸ Administrative Order No. 186.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Millennium Agreement between the Federally Recognized Sovereign Tribes of Alaska and the State of Alaska ¶ 2, Apr. 11, 2001. Although the Millennium Agreement did not address substantive issues, *id.* at ¶ 10, ICWA authorizes agreements (continued...)

“[e]ach [signatory] [t]ribe has its own independent form of government and exercises inherent sovereign authority.”⁸⁴ In turn, the signatory tribes acknowledged that “[t]he State of Alaska has a major responsibility to provide for the health, safety, and welfare of all Alaskans.”⁸⁵

In August 2001, two years after our *John v. Baker* decision, we decided *In re C.R.H.*⁸⁶ That case concerned the denial of a request by Native Village of Nikolai to transfer a child protection proceeding from superior court to tribal court.⁸⁷ The State, while defending against Native Village of Nikolai’s appeal in *C.R.H.*, urged us to overturn *Nenana* and its progeny.⁸⁸ The State pointed to the conflict between (1) the Ninth Circuit’s *Venetie* holding that some Alaska Native tribes have concurrent inherent authority over child protection matters affecting their members, undivested by P.L. 280, and (2) our *Nenana* holding that Alaska Native tribes may not assert jurisdiction over child protection matters unless they formally reassume jurisdiction over those matters

⁸³ (...continued)

between states and Indian tribes “respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements . . . for orderly transfer of jurisdiction on a case-by-case basis and . . . for concurrent jurisdiction between States and Indian tribes.” 25 U.S.C. § 1919(a) (2000).

⁸⁴ Millennium Agreement between the Federally Recognized Sovereign Tribes of Alaska and the State of Alaska, note 83, above, at ¶ 12(a).

⁸⁵ *Id.* at ¶ 13(b).

⁸⁶ 29 P.3d 849 (Alaska 2001).

⁸⁷ *Id.* at 850-51.

⁸⁸ Appellee State of Alaska’s Brief at 6, 41, *In re C.R.H.*, 29 P.3d 849 (No. S-9677).

under ICWA § 1918(a) because they were divested of it by P.L. 280.⁸⁹ The State explained that it “felt compelled” to oppose the tribe’s request for transfer because of *Nenana* and its progeny, but it was “in an untenable position” because *Nenana* and *Venetie* were irreconcilable.⁹⁰ The State argued in part that we should reexamine and overrule *Nenana* in light of *John v. Baker*’s holdings that Alaska’s federally recognized tribes have “‘inherent power [to] regulat[e] their internal and social relations,’ including adjudicatory authority over child custody matters” and that P.L. 280 did not divest that authority outside of Indian country.⁹¹

We compared ICWA § 1911(a), which provides that tribes lack exclusive Indian country and wardship jurisdiction “where such jurisdiction is otherwise vested in the State by existing Federal law,” with § 1911(b), which does not contain a parallel limiting provision for transfer jurisdiction.⁹² We concluded that “Congress intended P.L. 280 to affect tribes’ exclusive jurisdiction under subsection 1911(a), but did not intend P.L. 280 to affect transfer jurisdiction under subsection 1911(b).”⁹³ We therefore held that federally recognized tribes in Alaska may accept transfer of ICWA cases under § 1911(b) without formal reassumption of jurisdiction, and we overruled *Nenana, F.P.*, and *K.E.* to the extent they were inconsistent with that holding.⁹⁴ But having concluded that Congress gave tribes § 1911(b) transfer jurisdiction regardless of their P.L. 280

⁸⁹ *Id.* at 5.

⁹⁰ *Id.*

⁹¹ *Id.* at 13, 25 (quoting *John v. Baker*, 982 P.2d at 754-55).

⁹² *In re C.R.H.*, 29 P.3d at 852.

⁹³ *Id.*

⁹⁴ *Id.* at 850-52.

status, we found it unnecessary to reconsider whether Alaska Native tribes affected by P.L. 280 retained initiating jurisdiction under § 1911(a) concurrent with the State.⁹⁵

DHSS subsequently requested an opinion from then-Attorney General Bruce Botelho on *C.R.H.*'s effect.⁹⁶ In the responsive memorandum, the Attorney General's office acknowledged that "no tribe in Alaska [could] exercise exclusive jurisdiction over its children based on either residency or domicile within the tribe's reservation" because the only tribe occupying a reservation, Metlakatla Indian Community, exercises concurrent jurisdiction.⁹⁷ The memorandum also acknowledged Native Village of Barrow's and Native Village of Chevak's successful petitions to reassume exclusive jurisdiction over matters involving their children.⁹⁸ As to Alaska's other tribes, the memorandum stated that before a child custody proceeding's initiation, a tribe and the State shared concurrent jurisdiction and either could take steps to protect a member child or membership-eligible child.⁹⁹ The memorandum explained that a tribe could exercise exclusive jurisdiction over a child either by (1) initiating a tribal court proceeding regarding an Indian child not already within the State's custody and declaring

⁹⁵ *Id.* at 852. One early commentator noted that "[r]ead together with *John v. Baker*, *C.R.H.* confirms tribal concurrent ICWA jurisdiction as well." CASE & VOLUCK, note 77, above, at 430 n.406.

⁹⁶ Memorandum from Assistant Att'y Gen. Donna Goldsmith for Jay Livey, Dep't of Health & Soc. Srvs. Comm'r (Mar. 29, 2002) (No. 441-00-0005) *revoked by* 2004 FORMAL OP. ATT'Y GEN. 135.

⁹⁷ *Id.* at 3; *see John v. Baker*, 982 P.2d at 748 n.43 (noting Metlakatla Reservation on Annette Islands is Alaska's only post-ANSCA Indian reservation).

⁹⁸ Memorandum From Assistant Att'y Gen. Donna Goldsmith, note 96, above, at 3.

