IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, PATRICK S. GALVIN, in his official capacity as the Commissioner of the Alaska Department of Revenue and JOHN MALLONEE, in his official capacity of Director of the Alaska Child Support Services Division,

Appellants,

v.

CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA, on its own behalf and as *parens patriae* on behalf of its members,

Appellee.

Supreme Court No.: S-14935

Trial Court Case No.: 1JU-10-00376 CI

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

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

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Federal Statutes

Full Faith and Credit For Child Support Orders

28 USC § 1738B

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

(1) shall enforce according to its terms a child support order made consistently with this section by a court of another State; and
(2) shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i).

(b) Definitions.--In this section:
"child" means--
(A) a person under 18 years of age; and
(B) a person 18 or more years of age with respect to whom a child support order has been issued pursuant to the laws of a State.
"child's State" means the State in which a child resides.
"child's home State" means the State in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the 6-month period.
"child support" means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.
"child support order"--
(A) means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and
(B) includes--
(i) a permanent or temporary order; and
(ii) an initial order or a modification of an order.
"contestant" means--
(A) a person (including a parent) who--
(i) claims a right to receive child support;
(ii) is a party to a proceeding that may result in the issuance of a child support order; or

(iii) is under a child support order; and

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

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

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

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

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

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

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

(B) has personal jurisdiction over the contestants; and

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

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

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

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

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

(B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

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

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

(2) If 2 or more courts have issued child support orders for the same obligor and child, and only 1 of the courts would have continuing, exclusive jurisdiction under this

section, the order of that court must be recognized.

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

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

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

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

(h) Choice of law.--

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

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

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

(i) Registration for modification.--If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.

Alaska Statutes

AS 25.25.101. Definitions

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

AS 25.25.205. Continuing, exclusive jurisdiction.

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

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

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

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

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

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

(2) enforce nonmodifiable aspects of that order; and

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

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

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

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

AS 25.25.611. Modification of child support order of another state.

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

(1) the following requirements are met:

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

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

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

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

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

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

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

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

AS 25.25.613. Jurisdiction to modify support order of another state when individual parties reside in this state.

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

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

Introduction

This is a case of first impression in Alaska.[1] The legal issues have not been determined by *John v. Baker I*[2] or any other Alaska Supreme Court decision. This Court did not answer the question of tribal child support jurisdiction in Alaska in *John v. Baker III*.[3] It only expressly rejected the argument that *John v. Baker I* had "implicitly conceded" Alaska tribal jurisdiction over child support.[4]

Nine years later, the issue of Alaska tribes' subject matter jurisdiction over child support is again ripe. The Central Council Tribe is issuing child support orders within the State of Alaska—impacting State child support operations. The Tribe issues child support orders broadly over parents of member children—including many nonmembers. The Tribe suggests that this is authorized under *John I*. This far-reaching tribal jurisdiction over child support is unnecessary and unsupported. Further, the Council asks this Court to avoid the tough questions and asks instead for a broad pronouncement like *John I* or *Tanana*. The Court should decline that invitation. The tough questions are ripe for decision here, and Alaska's Native children need decisions—not further litigation.

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1 To the best of Appellants' knowledge, this issue also has not been addressed by any state or federal appellate court.

2 *John v. Baker*, 928 P.2d 738 (Alaska 1999) (*John I*).

3 *John v. Baker*, 125 P.3d 323, 327 n.15 (Alaska 2005) (*John III*) (because the Tribe had not issued a recognizable child support order, declining "to express any opinion" on whether Alaska tribes had jurisdiction over child support).

4 *John III*, 125 P.3d at 326; *see also John v. Baker*, 30 P.3d 68, 78 (Alaska 2001) (*John II*) (remanding to tribal court "to conduct further child custody proceedings").

ARGUMENT

I. The test: As domestic dependent nations, the Tribes' retained sovereign authority is limited to jurisdiction over their land and their members, unless Congress has explicitly expanded it.

The Council gets the test for tribal authority wrong.[5] It wrongly suggests that the Tribe has retained jurisdiction over child support unless Congress affirmatively eliminates it.[6] The Council's error is rooted in its misconception of the Tribe's retained powers (that is, inherent powers) and the fact that it glosses over the "among members" aspect of retained tribal powers.

Tribes are "domestic dependent nations."[7] As such, they "have lost many of the attributes of sovereignty" and they have limited sovereign authority.[8] That is, because of their "incorporation into the United States," tribes do not have subject matter jurisdiction over matters "'involving *the relations between an Indian tribe and nonmembers of the tribe*.'"[9] At bottom, the tribes' dependent status "is necessarily inconsistent with their freedom independently *to determine their external relations*."[10]

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5 *See* Ae. Br. 13 (stating that to prevent tribal child support jurisdiction, Congress would need to "specifically eliminate tribal authority to decide how parents should support tribal member children").

6 Ae. Br. 13.

7 *United States v. Lara*, 541 U.S. 193, 199 (2004).

8 *Montana v. United States*, 450 U.S. 544, 563-64 (1981).

9 *Id.* (emphasis in original) (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)) (recognizing "implicit divestiture of sovereignty" over nonmembers).

10 *Id.*at 564.

Thus, tribes have only retained "the powers of *self*-government."[11] These self-government powers "involve *only the relations among members of a tribe*"[12] and include the power "to regulate domestic relations *among members*."[13] The United States Supreme Court did not hold (as the Tribe suggests) that tribes have retained jurisdiction over domestic relations cases involving a member child.[14] Rather, the Court held that the "exercise of tribal power beyond what is necessary to protect tribal *self*-government or to control *internal* relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[15]

To support their proposition that the Tribe has the "traditional sovereign authority" "to decide how parents should support tribal member children" (without regard to the membership status of the parents or other parties), the Tribe quotes from the 1988 edition of Canby's *American Indian Law*: "'the relevant inquiry is whether any limitation exists to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act.'"[16] But the current edition of Canby's treatise also notes that in order to determine

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11 *Id.* (emphasis added).

