Nos. 21-376, 21-377, 21-378 & 21-380

In the Supreme Court of the United States

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

CHAD EVERET BRACKEEN, ET AL.

CHEROKEE NATION, ET AL., PETITIONERS

v.

CHAD EVERET BRACKEEN, ET AL.

STATE OF TEXAS, PETITIONER

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

CHAD EVERET BRACKEEN, ET AL., PETITIONERS

v.

DEB HAALAND, SECRETARY OF THE INTERIOR, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITIONS FOR WRITS OF CERTIORARI FILED: SEPT. 3, 2021
PETITIONS FOR WRITS OF CERTIORARI GRANTED: FEB. 28, 2022

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TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11479

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,
Plaintiffs-Appellees,

v.

DEB HAALAND, Secretary, U.S. Department of the Interior; DARRYL LACOUNTE, in his official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; XAVIER BECERRA, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants-Appellants

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,
Intervenor Defendants-Appellants

DOCKET ENTRIES

DATE	PROCEEDINGS
11/19/2018	US CIVIL CASE docketed. NOA filed by Appellants Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation and Quinalt Indian Nation
	* * * * *
11/19/2018	OPPOSED MOTION filed by Appellants Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation and Quinalt Indian Nation for stay pending appeal Ruling is requested by: 12/04/2018.
11/19/2018	APPENDIX FILED
	* * * * *
11/27/2018	RESPONSE/OPPOSITION . . . filed by Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Danielle Clifford, Mr. Jason Clifford, Ms. Altagracia Socorro Hernandez, Mr. Frank Nicholas Libretti and Ms. Heather Lynn Libretti [8927999-1] to the Motion for stay pending appeal filed by Appellants Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation and Quinalt Indian Nation.
	* * * * *
11/30/2018	REPLY filed by . . . Appellants Cherokee Nation, Morongo Band of Mission

DATE	PROCEEDINGS
	Indians, Oneida Nation and Quinalt Indian Nation
	* * * * *
12/03/2018	COURT ORDER - with respect to appellants' opposed motion for stay pending appeal, the district court's order October 2018 judgment is stayed pending further order of this court
	* * * * *
01/14/2019	SUFFICIENT AMICUS CURIAE BRIEF FILED by States of California, Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Virginia, Washington and Wisconsin.
	* * * * *
01/16/2019	SUFFICIENT AMICUS CURIAE BRIEF FILED by Mr. Robert T. Anderson, Ms. Barbara A. Atwood, Ms. Bethany Berger, Ms. Kristen Carpenter, Mr. Matthew L. Fletcher, Ms. Carole Goldberg, Ms. Lorie Graham, Ms. Sarah Krakoff, Ms. Angela Riley, Ms. Addie C Rolnick, Mr. Alex Skibine Ms. Maylinn Smith, Mr. Michalyn Steele, Ms. Rebecca Tsosie and Mr. Charles Wilkinson.
	* * * * *
01/16/2019	AMICUS CURIAE BRIEF FILED by Casey Family Programs and 30 Other

DATE	PROCEEDINGS
	Organizations Working with Children, Families, and Courts to Support Children's Welfare.
	* * * * *
01/16/2019	AMICUS CURIAE BRIEF FILED by Professor Gregory Ablavsky.
	* * * * *
01/16/2019	Amended AMICUS CURIAE BRIEF FILED by Members of Congress.
01/16/2019	APPELLANT'S BRIEF FILED . . . by Cherokee Nation, Morongo Band of Mission Indians, Quinault Indian Nation and Oneida Nation.
01/16/2019	RECORD EXCERPTS FILED . . . by Appellants Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation and Quinault Indian Nation.
	* * * * *
01/16/2019	AMICUS CURIAE BRIEF FILED by Administrative Law and Constitutional Law Scholars. The Consent is Included in the Brief.
	* * * * *
01/16/2019	AMICUS CURIAE BRIEF FILED by Native American Women and Indian Tribes and Organizations. The Consent is Included in the Brief.
	* * * * *
01/16/2019	APPELLANT'S BRIEF FILED . . . by Mr. Alex Azar, Bureau of Indian Affairs, DOI, HHS, Ms. Tara Sweeney, USA and Mr. Ryan Zinke

DATE	PROCEEDINGS
01/16/2019	RECORD EXCERPTS FILED . . . by Mr. Alex Azar, Bureau of Indian Affairs, DOI, HHS, Ms. Tara Sweeney, USA and Mr. Ryan Zinke
	* * * * *
01/16/2019	OPPOSED MOTION to intervene filed by Navajo Nation in support of Appellants, alternatively to file amicus brief, to file amicus brief in excess of the word count limitation but not to exceed 11,069 words
	* * * * *
01/16/2019	AMICUS CURIAE BRIEF FILED by 325 Federally Recognized Tribes, Association on American Indian Affairs, National Congress of American Indians, National Indian Child Welfare Association, and Other Indian Organizations.
	* * * * *
01/22/2019	RESPONSE/OPPOSITION filed by Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Danielle Clifford, Mr. Jason Clifford, Ms. Altagracia Socorro Hernandez, Mr. Frank Nicholas Libretti and Ms. Heather Lynn Libretti to the Update/term response deadline, Motion to intervene filed by Navajo Nation in 18-11479, Motion to file amicus brief filed by Navajo Nation in 18-11479, Motion to file brief in excess of word count filed by Navajo Nation in 18-11479

DATE	PROCEEDINGS
	* * * * *
01/23/2019	REPLY filed by Not Party Navajo Nation to the Response/Opposition filed by Appellees State of Louisiana, State of Texas, State of Indiana, Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Altagracia Socorro Hernandez, Mr. Jason Clifford, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti and Ms. Danielle Clifford in 18-11479
01/24/2019	CASE CALENDARED for oral argument on Wednesday, 03/13/2019 in New Orleans in the East Courtroom -- AM session.
	* * * * *
01/25/2019	COURT ORDER - IT IS ORDERED that the opposed motion of Navajo Nation to intervene in support of the appellants is GRANTED. IT IS FURTHER ORDERED that the alternative opposed motion of Navajo Nation for leave to file amicus brief if motion to intervene is denied is DENIED as moot. IT IS FURTHER ORDERED that the alternative opposed motion of Navajo Nation to file amicus brief in excess of word count limitation but not to exceed 11,069 words is DENIED as moot. IT IS FURTHER ORDERED that the motion of United Keetowah Band of Cherokee Indians in Oklahoma for leave to file amicus brief is GRANTED.