⁹⁹ *Id.* at 2.

the child a tribal court ward or (2) receiving transfer of a case initiated in state court.¹⁰⁰ According to the memorandum, the State lacked authority to investigate a report of harm concerning an Indian child it knew was a tribal court ward, but the State could forward risk of harm information to the tribe.¹⁰¹ Finally, the memorandum advised DHSS that in addition to recognizing cultural adoptions under ICWA § 1911(d), the State was required to “recognize tribal court adoption orders to the extent that it recognize[d] such orders from sister states and other foreign orders” because “*C.R.H.* removed all impediments that historically prevented [recognition of] tribal court adoptions.”¹⁰²

3. The State’s position after October 1, 2004

On October 1, 2004, then-Attorney General Gregg Renkes issued a direction-changing advisory opinion regarding tribal jurisdiction and ICWA-defined child custody proceedings.¹⁰³ The 2004 Attorney General Opinion, based on *C.R.H.* and the *Nenana* remnants left in place after *C.R.H.*, and without acknowledging *John v. Baker*’s implications, concluded that:

Alaska state courts have exclusive jurisdiction over child custody proceedings involving Alaska Native children unless (1) the child’s tribe has successfully petitioned the Department of Interior to reassume exclusive or concurrent jurisdiction under the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1918 or (2) a state superior court has transferred jurisdiction of the child’s case to a tribal court in accordance

¹⁰⁰ *Id.* at 2, 4 n.7.

¹⁰¹ *Id.* at 4.

¹⁰² *Id.* at 5.

¹⁰³ 2004 FORMAL OP. ATT’Y GEN. 135.

with 25 U.S.C. § 1911(b) and the tribal court is exercising its jurisdiction.^[104]

OCS then revised its Policy and Procedure Manual, citing the 2004 Attorney General Opinion as authority. The manual still recognizes Native Village of Barrow, Native Village of Chevak, and Metlakatla Indian Community as having exclusive or concurrent ICWA jurisdiction in their specified territories. But the manual redefines the meaning of “concurrent” jurisdiction exercisable by the remaining tribes: the 2002 edition states that until a child custody proceeding is initiated, “the tribe and the [S]tate simultaneously share authority and either government may take the steps necessary to protect a child who may be at risk”; the 2004 edition removed that provision and otherwise limited concurrent jurisdiction to cases transferred from state court.

OCS also changed the way it shared information with tribes. Before 2004 OCS contacted a child’s tribe “[a]s soon as possible, and if possible prior to the assignment for investigation” to ascertain whether the tribe already had custody of the child or wanted to take jurisdiction over a child protection proceeding. The 2004 Attorney General Opinion advised that OCS was authorized “to release information concerning minor children for whom state court proceedings have not been initiated” to a “tribe properly exercising jurisdiction over a child protection proceeding involving the tribe’s member child,” but that “OCS must promulgate regulations governing the release of this information.” On March 21, 2005, OCS proposed new regulations for releasing information to tribes “if such a release is in the best interests of the child . . . and the child is not [the subject of a child in need of aid] case where the child’s tribe is not a party” or “to assist in an investigation of a report of harm.”

One OCS supervisor described actual changes in OCS policy following the 2004 Attorney General Opinion as follows:

¹⁰⁴ *Id.* at 3.

Policies have changed recently regarding when we contact the tribe in investigations. . . . [W]e don't share information regarding investigations unless the investigation is underway. In other words, . . . the tribe can't have access to allegations that are made unless I have releases from my clients. They can't get copies of Reports of Harm unless . . . the parent in the Report of Harm has signed a release. Until [the tribes] have intervened legally in a [child in need of aid] case. In which case, then, they get all that.

BVS also changed its policies based on the 2004 Attorney General Opinion. The 2004 Attorney General Opinion stated that "the [S]tate retains exclusive jurisdiction over Alaska Native adoption proceedings unless a tribe has reassumed jurisdiction" but the State's "longstanding policy" of "ratif[y]ing Indian adoptions that occur under tribal custom as a matter of equity under state law" is unchanged. According to a letter from BVS to the Kaltag Tribal Council, BVS began refusing to accept tribal court adoption paperwork in October 2005 unless it was from Native Village of Barrow, Native Village of Chevak, or Metlakatla Indian Community, and began processing only cultural adoptions for the remaining tribes.

C. Ripeness Analysis For This Case

As noted earlier, the State moved to dismiss the Tribes' suit on ripeness grounds. It contended the Tribes had alleged no actual harm, but rather presented nothing more than an abstract disagreement with an opinion by the Attorney General. The State pointed out the lawsuit was filed shortly after the 2004 Attorney General Opinion was issued and no actual controversy regarding implementation had yet arisen. Relying primarily on our 2001 decision *Brause v. State, Department of Health & Social Services*,¹⁰⁵ the State argued that in the absence of specific facts regarding actual

¹⁰⁵ 21 P.3d at 358-60 (discussing federal law and affirming, under abuse of discretion standard, superior court's dismissal on ripeness grounds of action for (continued...))

governmental action to provide context, the case was not ripe and there was no need for the superior court to act.

The Tribes opposed the State's dismissal motion, arguing that (1) the State had taken action well beyond the mere issuance of an Attorney General's opinion, including changes in department manuals and actual dealings with tribes, and (2) then-existing Alaska case law on standing, including the concept of ripeness, required only the threat of future injury. Judge Suddock agreed with the Tribes.

During the briefing for this appeal we issued our decision in *State v. ACLU of Alaska*.¹⁰⁶ In that case we continued *Brause*'s new emphasis on federal ripeness law with respect to a narrow line of cases — those involving pre-enforcement constitutional challenges to statutes.¹⁰⁷ We stated that “the constitutionality of a statute generally may not be challenged as an abstract proposition” and looked to see if the plaintiffs had presented the basis for an exception to that general rule.¹⁰⁸ We then noted the similarity of our earlier cases warning against advisory opinions and resolving abstract questions of law to the Ninth Circuit's recent decision in *Alaska Right to Life Political Action*

¹⁰⁵ (...continued)
declaratory relief in connection with constitutional challenge to statute precluding same-sex marriage because plaintiffs had not alleged any specific denial of rights associated with marriage).

¹⁰⁶ 204 P.3d 364 (Alaska 2009).

¹⁰⁷ *See id.* at 366 (concerning “pre-enforcement challenge to a newly amended statute that prohibits the possession and use of marijuana”); *id.* at 368 (looking to federal law); *see also Brause*, 21 P.3d at 358 (concerning request for declaration that statute denying same-sex marriages recognition is unconstitutional where challengers did not allege they had been denied any specific benefits); *id.* at 358-60 (relying in part on 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532, at 112, 114-15 (2d ed. 1984)).

¹⁰⁸ *ACLU of Alaska*, 204 P.3d at 366.