12 *Id.* (emphasis in original).

13 *Id.* (emphasis added) (also noting power to determine tribal membership and power to prescribe rules of inheritance for members).

14 Ae. Br. 13. While the Council refers to the test as "internal domestic relations" (and argues that "internal" means involving a member child), the United States Supreme Court has made clear that "internal relations" means "relations among members of a tribe." *Montana*, 450 U.S. at 564. The language "among members" indicates that a member-nonmember case does not fall under a tribe's jurisdiction (unless one of the *Montana* exceptions is met). *Id.* at 564-66.

15 *Montana*, 450 U.S. at 564 (emphasis added).

16 Ae. Br. 13 (quoting Order, *Kaltag Tribal Council v. Jackson*, which quotes *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 556 (9th Cir. 1991), which

whether any limitation exists on a tribe's sovereignty, one must examine, among other things, judicial decisions.[17] Those judicial decisions reveal that tribes do not have jurisdiction over the broad category of domestic relations matters—tribes have been implicitly divested of jurisdiction over matters "involving the relations between an Indian tribe and nonmembers of the tribe."[18]

And after Canby notes the historical inquiry ("whether any limitation exists to prevent the tribe from acting"), Canby discusses at length the ensuing federal Indian law jurisdictional cases, which recognized that tribal authority was limited by the tribes' domestic dependent status.[19] Canby notes that, while Indian law in its infancy recognized more expansive tribal powers, later United States Supreme Court case law "has reversed the usual presumption regarding sovereignty when the tribe's power over nonmembers is concerned."[20] That is, "[i]nstead of presuming that tribal power exists, and searching to see whether statutes or treaties negate that presumption, the Court presumes that tribal power over nonmembers is absent unless one of the *Montana* exceptions applies or

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quotes W. Canby, *American Indian Law* 71-72 (2d. ed. 1988)). This quote is found in the current chapter on "Origins and Development of Tribal Sovereignty." W. Canby, *American Indian Law* 76 (5th ed. 2009).

17 *See* W. Canby, *American Indian Law* 79 (5th ed. 2009).

18 *See e.g.*, *Montana*, 450 U.S. at 564; *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327 (2008).

19 W. Canby, *American Indian Law* 80-93 (5th ed. 2009) (noting domestic dependent status resulted in lack of jurisdiction over crimes by non-Indians, over regulation of liquor sales, over hunting/fishing by non-Indians on non-Indian owned land within reservation, over tort case between nonmembers on state highway through reservation, over taxation of non-Indian activities on non-Indian land within reservation, over state officers executing a search warrant on the reservation, and over claimed discrimination against Indians in the sale of fee lands within the reservation to non-Indians).

20 W. Canby, *American Indian Law* 91 (5th ed. 2009).

Congress has otherwise conferred the power."[21] Similarly, Cohen's *Handbook of Federal Indian Law* notes that there is now a presumption against tribal jurisdiction over nonmembers and the *Montana* exceptions (allowing tribal jurisdiction over nonmembers in limited circumstances) have been narrowed.[22]

The Tribe is incorrect when it states that "the appropriate question is whether Congress acted to specifically eliminate tribal authority to decide how parents should support tribal member children" and that it has jurisdiction over child support "until affirmatively extinguished by Congress."[23] The Tribe's formulation of its jurisdiction is completely at odds with the controlling Supreme Court case law that has "cemented firmly its view that tribes, as domestic dependent nations, have no authority over nonmembers unless one of the two *Montana* exceptions (narrowly construed) applies."[24] In sum, if the Council were to have jurisdiction over child support—a matter not "among members"—that authority would have to have been delegated by Congress.

II. Membership matters: Tribes have inherent authority over "domestic relations *among* members."

The Council recognizes the limitation on its inherent authority to "internal domestic relations matters."[25] But the Council only plays lip service to the foundational rule of tribal jurisdiction—that tribes only have the inherent power "to regulate domestic

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21 *Id.*

22 *Cohen's Handbook of Federal Indian Law* § 4.02[3][c], at 236-37 (Nell Jessup Newton ed. 2012).

23 Ae. Br. 13.

24 W. Canby, *American Indian Law* 91 (5th ed. 2009).

25 Ae. Br. 13 (heading A).

relations *among members*" (*i.e.*, internal matters).[26] The Council ignores this "among members" requirement and suggests that it has jurisdiction over any domestic relations matter.[27] The Council says that *John I* allows it to and that jurisdiction over nonmembers is a matter of personal jurisdiction that is not currently before the Court. The Council's positions are not supported by the law or the facts.

A. *John v. Baker I* did not decide that "among members" means any case involving a member child.

John I did not decide that "domestic relations among members" means that Alaska tribes have jurisdiction over any case involving a member child.[28] The question asked in *John I* was "whether the sovereign adjudicatory authority of Native tribes exists outside the confines of Indian country."[29] In answering that question, *John I* only held that outside of Indian country "Native tribes . . . possess the inherent sovereign power to adjudicate child custody disputes *between tribal members* in their own courts."[30]

In deciding the extra-territorial jurisdiction of Alaska tribes, the Court did focus on child membership.[31] The Court focused on child membership because the test, as stated by this Court, is whether tribes "have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members"[32] and because the father

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26 *See Plains Commerce*, 554 U.S. at 327-28; *Montana*, 450 U.S. at 564.

27 Ae. Br. 13, 14, 25 (each referring to inherent jurisdiction "over domestic relations cases").

28 *See, e.g.*, Ae. Br. 18, 20, 22.

29 *John I*, 982 P.2d at 743.

30 *Id.* (emphasis added).

31 *Id.* at 759 (child's tribal membership as a determining factor).

