No. 09-960

In The
Supreme Court of the United States

WILLIAM H. HOGAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ALASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

KALTAG TRIBAL COUNCIL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court and the court of appeals correctly held – consistent with the decisions of the Alaska Supreme Court and all other reported decisions, and consistent with petitioner State of Alaska's repeated position in prior litigation – that § 1911(d) of the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (ICWA), requires Alaska to "give full faith and credit to the judicial proceedings of" the Kaltag Tribe applicable to an "adoptive placement proceeding" when Indian guardians from a neighboring Tribe invoked the jurisdiction of the Kaltag Tribal Court in order to adopt a child of the Kaltag Tribe.

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BRIEF IN OPPOSITION

INTRODUCTION

Nearly 20 years ago the Ninth Circuit affirmed that, so long as an Alaska Native Village is federally recognized as an Indian Tribe, its retained tribal sovereignty includes the authority to adjudicate an adoption proceeding in its tribal court involving the custody and welfare of a tribal child. *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) (writing for a unanimous court, Judge O'Scannlain applied this rule where an adoptive

Indian parent from a neighboring Tribe invoked a tribal court's jurisdiction). In essentially now seeking review of that unremarkable decision – which Alaska state courts have firmly embraced, *see John v. Baker*, 982 P.2d 738 (Alaska 1999), *cert. denied* 528 U.S. 1182 (2000); *In re C.R.H.*, 29 P.3d 849 (Alaska 2001); *Native Village of Tanana v. State*, No. 3AN-04-1214 CI, slip op. (Ak. Sup. Ct. May 25, 2007), *appeal argued*, No. S-13332 (Alaska Dec. 10, 2009), and which petitioner until 2004 likewise firmly embraced, *see* Amicus Brief of the State of Alaska at 4-6, *John*, 982 P.2d 738 (No. S-08099); Appellee State of Alaska's Brief at 25, *C.R.H.*, 29 P.3d 849 (No. S-09677) – petitioner is 20 years too late.

Unlike its position in *Venetie*, petitioner no longer asserts that Alaska Native Villages are not federally recognized Tribes possessed of the usual attributes of retained tribal sovereignty, including the same privileges and immunities, generally enjoyed by all Indian Tribes. Pet. 17 n. 12.[1] Petitioner also no longer

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[1] *See also John*, 982 P.2d at 749 ("[W]e hold that Alaska Native tribes, by virtue of their inherent powers as sovereign nations, do possess [non-territorial] authority [to resolve domestic disputes]"); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54364, 54366 (Oct. 21, 1993) (Alaska Tribes "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"); Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, Title I, §§ 101-104, 108 Stat. 4791 (codified in part at 25 U.S.C. §§ 479a-479a-1). Petitioner's concession on this point, Resp. App. 4, together with congressional and secretarial actions,

(Continued on following page)

asserts that something in the ICWA divested Indian Tribes of any of their retained tribal sovereignty over tribal children, whether inside or outside areas denominated "Indian country."[2] And petitioner also no longer asserts that something in Public Law No. 83-280, 67 Stat. 588 (1953) (Public Law 280), *codified in part as amended at* 28 U.S.C. § 1360, divested Indian Tribes in Alaska of any of their retained tribal sovereignty over tribal children, whether inside or outside areas denominated "Indian country."[3] Indeed, by framing its question presented as being limited to only "nonmembers," Pet. i, petitioner no longer asserts that Indian Tribes in Alaska lack jurisdiction to adjudicate *ab initio* in their tribal courts custody proceedings and adoptions involving tribal children and other tribal members.[4]

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is a complete answer to Amici's suggestion that the issue of tribal recognition is properly presented in this case. Amici Br. at 15-16.

[2] *See Venetie*, 944 F.2d at 562 ("Neither the [ICWA] nor Public Law 280 prevents [the Tribe] from exercising concurrent jurisdiction"); *John*, 982 P.2d at 753 (the ICWA was not meant to "eradicate tribal court jurisdiction over family law matters," but rather the "ICWA's goal was to increase tribal control over custody decisions involving tribal children," and the "ICWA's very structure presumes [that Tribes] are capable of adjudicating child custody matters in their own courts").

[3] *See John*, 982 P.2d at 745-46 (recognizing *Venetie*'s holding that "[Public Law] 280 had not stripped the villages of sovereignty over child custody issues because it had granted the states only concurrent jurisdiction").

[4] Amici's assertion that Tribes in Alaska possess no sovereign authority whatsoever thus goes far beyond the Petition

(Continued on following page)

Petitioner's sole argument is that the foregoing acknowledged inherent sovereignty that a Tribe possesses over the welfare of an at-risk tribal child does not extend to adjudicating the rights to that child of a putative Indian father from a neighboring Tribe, nor of an adoptive Indian couple from a neighboring Tribe who wish to adopt that child. The problem with presenting that question in this case, as it would have been in *Venetie*, is that both the putative father and the adoptive parents below *consented* to – indeed, in the case of the adoptive parents here, they actually *invoked* – the Kaltag Tribal Court's jurisdiction. Granting certiorari to determine whether Indian citizens from neighboring Tribes can *consent to or invoke* the jurisdiction of a Tribal Court in connection with a proceeding involving the welfare of an at-risk tribal child who has now been adopted for four years is hardly a sensible use of this Court's scarce resources.

That is all that this case is about. The ICWA requires that every State give "full faith and credit" to all acts and proceedings of the courts of an "Indian tribe," § 1911(d), a term which petitioner concedes expressly includes Alaska Native villages. Pet. 17 n. 12; *see also* § 1903(8). The Kaltag Tribe is one such village. For years the Tribe took care to protect and guard the interests of one at-risk village child, Baby

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and is an assertion that was never raised below. Amici Br. at 8, 11.

N.S., from abuse and neglect by her troubled single-mother and putative absent father. After years of failed reunification efforts (including the mother's imprisonment for a parole violation on a prior Murder II conviction), the mother and putative father consented to the termination of their parental rights and to the adoption of the child into a new home through proceedings instituted in the Kaltag Tribal Court. At no time did any party ever raise a jurisdictional objection, nor did petitioner object to the Tribal Court's action, even though petitioner was well aware of the proceedings. Everyone's silence is hardly surprising, considering that the adoptive parents from the neighboring Tribe *invoked* the Kaltag Tribal Court's jurisdiction.

Only when the adoptive parents sought a substitute birth certificate from Alaska's Bureau of Vital Statistics did petitioner refuse, now contending that an intervening 2004 Opinion from a new state Attorney General prohibited the Bureau from according full faith and credit to *any* Alaska tribal court decree issued in a case that did not originate in, and was not transferred from, a state court. That opinion was a sharp break from the State's prior positions taken in the *John* and *C.R.H.* litigation, and it called into question the State's obligation under the ICWA to "give full faith and credit" to *all* child welfare cases originating in tribal courts – even cases involving exclusively tribal members. Although petitioner's purported limitation of the proposed question presented here to "nonmember[s]" suggests a more narrow

issue, the logic of petitioner's State-as-gatekeeper-to-tribal-courts argument challenges *all* tribal-initiated court proceedings involving the welfare of tribal children – even voluntary adoptions of the kind presented here, and even proceedings exclusively among tribal members.

Petitioner's new, narrow and extreme view of tribal authority over tribal children has never been adopted by any court anywhere, and it was properly rejected by the court of appeals here, just as it was by a different three judge-panel in *Venetie*. As history has shown in the 20 intervening years since *Venetie* was decided, the sky has not fallen on the States where Indian Tribes initiate proceedings to protect tribal children, whether both parents are tribal members or where one parent is from another Tribe but *consents* to the court's jurisdiction. Not only has the sky not fallen, but petitioner itself has urged its own Supreme Court, repeatedly – up until the new Attorney General's flip-flop opinion was released in 2004 – to *embrace* the *Venetie* ruling as a matter of state law, so that the State and Tribes could work together in partnership to provide a more complete and effective set of protections for children in need of aid across Alaska's vast expanse.