Committee v. Feldman.¹⁰⁹ We stated: “While pure legal questions that require little factual development are more likely to be ripe, a party bringing a pre[-]enforcement challenge must nonetheless present a concrete factual situation.”¹¹⁰ Looking back to *Brause* and its reliance on federal law, we reiterated the practical formulation for ripeness of pre-enforcement constitutional challenges to statutes: balancing the need for decision against the risks of decision.¹¹¹

The plaintiffs in *ACLU of Alaska* had challenged a newly enacted statute criminalizing the possession of small amounts of marijuana, arguing that the statute was unconstitutional under *Ravin v. State*.¹¹² We first determined that because the plaintiffs faced federal prosecution for marijuana possession regardless of state law, the threat of the new law did not really create a hardship to them.¹¹³ We then determined that concrete facts regarding the State’s enforcement of the new statute might aid in our decision.¹¹⁴ We also considered the litigation’s high-profile nature, with interest by both the legislative and executive branches, and that deference to the legislative branch prohibits us from declaring statutes unconstitutional unless “squarely faced with the need to do

¹⁰⁹ *Id.* at 368-69; *see Feldman*, 504 F.3d 840 (9th Cir. 2007).

¹¹⁰ *ACLU of Alaska*, 204 P.3d at 368 (quoting *Feldman*, 504 F.3d at 849) (internal quotation marks omitted).

¹¹¹ *Id.* at 369.

¹¹² *Id.* at 366; *see Ravin*, 537 P.2d 494, 504, 511 (Alaska 1975) (holding Alaskans have fundamental right to privacy in their homes and allowing possession of small amounts of marijuana in home by adults for personal and private use).

¹¹³ *ACLU of Alaska*, 204 P.3d at 369-70.

¹¹⁴ *Id.* at 372-73.

so.”¹¹⁵ Because of these factors, we concluded that the decisional risks outweighed the need for decision and that the plaintiffs therefore were not entitled to an exception from the general rule against pre-enforcement constitutional challenges to statutes.¹¹⁶ We vacated the superior court’s judgment in the plaintiffs’ favor and dismissed the proceedings.¹¹⁷

The State and the Tribes disagree on *ACLU of Alaska*’s application here. The State implicitly characterizes this case as a pre-enforcement challenge to the 2004 Attorney General Opinion and asserts that the Tribes are asking “for a sweeping decision” despite the “factual vacuum of this case.” The State argues the Tribes have not demonstrated a need for a decision, but the risk of decision is high because “jurisdictional analysis depends on [a variety of different] factual circumstances.” The State points to a number of hypothetical fact patterns raising difficult questions and leading to differing results in the jurisdictional analysis, including if only one parent is a tribal member, if the parents are members of different tribes, and if one or both of the parents do not consent to tribal jurisdiction. It concludes that considering the tribal jurisdiction question raised here in the absence of concrete facts “invites an inaccurate[,] broad[,] and unqualified jurisdictional ruling.”

The Tribes respond that the State’s argument rings hollow because the State contends that no Alaska Native tribe possesses *any* jurisdiction to initiate ICWA-defined child custody proceedings unless the tribe has reassumed jurisdiction under ICWA § 1918. The Tribes assert that this case does not raise an issue about tribal jurisdiction and authority over non-members and expressly ask us to refrain from addressing that issue.

¹¹⁵ *Id.* at 373.

¹¹⁶ *Id.* at 371-74.

¹¹⁷ *Id.* at 374.

The Tribes point to the existence of tribal court systems and specific examples of the 2004 Attorney General Opinion's effect on tribal jurisdiction and powers,¹¹⁸ and argue that there is a real case and controversy ripe for decision.

The Tribes distinguish *ACLU of Alaska* by observing that “the [c]ourt in *ACLU* was most influenced by the fact that the actions the plaintiffs sought to engage in, even if protected from criminalization under Alaska law, still remained criminal under federal law” and “[n]o analogue is present here.” The Tribes also point out that “the [c]ourt in *ACLU* found that the plaintiffs’ declarations did not indicate that the statute at issue would [a]ffect their conduct, or that they would be the subjects of enforcement,” while “[h]ere, it is clear . . . that the State is enforcing its new policies vigorously.” The Tribes further note that “in *ACLU* a ‘narrowing construction’ of the new marijuana statute was possible, thus making adjudication of individual cases more appropriate; here, by contrast, the State’s position is monolithic, barring *all* child protection proceedings from being initiated in tribal courts absent . . . re-assumption . . . and barring [recognition of] *all* tribal court adoption proceedings.” (Emphasis in original.) The final distinction drawn by the Tribes is that “in *ACLU* due respect for the legislative branch required some hesitation on the [c]ourt’s part before declaring an enacted statute unconstitutional,” but “[h]ere, in contrast, state officials are taking actions based upon their interpretation of

¹¹⁸ The Tribes point out that based on the 2004 Attorney General Opinion, OCS changed its policy on recognizing existing tribal child custody proceedings, and that the record reflects one application of the new policy involving a member child of the Kenaitze Tribe. The child had been: (1) the subject of several emergency petitions before the Tribe; (2) the subject of multiple reports of harm OCS had transferred to the Tribe for follow-up; and (3) held by a state court to be under the tribal court’s jurisdiction. OCS disregarded this previous activity and reopened its investigation, requesting a state court order compelling the child’s attendance at an interview regarding allegations the Tribe had already investigated and found unsubstantiated. The Tribes also point out that BVS stopped issuing birth certificates for children adopted in tribal courts shortly after the 2004 Attorney General Opinion was issued.

Alaska Supreme Court case law — a subject on which this [c]ourt is in the best position, and has an obligation, to decide.”

The Tribes have the better argument. The State’s actions in response to the 2004 Attorney General Opinion go beyond enacting a statute that might be challenged as facially unconstitutional. Indian children may be at risk of harm because of the State’s refusal to coordinate and cooperate with tribes regarding reports of harm; Indian children, as well as their natural and putative adoptive parents, may be held in legal limbo by the State’s refusal to give full faith and credit to tribal adoption decrees; and both the State and tribal courts need to understand the extent to which tribal court orders in “child custody proceedings,” as that term is defined in ICWA, are entitled to full faith and credit. We agree with Judge Suddock: families and children are being affected; State and tribal relations are being affected; the State and Alaska Native tribes, as well as State and tribal courts, are being affected. Under our approach to ripeness in cases not involving pre-enforcement constitutional challenges to statutes, the Tribes have readily established the injury and threat of injury necessary to support this suit.¹¹⁹

We conclude that the legal issue before us has been sufficiently narrowed by our previous cases and the conflicting Ninth Circuit cases. There are enough facts before us to resolve the parties’ fundamental jurisdictional dispute in limited fashion: We will decide whether — absent formal reassumption of jurisdiction under ICWA § 1918 — Alaska Native tribes have inherent sovereign jurisdiction, concurrent with the

¹¹⁹ See generally *ACLU of Alaska*, 204 P.3d at 375-76 (Carpeneti, J., dissenting) (“We interpret standing, and by extension ripeness, leniently in order to facilitate access to the courts: ‘The basic idea . . . is that an identifiable trifle is enough for standing to fight out a question of principle.’ ” (quoting *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 34 (Alaska 2001))); *Brause*, 21 P.3d at 360-61 (Bryner, J., dissenting) (“This court’s standing jurisprudence indicates a willingness to adjudicate claims where the injury claimed is but ‘an identifiable trifle.’ ” (quoting *Bowers Office Prods., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1097 (Alaska 1998))).