32 *Id.* at 748.

argued that his children were not tribal members.[33] As such, *John I*'s conclusion that the "Northway court had jurisdiction over [the] case only if the children are members or are eligible for membership" is unremarkable.[34] The children's membership was the jurisdictional floor, not the entire jurisdictional equation. The issue of tribal jurisdiction over nonmember parents was not briefed in *John I* and was not decided.

That *John I* did not decide this jurisdictional question is confirmed by this Court's later *Tanana* decision.[35] There this Court referred to *John I* as "recogniz[ing] concurrent inherent tribal jurisdiction outside the confines of Indian country to adjudicate non-ICWA child custody disputes *between tribal members*."[36] *Tanana* set out four foundational points of *John I*—none involved jurisdiction over nonmember parents.[37] And *Tanana* specifically stated that "the extent of tribal jurisdiction over non-member parents of Indian children" was an open question.[38]

B. Tribal courts have limited jurisdiction, and child support is related to, but not inextricably intertwined with, child custody.

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33 *John v. Baker I, Suppl. Ae. Br.*, 1998 WL 35172673, at *31-32 (May 4, 1998); *Suppl. Ae. R. Br.*, 1998 WL 35241864, at *8-13 (May 24, 1998); *see John I*, 982 P.2d at 764 (stating that "Northway court had jurisdiction over this case only if the children are members or are eligible for membership in the village").

34 *John I*, 982 P.2d at 764; *see id.* at 759.

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

36 *Id.* at 742 (emphasis added); *see also id.* (stating that *John I* recognized the "inherent, non-territorial sovereignty allowing them to resolve domestic disputes *between their own members*") (emphasis added); *id.* at 743 (stating that *John I* held that tribes were not divested of "their sovereign powers to adjudicate child custody disputes *between village members*") (emphasis added).

37 *See id.* at 750.

38 *Id.* at 752.

The State's argument is not that the Tribe "enjoy[s] less of an interest" in child support than in child custody.[39] Rather, it is that the United States Supreme Court has determined that tribes have limited jurisdiction and have retained inherent authority only over "*internal* relations"—i.e., "domestic relations *among members*."[40] Child support is not "internal" to the tribe because (1) Congress has mandated that the State have a comprehensive, statewide child support scheme,[41] which is inconsistent with recognizing nonterritorial jurisdiction of the Tribe, and (2) the Tribe is ordering *nonmember* parents to take certain actions. Except as necessary to protect tribal self-government, tribal jurisdiction is not determined by how important a matter is to a tribe. It is determined by the tribe's territory and its members.

The Tribe claims jurisdiction because child support and custody are intertwined.[42] While child support is related to children, it does not fall under "domestic relations *among members*." That is true because the State has jurisdiction throughout Alaska, Congress mandated that child support be determined on a geographical basis under UIFSA and FFCCSOA, and the Tribe lacks authority to order nonmember parents or employers to take action.[43] It is not uncommon for one state to have jurisdiction over

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39 *See* Ae Br. 30-32.

40 *Montana*, 450 U.S. at 564 (emphasis added).

41 Because the State enjoys statewide jurisdiction and sets child support orders statewide, tribal jurisdiction does not determine whether a tribal child will be "fed, clothed, and sheltered." Ae. Br. 32; [*see* Exc. 654, 527-34]

42 Ae Br. 31.

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

child custody and a different state to have jurisdiction over child support.[44] That the Tribe has jurisdiction over child custody under *John I* does not compel tribal jurisdiction over child support.[45]

While *McCaffery* did quote a commentator who said that a child support order is "an inevitable concomitant of custody decisions," it did not hold that one court must have subject matter jurisdiction over both custody and child support.[46] Rather, *McCaffery* only held that it "would not violate 'traditional notions of fair play and substantial justice' to exercise *personal* jurisdiction over [the father] on child support issues."[47]

The cases cited by the Tribe at page 34 of its brief all addressed the jurisdiction of tribes within their own reservations. The question in *Iron Heart* was whether the State's action of applying its stepparent responsibility law to the plaintiffs would infringe 'the right of *reservation* Indians to make their own laws and be ruled by them.'"[48] *Three Irons* did not deal with the extent of tribal jurisdiction but rather with enforcement of a Colorado child support order in Montana.[49] *Three Irons* held that Montana did not have subject matter jurisdiction over the transaction or personal jurisdiction over the husband,

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44 *Compare* Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) AS 25.30.300-.910 *with* UIFSA, AS 25.25.101-.903, *and* FFCCSOA, 28 U.S.C. § 1738B.

45 At. Br. at 44-45.

46 *McCaffery v. Green*, 931 P.2d 407, 414 (Alaska 1997) (quoting Monica J. Allen, *Child-State Jurisdiction: A Due Process Invitation to Reconsider Some Basic Family Law Assumptions*, 26 Fam. L.Q. 293, 307 (1992)); *see* Ae. Br. 33-34.

47 *McCaffery*, 931 P.2d at 415 (emphasis added).

48 *Iron Heart v. Ellenbecker*, 689 F. Supp. 988, 994 (D.S.D. 1988) (emphasis added).

49 *State ex rel. Three Irons v. Three Irons*, 621 P.2d 476, 477 (Mont. 1980).

who was living on the reservation.[50] While the court said that the wife's remedy was to bring an enforcement proceeding in tribal court, the case did not determine whether the tribal court would have jurisdiction over that matter.[51] The same was true of *Flammond*.[52] Similarly, *Jackson County* was an all-member case in which all parties lived on the reservation.[53] These cases do not establish inherent tribal jurisdiction over child support off-reservation.

C. Tribal inherent authority over "domestic relations *among members*" is a subject matter jurisdiction issue and is ripe for decision here.