Unable to identify *any* other case in which there is a true decisional conflict, petitioner stretches to invent a conflict with more recent decisions of this Court – none of which involved the commonplace assertion of tribal jurisdiction over the welfare of a tribal child, much less a case where any non-member parties had *consented to or invoked* the tribal court's

jurisdiction. Petitioner's theory that Congress through the ICWA vested in the States the role of gatekeepers over all cases that might thereafter be heard by a tribal court involving a child domiciled outside Indian country turns upside down Congress' protective purpose to *strengthen* tribal interests in the welfare of tribal children. As the Ninth Circuit made clear 20 years ago in *Venetie*, and as this Court made clear two years earlier in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), the ICWA was intended to supplement and complement the powers of Tribes, not to diminish them. The petitioner simply ignores that inconvenient part of the court of appeals' analysis, which is unassailable.

Because there is no conflict with any other court, and because the facts below make this case a poor vehicle for deciding a question that was never presented, much less decided below – namely the authority of a tribal court to adjudicate the rights of a non-consenting non-member parent of a tribal child – the Petition should be denied. The "decision to grant certiorari represents a commitment of scarce judicial resources," *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985), and "it is certainly safe to assume that whenever [the Court] grant[s] certiorari in a case not deserving plenary review, [it] increase[s] the likelihood that certiorari will be denied in other, more deserving cases." *Watt v. Alaska*, 451 U.S. 259, 274 n. 1 (1981) (Stevens, J., concurring). Such would be the outcome if the Court were to grant certiorari here.

COUNTER STATEMENT

Contrary to petitioner's hyperbole, the decision below preserves – indeed, has nothing to do with – the authority of Alaska's state courts to exercise jurisdiction in "involuntary" child custody proceedings (that is, cases in which a parent objects to a court's jurisdiction). It also has nothing to do with involuntary tribal jurisdiction over non-member Indians, since the one putative parent here who is from another Tribe waived any jurisdictional objection, and because the State – which was fully informed about the child protection proceeding – never raised that issue below. This case is strictly about tribal jurisdiction that is concurrent with state jurisdiction. It concerns a voluntary, consensual adoption proceeding, and the court of appeals' routine application of settled law does not warrant plenary review.

Indeed, up until petitioner's sudden reversal of position in 2004, petitioner *embraced* the rule of law that it now seeks to overturn, recognizing 156 tribal court adoption orders issued by 45 different tribal courts. Resp. App. 1-4. Petitioner actively *supported* the rule of law that has been affirmed here and that has been previously adopted by the Alaska Supreme Court *at petitioner's urging*, which is that federally recognized Tribes in Alaska possess inherent jurisdiction – concurrent with the State's – over proceedings involving tribal children. The only new issue petitioner now seeks to raise – involuntary tribal court jurisdiction over a non-member Indian parent – is simply not presented here.

A. Factual Background

1. In the wake of this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), the Alaska Supreme Court took up the residual question of whether Alaska Tribes have sovereign authority over their members even though Alaska Tribes do not generally occupy Indian country. *John*, 982 P.2d at 748. While not parties to the proceeding, the State of Alaska and the Federal Government were invited to express their views. Both filed amicus briefs urging the Alaska Supreme Court to bring its common law into conformity with more recent actions by all three branches of the federal government recognizing Alaska Tribes as sovereigns with retained authority over their members, including conformity specifically with the very decision of the Ninth Circuit in *Venetie* which the State now disparages.

As petitioner explained at the time, the issue was one of extraordinary importance to Alaska:

> [T]he conflict between this court's rulings in *Native Village of Nenana v. State of Alaska, DHSS*, 722 P.2d 219 (Alaska 1986) and its progeny, and the decision of the United States Court of Appeals for the Ninth Circuit in [*Venetie*], has left the State in an untenable position. On the one hand, it must abide by the law of this State as determined by this court; on the other, its failure to follow the Ninth Circuit's interpretations as it relates to any villages other than those involved in [*Venetie*] has resulted in repeated

> suits filed by tribes in federal court, challenging the State's inability to recognize tribal court orders. These suits have tied up the lives of the affected persons, particularly delaying permanent placements for children, and have diverted state resources from necessary state services. The State wants to cooperate more closely with tribes, avoiding duplicative programs and stretching our combined resources further than either could manage separately, particularly in the under-served regions of Alaska.

Amicus Brief of the State of Alaska at 1, *John,* 982 P.2d 738 (No. S-08099).

After analyzing this Court's jurisprudence on the nature of inherent tribal sovereignty, the Alaska Supreme Court *agreed* with petitioner and concluded that "Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members," in particular, in cases involving tribal children, regardless of whether or not the Tribe occupies Indian country. *John*, 982 P.2d at 748-49. In opposing certiorari in this Court in *John*, the State filed an amicus brief in support of tribal authority, arguing persuasively:

> In an effort to paint a Jurisdictional conflict where none exists, petitioner mischaracterizes the Jurisdictional consequences of the Alaska Supreme Court's decision. The decision does not, as suggested by the petition, empower Alaska tribes to "supersede" the

> jurisdiction of Alaska courts to adjudicate child custody disputes. Instead, the decision confirms the jurisdiction of the Alaska state courts, concurrent with Alaska tribal courts, to hear child custody disputes involving tribal children.
>
> Indeed, recognition of concurrent jurisdiction between state and tribal courts provides improved access to judicial resolution of parental custody disputes, especially for rural Alaskans. When coupled with the newly articulated comity criteria, it will also reduce parents' forum shopping in these cases. The Alaska Supreme Court's comity holding is thus an appropriate state law accommodation of the State's efforts to enhance cooperation between state and tribal court systems in Alaska.

Brief for the State of Alaska as Amicus Curiae in Support of Respondent at 8-9, *Baker v. John*, 528 U.S. 1182 (2000) (No. 99-973) (internal citations omitted). Thereafter, Alaska Governor Tony Knowles issued Administrative Order 186 (Sept. 29, 2000) acknowledging the legal and political existence of Alaska's federally recognized Tribes, and directing Alaska's Executive Branch to work on a government-to-government basis with Alaska's sovereign Tribes.

A year later the Alaska Supreme Court addressed whether Public Law 280 divested Tribes in Alaska of their pre-existing inherent jurisdiction and, as a consequence, whether Alaska Tribes could receive transfer of ICWA cases from a state court to a tribal

court under § 1911(b) of the ICWA (or whether, instead, such Tribes would first have to petition the Secretary of the Interior to reassume such jurisdiction under § 1918 of the ICWA). *See In re C.R.H.*, 29 P.3d 849 (Alaska 2001). In *C.R.H.*, the State had technically opposed a motion to transfer a child custody proceeding under § 1911(b) from state court to tribal court, while indicating its desire to *support* the requested transfer. *Id*. at 851. The State explained that its technical opposition to the transfer stemmed from the fact that, despite the State's own earlier request in *John* that the court "overrule" *Nenana* and similar cases, the court had not yet done so. *Id*. The State was therefore "constrained until the Alaska Supreme Court overrules these decisions." *Id*. The State then filed a brief urging the Alaska Supreme Court to confirm that Alaska Tribes *could* hear cases transferred from state court without the Tribes first petitioning the Secretary to "reassume" such jurisdiction under § 1918 of the ICWA. Appellee State of Alaska's Brief at 26-29, *C.R.H.*, 29 P.3d 849 (No. S-09677) (explaining that the ICWA § 1918 process is for securing "exclusive" tribal jurisdiction, not the concurrent jurisdiction that already exists). The Alaska Supreme Court agreed, upholding the right of Alaska Tribes to secure transfer jurisdiction under § 1911(b) and expressly overruling everything to the contrary in *Nenana* and related earlier decisions. *C.R.H.*, 29 P.3d at 854. Though petitioner now asserts that Alaska's courts have had "difficulty" in "grappling with this important issue," Pet. 21-22, it would

be more accurate to say that modern Alaska case law is squarely and uniformly against petitioner.