State, to initiate ICWA-defined child custody proceedings. We therefore affirm Judge Suddock's decision denying the State's motion to dismiss the Tribe's suit and we decline to vacate the superior court judgment and dismiss this appeal on ripeness grounds.

D. Today's Holding Regarding Alaska Native Tribal Sovereignty And ICWA

John v. Baker is foundational Alaska authority regarding Alaska Native tribal jurisdiction over the welfare of Indian children, notwithstanding the sharpness of the debate or the division of the court in reaching its ultimate conclusion.¹²⁰ Notably, the State does not ask that *John v. Baker* be overruled.

Having thoroughly outlined *John v. Baker*'s tribal jurisdiction analysis, we reiterate only the following four points from that decision to set the stage for our consideration of the State's arguments here. First, unless and until its powers are divested by Congress, a federally recognized sovereign Indian tribe has powers of self-government that include the inherent authority to regulate internal domestic relations among its members.¹²¹ Second, ANCSA's elimination of nearly all Indian country in Alaska did not divest federally recognized sovereign Alaska Native tribes of their

¹²⁰ The debate continued among commentators after the decision. See, e.g., David M. Blurton, *John v. Baker and the Jurisdiction of Tribal Sovereigns Without Territorial Reach*, 20 ALASKA L. REV. 1, 26 (2003) (criticizing *John v. Baker*'s holding and interpreting United States Supreme Court cases to be "highly indicative . . . that tribes, without Indian country, do not have inherent sovereign powers and lack criminal, civil adjudicatory, and regulatory authority"); Andy Harrington, *Exclusive of What? The Historical Context of the 1970 "Metlakatla" Amendment to PL 280*, 23 ALASKA L. REV. 1, 7-9, 30-32, 38-49 (2006) (criticizing *John v. Baker* dissent's conclusion that 1970 amendment indicates P.L. 280 divested Alaska Native tribes of jurisdiction and taking position that (1) amendment was intended to supercede federal case law holding Metlakatla Reservation was not in Indian country and (2) "exclusive" in P.L. 280 § 2(c) does not mean exclusive of tribal jurisdiction, but instead means exclusive of federal jurisdiction under the General Crimes and Major Crimes Acts, 18 U.S.C. §§ 1152, 1153).

¹²¹ *John v. Baker*, 982 P.2d at 751.

authority to regulate internal domestic relations among their members.¹²² Third, we “must resolve ambiguities in statutes affecting the rights of Native Americans in favor of Native Americans” and “we will not lightly find that Congress intended to eliminate the sovereign powers of Alaska tribes.”¹²³ Fourth, “Congress’s purpose in enacting ICWA reveals its intent that Alaska Native villages retain their power to adjudicate child custody disputes” and “ICWA’s very structure presumes both that the tribes . . . are capable of adjudicating child custody matters . . . and that tribal justice systems are appropriate forums for resolution of child custody disputes.”¹²⁴

The State contends that ICWA § 1911 constitutes a “complete jurisdictional scheme” limiting a tribe’s initiating jurisdiction to child custody proceedings in Indian country under § 1911(a), but allowing, under certain conditions, transfer jurisdiction for those proceedings outside of Indian country under § 1911(b). According to the State, this scheme “reflects Congress’[s] reasonable balancing of tribal rights, parental rights off-reservation, and state rights off-reservation.” The State argues that the superior court’s acknowledgment of inherent sovereign jurisdiction to initiate child custody proceedings: (1) “fundamentally upend[s] ICWA’s delicate balance of parental, state, and tribal interests”; (2) circumvents transfer jurisdiction limitations; (3) allows tribes to exercise jurisdiction over non-members; and (4) magnifies the disjunction in Indian law that P.L. 280 may have divested Alaska Native tribal powers inside Indian country but not outside

¹²² *Id.* at 753.

¹²³ *Id.* at 752-53 (citing *In re F.P.*, 843 P.2d at 1219).

¹²⁴ *Id.* at 753-54 (citing 25 U.S.C. § 1911).

it — as noted in *John v. Baker*, “generally, Indian nations possess greater powers in Indian country than they do outside it.”¹²⁵

The Tribes respond that: (1) ICWA was intended to give tribes more, not less, power and authority to protect the best interests of their children; (2) this case does not present the issues the State raises concerning tribal jurisdiction over non-members; and (3) the remaining vestige of *Nenana*’s divestiture interpretation of P.L. 280 should be overruled, thereby eliminating the alleged jurisdictional disjunction.

We agree with the Tribes. ICWA creates limitations on states’ jurisdiction over ICWA-defined child custody proceedings, not limitations on tribes’ jurisdiction over those proceedings.¹²⁶ And we acknowledge that in the nearly 25 years since our *Nenana* decision, our view of P.L. 280’s impact on tribal jurisdiction has become the minority view — other courts and commentators have instead concluded that P.L. 280 merely gives states concurrent jurisdiction with tribes in Indian country.¹²⁷ What remains of

¹²⁵ *Id.* at 748 n.46.

¹²⁶ *See Holyfield*, 490 U.S. at 44-45 (stating ICWA’s purpose was “to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings” because “Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities” (emphasis in original)); COHEN’S HANDBOOK, note 16, above, at § 11.01[1], 820 n.2 (“This conclusion is inescapable from a reading of the entire statute, the main effect of which is to curtail state authority.”); ICWA HANDBOOK, note 17, above, at 5 (observing ICWA was intended, in part, “to encourage tribal adjudication of child custody proceedings involving Indian children”).