The Court cannot ignore the membership issue. Tribal membership, along with territory, is the core factor in determining tribal subject matter jurisdiction over disputes.[54] The tribes' dependent status means that they cannot "determine their external

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50 *Id.*

51 *See id.*

52 *State ex rel. Flammond v. Flammond*, 621 P.2d 471, 472-74 (Mont. 1980) (holding that county district court could not enforce California child support order because "Montana may not exercise subject matter jurisdiction over transactions arising on Indian reservations" and court lacked personal jurisdiction over father living on reservation). The *Sanders* case, also cited by the Council, did not address the extent of tribal jurisdiction over child support because Sanders failed to adequately brief his jurisdictional arguments. *Sanders v. Montana, Dep't of Pub. Health and Human Servs.*, 120 P.3d 811 (Mont. 2005) (unpublished opinion).

53 *Jackson County ex rel Smoker v. Smoker*, 459 S.E. 2d 789, 790 (N.C. 1995) (holding that county district court could not assert jurisdiction to collect child support from the ex-husband because tribe had already asserted jurisdiction over the matter).

54 *Montana*, 450 U.S. at 563 (quoting *United States v. Wheeler*, 435 U.S. 313 (1978)) (stating that "tribes are 'unique aggregations possessing attributes of sovereignty over both their members and their territory'"). The "general rule restrict[ing] tribal authority over nonmember activities . . . is particularly strong when the nonmembers' activity occurs on land owned in fee simple by non-Indians." *Plains Commerce*, 554 U.S. at 328; *see also Cohen's Handbook* § 4.02[3][c][ii], at 237 (stating that under the *Montana* exceptions "the status of land would remain a crucial threshold consideration").

relations" and only have jurisdiction over "domestic relations ***among members***."[55] Because the power to regulate child support involving nonmember parents on non-Indian land goes to the tribe's power to hear a case, it is a subject matter jurisdiction (not personal jurisdiction) question.[56] The presumptive rule is that tribes have jurisdiction over "domestic relations among members," but do not have subject matter jurisdiction over disputes involving nonmembers.[57] The parties' membership status is key to the Tribe's subject matter jurisdiction and cannot be left to be decided at another time.[58]

The Council suggests that this Court not address the nonmember issue because this case is "about the State's blanket objection to the Tribe asserting jurisdiction over child support in *all* cases," and "[t]here is no specific case involving a non-member before this Court."[59] This position ignores the direct state involvement in tribal child support cases,[60]

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55 *Plains Commerce*, 554 U.S. at 327; *Montana*, 450 U.S. at 564 (emphasis added).

56 *Cohen's Handbook* § 7.01, at 597 (defining subject matter jurisdiction as the "ability of a court to hear a particular kind or case, either because it involves a particular subject matter or because it is brought be a particular type of plaintiff or against a particular type of defendant"); *id.* §7.02[2], at 605-06 (noting that "*Montana* exception establish[es] subject matter jurisdiction"); *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (holding that tribal court lacked subject matter jurisdiction over action against nonmembers in accident on non-Indian land); *Nevada v. Hicks*, 533 U.S. 353, 368 n.8 (2001) (referring to *Strate*'s holding as "limitation on jurisdiction over nonmembers pertain[ing] to subject matter, rather than merely personal, jurisdiction"); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1128-29 (9th Cir. 2006) (en banc) (linking party's member/nonmember status to the analysis of subject matter jurisdiction); *see also* [Exc. 593 (the Central Council agreed below that subject matter jurisdiction turns on membership but argued that only the child's membership was relevant)]

57 *Montana*, 450 U.S. at 563-64; *Plains Commerce*, 554 U.S. 327-30.

58 *See* Ae. Br. 36-39 (suggesting that this Court not decide nonmember issue).

59 Ae. Br. 36.

60 *See* At. Br. 17-28; section IV below.

the nonmember cases in the record, the basis of the Tribe's suit against the State, and the superior court's broadly worded orders.

The Council's complaint asserts tribal jurisdiction over any parent (member or not) based only on the membership status of the child. [Exc. 9 (¶ 2)] The superior court accepted this expansive view and recognized tribal jurisdiction (based only on the fact that the child was a tribal member) over child support in Alaska. [Exc. 664, 668, 669, 678] The superior court also issued a broad permanent injunction against the State requiring it to recognize, enforce, and process all tribal child support orders (which under its prior order and final judgment is any tribal order involving a tribal child) without regard to whether a nonmember parent was involved. [Exc. 676-77] Because the only relevant factor under the superior court order is the child's membership, this necessarily provides for tribal jurisdiction over nonmember parents. [Exc. 669, 678]

Based on these facts, one thing is certain. If the State refused to enforce a Council child support order involving a member child because it involved a nonmember parent, the State would be hit with either a motion "to modify or broaden [the superior court's] injunction" or "contempt or other enforcement proceedings." [*See* Exc. 673] These questions about tribal subject matter jurisdiction over child support cases between nonmembers and members must be answered or the State will be vulnerable to attack.

And the nonmember issue is not theoretical. The record contains at least four cases where the Council asserted subject matter jurisdiction in child support cases involving

nonmember parents.[61] The Tribe asserted jurisdiction over the Edenshaw-Calhoun case. [Exc. 300-04, 316-57] Mr. Calhoun is not a member of the Tribe.[62] [Exc. 342, 354] In the Guthrie-Charboneau-Werth case [Exc. 358-405, 459-96], both Mr. Charboneau and Mr. Werth are nonmembers.[63] [Exc 464, 490] In the Amundson-Gregorioff case [Exc. 406-30], Mr. Amundson is a nonmember. [Exc. 415, 422] In the Cadiente-Willson case [Exc. 431-58], Mr. Willson is a nonmember (who contested tribal jurisdiction). [Exc. 444, 446-47] In the Hostetler-Teal case [Exc. 497-509], *no one* is a member of the Council—not the mother, not the child, and not the father. [Exc. 498][64] In each of these cases, the Tribe is ordering the nonmember to take action (*e.g.*, take a paternity test or pay child support). [Exc. 301, 463, 459, 406-07, 431-32, 497-05] These nonmember cases are not an anomaly—"[v]ery few child welfare cases brought before any Alaska tribal court . . . involve two parents from the same tribe."[65]

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61 Each of these nonmember cases was discussed in the State's briefing below. [Exc. 191, 232, 233, 244, 247, 250, 630] In addition, tribes issuing child support orders within Alaska will require continuous state involvement. At. Br. 17-28; section IV below.