In 2002, Alaska Attorney General Bruce Botelho issued an advisory Opinion to the Department of Health and Social Services (DHSS) providing instructions on how to implement the Alaska Supreme Court's decisions in *John* and *C.R.H.*, and how DHHS and its agencies should work cooperatively with Alaska tribal agencies and courts. Pet. 22 n. 15. In the meantime, between June 1, 2000 to September 3, 2004, the Alaska Bureau of Vital Statistics recognized 156 tribal court adoptions issued by 45 tribal courts in Alaska. Resp. App. 1-4. Thus, as of 2004, Alaska Tribes and the State worked cooperatively for the overall protection of tribal children and did so without any evidence of adverse consequences either to those children or to others.

2. Following a new election, a newly-appointed Attorney General struck out on a radically different course. In clear disregard of the Alaska Supreme Court and of his own predecessors, Attorney General Gregg Renkes suddenly revoked Attorney General Botelho's Opinion and substituted for it a new Opinion issued October 1, 2004. 2004 Op. Att'y Gen. No. 1 (Oct. 1, 2004) (Renkes Opinion). The new Opinion accepted the bare holdings of *John* and *C.R.H.* but purported to carve out from any "full faith and credit" ICWA recognition the decrees from any adoption or child protection proceedings issued by any tribal court where the tribal court proceedings did not originate in and were not transferred from a state court.

For all such cases, the Renkes Opinion declared that state agencies were no longer to recognize any concurrent tribal court jurisdiction over children's cases unless the Tribe at issue first successfully petitioned the Secretary of the Interior to "reassume" jurisdiction under § 1918 of the ICWA – essentially the very opposite of the position Alaska successfully advanced in *C.R.H.* DHSS complied with these new instructions by repealing all prior cooperative policies, and by putting in their place new policies that effectively instructed DHSS caseworkers to ignore all tribal court child protection or adoption proceedings. This effected a 180-degree turn in state policy toward Alaska tribal courts in the context of children's proceedings, and needlessly created conflict and confusion where none had existed before.

3. Shortly after these events, five Tribes, together with a non-Native couple who had adopted an Indian child in tribal court, brought suit in the Alaska Superior Court to restore the *status quo ante* and to secure once again a declaration that Alaska Tribes possess inherent authority over the domestic relations of their tribal members, including original jurisdiction to initiate all children's proceedings involving tribal children such as adoption proceedings. The Alaska Superior Court entered an Order and Judgment in favor of plaintiffs, holding that "[t]here is nothing in ICWA that prohibits or limits Tribes from passing laws that would allow the Tribe to initiate [Child in Need of Aid] cases in tribal court. As such, the inherent sovereign power of the tribes

remains intact." *Native Village of Tanana v. State*, No. 3AN-04-1214 CI, slip op. 17-18 (Ak. Sup. Ct. May 25, 2007), *appeal argued*, No. S-13332 (Alaska Dec. 10, 2009). In the *Tanana* appellate litigation, petitioner raises all of the same jurisdictional challenges that it now asserts here.

4. The facts giving rise to this case began long before petitioner's recent about-face. Baby N.S. was born on October 18, 1999, to a troubled single-mother on parole from a "Murder II" conviction. *See State v. G.S.*, Case No. 4FA-S90-00254 CR, Temporary Order (Ak. Sup. Ct. Sept. 5, 2003) (revoking parole). On June 10, 2000, a tribal child welfare worker and a tribal mental health counselor investigated a report of harm and found the mother "passed out at noon" and unable to care for Baby N.S., then eight months old. *In re N.S.*, Case No. 00-0611, Order Granting Temporary Custody at 1 (Kal. Trib. Ct. June 13, 2000). The Kaltag Tribal Court entered an Order of Emergency Custody on June 11, 2000, making Baby N.S. a ward of the Tribal Court and temporarily placing her with V.B. *Id*. The court based its subject matter jurisdiction on the fact that Baby N.S.'s mother is a member of the Kaltag Tribe, that the child is therefore a tribal member under Kaltag's Constitution, and that Kaltag is a federally recognized Indian Tribe. *Id.*; *see also* 25 U.S.C. § 1903(8). During a follow-up hearing on June 13, 2000, the mother stated that the "father of the child is unknown" and expressed concern regarding her conditions of probation. *N.S.*, Order Granting Temporary

Custody at 2 (June 13, 2000). In the interest of "monitor[ing] her well-being," the court retained legal custody of Baby N.S., ordering the child's mother, G.S., to "immediately begin counseling," and also ordering that physical custody should remain with V.B. "until [G.S.] is sober and able to care for [the] child." *Id.* at 2.

The court returned custody of Baby N.S. to the mother on July 7, 2000, after the mother reported being "sober for nearly a month." *N.S.*, Case Review and Order Relinquishing Custody at 1 (July 7, 2000). But on September 2, 2000, a Kaltag tribal health aide made another report of harm that Baby N.S. (now ten months old) was "in her mother's home with intoxicated adults." *N.S.*, Order Granting Temporary Custody at 1 (Sept. 6, 2000). A child safety check at the home by a child welfare worker found that N.S. "smelled strongly of urine, she had a raw neck, and a bruise on her right cheek." *Id*. On September 5, 2000, a State Division of Family and Youth Services (DFYS) case worker "was in Kaltag and found [G.S.] passed out at the home of [A.C.] and was unable to wake her." *Id*. at 2. But petitioner initiated no action in state court, neither at that time nor at any other time.

Baby N.S. was temporarily placed with L.S. until she could be placed with her maternal aunt and uncle, J.S. and G.S., in the Village of Nulato. *Id*. at 3. This order was extended an additional 30 days after the mother completed a recovery program, but the mother became intoxicated immediately upon re-entering Kaltag. *N.S.*, Order Granting Temporary

Custody at 2-3 (Nov. 6, 2000). Upon learning that Baby N.S.'s mother had left for Fairbanks and was reincarcerated following the previous hearing, the court extended custody of Baby N.S. an additional 90 days, *N.S.*, Order Granting Temporary Custody at 2-3 (Dec. 14, 2000), and thereafter for another 90 days upon learning she planned to reenter detox. *N.S.*, Order Granting Temporary Custody at 3 (Mar. 29, 2001).

During a subsequent status hearing, the court determined that Baby N.S.'s putative father was a tribal member from a neighboring village. *N.S.*, Order Granting Temporary Custody at 1 (Mar. 28, 2003). The putative father was contacted and asked to take a paternity test and to give a Kaltag child welfare worker a list of possible family members who might be considered for a temporary custody placement of the child. *Id*. at 3-5. The putative father refused to take custody of Baby N.S. and stated that he was unaware of anyone from his family who could take custody of the child. *Id.* at 3. He waived his right to be present at the temporary custody hearing, *id*., and would later state that he did "not want his family involved in this situation" and that placement with him was "out of the question" because he "barely takes care of himself." *N.S.*, Order Granting Temporary Custody at 2 (July 10, 2003).