DATE	PROCEEDINGS
	* * * * *
01/25/2019	SUFFICIENT AMICUS CURIAE BRIEF FILED by United Keetoowah Band of Cherokee Indians in Oklahoma.
01/25/2019	INTERVENOR'S BRIEF FILED by Intervenor Navajo Nation.
	* * * * *
02/05/2019	AMICUS CURIAE BRIEF FILED by The Project on Fair Representation.
	* * * * *
02/06/2019	AMICUS CURIAE BRIEF FILED by State of Ohio.
	* * * * *
02/06/2019	APPELLEE'S BRIEF FILED . . . by State of Indiana, State of Louisiana and State of Texas.
	* * * * *
02/06/2019	AMICUS CURIAE BRIEF FILED by Christian Alliance for Indian Child Welfare.
02/06/19	APPELLEE'S BRIEF FILED . . . by Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Danielle Clifford, Mr. Jason Clifford, Ms. Altagracia Socorro Hernandez.
	* * * * *
02/06/2019	MOTION filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Danielle Clifford, Mr. Jason Clifford, Ms. Altagracia Socorro Hernandez, Mr. Frank Nicholas Libretti and Ms. Heather Lynn Libretti

DATE	PROCEEDINGS
	for judicial notice, to place Tarrant County order, Minnesota Court order, and Nevada Adoption order under seal.
	* * * * *
02/07/2019	AMICUS CURIAE BRIEF FILED by Goldwater Institute, Cato Institute, Texas Public Policy Foundation, and American Academy of Adoption Attorneys.
	* * * * *
02/19/2019	APPELLANT'S REPLY BRIEF FILED . . . by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation and Quinault Indian Nation.
02/19/2019	APPELLANT'S REPLY BRIEF FILED . . . by Mr. Alex Azar, Mr. David Bernhardt, Acting Secretary, U.S. Department of the Interior, Bureau of Indian Affairs, DOI, HHS, Ms. Tara Sweeney and USA.
02/19/2019	INTERVENOR'S REPLY BRIEF FILED . . . by Intervenor Navajo Nation.
02/20/2019	COURT ORDER granting opposed Motion for judicial notice filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Altagracia Socorro Hernandez, Mr. Jason Clifford, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti and Ms.

DATE	PROCEEDINGS
	Danielle Clifford; and to place state court documents under seal
	* * * * *
02/25/2019	UNOPPOSED MOTION filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Danielle Clifford, Mr. Jason Clifford, Ms. Altagracia Socorro Hernandez, Mr. Frank Nicholas Libretti and Ms. Heather Lynn Libretti for judicial notice, to place State trial court document attached under seal.
	* * * * *
02/27/2019	COURT ORDER granting unopposed motion for judicial notice and to place state court document under seal filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Altagracia Socorro Hernandez, Mr. Jason Clifford, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti and Ms. Danielle Clifford
	* * * * *
03/06/2019	UNOPPOSED MOTION filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Danielle Clifford, Mr. Jason Clifford, Ms. Altagracia Socorro Hernandez, Mr. Frank Nicholas Libretti and Ms. Heather Lynn Libretti for judicial notice, to place March 1st Tarrant County state order under seal.

DATE	PROCEEDINGS
03/11/2019	COURT ORDER granting unopposed Motion for judicial notice filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Altagracia Socorro Hernandez, Mr. Jason Clifford, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti and Ms. Danielle Clifford; granting Motion to place March 1, 2019 Tarrant County state court order under seal filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Altagracia Socorro Hernandez, Mr. Jason Clifford, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti and Ms. Danielle Clifford
03/13/2019	ORAL ARGUMENT HEARD before Judges Wiener, Dennis, Owen. Arguing Person Information Updated for: Adam Howard Charnes arguing for Appellant Cherokee Nation, Appellant Morongo Band of Mission Indians, Appellant Oneida Nation; Arguing Person Information Updated for: Eric Grant arguing for Appellant Alex Azar, Appellant Acting Secretary Bernhardt, U.S. Department of the Interior, Appellant Bureau of Indian Affairs, Appellant Tara Sweeney, Appellant United States Department of Health and Human Services, Appellant United States Department of Interior; Arguing Person

DATE	PROCEEDINGS
	Information Updated for: Kyle Douglas Hawkins arguing for Appellee State of Indiana, Appellee State of Louisiana; Arguing Person Information Updated for: Matthew Dempsey McGill arguing for Appellee Chad Everet Brackeen, Appellee Jennifer Kay Brackeen, Appellee Danielle Clifford, Appellee Jason Clifford, Appellee Altagracia Socorro Hernandez, Appellee Frank Nicholas Libretti
	* * * * *
08/09/2019	PUBLISHED OPINION FILED. Affirmed in Part, Reversed in Part and Rendered Judge: JLW, Judge: JLD, Judge: PRO. Mandate issue date is 10/01/2019
08/09/2019	JUDGMENT ENTERED AND FILED. Costs Taxed Against: Appellees.
08/16/2019	MODIFIED PUBLISHED OPINION ISSUED to include Judge Owen's concurring in part and dissenting in part.
09/13/2019	UNOPPOSED MOTION filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Danielle Clifford, Mr. Jason Clifford, Ms. Altagracia Socorro Hernandez, Mr. Frank Nicholas Libretti and Ms. Heather Lynn Libretti to extend the time to file a rehearing until 10/23/2019.