62 Mr. Calhoun challenged the jurisdiction of the Tribe. [*See* Exc. 312-13]

63 At conception, Ms. Guthrie was married to Werth. [Exc. 464] Werth acknowledged paternity before the tribal court; but Charboneau was determined to be the biological father through genetic testing. [Exc. 464, 362, 480-81, 487] CSSD performed genetic testing because Ms. Guthrie applied to the State for CSSD services. [Exc. 358-60]

64 The petitioner is a member of Ketchikan Indian Community. [Exc. 498] Members of that tribe cannot be members of the Council. *See* www.kictribe.org/contact/enrollment/index.html (visited May 4, 2014). A tribe only has jurisdiction over members of their own tribe. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980) (nonmember Indians are not under jurisdiction of tribe because they are not part of "tribal self-government" and have no say in tribal affairs; nonmember Indians "stand on the same footing as non-Indians").

65 *Simmonds v. Parks*, No. S-14103, Amicus Br. 3; *see also Simmonds v. Parks*, No. S-14103, Franke Aff. 2, ¶4 ("In the vast majority of our cases, there is one parent who is

Further, where the child is in state custody (such as in a child-in-need-of-aid case or juvenile delinquency proceeding), the State will be the child's legal and physical custodian.[66] The Tribe would be setting the child support obligation due to the State—a nonmember.[67] This entanglement in the affairs of the nonmember State has already occurred at least once.[68]

The issue of the Tribe's subject matter jurisdiction over nonmembers is squarely before this Court and should be directly addressed.

III. Membership matters: The *Montana* exceptions, which allow limited tribal authority over nonmembers, do not apply.

There are two exceptions to the presumptive rule that tribes have no jurisdiction over nonmembers: a consensual business relationship, and civil authority over nonmember conduct "on fee lands within [the tribe's] reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the

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not an enrolled member"); Schultz Aff. 1, ¶ 5 ("In most of our cases, there is one parent who is not an enrolled member of the Tribe."); Brown Aff. 2, ¶8 (representing the Association of Village Council Presidents; "Due to the nature of the villages' small population, it is a necessity of life that tribal members inter-marry and/or have children with tribal members in other villages."). The amici tribes in the *Simmonds* case are the Kenaitze Indian Tribe, the Native Village of Eek, and the Minto Tribal Court. The Court can take judicial notice of submissions in these other proceedings before it.

[66] Where a child support order is issued in Indian country (i.e., where Congress has recognized tribal child support jurisdiction), the State is a "contestant." 28 U.S.C. § 1738B(b). The tribal court in Indian country would need personal jurisdiction over the contestant State, which would get notice and a reasonable opportunity to be heard. 28 U.S.C. § 1738B(c). It is incongruous to suggest that tribes outside of Indian country have more power, and the State (in which landless tribes are acting) would have fewer rights.

[67] [Exc. 530-31 (Mallonee Aff. ¶14)]

[68] [Exc. 530-31 (Mallonee Aff. ¶14); 579-83 (Tribe issued a child support order for N.D., who was in State custody)]

health or welfare of the tribe."[69] Notably, the Council does not even argue that it meets either *Montana* exception.[70] That's because neither exception applies.[71]

The United States argues that the second *Montana* exception applies because "the political integrity, health, and welfare of the Tribe are closely linked to its ability to ensure its children are financially supported."[72] If this was all that was needed to meet the second *Montana* exception, *any* matter involving tribal children would fall under the Tribe's subject matter jurisdiction, and the presumptive rule that tribes do not have jurisdiction over nonmembers would be obliterated. [73] But "[t]hese exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule' or 'severely shrink' it."[74] Under the second exception "[t]he conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community."[75] According to Cohen, "the elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences."[76]

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69 *Montana*, 450 U.S. at 565.

70 *See* Ae. Br. 1-40.

71 *See also* At. Br. 34-39.

72 U.S. Br. at 31.

73 For example, the Tribe's enforcement power would be limitless and could include suspending the obligor's Alaska driver's license, pursuing criminal non-support charges against the obligor, and even requiring payment from the obligor's employer, such as the State of Alaska.

74 *Plains Commerce*, 554 U.S. at 330 (quoting *Atkinson Trading Co.*, 532 U.S. 645, 647, 655 (2001)); *Strate*, 520 U.S. at 458).

75 *Plains Commerce*, 554 U.S. at 341.

76 *Cohen's Handbook* § 4.02[3][c], at 234 n.75; *see Plains Commerce*, 554 U.S. at 341 (quoting *Cohen's Handbook* on this point).

Tribal power over nonmember parents is not essential to the existence of the Council tribal community. The State runs a statewide program to establish and enforce the child support obligations of parents—both members and nonmembers.[77] That the State would set the child support obligation for a member child living in Alaska instead of the Tribe setting it can hardly be said to be "catastrophic."

IV. State impacts matter: The Tribe's assertion of child support jurisdiction outside Indian country impacts the State's interests and is not a truly "internal" domestic relations matter.

There are two keystones of tribal inherent jurisdiction: its members and its territory.[78] Because the Council is not operating within its own territory, the only other basis for tribal jurisdiction over child support is that it would be a matter "involv[ing] only the relations among members of a tribe."[79] As discussed above, the vast majority of tribal orders in domestic relations cases will involve a nonmember parent.[80] In addition, the Council's assertion of child support jurisdiction impacts the State's sovereign interest in running a statewide child support program. These state impacts indicate that Alaska tribes do not have inherent jurisdiction over child support.

There is little support for the Council's having tribal jurisdiction over child support outside Indian country. *Cohen's Handbook of Federal Indian Law* gives three examples of tribal jurisdiction outside tribal territory: 1) "matters involving the exercise of off-reservation treaty rights," 2) "jurisdiction to determine ownership of tribal property

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77 At. Br. 3-4, 17-18, 23-25.