Between June 10, 2000 and March 8, 2004, Baby N.S. was cared for by six Indian custodians. During this period the court held 13 status hearings to review N.S.'s welfare and to monitor the child's placement. Once discovered, the putative father was

given written notice of every hearing but repeatedly waived his right to be present. In the meantime, the mother was ordered to enroll in an alcohol recovery program, to seek individual counseling, and to comply with her parole conditions. But she instead became incarcerated for parole violations and upon being released resumed drinking.

On July 29, 2004, more than four years after the first report of harm, and after all rehabilitative efforts to reunite the child with her mother had failed, the court terminated the parental rights of N.S.'s mother and putative father. Pet. App. 23a-27a. The court then placed N.S. in the permanent guardianship of Hudson and Selina Sam, a couple who lived in the neighboring upriver village of Huslia. *Id*. N.S.'s mother and putative father were given written and verbal notice of the termination hearing. *Id.* The mother appeared telephonically but did not object to the termination. *Id*. The father again waived his right to be present. *Id*. at 24a.

In August 2005 the Sams petitioned the local Huslia Tribal Court to adopt N.S. But, because N.S. is a Kaltag tribal member, the Huslia Tribal Court forwarded the adoption petition to the Kaltag Tribal Court.

5. On October 14, 2005, the Kaltag Tribal Court issued an Order of Adoption declaring the Sams to be N.S.'s parents. *Id*. at 22a. In the same Order, the court ordered that N.S.'s name be changed to reflect her new parents' name, and directed that this be reflected on a new birth certificate. *Id*. The clerk of the

court then entered and submitted a Report of Adoption on a state adoption form to the Alaska Bureau of Vital Statistics, requesting a new birth certificate for N.S. *Id*. at 5a.

On January 26, 2006, the Alaska Bureau of Vital Statistics rejected the request. Referencing the Renkes Opinion, the Bureau explained: "As of October 25, 2004, the Bureau will only be accepting Tribal Court granted adoption paperwork from the following 3 entities: Barrow, Chevak, and Metlakatla." *Id*. Kaltag then brought this suit in federal court to compel the State to give full faith and credit to Kaltag's adoption decree under the ICWA's full faith and credit provision, 25 U.S.C. § 1911(d).

B. The Proceedings Below

The specific question addressed by the district court was whether, pursuant to § 1911(d) of the ICWA, the State must give full faith and credit to an ICWA adoption decree[5] where the adoptive parents are Indians from a neighboring Tribe who voluntarily invoked the jurisdiction of the Tribe in which the child was a member. In the district court, petitioner argued that in the absence of an Indian reservation or other form of "Indian country," a Tribe possesses no

[5] A "child custody proceeding" is defined under 25 U.S.C. § 1903(1)(iv) of the ICWA as including "'adoptive placement' which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption."

jurisdiction to initiate proceedings in a tribal court over a member child, including voluntary adoption proceedings. In other words, under petitioner's changed policy the Tribe could only exercise jurisdiction over an adoption case if the case were commenced in state court and then transferred to the tribal court – the tribal court would apparently have inherent jurisdiction to *receive and adjudicate* a transferred case, but not to *commence* such a case *ab initio*. Importantly for purposes of the Petition, in the district court petitioner never even mentioned, much less raised, the purported rights of the absent putative Indian father who repeatedly declined to be involved, nor of the Indian adoptive parents who are plaintiffs.

C. The Decisions Below

Relying in part on this Court's holding that § 1911(b) "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation," *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989), the district court found petitioner's interpretation of § 1911(b) strained." Pet. App. 14a-15a. "It would be incongruent for this court to find that [§ 1911(b)'s] 'presumptively tribal jurisdiction' requires the Tribe to first defer jurisdiction to the state court, and then wait for the state court to transfer the matter to tribal court." *Id.* The district court rejected petitioner's claim that a Tribe lacks all jurisdiction to adjudicate a child protection proceeding outside of Indian country involving

a tribal child. *Id*. at 17a (citing *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 599 n. 2 (9th Cir. 1991) ("A tribe's authority over its reservation or Indian country is incidental to its authority over its members.")). The district court concluded that for purposes of such jurisdiction, "it is the membership of the child that is controlling, not the membership of the individual parents." Pet. App. 17a. (citing *John v. Baker*, 982 P.2d 738, 759 (Alaska 1999), *cert. denied* 528 U.S. 1182 (2000) ("A tribe's inherent sovereignty to adjudicate internal domestic custody matters depends on the membership or eligibility for membership of the child.")).

A unanimous panel affirmed in a brief unpublished memorandum opinion. Pet. App. 2a-3a. The court of appeals agreed with the district court's decision that under § 1911(d) of the ICWA, "full faith and credit" must be given to the Kaltag Tribal Court's adoption decree, finding this conclusion compelled by that court's binding precedent in *Venetie*. *Id.* Petitioner sought en banc review but failed to receive a single vote.

REASONS FOR DENYING THE PETITION

1. In an effort to amplify the appellate court's decision to one of extraordinary import, petitioner grossly mischaracterizes the jurisdictional consequences of the appellate court's decision. The decision does not shift to Indian Tribes jurisdiction over "matters traditionally reserved to the States." Pet. 10.

Instead, the decision confirms the longstanding principle that tribal courts possess jurisdiction, at all times *concurrent* with state courts, to initiate child custody proceedings outside Indian country to protect children of the Tribe. As petitioner itself recognized prior to its sudden about-face in 2004:

> *[R]ecognition of concurrent jurisdiction between state and tribal courts provides improved access to judicial resolution of parental custody disputes, especially for rural Alaskans*. When coupled with the newly articulated comity criteria, it will also reduce parents' forum shopping in these cases. The Alaska Supreme Court's comity holding is thus an appropriate state law accommodation of the State's efforts to enhance cooperation between state and tribal court systems in Alaska.

Brief for the State of Alaska as Amicus Curiae in Support of Respondent at 8-9, *Baker v. John,* 528 U.S. 1182 (2000) (No. 99-973) (emphasis added).

Petitioner incorrectly states that "[a]t no point during this time was the State of Alaska made aware of these tribal court proceedings," Pet. 8, implying that had they been "made aware" they would have contested the Kaltag Tribe's jurisdiction. This, too, is not correct: the record shows plainly that the State was actively aware of the proceedings as early as 2000, when a state DFYS case worker "was in Kaltag and found [G.S.] passed out at the home of [A.C.] and was unable to wake her." Resp. App. 6. The district court found that "[i]ndeed, in this case the state CINA

office was notified; however what resulted from that notification is unclear." Pet. App. 15 n. 21. In addition, the mother's criminal conduct and her subsequent parole violations, resulting in reincarceration by the State during this same period, were all issues of which state corrections officers were well aware – including some of the same officials who were in active communication with the Kaltag Tribal Court. *N.S.*, Order Granting Temporary Custody at 2 (Dec. 14, 2000). The State also admitted that "it is true that DHSS received some reports of harm concerning N.S. in 2003." Appellants' Opening Brief at 40 n. 105, *Kaltag Tribal Council v. Karleen Jackson*, No. 08-35343 (9th Cir. filed Aug. 8, 2008). Although petitioner was therefore well apprised of the danger to Baby N.S. and of the on-going tribal court proceedings, it chose to defer to the Kaltag Tribal Court. Having chosen not to proceed then, petitioner should not be heard now to complain that there was a jurisdictional defect in the Tribal Court proceedings. *See*, *e.g.*, *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument that was "inadequately preserved in the prior proceedings"). In short, petitioner's 2004 change of position does not create a conflict worthy of this Court's review.