DATE	PROCEEDINGS
09/17/2019	COURT ORDER granting in part unopposed Motion to extend the time to file a petition for rehearing filed by Appellees State of Louisiana, State of Texas, State of Indiana, Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Altagracia Socorro Hernandez, Mr. Jason Clifford, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti and Ms. Danielle Clifford until 10/01/2019
10/01/2019	PETITION for rehearing en banc Paper Copies of Rehearing due on 10/07/2019 for Appellees Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti and Heather Lynn Libretti.
10/01/2019	PETITION for rehearing en banc Paper Copies of Rehearing due on 10/07/2019 for Appellees State of Indiana, State of Louisiana and State of Texas.
	* * * * *
10/10/2019	AMICUS CURIAE BRIEF FILED by New Civil Liberties Alliance.
10/10/2019	AMICUS CURIAE BRIEF FILED by Cato Institute, Goldwater Institute and Texas Public Policy Foundation.
10/10/2019	AMICUS CURIAE BRIEF FILED by Christian Alliance for Indian Child Welfare.

DATE	PROCEEDINGS
	* * * * *
10/23/2019	RESPONSE/OPPOSITION filed by Navajo Nation to the Petition for rehearing en banc filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Altagracia Socorro Hernandez, Mr. Jason Clifford, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti and Ms. Danielle Clifford in 18-11479, Petition for rehearing en banc filed by Appellees State of Louisiana, State of Texas and State of Indiana in 18-11479
10/23/2019	RESPONSE/OPPOSITION . . . filed by Mr. Alex Azar, Mr. David Bernhardt, Secretary, U.S. Department of the Interior, Bureau of Indian Affairs, DOI, HHS, Ms. Tara Sweeney and USA.
	* * * * *
10/31/2019	JOINT REPLY filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Danielle Clifford, Mr. Jason Clifford, Ms. Altagracia Socorro Hernandez, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti, State of Indiana, State of Louisiana and State of Texas to the Response/Opposition filed by Appellants USA, DOI, HHS, Bureau of Indian Affairs, Mr. Alex Azar, Ms. Tara Sweeney and Mr. David Bernhardt, Secretary, U.S. Department of the Interior in 18-11479, to

DATE	PROCEEDINGS
	the Response/Opposition filed by Appellants Cherokee Nation, Oneida Nation, Quinault Indian Nation, Morongo Band of Mission Indians and Intervenor Navajo Nation in 18-11479, to the Petition for rehearing en banc filed by Appellees State of Louisiana, State of Texas and State of Indiana in18-11479, to the Petition for rehearing en banc filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Altagracia Socorro Hernandez, Mr. Jason Clifford, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti and Ms. Danielle Clifford in 18-11479
	* * * * *
11/04/2019	SUR REPLY filed by Appellants Mr. Alex Azar, Mr. David Bernhardt, Secretary, U.S. Department of the Interior, Bureau of Indian Affairs, Ms. Tara Sweeney, HHS, DOI and USA in support of the Response/Opposition filed by Appellants USA, DOI, HHS, Bureau of Indian Affairs, Mr. Alex Azar, Ms. Tara Sweeney and Mr. David Bernhardt, Secretary, U.S. Department of the Interior in 18-11479
	* * * * *
11/07/2019	COURT ORDER granting, on the court's own motion, rehearing en banc mooting Petition for rehearing en banc filed by Appellees State of Louisiana,

DATE	PROCEEDINGS
	State of Texas and State of Indiana, mooting Petition for rehearing en banc filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Altagracia Socorro Hernandez, Mr. Jason Clifford, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti and Ms. Danielle Clifford. A/Pet Supplemental Brief due on 12/06/2019 for Appellants Alex Azar, David Bernhardt, Secretary, U.S. Department of the Interior, Bureau of Indian Affairs, Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinault Indian Nation, Tara Sweeney, United States Department of Health and Human Services, United States Department of Interior and United States of America; Intervenor Supplemental Brief due on 12/13/2019 for Intervenor Navajo Nation; E/Res Supplemental Brief due on 01/07/2020 for Appellees Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, Heather Lynn Libretti, State of Indiana, State of Louisiana and State of Texas; reopening case
11/07/2019	REVISED COURT ORDER rescinding previously issued court order ruling on rehearing en banc petitions.

DATE	PROCEEDINGS
	Granting petition for rehearing en banc filed by Appellees State of Louisiana, State of Texas and State of Indiana, granting petition for rehearing en banc filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Altagracia Socorro Hernandez, Mr. Jason Clifford, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti and Ms. Danielle Clifford. It is ordered that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.
11/07/2019	OPINIONS VACATED. The panel opinions in this case dated 08/09/2019 and 08/16/2019 are vacated in accordance with 5th Cir. R. 41.3.
	* * * * *
12/04/2019	CASE CALENDARED for En Banc rehearing on Wednesday, 01/22/2020 in New Orleans
	* * * * *
12/06/2019	APPELLANT'S SUPPLEMENTAL RIEF FILED . . . by Mr. Alex Azar, Mr. David Bernhardt, Secretary, U.S. Department of the Interior, Bureau of Indian Affairs, DOI, HHS, Ms. Tara Sweeney and USA.
	* * * * *

DATE	PROCEEDINGS
12/06/2019	APPELLANT'S SUPPLEMENTAL BRIEF FILED . . . by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation and Quinault Indian Nation.
	* * * * *
12/13/2019	INTERVENOR'S BRIEF FILED . . . by Intervenor Navajo Nation.
	* * * * *
12/18/2019	AMICUS CURIAE BRIEF FILED by Professor Gregory Ablavsky.
12/18/2019	AMICUS CURIAE BRIEF FILED by Native American Women and Indian Tribes and Organizations.
12/18/2019	AMICUS CURIAE BRIEF FILED by Casey Family Programs and 30 Other Organizations Working with Children, Families, and Courts to Support Children's Welfare.
12/18/2019	AMICUS CURIAE BRIEF FILED by Members of Congress.
12/18/2019	AMICUS CURIAE BRIEF FILED by Indian Law Scholars.
12/18/2019	AMICUS CURIAE BRIEF FILED by State of Alaska, State of Arizona, State of California, State of Colorado, State of Idaho, State of Illinois, State of Iowa, State of Maine, State of Massachusetts, State of Michigan, State of Minnesota, State of Mississippi, State of Montana, State of New Jersey, State of New Mexico, State of Oregon, State of Rhode