78 *Montana*, 450 U.S. at 563-64.

79 *Id.* at 564.

80 *See* section II.C. above.

without regard to Indian country," and 3) the child custody matter in *John v. Baker I*.[81] Outside Indian country, "nondiscriminatory state laws have been held to apply unless federal law provides otherwise."[82]

In child custody matters, the focus is on the child.[83] Here, the focus is on the obligation of the parent to provide for a child's support—something that the State regulates, as mandated by Congress through UIFSA and FFCCSOA, on a statewide basis. While a tribe has an interest in ensuring that tribal children are supported, that interest is not a uniquely tribal interest that "involve[s] *only the relations among members of a tribe*"—i.e., one that would support extraterritorial jurisdiction.[84]

The Council objects to the State's discussion of the state impacts and notes that *Wagnon* discussed "state infringement on tribal sovereignty."[85] Granted, not many cases discuss tribal infringement of state off-reservation interests. But the reason is that off-reservation tribal jurisdiction, with a few exceptions, has not been recognized. The State's argument is not that tribal jurisdiction "evaporates when [tribal] jurisdiction has an impact on the State,"[86] but rather that the Tribe never had jurisdiction to begin with because it only has jurisdiction over its territory and its people. The Tribe's extra-

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81 *Cohen's Handbook* § 7.02[1][c], at 603; *see also id.* § 6.01[5], at 503-04 (discussing same limited exceptions to tribal jurisdiction outside of Indian country).

82 *Cohen's Handbook* § 6.01[5], at 503.

83 *See Williams v. Barbee*, 243 P.3d 995, 1000 (Alaska 2010); *see also* 25 U.S.C. §§ 1901-1903 (focusing on child in Indian Child Welfare Act proceedings).

84 *See Montana*, 450 U.S. at 564 (describing tribal inherent power).

85 Ae. Br. 23.

86 Ae. Br. 22.

territorial foray into child support is simply not supported by the Indian law cases or the balancing-of-interest cases.

Despite the Council's claims, child support is not truly an "internal" domestic relations issue, even between member parents. The Tribe admits that it lacks any enforcement authority.[87] Its child support program is entirely based on an obligor's and an employer's *voluntarily* following orders. It has no power to criminally sanction a parent for non-payment of child support.[88] It has no authority over employers.[89] It has no authority to revoke a parent's drivers' license or garnish a bank account.[90] The Tribe's child support program is entirely based on voluntary compliance by parents and employers, and enforcement by the State.

And the impacts to the State from the Council's child support program are not like those from the other fifty states, or tribes with Indian country. The State has not had to create positions to help other states understand the intricacies of child support program or to invent fixes (because those fifty states and tribes, unlike the Council, operate out of a land base, as contemplated by UIFSA and FFCCSOA).

More disconcerting is the Council's silence on the impacts of having 229 tribes issuing child support orders in Alaska, only two of which have federally approved child

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87 Ae. Br. at 26.

88 *Cohen's Handbook* § 904, at 765-69 (stating that tribes only have criminal jurisdiction in Indian country, with some exceptions).

89 Alaska employers are required to honor wage withholding orders under state law. *See* AS 25.25.501; AS 25.27.070(b). An employer's failure to honor a wage withholding order must be pursued in state court, not tribal court.

90 Ae. Br. at 26.

support programs. Under Council's theory of inherent authority, potentially three different child support awards could be issued (mother's tribe, father's tribe, and State) for one Native child. And 227 tribes are not subject to any federal oversight requiring uniform child support guidelines and cooperation with other tribes and state child support agencies. Yet the superior court's order would permit those 227 tribes to issue child support orders. [Exc. 513]

V. Land matters: Congress has recognized a Tribe's territorial powers, not inherent power, to issue child support orders.

Despite the claims in the federal government's amicus brief, Congress has recognized a Tribe's territorial—not inherent—power to issue child support orders.[91] Tribal jurisdiction over child support in Alaska is inconsistent with the comprehensive federal scheme that Congress has mandated for child support in the United States through the adoption of the Full Faith and Credit for Child Support Orders Act (FFCCSOA) and the Uniform Interstate Family Support Act (UIFSA).

A. Congress requires states to provide full faith and credit to child support orders issued in "Indian country."

In 1994, Congress passed FFCCSOA to address problems with enforcing and establishing child support orders across state lines.[92] It was passed to address the growing number of child support cases involving disputes between parents who resided in different states and to prevent parents from avoiding paying child support (because

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91 U.S. Br. at 16.

92 28 U.S.C. § 1738B; S. Rep. 103-361 sec. 2(a), 1994 U.S.C.C.A.A.N. 3259, 3261-62.

ongoing child support orders of other states were not given full faith and credit under the Constitution).[93] Through FFCCSOA, Congress "establish[ed] national standards" and required all states to give full faith and credit to child support orders issued by other states and *in Indian country*.[94]

The legislation focused on enforcement of child support orders across *boundaries*, including Indian reservations. The Act defines "state" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and *Indian country* (as defined in section 1151 of title 18)."[95] Congress specifically defined "state" as "Indian country" (not "tribe") "in recognition of the fact that courts . . . *in Indian country*, have jurisdiction to enter, and often do enter, child support orders."[96]

Thus geographical boundaries (of a state or Indian country) are critical to full faith and credit for child support orders and for Congress's inter-state and tribal jurisdictional rules for establishing, modifying, and enforcing a child support order. All of these provisions focus on the *residence* of the child and parents or contestant.[97] For example, a core provision of FFCCSOA is the concept of "continuing, exclusive jurisdiction"—that is, a court has continuing exclusive jurisdiction over child support as long as the child or

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93 S. Rep. 103-361, 1994 U.S.C.C.A.A.N. 3259, 3261-62.