2. Petitioner wrongly argues that the appellate court's decision conflicts with the decisions of this Court barring "the extension of tribal civil authority over nonmembers on non-Indian land." Pet. 3 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2722 (2009) (internal

quotation marks omitted) (quoting *Nevada v. Hicks*, 533 U.S. 353, 360 (2001))). Neither *Hicks* nor *Plains Commerce* suggest that Tribes lack authority concurrent with the States to initiate and adjudicate child protection proceedings over member children, over the consenting parents of such children, or over the consenting adoptive parents of such children. In *Hicks*, this Court barred a tribal court tort action against state law enforcement officers for actions taken while executing a search warrant involving an off-reservation crime because the actions of state officers investigating a state crime were not "connected to that right of the Indians to make their own laws and be governed by them." *Hicks*, 533 U.S. at 361. In doing so this Court carefully distinguished tribal court involvement in those activities that might interfere with tribal authority, including the right "to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Id.* at 360-61 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (internal quotation marks omitted) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981))). Petitioner simply ignores this inconvenient aspect of *Hicks*, just as petitioner ignores this Court's cautionary language in *Hicks* that the Court's "holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law." 533 U.S. at 358 n. 2. As for *Plains Commerce*, there this Court limited the ability of tribal courts to adjudicate *adversarial* proceedings arising out of commercial real estate transactions between non-members

arising on fee lands. 128 S. Ct. at 2714 ("This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals."). That proposition, too, has nothing to do with this case.

Petitioner's analysis mistakenly merges the general proposition in Indian law that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *id.* at 2720 (internal citation omitted), with the incorrect assertion that a Tribe's jurisdiction over its members is per se restricted to the confines of Indian country, even when the matter at issue involves a tribal child, and even when the non-members from another Tribe *voluntarily invoke* the Tribe's jurisdiction over the child. As the court of appeals correctly explained, in such circumstances "[r]eservation status is not a requirement of jurisdiction because '[a] Tribe's authority over its reservation or Indian country is incidental to its authority over its members.'" Pet. App. 2a-3a (quoting *Venetie*, 944 F.2d at 559 n. 12); *see also* Mack T. Jones, Note, *Indian Child Welfare: A Jurisdictional Approach*, 21 ARIZ. L. REV. 1123, 1139 (1979) ("[J]urisdiction hinges upon the ethnic identity and tribal membership of the child, rather than the geographical location of the child's domicile. This reflects Congress' recognition of the fact that tribal ties extend beyond the boundaries of the reservation."); FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 7.02[1][c], pp. 1602-03 (2005 ed.) (hereinafter COHEN) ("Tribal court subject matter jurisdiction over actions arising outside Indian country extends . . . to cases involving the internal concerns

of tribal members, *and also to cases involving non-members who have consented to tribal jurisdiction*.") (emphasis added).

Congress agrees. As a result, statutes like the ICWA focus on the child's tribal membership as the determining factor in defining tribal jurisdiction. 25 U.S.C. § 1903(4) (defining "Indian child" as a child who is a tribal member or eligible for membership). Petitioner's assertion that the ICWA's jurisdictional scheme was intended as a limit on tribal jurisdiction in favor of state authority is contrary to the statute's purpose and over two decades of jurisprudence recognizing that "Congress was concerned with the rights of Indian families and Indian communities vis-á-vis state authorities. More specifically, its purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989) (emphasis in original) (internal citations omitted).

As the leading Indian law treatise observes, the ICWA's purpose in placing limits on state courts "is inescapable from a reading of the entire statute, the main effect of which is to curtail state authority." COHEN § 11.01[1], at 802 n. 2 (citing 25 U.S.C. §§ 1901, 1911-1916, 1918). Rather than conflicting with decisions of this Court, the appellate decision is fully *in accord* with this Court's holding in *Holyfield,* 490 U.S. at 36, that the ICWA "creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation," a recognition that was hardly "*dicta*," Pet. 24 (emphasis added),

since it was critical to the Court's analysis of the entire jurisdictional question presented. Further, it is supported by a long line of authority going back nearly a century and holding that Indian Tribes possess inherent authority to regulate the conduct of their members in child welfare and other domestic relations matters. *See Holyfield*, 490 U.S. at 42 ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA. Indeed, some of the ICWA's jurisdictional provisions have a strong basis in pre-ICWA case law in the federal and state courts."); *United States v. Quiver*, 241 U.S. 602, 603-04 (1916) ("At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated . . . according to their tribal customs and laws."). This is because the power of an Indian Tribe to determine questions of internal relations derives from the essential character of the Tribe as a distinct political entity. *See, e.g., Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 390 (1976) (*per curiam*) (recognizing that the jurisdiction of a tribal court "does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the [Tribe] under federal law"). Membership in a Tribe thus provides the necessary predicate for both tribal jurisdiction over tribal members and tribal jurisdiction over the subject matter of member domestic relations. *See Holyfield*, 490 U.S. at 42 (exclusive tribal jurisdiction over off-reservation Indian children based both on mother's domicile and on children's eligibility for membership in the Tribe).

Child welfare matters lie at the core of tribal sovereignty – a Tribe's inherent power to "determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana*, 450 U.S. at 564 (internal citations omitted). Congress agrees, recognizing in the ICWA that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). Decisions of this Court fully support the proposition, reaffirmed below and acknowledged by the Alaska Supreme Court in *John* and *C.R.H.*, that Alaska Tribes possess the authority to govern their own internal relations – and specifically to address the welfare of endangered tribal children – even when they do not occupy Indian country. WILLIAM C. CANBY, AMERICAN INDIAN LAW 463 (5th ed. 2009) ("The *John* case . . . leaves the Alaska Court more closely in line with federal court decisions.").

3. Nor does the court of appeals decision conflict with three decisions from other circuits, notwithstanding petitioner's selective quotation from all three. Pet. 20. None of these cases have anything to do with the question presented here and addressed by the panel below. *See Nord v. Kelly,* 520 F.3d 848, 851-52 (8th Cir. 2008) (whether tribal court could entertain claims brought by non-Indian against non-member Indian arising out of accident on state highway

within reservation); *MacArthur v. San Juan County*, 497 F.3d 1057, 1060-61 (10th Cir. 2007) (whether tribal court could entertain suits involving tort and civil rights violations brought by member and non-member Indians against non-member employers); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1089 (8th Cir. 1998) (whether tribal court could entertain suit contesting Breweries' use of the Crazy Horse name in the off-reservation manufacture, sale, and distribution of Crazy Horse Malt Liquor). All these cases, like *Hicks* and *Plains Commerce*, involved adversarial proceedings in tribal courts against non-Indians arising out of commercial dealings or tort actions. They have nothing to do with a consensual adoption case or a consensual termination proceeding.

With respect to the question actually addressed by the court of appeals here, the decision is fully *in accord* with the precedent of other Circuits. *See*, *e.g.*, *In re Larch,* 872 F.2d 66, 69 (4th Cir. 1989) ("[The ICWA] discloses that Congress recognized that there can be concurrent jurisdiction in state and tribal courts"); *AFL-CIO v. United States,* 195 F.Supp.2d 4, 21 (D.D.C. 2002), *aff'd* 330 F.3d 513 (D.C. Cir. 2003), *cert. denied* 540 U.S. 1088 (2003) (recognizing Alaska's Tribes' sovereign status and noting *Venetie*'s holding "requiring Alaska to give full faith and credit to child custody determinations made by tribal courts of the native villages"); *cf. In re M.A.*, 137 Cal.App.4th 567, 574 (Cal. Ct. App. 2006) ("Public Law 280 . . . grant[ed] the state *concurrent*, not exclusive, jurisdiction," and citing *Venetie*) (emphasis in original).