DATE	PROCEEDINGS
	Island, State of Utah, State of Virginia, State of Washington, State of Wisconsin and States of Connecticut, Nevada, New York, Oklahoma, Pennsylvania,, and District of Columbia.
12/18/2019	AMICUS CURIAE BRIEF FILED by Administrative Law and Constitutional Law Scholars.
12/18/2019	AMICUS CURIAE BRIEF FILED by Quapaw Nation.
12/18/2019	AMICUS CURIAE BRIEF FILED by 486 Recognized Tribes, Association on American Indian Affairs, NationaCongress of American Indians, National Indian Child Welfare Association, and other Indian Organizations.
	* * * * *
12/26/2019	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellants Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation and Quinault Indian Nation
01/03/2020	RESPONSE filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Danielle Clifford, Mr. Jason Clifford, Ms. Altagracia Socorro Hernandez, Mr. Frank Nicholas Libretti and Ms. Heather Lynn Libretti to the 28j Letter filed by Appellants Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation and Quinault Indian Nation

DATE	PROCEEDINGS
	* * * * *
01/07/2020	APPELLEE'S SUPPLEMENTAL BRIEF FILED . . . by State of Indiana, State of Louisiana and State of Texas.
	* * * * *
01/07/2020	APPELLEE'S SUPPLEMENTAL BRIEF FILED . . . by Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Danielle Clifford, Mr. Jason Clifford, Ms. Altagracia Socorro Hernandez, Mr. Frank Nicholas Libretti and Ms. Heather Lynn Libretti
	* * * * *
01/10/2020	AMICUS CURIAE BRIEF FILED by State of Ohio.
01/10/2020	AMICUS CURIAE BRIEF FILED by New Civil Liberties Alliance.
01/10/2020	AMICUS CURIAE BRIEF FILED by Christian Alliance for Indian Child Welfare.
	* * * * *
01/14/2020	AMICUS CURIAE BRIEF FILED by Cato Institute, Goldwater Institute and Texas Public Policy Foundation.
	* * * * *
01/14/2020	AMICUS CURIAE BRIEF FILED by The Project on Fair Representation.
	* * * * *
01/15/2020	The En Banc ORAL ARGUMENT panel has requested of the parties the following: The parties should be prepared to discuss whether ICWA's

DATE	PROCEEDINGS
	delegation of power to the tribes violates the Presentment Clause, U.S. Const. art. 1, sec. 7, cl. 2; see, e.g., Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991).
	* * * * *
01/22/2020	EN BANC ORAL ARGUMENT HEARD Owen, Jones, Smith, Wiener, Stewart, Dennis, Elrod, Southwick, Haynes, Graves, Higginson, Costa, Willett, Duncan, Engelhardt, Oldham En Banc;. Arguing Person Information Updated for: Adam Howard Charnes arguing for Appellant Cherokee Nation, Appellant Morongo Band of Mission Indians, Appellant Oneida Nation; Arguing Person Information Updated for: Eric Grant arguing for Appellant Alex Azar, Appellant Secretary Bernhardt, U.S. Department of the Interior, Appellant Bureau of Indian Affairs, Appellant Tara Sweeney, Appellant United States Department of Health and Human Services, Appellant United States Department of Interior; Arguing Person Information Updated for: Kyle Douglas Hawkins arguing for Appellee State of Indiana, Appellee State of Louisiana; Arguing Person Information Updated for: Matthew Dempsey McGill arguing for Appellee Chad Everet Brackeen,

DATE	PROCEEDINGS
	Appellee Jennifer Kay Brackeen, Appellee Danielle Clifford, Appellee Jason Clifford, Appellee Altagracia Socorro Hernandez, Appellee Frank Nicholas Libretti; Arguing Person Information Updated for: Paul Spruhan arguing for Intervenor Navajo Nation
	* * * * *
04/06/2021	EN BANC PUBLISHED OPINION FILED. [18-11479 Affirmed in Part, Reversed in Part and Rendered] Mandate issue date is 06/01/2021 (This opinion includes URL material that is archived by the Fifth Circuit Court of Appeals Library, and made available at http://www.lb5.uscourts.gov/ArchivedURLS/.)
04/6/21	EN BANC JUDGMENT ENTERED AND FILED.
	* * * * *
06/01/21	MANDATE ISSUED. Mandate issue date satisfied.
09/10/21	SUPREME COURT NOTICE that petition for writ of certiorari was filed by Appellants Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation and Quinault Indian Nation on 09/03/2021. Supreme Court Number: 21-377.
9/10/2021	SUPREME COURT NOTICE that petition for writ of certiorari was filed by

DATE	PROCEEDINGS
	Appellee State of Texas on 09/03/2021. Supreme Court Number: 21-378.
9/10/2021	SUPREME COURT NOTICE that petition for writ of certiorari was filed by Appellees Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Danielle Clifford, Mr. Jason Clifford, Ms. Altagracia Socorro Hernandez, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti, State of Indiana, State of Louisiana and State of Texas on 09/03/2021. Supreme Court Number: 21-380.
9/10/2021	SUPREME COURT NOTICE that petition for writ of certiorari was filed by Appellants Ms. Deb Haaland, Secretary, U.S. Department of the Interior, Mr. Darryl LaCounte, HHS, DOI and USA on 09/03/2021. Supreme Court Number: 21-376.
02/28/2022	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellees State of Louisiana, State of Texas, State of Indiana, Mr. Chad Everet Brackeen, Ms. Jennifer Kay Brackeen, Ms. Altagracia Socorro Hernandez, Mr. Jason Clifford, Mr. Frank Nicholas Libretti, Ms. Heather Lynn Libretti and Ms. Danielle Clifford in 18-11479 on 02/28/2022.
02/28/2022	SUPREME COURT ORDER received granting petition for writ of certiorari

DATE	PROCEEDINGS
	filed by Appellants USA, DOI, HHS, Ms. Deb Haaland, Secretary, U.S. Department of the Interior and Mr. Darryl LaCounte in 18-11479 on 02/28/2022.
02/28/2022	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellants Cherokee Nation, Oneida Nation, Quinault Indian Nation and Morongo Band of Mission Indians in 18-11479 on 02/28/2022.
02/28/2022	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellee State of Texas in 18-11479 on 02/28/2022.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

Civil Action No. 4:17-cv-00868-O

CHAD EVERET BRACKEEN, et al., *Plaintiffs*.

v.