94 S. Rep. 103-361 sec. 2(b); 28 U.S.C. § 1738B.

95 28 U.S.C. § 1738B (b) (emphasis added).

96 S. Rep. 103-361, 1994 U.S.C.C.A.A.N. 3259, 3263 (emphasis added).

97 A "contestant" can include "a State or political subdivision of a State to which the right to obtain child support has been assigned," which commonly occurs in exchange for receiving public assistance benefits. 28 U.S.C. § 1738B(b).

parent continues to reside in that state, and another state (including a tribe in Indian country) cannot modify child support.[98] It provides for modification of a child support order "if there is no individual contestant or child *residing* in the issuing State."[99] It provides for rules on recognition of multiple valid child support orders based on the child's "home State."[100] Congress amended FFCCSOA in 1996 and 1997, adding definitions for "child's State" and "child's home State" (both based on the child's location).[101] In that same legislation, Congress provided for direct funding for tribal child support programs—notably, it did not expand the definition of "state" to recognize tribal child support orders issued outside Indian Country.[102]

Amicus National Association of Tribal Child Support Directors glosses over the significance of geographical borders in FFCCSOA and inter-governmental child support establishment, modification, and enforcement. The Association doesn't even attempt to

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98 28 U.S.C. § 1738B(d) ("A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant, unless the court of another State . . . has made a modification of the order."); 28 U.S.C. § 1738B(i) (allowing registration of order for modification if no contestant or child is residing in issuing state).

99 28 U.S.C. § 1738B(i) (emphasis added).

100 28 U.S.C. § 1738B(f) (defining "child's home State" as "the State *in which a child lived* with a parent or a person acting as parent for at least 6 consecutive months . . . and, if a child is less than 6 months old, the State in which the child lived from birth with any of them.") (emphasis added); *see also* 28 U.S.C. § 1738B(b) (defining "child's State" as "the State in which a child resides"). Prior to FFCCSOA, parents could be subject to multiple valid orders issued in different states. FFCSSOA and the Uniform Interstate Family Support Act created a new "one-order" child support world through "continuing, exclusive jurisdiction." Hatamyar, *Interstate Establishment, Enforcement, and Modification of Child Support Orders*, 25 Okla. City U.L. Rev. 511, 515 (2000).

101 Pub. L. No. 104-193 (Aug. 22, 1996), 110 Stat 2105, 2221-22; Pub. L. No. 105-33 (Aug. 5, 1997), 111 Stat. 251, 636.

102 Pub. L. No. 104-193 (Aug. 22, 1996), 110 Stat 2105, 2221-22, 2256.

address how the FFCCSOA jurisdiction rules apply in Alaska with 229 tribes (only one with a reservation). It disregards that only 2 of Alaska's 229 tribes are subject to the federal IV-D regulations and federal oversight of their child support program. The Association's suggestion that the State could attend more trainings and conferences avoids the critical legal question presented here: whether Alaska tribes have jurisdiction to issue child support orders outside of Indian country and involving nonmembers.

B. The Uniform Interstate Family Support Act's jurisdictional rules are also based on territory.

As a condition for federal child support funding, in 1996 Congress required states to enact the Uniform Interstate Family Support Act (UIFSA).[103] UIFSA works in tandem with the federal child support law, FFCCSOA, and defines procedural rules between states and tribes for establishment, modification, and enforcement of a child support order to ensure that only one valid child support order exists.[104] UIFSA does not grant original jurisdiction to a state or tribe—the state or tribe must have an independent basis for exercising child support jurisdiction,[105] a legal principle undisputed by CCTHITA.[106]

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[103] 42 U.S.C. § 666(f); Pub. L. No. 104-193 (Aug. 22, 1996), 110 Stat 2105, 2221-22, 2256.

[104] Hatamyar, *Interstate Establishment, Enforcement, and Modification of Child Support Orders*, 25 Okla. City U. L. Rev. 511, 515, 519-20 (2000); *Office of Child Support ex rel. Lewis v. Lewis*, 882 A.2d 1128, 1133 (Vt. 2004).

[105] *See Goddard v. Heintzelman*, 875 A.2d 1119, 1122 (Pa. Super. Ct. 2005) (holding that "UIFSA is a procedural statute . . . [which] merely establishes the method for enforcing a right" and does not affect substantive rights); *Child Support Enforcement Div. of Alaska v. Brenckle*, 675 N.E.2d 390, 393 (Mass. 1997) (same); *Thrift v. Thrift*, 760 So.2d 732, 736 (Miss. 2000) (same).

UIFSA, like FFCCSOA, relies on geographical boundaries. Both focus on "continuing exclusive jurisdiction" over child support, which is dictated by the residence of the child and parents.[107] Similarly, the rules for modification of another state's child support order are governed by whether the child and parents no longer reside in the issuing state or tribal territory.[108] In this case, no one can "reside" in Central Council because it does not have Indian Country.[109] There is no principled way to reconcile UIFSA, which Congress has required the State to follow, with roving tribal jurisdiction over child support based solely on the membership of the child.

C. Congress's funding of tribal child support programs is not recognition of inherent child support authority.

The United States also contends that Congress's direct funding of tribal child support programs is recognition of a tribe's inherent authority over child support.[110] This position fails to acknowledge the history of direct funding for tribes, Congress's statutory child support scheme, and the federal government's own regulations.

In 1996, Congress provided for direct federal funding to tribes to operate IV-D child support agencies.[111] This provision of funding was part of the same legislation that

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106 [Exc. 36 (Central Council summary judgment motion agreeing that "UIFSA is not an act that grants jurisdiction to tribes"); 585 (Council reply arguing that tribal authority over child support comes from its inherent sovereignty)].

107 AS 25.25.205; 28 U.S.C. § 1738B(d).

108 AS 25.25.611; 28 U.S.C. § 1738B(e).

109 Again, the amicus Association fails to deal with these legal issues and tries to frame them as an administrative issue. National Ass'n Br. at 1-16.