As for state cases, petitioner's reliance on *Roe v. Doe*, 649 N.W.2d 566 (N.D. 2002), Pet. 21, is likewise inapposite, for that case involved a putative father's collateral attack on a twelve-year-old *state* court judgment of paternity, not the validity of a tribal court decree. To the contrary, in upholding the state court's concurrent jurisdiction to determine paternity where conception may have occurred on-reservation and the father resided off-reservation, the court repeatedly cites approvingly to *John* and other cases recognizing that "[o]utside Indian country . . . the state *as well as the tribe*, can adjudicate such disputes in its courts." *Id.* at 578-80 (emphasis added) (also citing Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051, 1082 (1989) ("[W]ith respect to claims that have significant off-reservation impact or occur off-reservation, state courts may assert jurisdiction, *concurrent with tribal courts*, even as to actions involving Indian defendants.") (emphasis added)).[6]

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[6] *See also*, *In re Laura F.*, 83 Cal.App.4th 583, 593-94 (Cal. Ct. App. 2000) (where Indian children are "neither domiciled nor residing within any reservation of the Tribe," then "either the juvenile court or the Tribe could conduct such proceedings"); *In re Adoption of S.S.*, 657 N.E.2d 935, 942 (Ill. 1995) (Section 1911(b) "confers concurrent jurisdiction on the State courts along with the tribal court where the child is not domiciled and does not reside on the reservation. Under section 1911(b), there is still a presumption that the tribal court should hear the case"); *Adoption of Arnold*, 741 N.E.2d 456, 461 (Mass. App. Ct. 2001) ("If a child is not domiciled on a reservation, then State

(Continued on following page)

Similarly inapposite is petitioner's reliance on *In re Guardianship of D.L.L. and C.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980). Pet. 21. Indeed, *D.L.L.* actually *supports* the proposition repeated by the court of appeals here and in *Venetie*, and by the Alaska Supreme Court in *John*, that Tribes possess membership-based, non-territorial jurisdiction, concurrent with the State, over children's proceedings involving the welfare of tribal children. *D.L.L.*, 291 N.W.2d at 281 ("Even though a member of an Indian tribe may be outside the territorial boundaries of the reservation, the tribal government may regulate the absent member's affairs involving questions of . . . domestic relations.") (internal citation omitted).[7]

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and tribal courts have concurrent jurisdiction, and a State court is required to notify the tribe if it has reason to believe that the custody proceedings involve an Indian child."); *Spear v. McDermott*, 916 P.2d 228, 234 (N.M. Ct. App. 1996) ("It is undisputed that, at the time the abuse and neglect proceedings began in the children's court, the twins and their mother were both residing in and domiciled in New Mexico, rather than in the Cherokee Nation. Under those circumstances, the children's court had concurrent jurisdiction over the case, sharing that jurisdiction with the Cherokee tribal court.") (citing § 1911(b)).

[7] The court of appeals' decision is also in accord with other state appellate courts that have examined the nature of tribal sovereignty over members situated outside Indian country. *See, e.g.*, *In re Appeal in Pima County Juvenile Action*, 635 P.2d 187, 191-92 (Ariz. Ct. App. 1981), *cert. denied sub nom. Catholic Soc. Servs. of Tucson v. P.C.*, 455 U.S. 1007 (1982) (finding that the Arizona trial court "should have deferred to tribal jurisdiction" and transferred the case to the tribal court in Montana even though the child was living in Arizona with the prospective adoptive parents at the time of the child custody proceeding); *cf.*

(Continued on following page)

At the very least, denying certiorari now would allow further development of the law, which would only benefit this Court should a conflict ever develop. Indeed, in the recently-argued *Tanana* case, *Native Village of Tanana v. State*, No. 3AN-04-1214 CI, slip op. (Ak. Sup. Ct. May 25, 2007), *appeal argued*, No. S-13332 (Alaska Dec. 10, 2009), the Alaska Supreme Court is currently considering the *identical* issue presented here. *See*, *e.g.*, *Arizona v. Evans*, 514 U.S. 1, 23 n. 1 (1995) (Ginsberg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."). A decision in *Tanana* is expected shortly.

4. The precise question decided below concerned whether Alaska must give "full faith and credit"

Wisconsin Potowatomies of the Hannahville Indian Cmty. v. Houston, 393 F.Supp. 719, 730 (W.D. Mich. 1973) (holding that child custody proceeding for three orphaned children of an Indian father and non-Indian mother was within the jurisdiction of the tribal court, not the state court, even though the children were not residing on the reservation at the time: "If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a sine qua non to the preservation of its identity."); *Wakefield v. Little Light,* 347 A.2d 228, 237-38 (Md. 1975) (holding that the tribal court for the Crow Indian reservation in Montana had jurisdiction over a child living in Maryland and not present in Indian country).

under § 1911(d) of the ICWA to "any action resulting in a final decree of adoption," § 1903(1)(iv), where the adoptive parents are non-member Indians who invoked the Tribe's jurisdiction over a member child. This question was correctly resolved in *Venetie* in favor of tribal jurisdiction, concurrent with state jurisdiction, and has been settled law in both state and federal courts for two decades.[8] This Court denied certiorari to review the same issue in *John*, this Court denied certiorari on the same issue in *Doe*, and absolutely nothing has changed to warrant a different result here. While petitioner contends without support that the appellate court's decision is based on a

[8] *See*, *e.g.*, *Doe v. Mann,* 415 F.3d 1038, 1063 n. 32 (9th Cir. 2005), *cert. denied* 547 U.S. 1111 (2006) ("This question [regarding concurrent state/tribal jurisdiction] was resolved by our decision in [*Venetie*], which held that Public Law 280 states have only concurrent jurisdiction with the tribes over child custody proceedings involving Indian children."); *United States v. Stone*, 112 F.3d 971, 973 (8th Cir. 1997) ("Broadly put, [Public Law 280] gave to certain enumerated states concurrent jurisdiction over criminal and civil matters involving Indians, where jurisdiction had previously vested only in federal and tribal courts.") (quoting *Venetie,* 944 F.2d at 555 n. 8); *Confederated Tribes of Colville Reservation v. Sup. Ct. of Okanogon County*, 945 F.2d 1138, 1140 n. 4 (9th Cir. 1991) (recognizing *Venetie*'s holding that Public Law 280 did not divest tribal courts of concurrent jurisdiction over child custody matters); *In re Marrige of Skillen*, 956 P.2d 1, 18 (Mont. 1998) (holding that "when an Indian child resides off the reservation, the state court and tribal court share concurrent jurisdiction"); *State v. Schmuck*, 850 P.2d 1332, 1343-44 (Wash. 1993) (extensively examining *Venetie* and agreeing that under Public Law 280, state and tribal jurisdiction are concurrent).

fundamentally flawed interpretation of the ICWA, this Court's holding in *Holyfield*, that the ICWA establishes "concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation," 490 U.S. at 36, coupled with the absence of any dissenting opinion from *any* member of the court of appeals, confirms that the decision below represents a straightforward application of the well-accepted principle that Tribes possess *concurrent* jurisdiction to initiate and adjudicate matters concerning member children residing outside Indian country, and that §§ 1911(b) and 1918 of the ICWA do not bar Tribes from exercising their concurrent jurisdiction until (1) a state court case is first commenced from which a transfer may be requested, or (2) the Secretary grants a special reassumption petition.

Lacking the traditional reasons for granting certiorari, petitioner devotes a significant amount of its effort to hypothetical problems that may arise if tribal courts are permitted to exercise jurisdiction in child protection cases. It is striking that petitioner must rely exclusively on hypothetical harms, even though the rule petitioner challenges has been in place for nearly 20 years. If any of those untoward effects were more than theoretical, they would have occurred by now. The fact that they have not arisen merely reflects the cooperative and collaborative efforts of both the tribal and state judiciaries to protect the best interests of the children of the State of Alaska. The success of those efforts provides a powerful reason for this Court not to intervene.