¹²⁷ *See Kaltag Tribal Council*, 344 Fed. Appx. at 325 (“[N]either the ICWA nor [P.L.] 280 prevented the Kaltag court from exercising jurisdiction.”); COHEN’S HANDBOOK, note 16, above, §6.04[3][c], at 560-61 (“The nearly unanimous view among tribal courts, state courts and lower federal courts, state attorneys general, the Solicitor’s Office for the Department of the Interior, and legal scholars, is that [P.L.] 280 left the inherent civil and criminal jurisdiction of Indian nations untouched.” (footnotes omitted)); ICWA HANDBOOK, note 17, above, at 34 (“It has become clear . . . that the
(continued...)”)

Nenana must now be overruled. We adopt the view that P.L. 280 did not divest tribes of all jurisdiction under § 1911(a), but rather created concurrent jurisdiction with the State.

Accordingly, in light of our foundational decision *John v. Baker*, ICWA, federal case law regarding Alaska Native tribal sovereignty, and the absence of express contrary Congressional intent, we hold that federally recognized Alaska Native tribes that have not reassumed exclusive jurisdiction under § 1918(a) still have concurrent jurisdiction to initiate ICWA-defined child custody proceedings, both inside and outside of Indian country. Necessarily, federally recognized Alaska Native tribes are entitled to all of the rights and privileges of Indian tribes under ICWA, including procedural safeguards imposed on states¹²⁸ and § 1911(d) full faith and credit with respect to ICWA-defined child custody orders to the same extent as other states' and foreign orders.¹²⁹

¹²⁷ (...continued)

retrocession provisions . . . permit Indian tribes to reassume exclusive jurisdiction over their children domiciled in Indian country, but these tribes can exercise concurrent jurisdiction over their children along with state courts and can exercise transfer jurisdiction under § 1911(b)"); CASE & VOLUCK, note 77, above, at 394 ("[I]t is now generally agreed that [P.L. 280] does not deprive tribes of concurrent jurisdiction."); *id.* at 390 n.134 ("Retrocession does not seem to be required for tribal courts to exercise concurrent jurisdiction over child custody matters, because such jurisdiction was not surrendered to the state under P.L. 280.").

¹²⁸ See, e.g., 25 U.S.C. § 1912(a) (2000) (requiring notice to Indian tribes); 25 U.S.C. § 1911(b) (providing Indian tribes with right to petition for transfer to tribal court); *id.* at § 1911(c) (providing Indian tribes with right to intervene); see generally ICWA HANDBOOK, note 17, above, at 83-111.

¹²⁹ See *John v. Baker*, 982 P.2d at 761-62 ("ICWA requires courts to extend full faith and credit to tribal court decisions involving 'child custody proceedings' as that term is defined by [ICWA]."). This case does not present a specific full faith and credit dispute and we do not need to discuss potential limitations on § 1911(d) full faith and
(continued...)

We do not have before us sufficient facts to make determinations about specific limitations on inherent tribal jurisdiction over ICWA-defined child custody proceedings. The nature and extent of tribal jurisdiction in any particular case will depend upon a number of factors, including but not limited to: (1) the extent of the federal recognition of a particular tribe as a sovereign; (2) the extent of the tribe's authority under its organic laws; (3) the tribe's delegation of authority to its tribal court; and (4) the proper exercise of subject matter and personal jurisdiction. Among the many issues we are not deciding today are: (1) whether, parallel to ICWA § 1911(b) transfer jurisdiction limitations, parents of Indian children might have the right to object to tribal jurisdiction; (2) the extent of tribal jurisdiction over non-member parents of Indian children; and (3) the extent of tribal jurisdiction over Indian children or member parents who have limited or no contact with the tribe. We therefore do not need to address the varied hypothetical situations posited by the State as creating difficult jurisdictional questions — we leave those for later determinations under specific factual circumstances.

E. Our Decision's Impact On The Judgment For Declaratory And Injunctive Relief

Our ruling is more limited than the declaratory relief entered by Judge Tan, and we therefore vacate that portion of the declaratory judgment going beyond today's decision. Today's decision should clarify any confusion about jurisdiction that may be held by federally recognized Alaska Native tribes to initiate ICWA-defined child custody proceedings. We are confident the State's agencies will follow our clarifying ruling without the need for further injunctive relief, and out of respect for the executive branch

¹²⁹ (...continued)

credit. *See, e.g., Starr v. George*, 175 P.3d 50, 55-58 (Alaska 2008) (discussing due process requirement for orders afforded § 1911(d) full faith and credit).

we therefore vacate that portion of the judgment entering such relief (but without prejudice to the right of the Tribes to seek future relief if deemed necessary).

V. CONCLUSION

The superior court's judgment is **AFFIRMED** in part and **VACATED** in part, as set forth above.

5

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

RUSSELL PETERSON, JR.,)
)
 Plaintiff,)
)
 v.)
)
 STATE OF ALASKA,)
)
 Defendant.)

Case No. 1JU-10-569 CI

SUBPOENA FOR TAKING DEPOSITION
DUCES TECUM

To: **Jim Duncan, Business Manager**
Alaska State Employees Association
Address: **1577 C Street, Anchorage, AK 99501**

You are commanded to appear in this office to testify under oath in the above case at:

Date and Time: **November 3, 2010 @ 9:00 a.m.**
Location: **Attorney General's Office**
1031 W. 4th Ave, Suite 200, Anchorage, AK, 99501

Notice, as required by Civil Rule 45(d), has been served upon Doug Mertz, counsel for Plaintiff on September 29, 2010.

You are ordered to bring with you: the entire ASEA file pertaining to Russell J. Peterson Jr. (DOB: 2/18/64); including but not limited to all written correspondence between ASEA and Mr. Peterson's legal counsel, Doug Mertz, or any other individual providing legal representation to Mr. Peterson.

Date: 10/1/10

Deputy Clerk CAIM McEula

Subpoena issued at request of:
AAG John M. Ptacin
Attorney for State of Alaska
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Telephone: (907)269-6612
Fax: (907) 269-4978



Before this subpoena may be issued,
the above information must be filed
in and a copy must be presented to the
clerk of court. Notice of deposition has
been served upon opposing counsel.