RYAN ZINKE, et al., *Defendants*,

CHEROKEE NATION, et al., *Intervenor-Defendants*.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/25/2017	1	COMPLAINT against All Defendants filed by Chad Everet Brackeen, Jennifer Kay Brackeen, State of Texas. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Cover Sheet)
	* * * * *	
12/15/2017	22	AMENDED COMPLAINT against Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of the Interior, Ryan Zinke filed by Jennifer Kay Brackeen, Chad Everet Brackeen, State of Texas, Altagracia

DATE	DOCKET NUMBER	PROCEEDINGS
		Socorro Hernandez, State of Indiana, Jason Clifford, Frank Nicholas Libretti, State of Louisiana, Heather Lynn Libretti, Danielle Clifford. (Attachments: # 1 Exhibit(s) 1, # 2 Exhibit(s) 2, # 3 Exhibit(s) 3, # 4 Exhibit(s) 4, # 5 Exhibit(s) 5)
	* * * * *	
02/13/2018	27	MOTION to Dismiss filed by Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of the Interior, Ryan Zinke
02/13/2018	28	Brief/Memorandum in Support filed by Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of the Interior, Ryan Zinke re 27 MOTION to Dismiss (Attachments: # 1 Declaration(s) of JoAnn Kintz with Exhibits)
	* * * * *	
03/16/2018	33	STIPULATION *and Proposed Order Regarding Plaintiffs' Second Amended Complaint* by State of Indiana, State of Louisiana, State of Texas.

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: # 1 Proposed Amendment)
03/22/2018	34	ORDER: The Clerk of Court shall file Plaintiffs' Second Amended Complaint, attached hereto as ECF No. 33-1, on the docket, deemed filed as of this Order. Defendants shall have until May 21, 2018 to reply in support of their motion to dismiss. See order for further specifics. (Ordered by Judge Reed C. O'Connor on 3/22/2018)
03/22/2018	35	AMENDED COMPLAINT against All Defendants filed by Jason Clifford, Heather Lynn Libretti, Chad Everet Brackeen, Frank Nicholas Libretti, Danielle Clifford, Jennifer Kay Brackeen, State of Indiana, State of Louisiana, State of Texas, Altagracia Socorro Hernandez.
	* * * * *	
03/26/2018	41	MOTION to Intervene as *Defendants* filed by Cherokee Nation, Oneida Nation,

DATE	DOCKET NUMBER	PROCEEDINGS
		Quinalt Indian Nation, Morongo Band of Mission Indians (Attachments: # 1 Exhibit(s) A, # 2 Proposed Order).
03/26/2018	42	Brief/Memorandum in Support filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation re 41 MOTION to Intervene *as Defendants*
	* * * * *	
03/28/2018	45	ORDER granting 41 Motion to Intervene: Accordingly, the motion is well-taken and should be and is hereby GRANTED. The clerk shall FILE the intervenors' motion to dismiss, attached as Exhibit A (ECF No. 41-1) to their motion. (Ordered by Judge Reed C. O'Connor on 3/28/2018)
03/28/2018	46	MOTION to Dismiss filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation.
	* * * * *	

DATE	DOCKET NUMBER	PROCEEDINGS
04/05/2018	56	MOTION to Dismiss *Second Amended Complaint* filed by Alex Azar, Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke (Attachments: # 1 Proposed Order)
04/05/2018	57	Brief/Memorandum in Support filed by Alex Azar, Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke re 56 MOTION to Dismiss *Second Amended Complaint* (Attachments: # 1 Declaration(s) of JoAnn Kintz with Exhibits)
04/05/2018	58	MOTION to Dismiss *Plaintiff's Second Amended Complaint* filed by Cherokee Nation,

DATE	DOCKET NUMBER	PROCEEDINGS
		Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation (Attachments: # 1 Proposed Order)
	* * * * *	
04/26/2018	72	MOTION for Summary Judgment filed by State of Indiana, State of Louisiana, State of Texas
04/26/2018	73	Appendix in Support filed by State of Indiana, State of Louisiana, State of Texas re 72 MOTION for Summary Judgment (Attachments: # 1 Additional Page(s) Part 2, # 2 Additional Page(s) Part 3)
04/26/2018	74	Brief/Memorandum in Support filed by State of Indiana, State of Louisiana, State of Texas re 72 MOTION for Summary Judgment, 58 MOTION to Dismiss *Plaintiff's Second Amended Complaint*, 56 MOTION to Dismiss *Second Amended Complaint (Combined Brief in Opposition to Motions to Dismiss and in Support of*

DATE	DOCKET NUMBER	PROCEEDINGS
		Motion for Summary Judgment)
	*****	
04/26/2018	77	MOTION to Intervene as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19 filed by Navajo Nation (Attachments: # 1 Exhibit(s) A, # 2 Proposed Order)
04/26/2018	78	Brief/Memorandum in Support filed by Navajo Nation re 77 MOTION to Intervene as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19 (Attachments: # 1 Appendix (Exhibits 1-4))
04/26/2018	79	MOTION for Summary Judgment filed by Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, Heather Lynn Libretti (Attachments: # 1 Proposed Order)
04/26/2018	80	Brief/Memorandum in Support filed by Chad Everet