If the hypothetical issues identified by the State ever materialize, then the Court could seriously consider whether its intervention is warranted. In the meantime, the Court should deny certiorari here as it has for the past two decades on the same issue.[9]

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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[9] Amici's brief illustrates well that the state courts are available to entertain any such issue, as recently occurred with the dismissal of Amicus Taylor's case, *see Evansville Village v. Donielle Taylor*, No. 4FA-10-1226 CI, Order (Ak. Sup. Ct. Mar. 23, 2010) (dismissing action), underscoring that this Petition is not the place to resolve those still-developing cases.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KALTAG TRIBAL COUNCIL, and HUDSON AND SALINA SAM, Plaintiffs, vs. KARLEEN JACKSON, in her official capacity as Commissioner of Alaska Department of Health and Social Services; BILL HOGAN, in his official capacity as Deputy Commissioner of Alaska Department of Health and Social Services; and PHILLIP MITCHELL, in his official capacity as Section Chief of the Alaska Bureau of Vital Statistics, Defendants.	Case No. 3:06-CV-00211 (TMB)

DEFENDANT'S RESPONSE TO PLAINTIFFS' FIRST DISCOVERY REQUEST

[Dkt. 30, exh. 7, filed May 15, 2007]

The defendants, by counsel, respond to plaintiff's first discovery request as follows:

INTERROGATORIES

Interrogatory No. 1: Please state whether at any time prior to October 1, 2004, the Alaska Department of Health and Social Services and/or the Alaska

Bureau of Vital Statistics extended full faith and credit pursuant to 25 U.S.C. § 1911(d) of ICWA to a Tribal adoption decree from a federally recognized Tribe. If so, state the name of the tribe and whether a new birth certificate was issued to the adoptive child/children.

RESPONSE: The Alaska Bureau of Vital Statistics ("Bureau") has no easy way to determine if any certificate has been issued. Therefore, the response to this question is based on a review of Tribal adoptions processed during this time period. Since the Bureau did not start extending full faith and credit pursuant to 25 U.S.C. § 1911(d) of ICWA to a Tribal adoption decree until sometime after 2000, the search for Tribal and cultural adoptions was limited to those processed between January 1, 2000, and September 30, 2004. The list below only includes Tribal adoption decrees that were submitted on the Report of Adoption form used by state courts, i.e., the ones that were given full faith and credit; it does not include cultural adoptions submitted on forms as specified under 7 AAC 05.700.

Tribal Adoptions Processed

Village	Adoptions Processed
Akiachak	4
Akiak	4
Allakaket	1
Barrow	4
Brevig Mission	2
Chefornak	6
Copper Center	2

Goodnews Bay	4
Hooper Bay	21
Hughes	1
Kaltag	1
Kanatak	5
Kasigluk	1
Kenai	1
Kivalina	1
Knik	1
Kotlik	13
Kotzebue	16
Little Diomede	2
Manokotak	1
Metlakatla	2
Minto	1
Mountain Village (Asa Carsarmuit)	3
Napakiak	2
Nenana	1
Newtok	2
Nikolai	1
Noatak	8
Noorvik	7
Nulato	4
Orutsararmiut [sic]	1
Rampart	1
Ruby	1
Savoonga	8
Scammon Bay	1
Selawik	4
Shaktoolik	1
Shishmaref	1
Sitka	4
Stevens Village	6
Tanana	1

Togiak	1
Venetie	1
Wales	2
Yupit of Andreafski	1

Request for Admission No. 1: Please admit or deny that the Native Village of Kaltag, of which the Katag [sic] Tribal Council is the governing body, is a federally recognized Tribe and thus an "Indian Tribe" within the meaning of 25 U.S.C. § 1903.

RESPONSE: Admit

* * *

Request for Admission No. 3: Please admit or deny that you gave full faith and credit to Tribal adoption decrees from the Native Village of Venetie and/or Fort Yukon prior to October 1, 2004.

RESPONSE: Admit

Dated this 2nd day of April 2007.

TALIS J. COLBERG
ATTORNEY GENERAL

KALTAG TRIBAL COURT
KALTAG, ALASKA

In the Matter of:)	**Case No. 00-0611**
[N.S.])	Tribal Court Phone Number: (907) 534-2243
[Date Of Birth Omitted])	
Minor Tribal Member)	

ORDER GRANTING TEMPORARY CUSTODY

The Kaltag Tribal Court held a hearing on September 6, 2000, in accordance with the Order for Emergency Custody dated September 3, 2000. After considering all the evidence available, this Tribal Court finds that the welfare of the child, [N.S.], is endangered if temporary legal custody is not taken by the tribal court.

The Tribal Court HEREBY FINDS:

1. The mother of the child, [G.S.], is a Kaltag tribal member. Under the tribal constitution of Kaltag this child is a Kaltag tribal member under the jurisdiction of the Tribal Court and eligible to apply for enrollment; and

2. [A.E.], the Kaltag TFYS [tribal social worker], reviewed the case. She stated that she had received a report from the Health Aide, Dora Nickoli, on Saturday, September 2, 2000 that the above named child was in her mother's home with intoxicated adults. Ms. [E.] and the Mental Health Counselor, [V.B.], went to the home of [G.S.] to check on the welfare of this child and

found the home appeared to be occupied, but nobody responded, and the door was locked. The following day, Sunday, September 3, 2000, Ms. [E.] did another child safety check at the home and found that the mother was intoxicated and unable to communicate or care for the child. The child was in a diaper that smelled strongly of urine, she had a raw neck, and a bruise on her right cheek. When changing the child's diaper, there was dried feces on her bottom from having had a diaper changed without being cleaned, and a rash resulted. After contacting four Tribal Court Judges, Ms. [E.] carried out the decision of the Tribal Court to take Emergency custody of this child. The Health Aide was called to do a check up on the child, which occurred later that day. The child was placed into the physical custody of [L.S.]. The mother was not seen on Monday, September 4, 2000. On Tuesday, September 5, 2000, the DFYS Worker from Galena, Mark, was in Kaltag and found the mother, [G.S.], passed out at the home of [A.C.] and was unable to wake her. When the TFYS, [A.E.], tried to locate [G.] on the morning of this hearing, Ms. [S.] was not home. [A.C.] called the office and stated that [G.] was at her home and was still drinking, and Ms. [S.] was scaring Ms. [C.]. Ms. [E.] suggested that Ms. [S.] go to the clinic; and

3. Earlier in the summer, Ms. [B.] and Ms. [E.] visited the home after receiving the report on June 10, 2000 and found the mother of this child, [G.S.] passed out at noon. The child was placed in the care of [V.B.] after four Tribal Council members had been contacted regarding the

emergency. The mother was intoxicated that evening when visited again. The child was placed out of home for two weeks at that time and custody was relinquished by the Tribe and given back to the mother; and

4. The mother of the child, [G.S.], was given written notice of this hearing and was present at this hearing. She was not feeling well and was still intoxicated. She stated that she was too sick to speak to the Court at this time; and

5. The father of this child is unknown; and

* * *

7. The Kaltag TFYS, [A.E.], stated that if this child is placed out of home by the Court, that she does not have another home ready for the child, but will look into that if the court decides to keep the child out of the home at this time.

The Tribal Court CONCLUDES:

1. This child is a child in need of aid and should be made a ward of this court; and

2. It is in the best interest of the child for the village to take temporary legal custody of her in order to secure her care; and

3. It is in the best interest of the child to place her in the temporary physical custody of [L.S.] until the child can be escorted to Nulato to be placed in the temporary physical custody of [G.] and [J.S.], maternal uncle of the child and his wife. This child shall be placed in an out-of-home placement for sixty (60) days; and

4. It is in the best interest of this child that the mother, [G.S.], stop drinking alcohol and remain sober for the safety and well being of herself and this child; and

5. It is in the best interest of the child for the Kaltag TFYS, [A.E.], and the TCC Social Worker, Mishal Gaede, to monitor her well being, and to secure Foster Care funds for her if applicable.