PETITION FOR REVIEW

Statement of the Facts

The petitioner, a former State employee, filed an action for unjust termination against the State. Before filing the court case, he exhausted his administrative remedies by filing a grievance through his union, as required. Under the Collective Bargaining Agreement with the State, only a union representative was allowed to represent the employee in the grievance process; his private attorney could not participate on behalf of the member. After the grievance process ended and the employee filed suit, the State's attorney demanded all the union's records related to the member and the grievance, including all private communications, notes, and files related to the grievance and all communications from the employee's private attorney to the union. The Petitioner objected that these documents should be considered privileged as the union representative was acting in the role of an attorney when no attorney was allowed, and that to allow one side in litigation to have access to all the private factual and strategic communications between the opposing party and his legal representative would violate due process. On March 1, 2011, the trial court ruled that the State could obtain all the union records because the attorney/client privilege applies only to attorney representation, not to a non-lawyer advocate performing the same function. Petitioner contends that it is a fundamental violation of due process to permit one side in litigation to discover private communications, opinions, and strategies between the other party and his legal advocate. There had

been a trial date but the court took it off the calendar so the State could pursue its discovery claims.

Statement of the Question

When a litigant has gone through a mandatory administrative process before filing suit, and was represented in that process by a non-lawyer because the State allows only the union to represent union members, may the State, in subsequent litigation, discover all internal documents, communications, and files of the union, including all communications with the member and all communications with the member's private attorney working on the same matter? Does an advocate-client privilege apply when the party is not allowed to have his attorney represent him?

Why this Petition Should be Granted

This petition should be granted for these reasons:

1. Postponement of consideration of this point until a post-trial appeal will cause great hardship because matters on which the Petitioner has a legitimate reasonable expectation of privacy – his private communications with his own legal representative in an administrative proceeding – would be completely open to discovery, and his own representative in those proceedings could even be called to testify against him.
2. This is an issue of first impression in this court, on which there is substantial disagreement among courts in other states. If left in place, even for a short duration, it will affect many ongoing employment grievances files with the State and other

public employers, and has serious implications for the privacy of negotiations on collective bargaining agreements.

3. This issue is likely to evade review as in this employment action, the probability is that there will be either a settlement or a plaintiff's verdict, in either of which case there will be no appeal in which to address it. The State would then be free to continue this tactic and thereby jeopardize the rights of union members to fair and effective representation in the administrative grievance process.

Why the Ruling Below was Erroneous

This issue is new to this court, and we believe it is new to any Alaska trial court. It also relates to a new tactic by the State: Never before has the State invaded an opposing party's expectation of privacy by attempting to obtain the files of a union representative created in the grievance phase of the litigation. If the State's tactic is successful, it would create a fundamental imbalance in which one side could discover all the materials normally privileged in litigation while the other side maintains a privileged status for its own litigation records.

The union, ASEA, is recognized by the state as the sole legal representative of its members in grievances; both the state and the union refuse to permit a member's private attorney to take part or even observe any proceedings between the union and the state.¹ The union representative (sometimes called a business agent) performs the

¹ The restriction to a union representative and the exclusion of private attorneys in the administrative phase is found in the contract between the State of Alaska and the General Government Unit (GGU), Section 103, which reads:

The Employer will not negotiate or handle

functions that an attorney would in court: He or she makes arguments, presents evidence to the other side, negotiates settlements, and if a matter goes to arbitration, presents and cross-examines witnesses and delivers arguments to an arbitrator, in exactly the same way an attorney would if one were permitted. In this case the union representative communicated and met numerous times with the plaintiff on strategy and on negotiation goals in the proceedings against the state. The union also received informal advice from the member's private attorney on strategy.

The grievance process failed to resolve the issue, and having exhausted his administrative remedies, the plaintiff filed suit.

Now, the state has subpoenaed *all* the union's records involving the plaintiff, including *all* communications between the union representative and the plaintiff, and between the union representative and the undersigned acting as the plaintiff's attorney. The subpoena is sweeping:

All union records pertaining to Russell Peterson, Jr. (DOB: 2/28/64), including but not limited to all written correspondence between ASEA and Mr. Peterson's legal counsel, Doug Mertz, or any other individual providing

grievances with any individual or employee organization other than the Union with respect to terms and conditions of employment of bargaining unit members in the GGU. When individuals or organizations other than the Union request negotiations or seek to represent bargaining unit members in grievances or to otherwise represent bargaining unit members in Employer/employee matters, the Employer shall advise them that the Union is the exclusive representative for such matters. Similarly, the Union will so advise individuals or organizations making such requests.

legal representation to Mr. Peterson.²

This is an outrageous attempt to invade a privilege and to gain materials showing the opposing side's litigation strategy to which the state is not entitled. This attempt should not be countenanced, for these reasons:

1. The State's attorney is attempting to do what he could never do, legally or ethically, if the State had allowed the plaintiff to have attorney representation in the administrative phase. It is beyond denial that the State could not invade the attorney/client privilege by directly seeking communications between the plaintiff and his lawyer or otherwise seek to learn the thought processes and strategies of the lawyer;³ yet here, the State seeks exactly those things. The State's theory seems to be that since the union business agent – the plaintiff's legal representative in the administrative phase – was not a lawyer, the State is entitled to all his communications with the client/member, and all the communications of the legal representative with the party's private lawyer who offered assistance in the administrative proceeding.

The following points are incontrovertible: The plaintiff was entitled to legal representation in the administrative phase; the State itself, through the collective bargaining agreement, restricted that representation to a union representative, refusing to deal with a retained attorney; and now the State seeks all private

² Appendix 2.

³ Ak. Evidence Rule 503, Commentary to Rule 503.

communications between the client and the union legal representative, and between the union legal representative and the client's private attorney who was simultaneously advising the client in different phases of the same cause. So all the client's confidential communications – about legal strategy, about witnesses and evidence, about settlement negotiations and positions, would become open to the State. There is no justification for such an egregious violation of basic privileges.

2. There is no direct case law on this issue by the Alaska Supreme Court. But the court has made a clear analysis of the importance of privileges that should apply here. Moreover, courts elsewhere have dealt with the issue, and although the results are varied, there is a clear consensus that when the employee is restricted to representation by a union representative who is not a lawyer, it would be unfair if not unconstitutional to allow the employer to invade the confidentiality of the employee's relationship with his legal advisors.

a) Alaska law. The Alaska Supreme Court has held that the attorney-client privilege extends to client communications with a non-lawyer,⁴ in certain circumstances. Although the facts of that case differ from this case, the court made certain points that matter here:

...the very heart of the common-law privilege was to protect the facts given by the client to his attorney. The privilege was based on the necessity that an attorney have

⁴ American Nat. Watermattress Corp. v. Manville, 642 P.2d 1330, 1333-1334 (Alaska 1982).

the full disclosure of the facts from his client.⁵

The court has also noted the important public policy purpose of the privilege:

Other jurisdictions have held, however, that lawyer-client privilege is more than just a testimonial exclusion. "The privilege against disclosure is essentially a means for achieving a policy objective of the law. The objective is to enhance the value which society places upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others will be informed.... If client and counsel must confer in public view and hearing, both privilege and policy are stripped of value." *The Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 263 Cal.App.2d 41, 53-54, 69 Cal.Rptr. 480 (1968) (since superseded by statute).⁶

The court has stated that the attorney-client privilege is entitled to "greater solicitude" than the physician-patient privilege.⁷ This makes relevant the court's treatment of the physician-patient privilege. In *Allred v. State*, 554 P.2d 411 (Alaska 1976), the court found that a common law psychotherapist-patient privilege exists, based on consideration of the following factors that apply to all claims of privilege:

Professor Wigmore has proposed four canons to be used as a basis for determining whether, for any particular relationship, a common law privilege is desirable. These are:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to

⁵ *id.* at 1334, citations omitted.