DATE	DOCKET NUMBER	PROCEEDINGS
		Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, Heather Lynn Libretti re 58 MOTION to Dismiss *Plaintiff's Second Amended Complaint*, 79 MOTION for Summary Judgment , 56 MOTION to Dismiss *Second Amended Complaint (Combined Brief in Opposition to Motions to Dismiss and in Support of Motion for Summary Judgment)*
04/26/2018	81	Appendix in Support filed by Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, Heather Lynn Libretti re 79 MOTION for Summary Judgment
	* * * * *	
04/26/2018	132	AMICUS BRIEF OF THE STATE OF OHIO

DATE	DOCKET NUMBER	PROCEEDINGS
		OPPOSING DEFENDANTS' MOTION TO DISMISS 56
04/26/2018	133	BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
	* * * * *	
05/03/2018	87	RESPONSE filed by Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, Heather Lynn Libretti, State of Indiana, State of Louisiana, State of Texas re: 77 MOTION to Intervene *as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19*
	* * * * *	
05/15/2018	89	REPLY filed by Navajo Nation re: 77 MOTION to Intervene *as Defendant for the Limited Purpose of Seeking Dismissal Pursuant to Rule 19*

DATE	DOCKET NUMBER	PROCEEDINGS
05/25/2018	108	Brief/Memorandum in Support filed by Indian Law Scholars re 107 Unopposed MOTION for Leave to File Amicus Brief in Opposition to Plaintiffs' Motion for Summary Judgment
	* * * * *	
05/25/2018	115	REPLY filed by Alex Azar, Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke re: 56 MOTION to Dismiss Second Amended Complaint
05/25/2018	116	REPLY filed by Alex Azar, Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke re: 56 MOTION to Dismiss *Second Amended Complaint*

DATE	DOCKET NUMBER	PROCEEDINGS
05/25/2018	117	RESPONSE filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation re: 72 MOTION for Summary Judgment, 79 MOTION for Summary Judgment
05/25/2018	118	Brief/Memorandum in Support filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation re 117 Response/Objection
05/25/2018	119	Appendix in Support filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation re 117 Response/Objection
05/25/2018	120	RESPONSE AND OBJECTION filed by Alex Azar, Michael Black, Bureau of Indian Affairs, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke re: 72

DATE	DOCKET NUMBER	PROCEEDINGS
		MOTION for Summary Judgment
05/25/2018	121	Brief/Memorandum in Support filed by Alex Azar, Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke re 120 Response/Objection
05/25/2018	122	RESPONSE AND OBJECTION filed by Alex Azar, Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke re: 79 MOTION for Summary Judgment
05/25/2018	123	Brief/Memorandum in Support filed by Alex Azar, Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of Health and Human

DATE	DOCKET NUMBER	PROCEEDINGS
		Services, United States Department of the Interior, United States of America, Ryan Zinke re 122 Response/Objection, (Attachments: # 1 Declaration(s) of Christine Ennis pursuant to Rule 56(d))
	* * * * *	
05/25/2018	135	BRIEF OF GILA RIVER INDIAN COMMUNITY AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS 56 AND IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT 79
	*****	
05/25/2018	137	AMICUS BRIEF OF THE STATES OF CALIFORNIA, ALASKA, MONTANA, NEW MEXICO, OREGON, UTAH, AND WASHINGTON IN SUPPORT OF DEFENDANTS re: 56
05/25/2018	138	BRIEF OF AMICUS CURIAE 123 FEDERALLY RECOGNIZED INDIAN

DATE	DOCKET NUMBER	PROCEEDINGS
		TRIBES, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, AND OTHER INDIAN ORGANIZATIONS IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT 79 .
	* * * * *	
06/01/2018	139	ORDER: For the foregoing reasons, the Court finds that Proposed Intervenor's Motion to Intervene (ECF No. 77) should be and is hereby DENIED. (Ordered by Judge Reed C. O'Connor on 6/1/2018)
	* * * * *	
06/08/2018	142	REPLY filed by State of Indiana, State of Louisiana, State of Texas re: 72 MOTION for Summary Judgment
06/08/2018	143	REPLY filed by Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle

DATE	DOCKET NUMBER	PROCEEDINGS
		Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, Heather Lynn Libretti re: 79 MOTION for Summary Judgment
06/15/2018	144	MOTION for Summary Judgment filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation (Attachments: # 1 Proposed Order)
06/15/2018	145	Brief/Memorandum in Support filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation re 144 MOTION for Summary Judgment
06/15/2018	146	MOTION for Summary Judgment *(Partial)* filed by Alex Azar, Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of Health and Human Services, United States Department of the Interior, United States of America,

DATE	DOCKET NUMBER	PROCEEDINGS
		Ryan Zinke (Attachments: # 1 Proposed Order)
06/15/2018	147	Brief/Memorandum in Support filed by Alex Azar, Michael Black, Bureau of Indian Affairs, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke re 146 MOTION for Summary Judgment *(Partial)*
	* * * * *	
06/27/2018	150	RESPONSE AND OBJECTION filed by Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, Heather Lynn Libretti, State of Indiana, State of Louisiana, State of Texas re: 144 MOTION for Summary Judgment
06/27/2018	151	Brief/Memorandum in Support filed by Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford,

DATE	DOCKET NUMBER	PROCEEDINGS
		Altagracia Socorro Hernandez, Frank Nicholas Libretti, Heather Lynn Libretti, State of Indiana, State of Louisiana, State of Texas re 150 Response/Objection
06/29/2018	152	RESPONSE AND OBJECTION filed by State of Indiana, State of Louisiana, State of Texas re: 146 MOTION for Summary Judgment *(Partial)* (Attachments: # 1 Proposed Order)
06/29/2018	153	Brief/Memorandum in Support filed by State of Indiana, State of Louisiana, State of Texas re 152 Response/Objection
07/13/2018	154	REPLY filed by Alex Azar, Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke re: 146 MOTION for Summary Judgment *(Partial)*