The Tribal Court THEREFORE ORDERS:

1. The Kaltag Tribal Court takes temporary legal custody of the child, [N.S.], and makes her a ward of this court; and

2. The physical custody of the child is temporarily granted to [L.S.] until the child can be escorted to Nulato to be placed in the temporary physical custody of [G.] and [J.S.], maternal uncle of the child and his wife. [G.] and [J.S.], maternal uncle of the child and his wife, will be granted physical custody for the remainder of the next sixty (60) days, through November 6, 2000, during which time they shall exercise full powers of guardianship; and

3. The tribal court requests the mother of the child, [G.S.], to become sober, to remain sober, and to immediately make an appointment with [V.B.] for alcohol screening and a recommendation for either residential treatment or local counseling, and to provide the court with documentation of counseling through a signed release of information; and

4. The Tribal Court requests that the Kaltag TFYS, [A.E.], visit the home of [G.S.] weekly and offer services as needed; and

5. The Tribal Court requests that the Kaltag Counselor, [V.B.], forward her recommendation for this client to the TFYS, [A.E.], as soon as possible for the Court records; and

* * *

7. The Tribal Court requests that the Kaltag TFYS, [A.E.], and the TCC Social Worker, Mishal Gaede, monitor this case and pursue foster care funding if applicable; and

8. The tribal court will reconsider this matter in a hearing on November 6, 2000 to determine whether temporary custody by the court shall be extended for a period not to exceed one (1) year.

DONE BY TRIBAL COURT ACTION THIS 6th DAY OF SEPTEMBER, 2000.

/s/ Madeline Solomon
Presiding Judge

9-27-00
Date

KALTAG TRIBAL COURT
KALTAG, ALASKA

In the Matter of:)	**Case No. 00-0611**
N.S.)	Tribal Court Phone Number: (907) **534-2243**
[Date Of Birth Omitted])	
Minor Tribal Member(s))	

ORDER GRANTING TEMPORARY CUSTODY

The Kaltag Tribal Court held a hearing on March 28, 2003. Present in Kaltag were John Madros, presiding judge, Jason Saunders, judge, Madeline Solomon, judge, Beverly Madros, judge, and Donna Esmailka, TFYS. Present telephonically from Fairbanks were [G.S.], mother, and Racquel Alcain, TCC Child Protection Program Coordinator. After considering all the evidence available, this Tribal Court finds that the welfare of the child, [N.S.], is endangered if temporary legal custody is not continued by the tribal court.

The Tribal Court HEREBY FINDS:

1. The mother of the child, [G.S.], is a Kaltag tribal member. Under the tribal constitution of Kaltag this child is a Kaltag tribal member under the jurisdiction of the Tribal Court and eligible to apply for enrollment; and

2. The putative father of the child, [A.L.], may be a Koyukuk tribal member. Under the tribal constitution of Koyukuk, this child may be a Koyukuk

tribal member and eligible to apply for enrollment; and

3. Court History: * * * After the December 14, 2000 hearing, at which time the mother was intoxicated and continued drinking for two days, she left for Fairbanks. Ms. [E.] reported that [G.S.] was incarcerated after leaving Kaltag. She spoke to Ms. [S.]'s Probation Officer, Reuben, and reported that he recommended that Ms. [S.] be ordered to long-term residential treatment. She would not be allowed back in the village of Kaltag until March or April of 2001 and there was a State Court hearing on the matter on January 13, 2001.

   The December 14, 2000, the April 16, 2001 and the October 10, 2001 Court Orders included that the Tribal Court required the mother of the child, [G.S.], to become sober, to follow her aftercare plan and remain sober, and to immediately make an appointment for the FNA Women and Children's Recovery Program (WCRP), or another long-term treatment program, to seek individual counseling, and to provide the court with documentation of all services obtained through the North Star Center as well as documentation of applying to FNA WCRP through a signed releases of information. The child was placed with [J.] and [G.S.], maternal aunt and uncle to this child living in Nulato, but she was moved to Kaltag to the home of [L.S.], and then moved to the present home with the [M.]'s on November 2, 2001[.] The court was unable to hold a fall hearing until November 18, 2002. At that time, [G.] was incarcerated at Fairbanks Correctional

Center due to a parole violation. [N.] continued to be in the [M.] home and was doing well in their care. The court ordered the TFYS, Erica Solomon, to meet with [V.M.] to determine whether she would be interested in caring for [N.] permanently. A court hearing was to be scheduled in 30 days to determine the permanent plan for [N.]

4. The mother of the child, [G.S.], was given notice of this hearing and was present at this hearing. * * * She can't go to Kaltag until next year because that is where she committed her offense. She mentions that this is written in a letter from the parole board. She will bring the letter to Racquel at TCC so she can fax a copy to the tribal court. Her parole conditions include not drinking, working 40 hours a week, and completing a substance abuse aftercare treatment program.

* * *

5. The putative father of this child, [A.L.], was given written notice of this hearing and was not present at this hearing; and

* * *

7. Donna Esmailka, * * * stated that the previous TFYS, Erica Solomon, contacted [A.L.], the possible father. He was unable to take [N.] and didn't know if anyone from his family could take her. He called Donna today and said that he couldn't participate in the hearing because he is traveling. He didn't have any input to give for the hearing today.

* * *

The Tribal Court CONCLUDES:

1. This child is (a) child in need of aid and should be made a ward of this court; and

2. It is in the best interest of the child for the village to continue temporary legal custody of her in order to secure her care; and

3. It is in the best interest of the child to place her in the temporary physical custody of [V.M.] for the next 60 days; and

4. It is in the best interest of the child for the Kaltag TFYS, Donna Esmailka, and the TCC Social Worker, Racquel Alcain, to monitor her well being, and to secure Foster Care funds for her if applicable.

The Tribal Court THEREFORE ORDERS:

1. The Kaltag Tribal Court takes temporary legal custody of the child, [N.S.], and makes her a ward of this court; and

2. The physical custody of the child is temporarily granted to [V.M.] for 60 days, through May 28, 2003, during which time she shall exercise full powers of guardianship; and

3. The tribal court requires the mother of this child, [G.S.], to follow the conditions of her parole and to provide the court with documentation. The court also requests that she sign a release of information allowing the tribal court and TCC child protection program staff to obtain information from her parole officer; and

4. The tribal court requires the mother of this child, [G.S.], and the putative father, [A.L.], to sign an affidavit of paternity. The tribe requests that Racquel Alcain, TCC Child Protection Program Coordinator, assist the parents with completing this requirement.

5. The tribal court requires the putative father of this child, [A.L.], to provide Donna Esmailka, TFYS, with a list of relatives so that they may be considered for long-term placement of [N.].

6. The tribal court requires the foster parent, [V.M.], to contact the Kaltag Mental Health counselor and schedule an evaluation for [N.] to determine if ongoing counseling would be appropriate for her.

7. The court requires the Kaltag TFYS, Donna Esmailka, to complete two home visits per month with [V.M.].

* * *

9. The tribal court will reconsider this matter in a hearing on May 28, 2003, at 2:00 p.m. to determine whether temporary custody by the court shall be extended for a period not to exceed 90 days.

DONE BY TRIBAL COURT ACTION THIS 28th DAY OF MARCH, 2003.

/s/ John F. Madros Sr.
Presiding Judge

3-28-03
Date