⁶ *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248, n. 23 (Alaska, 1993).

⁷ *Lewis v. State*, 565 P.2d 846 (Alaska 1977) at note 4.

the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. 8 J. Wigmore, Evidence, § 2285. (Emphasis in original) ⁸

The court found that the need for confidentiality is essential in order to make the relationship work,. The most compelling statement of the need in the context of union representation came from the California Supreme Court in denying a claim that there was no privilege attached to the union-member relationship,

As Justice Broussard noted at oral argument, the Legislature could not have intended that the only sound advice the authorized [union] representative could give was, "Don't talk to me."⁹

In short, the privilege here – between the union legal representative and the member, which the State itself has required be substituted for the attorney–client relationship, fits all the factors listed above in Wigmore for a common law privilege. It is directly analogous to the attorney-client privilege and most likely should be a necessary extension of it in the circumstances of mandated union representation.

b) Other jurisdictions. Where private attorneys are prohibited, as here, from representing a member, several courts and agencies have had no problem in finding

⁸ 554 P.2d at 417.

⁹ Welfare Rights Org. v. Crisan, 190 Cal. Rptr. 919, 923 n. 3, 33 Cal. 3D 776, 771 661 P.2d 1073 (Cal. 1983).

that the communications between member and union representative is privileged. For example, in *Seelig v. Shepard*, 578 N.Y.S. 2D 965 (Supr. Ct. 1991), the court held:

...there arises, in the context of rules regulating relations between management and labor, a species of privilege for labor union leaders. If unions are to function, leaders must be free to communicate with their members about the problems and complaints of union members without undue interference. Members must be able to have confidence that what they tell their representatives on such subjects cannot be pried out of the representatives by an over-zealous governmental agency. Union members must know and be secure in feeling that those whom they elect from among their ranks will be their spokespersons and representatives, not the unwilling agents of the employer. The union leadership councils must be free to confer among themselves, exchange views, make plans and arrive at negotiating strategies without intrusion from the organs of official power.¹⁰

The California Supreme Court has held that the privileges that would otherwise be applicable to an attorney-client relationship apply to the lay relationship as well when the Legislature has created a system of lay representation. In *Welfare Rights Organization v. Crisan*, *Welfare Rights Org. v. Crisan*, 190 Cal. Rptr. 919, 923, 33 Cal. 3D 766, 771, 661 P.2d 1073 (Cal. 1983), the court stated:

[T]he considerations which support the privilege are so generally accepted that the Legislature must have implied its existence as an integral part of the right to representation by lay persons. Otherwise that right would, in truth, be a trap by inducing confidential communications and then allowing them to be used against the claimant. We do not attribute such a sadistic intent to the Legislature.

¹⁰ Accord, *City of Newburgh v. Newman*, 421 N.Y.S.2d 673 (App. Div. 1979).

33 Cal.3d at 771.¹¹

The same result has been reached by administrative tribunals. In *Cook Paint and Varnish Co.*, 258 NLRB 1230, 1231-1232 (1981), the National Labor Relations Board ruled that the employer committed an unfair labor practice by questioning a union steward, who had been involved in an employee's grievance arbitration, and by threatening to discipline the steward if he didn't turn over his notes:

Such consultation between an employee potentially subject to discipline and his union steward constitutes protected activity in one of its purest forms. To allow Respondent here to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives. Such actions by Respondent also inhibit stewards in obtaining needed information from employees since the steward knows that, upon demand of Respondent, he will be required to reveal the substance of his discussions or face disciplinary action himself. In short, Respondent's probe into . . . protected activities has not only interfered with the protected activities of those two individuals but has also cast a chilling effect over all of its employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline. [258 NLRB at 1232].¹²

¹¹ Other courts have noted that this privilege does not extend to immunizing factual information imparted by the union member, see *American Airlines, Inc. v. Superior Court*, 8 Cal. Rptr. 3d 146 (Cal. App. 2004); *Walker v. Huie*, 142 F.R.D. 497, 500 (D.Utah 1992). The defendants here have gone well beyond a discovery request for factual information.

¹² See also *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977); *New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police*, New Hampshire PELRB Decision No. 94-74 (August 31, 1994); *IBEW, Local 77*, No. 15544-U-00-3932, 2003 WL 21658695 (Wash. Pub. Employment Relations Comm'n 2003) and see *Teamsters Local 391 v. Terry*, 494 U.S. 558, 567, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990) (union has fiduciary duty to protect members' interests. Forcing the union to reveal what it has learned in confidence

In summary, there is solid support for the proposition that the State may not violate the spirit of the rules regarding attorney-client privilege and obtain materials to which it is not entitled, by the device of subpoenaing documents and notes in the possession of a union official, especially when the State has itself required that the member be represented by a union official instead of a lawyer.

3. It should also be obvious that if the union legal representative has a duty to withhold materials that are privileged, that also extends to materials sent to or from a private attorney who is simultaneously representing the same person in regard to the same actions by the State. If that were not the case, the State could in effect prevent

would breach that relationship of trust by converting it into management's agent for the collection and transmittal of information that employees might not otherwise choose to reveal.) A labor relations privilege has been recognized in several cases. See *Int'l Union v. Garner*, 102 F.R.D. 108 (M.D. Tenn. 1984); *Ill. Educ. Labor Relations Bd. v. Homer Cmty. Consol. Sch. Dist.*, 547 N.E.2d 182 (Ill. 1989); *Labor Relations Bd. v. Chi. Transit Auth.*, 793 N.E. 2d 730 (Illinois App. Ct. 2003); *Children's Village v. Greenburgh Eleven Teachers' Union Fed'n of Teachers*, 648 N.Y.S.2d 152 (N.Y. App. Div. 1996) (citing *Seelig*, op. cit., with approval); cf. *Alhambra Police Officers Ass'n v. City of Alhambra Police Dep't.*, 113 Cal. App. 4th 1413, 1422 (Cal. Ct. App. 2003) (recognizing privilege based upon California statute that privileges police officers from having to disclose information disclosed to another officer in non-criminal matters).