DATE	DOCKET NUMBER	PROCEEDINGS
07/24/2018	155	ORDER: For the foregoing reasons, the Court finds that Federal Defendants' Motion to Dismiss (ECF No. 56) and Tribal Defendants' Motion to Dismiss (ECF No. 58) should be and are hereby DENIED. (Ordered by Judge Reed C. O'Connor on 7/24/2018)
07/24/2018	156	ORDER: Plaintiffs' Motions for Summary Judgment (ECF Nos. 72 , 79) Hearing set for 8/2/2018 09:00 AM in US Courthouse, Courtroom 2nd Floor, 501 W. 10th St. Fort Worth, TX 76102-3673 before Judge Reed C. O'Connor. (Ordered by Judge Reed C. O'Connor on 7/24/2018)
07/27/2018	157	ORDER: The Court resets Plaintiffs' Motions for Summary Judgment (ECF Nos. 72 , 79) for hearing at 2:00 p.m. on Wednesday, August 1, 2018. (Ordered by Judge Reed C. O'Connor on 7/27/2018)

DATE	DOCKET NUMBER	PROCEEDINGS
08/01/2018	158	ELECTRONIC Minute Entry for proceedings held before Judge Reed C. O'Connor: Motion Hearing held on 8/1/2018. re: 72 MOTION for Summary Judgment, 79 MOTION for Summary Judgment. Attorney Appearances: Plaintiff – Lochlan Shelfer, Matthew McGill, David Hacker; Defense - JoAnn Kintz, Steven Miskinis, Adam Charnes. (Court Reporter: Denver Roden) (No exhibits) Time in Court - 3:55.
08/16/2018	159	NOTICE of *Lodging of the Administrative Record* filed by Alex Azar, Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke (Attachments: # 1 Certification of Administrative Record, # 2

DATE	DOCKET NUMBER	PROCEEDINGS
		Administrative Record Index)
	* * * * *	
08/21/2018	163	Notice of Filing of Official Electronic Transcript of Motion for Summary Judgment Proceedings held on 08-01-18 before Judge Reed C. O'Connor.
	* * * * *	
10/04/2018	166	ORDER: The Court finds that Plaintiffs' Motions for Summary Judgment (ECF Nos. 72 , 79) should be and are hereby GRANTED in part and DENIED in part. (Ordered by Judge Reed C. O'Connor on 10/4/2018)
10/04/2018	167	FINAL JUDGMENT: The Court issued its order partially granting Plaintiffs' Motions for Summary Judgment. It is therefore ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motions for Summary Judgment (ECF Nos. 72 , 79) are GRANTED in part and DENIED in part, and this case is DISMISSED with prejudice. The Court

DATE	DOCKET NUMBER	PROCEEDINGS
		DECLARES that 25 U.S.C. §§ 1901-23, 25 U.S.C. §§ 1951-52, 25 C.F.R. §§ 23.106-22, 25 C.F.R. §§ 23.124-32, and 25 C.F.R. §§ 23.140-41 are UNCONSTITUTIONAL. (Ordered by Judge Reed C. O'Connor on 10/4/2018)
10/10/2018	168	MOTION to Expedite *Consideration and* (), MOTION to Stay *Pending Appeal* filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation (Attachments: # 1 Proposed Order)
10/10/2018	169	Brief/Memorandum in Support filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation re 168 MOTION to Expedite *Consideration and* MOTION to Stay *Pending Appeal* (Attachments: # 1 Exhibit(s) A - Declaration of Nikkie Baker Limore)
10/10/2018	170	MOTION for Leave to File to Supplement the Record

DATE	DOCKET NUMBER	PROCEEDINGS
		filed by Chad Everet Brackeen with Brief/Memorandum in Support. (Attachments: # 1 Declaration(s) Declaration of Matthew D. McGill In Support of Individual Plaintiffs' Motion to Supplement the Record, # 2 Proposed Order Proposed Order) (McGill, Matthew) Modified restriction of attachment per filing atty on 10/12/2018
10/10/2018	171	Brief/Memorandum in Support filed by Chad Everet Brackeen re 170 MOTION for Leave to File to Supplement the Record
10/11/2018	172	ORDER: Accordingly, it is ORDERED that Plaintiffs file a response to Defendant Cherokee Nation's Motion to Expedite Consideration and Motion to Stay (ECF No. 168), and Defendants file a response to Plaintiff Brackeen's Motion for Leave to File Supplemental Briefing (ECF No. 170), explaining their

DATE	DOCKET NUMBER	PROCEEDINGS
		opposition, on or before October 15, 2018. It is further ORDERED that the replies to each be filed on or before October 17, 2018. (Ordered by Judge Reed C. O'Connor on 10/11/2018)
10/12/2018	173	ADDITIONAL ATTACHMENTS to 170 Motion for Leave to File, by Plaintiff Chad Everet Brackeen.
10/15/2018	174	RESPONSE filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation re: 170 MOTION for Leave to File to Supplement the Record
10/15/2018	175	RESPONSE filed by Alex Azar, Michael Black, Bureau of Indian Affairs, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke re: 170 MOTION for Leave to File to Supplement the Record (Attachments: # 1

DATE	DOCKET NUMBER	PROCEEDINGS
		Declaration(s) of JoAnn Kintz and Exhibits)
10/15/2018	176	RESPONSE AND OBJECTION filed by Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, Heather Lynn Libretti, State of Indiana, State of Louisiana, State of Texas re: 168 MOTION to Expedite *Consideration and* MOTION to Stay *Pending Appeal*
10/15/2018	177	Appendix in Support filed by Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, Heather Lynn Libretti, State of Indiana, State of Louisiana, State of Texas re 176 Response/Objection, *to Intervenor-Defendants' Motion to Stay*
10/17/2018	178	REPLY filed by Cherokee Nation, Morongo Band of