110 U.S. Br. at 16-21.

111 42 U.S.C. § 655(f).

amended FFCCSOA and required states to adopt UIFSA.[112] The reason for the tribal IV-D program was to address a jurisdictional gap on Indian reservations: in the lower 48 states, the states' authority was "limited or non-existent" within tribal territory.[113] "Consequently, States [were] limited in their ability to provide IV-D services on Tribal lands and to establish paternity and establish and enforce child support orders and Indian families . . . had difficulty getting IV-D services from State IV-D programs."[114] So, the tribal IV-D program was created primarily to prevent noncustodial parents from avoiding their child support obligations by retreating to Indian country where state child support orders could not be enforced. But this jurisdictional disconnect never existed in Alaska because Alaska has virtually no Indian country.[115] Alaska child support orders could be, and are, enforced statewide.[116]

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[112] Pub. L. No. 104-193 (Aug. 22, 1996), 110 Stat 2105, 2221-22, 2256 (Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)).

[113] [Exc. 517 (69 Fed. Reg. 16638 (2004))]; *see, e.g., Howe v. Ellenbecker*, 774 F. Supp. 1224, 1228, 1232 n.5 (D. S.D. 1991) (state attempts to enforce state child support orders on reservations unsuccessful because of jurisdictional issues). The reason that tribes in Indian country have child support jurisdiction is that "Tribes have traditionally had power 'over both their members and their territory.' Therefore, a tribe could exercise power over non-Indians and nonmember Indians who entered reservation land." *Cohen's Handbook* § 4.01[2][f], at 222.

[114] [Exc. 517 (69 Fed. Reg. 16638)]

[115] 43 U.S.C. § 1618(a) (2009) (revoking all Alaska Native reservations with exception of Annette Island Reserve); *Native Village of Venetie*, 522 U.S. at 524 (*quoting* 43 U.S.C. §§ 1603, 1618(a)) (recognizing ANCSA's revocation of reservations and extinguishment of all aboriginal claims). "Indian country" is defined as (a) land within Indian reservations, (b) "dependent Indian communities," and (c) Indian allotments under Indian title. 18 U.S.C. § 1151.

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

Despite the claims by the amicus United States, Title IV-D is merely a funding mechanism.[117] It does not determine the subject matter jurisdiction of individual tribes to issue child support orders[118]—much less recognize any rights whatsoever to operate off-reservation. Congress recognized that only those child support orders that are "issued by a court of competent jurisdiction" are enforceable in other states.[119] That is, child support orders governed by the Title IV-D program (tribal or otherwise) have to be issued by jurisdictions that have "the legal authority to take actions in child support matters."[120] In discussing the authority that tribes would exercise under Title IV-D, the Department of Health and Social Services commented that "it is expected that a Tribe will exercise authority over Tribal *members and others on Tribal lands* to the maximum extent legally permitted."[121] Title IV-D requires pre-existing jurisdiction; it does not create it.

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117 42 U.S.C. § 655(f) (funding for tribal child support enforcement IV-D program); *see also* 42 U.S.C. §§ 651, 655, 658a (providing funding to states); *see also Blessing v. Freestone*, 520 U.S. 329, 344 (1997) (stating that Title IV-D does not command a state to take any particular action, but requires substantial compliance with system goals for operating a child support program or the state risks loss of funds).

118 The Council agrees with the State that Title IV-D does not give the Tribe jurisdiction to adjudicate child support. [Exc. 585]

119 42 U.S.C. § 654(9)(C) (state child support plan must provide for state cooperation "in securing compliance by a non-custodial parent . . . with an order issued by a court of competent jurisdiction"); *see also* 45 C.F.R. § 309.05 (child support order is an order "issued by a court of competent jurisdiction").

120 [Exc. 519 (69 Fed. Reg. 16648 (cmt. 2 on § 309.05))] The legal authority of a tribe over matters is determined by federal case law. *Plains Commerce*, 554 U.S. at 324; *Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985).

121 [Exc. 524 (69 Fed. Reg. 16653 (cmt. 11 on § 309.65)]

This requirement of underlying jurisdiction is specifically recognized in the Final Rule on the tribal IV-D regulations. The Final Rule acknowledged that Title IV-D status does not confer jurisdiction, and found that

> it is not appropriate or necessary to define "Tribe" in terms of the limits of Tribal jurisdiction. The regulatory definition of "Tribe" is appropriately related to Federal recognition of governmental entities eligible for Federal funds. *Such definition is not intended to have any effect on the exercise of Tribal or State jurisdiction.*[122]

The Final Rule also found that "it is not appropriate or necessary in this regulation to define the territorial limits of a Tribe's authority" because this is "*more appropriately determined . . . by applicable federal law*, not by child support enforcement regulations."[123] Thus, the jurisdiction of tribal courts is independent of the tribal IV-D program, and "without proper jurisdiction, a tribunal cannot proceed to establish, enforce, or modify a support order or determine paternity."[124] Where a tribe does not have jurisdiction (such as here), then "the proper action" is "to refer the case to a State or another Tribe" that does.[125]

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122 [Exc. 519 (69 Fed. Reg. 16648 (cmt. 6 on § 309.05) (emphasis added))]

123 [Exc. 519-20 (69 Fed. Reg. 16648-49 (cmt. 7 on § 309.05)); *see also* Exc. 519 (69 Fed. Reg. 16648 (cmt. 6 on § 309.05) (the "definition [of 'Tribe'] is not intended to have any effect on the exercise of Tribal or State jurisdiction"))]

124 [Exc. 526 (69 Fed. Reg. 16655 (cmt. 1 on § 309.70))]

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

CONCLUSION

For the reasons stated above and in the State's opening brief, the Court should reverse the trial court's summary judgment order, final judgment, permanent injunction, and attorney fee award.

"[c]ontract[] with the State or with other Native entities . . . for delivery of IV-D services"))]