On the other hand, a full labor relations privilege has been rejected by some courts. See *Patterson v. Heartland Indus. Partners*, 225 F.R.D. 204 (N.D. Ohio 2004) (rejecting labor relations privilege under labor principles, but accepting the proposition that Freedom of Association principles would prevent the disclosure of confidential labor relations information); *Ahearn v. Rescare W. Va.*, 208 F.R.D. 565 (S.D. Va. 2002); *In Re Grand Jury Subpoenas Dated Jan. 20, 1998*, 995 F. Supp. 332 (E.D.N.Y. 1998); *EEOC v. People's Gas, Light and Coke Co.*, 1981 WL 2332 (N.D. Ill. 1981), appeal dismissed, 1992 WL 20019 (7th Cir. 1982) (supporting policy for protecting confidentiality but finding it not applicable in that case.)

The most extensive commentary on this issue is in Rubinstein, "Is a Full Labor Relations Evidentiary Privilege Developing?," 29 *Berkeley Journal of Employment & Labor Relations Law* 1.

all cooperation among allied co-counsel working on what is essentially the same effort. To allow such handicapping of a litigant would amount to a critical denial of his due process rights.

4. The subpoena would also violate Evidence Rule 408, by revealing one side's negotiation strategy, including private discussions of what settlements may be acceptable to the plaintiff. The Rule (and the commentary to it) literally relate to admissibility of statements made settlement negotiations. However it is clear from the commentary that the court's concern in promulgating the rule (which codified a common law privilege) was to protect the settlement process and not discourage settlement discussions. In this case, the broad subpoena demands any document communicating between the plaintiff and his union legal representative regarding settlement, what the State was likely to offer, what the plaintiff was willing to accept, and what the plaintiff may be willing to offer. This obviously invades an area which is forbidden to discovery.

5. The trial court's ruling on this issue acknowledged that a number of courts have recognized either a union-member privilege¹³ or a privilege in situations in which a statute authorizes lay representation.¹⁴ But the judge ultimately concluded that

¹³ *Seelig v Shepard*, 578 N.Y.S. 965 (N.Y. Sup. Ct. 1991), which has been relied in several other New York decisions recognizing a privilege, *Dist. No. 1-PCD v. Apex Marine Ship Mgmt. Co.*, 745 N.Y.S. 2D 522, 526-27, n. 2 (N.Y. App. Div. 2002); *children's Vill. v. Greenburgh Eleven Teachers' Union*, 648 N.R.S.2d 152, 153 (N.Y. App. Div. 1996); *In re Suffolk County Ethics Comm'n*, 909 N.Y.S.2d 339, 343-44 (N.Y. Sup. Ct. 2010). See also *Illinois Educ. Labor Relations Bd. v. Homer Cmt. Consol. Sch. Distr.*, 547 N.E.182, 185 (Ill. 1989).

¹⁴ *Welfare Rights Organization v. Crisan*, 190 Cal. Rptr. 919, 923, 33 Cal. 3D 766, 771, 661 P.2d 1073 (Cal. 1983).

Evidence Rule 501 prevents a court from recognizing a new privilege unless it is compelled by court rule, by the U.S. Constitution, the Alaska Constitution, or by an Alaska statute. The judge did not confront our reasoning that protection of such records is required by the due process provisions of the U.S. and Alaska Constitutions in order to provide basic fairness in an adversarial proceeding, or that it is required by the act of the State itself in making a mandatory provision in the collective bargaining agreement that only a union representative will be recognized in the administrative process, i.e., an action that tilts the playing field just as much as if it were a statute, unless the union representative also has a right to keep communications confidential.

6. We note that the cases from other jurisdictions also provide critical information on other misuses that could result if a privilege of confidentiality is not recognized here.

For example, if the State can obtain the union's records of internal communications with a member regarding a grievance proceeding, it can also depose the union representative to obtain even more information, and even call the union rep as a witness against his own client. Even further, if there is no union-member confidentiality, the State can, in any dispute over interpreting the collective bargaining agreement, subpoena all union records regarding internal discussions within the union among the members of the union's bargaining team. In short, the State's eagerness to obtain communications that are ordinarily treated as confidential can open a pandora's box by giving the State free access to many areas in which confidentiality is critical to the rights of organized labor and its members.

7. Finally, we note that nothing in our argument would prevent a litigant from using

discovery to obtain factual information relevant to the dispute. In this case the State can and has used interrogatories, requests for production, and depositions to dig into all possible facts concerning the Petitioner and his claim. The only things that would come within a privilege are the communications between the member and his union representative and between the member's private attorney and the union representative, including litigation preparation materials and work product; no privilege would extend to any underlying facts that would otherwise be discoverable.

Relief Requested

We request the court to rule that in these circumstances – an administrative proceeding in which a litigant is required to be represented by a union official, not by a lawyer – the records and files of the union official are entitled to the same confidentiality as would apply to the records and files of an attorney, if one had been allowed to participate.

Conclusion

As the California Supreme Court said,

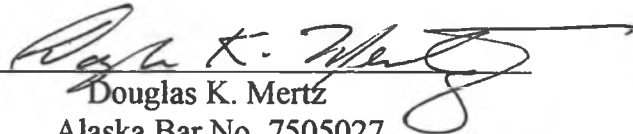
[Without a privilege], that right [to a non-lawyer representative] would, in truth, be a trap by inducing confidential communications and then allowing them to be used against the claimant. We do not attribute such a sadistic intent to the Legislature.

. . . the Legislature could not have intended that the only sound advice the authorized representative could give was, "Don't talk to me."¹⁵

¹⁵ Welfare Rights Organization v. Crisan, 33 Cal.3d 766, 771, 190 Cal. Rptr. 919, 923, 661 P.2d 1073 (1983).

This case is of such importance to labor relations and to litigation over employment causes that this court should intervene now and recognize that in the circumstances of this case, the private communications of both sides in litigation should remain private.

Dated: *March 10, 2011*



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