DATE	DOCKET NUMBER	PROCEEDINGS
		Mission Indians, Oneida Nation, Quinalt Indian Nation re: 168 MOTION to Expedite *Consideration and* MOTION to Stay *Pending Appeal*
10/17/2018	179	REPLY filed by Chad Everet Brackeen, Jennifer Kay Brackeen re: 170 MOTION for Leave to File to Supplement the Record
10/19/2018	180	Unopposed MOTION for Leave to File Supplemental Authority*and* (), MOTION to Expedite filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation (Attachments: # 1 Exhibit(s) A - MD v. Abbott, # 2 Proposed Order)
10/29/2018	181	ORDER: Based on the foregoing, the Court finds that Defendants have not met their burden of showing that the circumstances justify an exercise of the Court's discretion to grant a stay. Accordingly, the Court finds that Defendant's Motion to Stay

DATE	DOCKET NUMBER	PROCEEDINGS
		Pending Appeal (ECF No. 168) should be and is hereby DENIED. The Court finds that Individual Plaintiffs' Motion for Leave to File to Supplement the Record (ECF No. 170) should be and is hereby GRANTED because the supplementary documents are relevant to subject matter jurisdiction, are not prejudicial to another party, and Plaintiffs already met the challenge to their standing at the time of judgment, and must maintain standing throughout appeal. The Court also finds that Defendant's Unopposed Motion for Leave to File Supplemental Authority (ECF No. 180) should be and is hereby GRANTED. (Ordered by Judge Reed C. O'Connor on 10/29/2018)
10/29/2018	182	(Document Restricted) Declaration of Matthew D. McGill In Support of Individual Plaintiffs' Motion to

DATE	DOCKET NUMBER	PROCEEDINGS
		Supplement the Record re: 170 MOTION for Leave to File to Supplement the Record filed by Chad Everet Brackeen.
10/29/2018	183	Supplemental Authority re: 180 Unopposed MOTION for Leave to File Supplemental Authority and, MOTION to Expedite filed by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation.
	* * * * *	
11/02/2018	185	MOTION to Intervene *for Purposes of Appeal* filed by Navajo Nation (Attachments: # 1 Proposed Order)
11/02/2018	186	Brief/Memorandum in Support filed by Navajo Nation re 185 MOTION to Intervene *for Purposes of Appeal* (Attachments: # 1 Exhibit(s) 1)
11/19/2018	187	NOTICE OF APPEAL as to 155 Order on Motion to Dismiss, 167 Judgment, 181 Order on Motion to Expedite, Order on Motion to

DATE	DOCKET NUMBER	PROCEEDINGS
		Stay, Order on Motion for Leave to File, to the Fifth Circuit by Cherokee Nation, Morongo Band of Mission Indians, Oneida Nation, Quinalt Indian Nation.
11/19/2018		USCA Case Number 18-11479 in United States Court of Appeals Fifth Circuit for 187 Notice of Appeal, filed by Quinalt Indian Nation, Cherokee Nation, Oneida Nation, Morongo Band of Mission Indians.
11/20/2018	188	RESPONSE filed by Chad Everet Brackeen, Jennifer Kay Brackeen, Danielle Clifford, Jason Clifford, Altagracia Socorro Hernandez, Frank Nicholas Libretti, Heather Lynn Libretti, State of Indiana, State of Louisiana, State of Texas re: 185 MOTION to Intervene *for Purposes of Appeal*
	* * * * *	
11/29/2018	189	REPLY filed by Navajo Nation re: 185 MOTION to Intervene *for Purposes of Appeal* (Attachments: # 1

DATE	DOCKET NUMBER	PROCEEDINGS
		Exhibit(s) 1, # 2 Exhibit(s) 2)
	* * * * *	
11/30/2018	190	NOTICE OF APPEAL to the Fifth Circuit by Alex Azar, Michael Black, Bureau of Indian Affairs, Bryan Rice, United States Department of Health and Human Services, United States Department of the Interior, United States of America, Ryan Zinke.
	* * * * *	
12/03/2018	192	ORDER of USCA No. 18-11479 as to 187 Notice of Appeal, filed by Quinalt Indian Nation, Cherokee Nation, Oneida Nation, Morongo Band of Mission Indians. IT IS ORDERED that, with respect to the appellants opposed motion for stay pending appeal, the district courts October 2018 judgment is stayed pending further order of this court. (Attachments: # 1 USCA Cover Letter)
12/12/18	195	ORDER: Having considered the motion, briefing,

DATE	DOCKET NUMBER	PROCEEDINGS
		and applicable law, the Court hereby DEFERS resolution of the Navajo Nation's Motion to Intervene (ECF No. 185) pending further action from the Court of Appeals. (Ordered by Judge Reed C. O'Connor on 12/12/2018)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, JENNIFER KAY BRACKEEN, FRANK NICHOLAS LIBRETTI, HEATHER LYNN LIBRETTI, ALTAGRACIA SOCORRO HERNANDEZ, JASON CLIFFORD, and DANIELLE CLIFFORD,	)	
and	)	
STATE OF TEXAS, STATE OF LOUISIANA, and STATE OF INDIANA,	)	
Plaintiffs,	)	Civil Action No. 4:17-cv-868-O
v.	)	
UNITED STATES OF AMERICA; RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; BRYAN RICE, in his official capacity as Director of the Bureau of Indian Affairs; JOHN	)	

TAHSUDA III, in his official capacity as Acting Assistant Secretary for Indian Affairs; the BUREAU OF INDIAN AFFAIRS; the UNITED STATES DEPARTMENT OF THE INTERIOR; ALEX AZAR, in his official capacity as Secretary of the United States Department of Health and Human Services; and the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

SECOND AMENDED COMPLAINT AND PRAYER FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Chad and Jennifer Brackeen are the adoptive parents of A.L.M., a two-year-old boy, and have provided him with a loving, safe, and permanent home. The Brackeens fostered A.L.M. since he was ten months old, and A.L.M.'s biological parents and grandmother supported the adoption. For months, their adoption of A.L.M. was delayed—caught in a terrifying whirlwind of court proceedings that occurred only because the federal government classifies A.L.M. as an "Indian child."

2. Because federal law classifies A.L.M. as an "Indian child," when the Brackeens petitioned to adopt A.L.M., the Texas family court applied federal law

rather than Texas law to determine whether the Brackeens could adopt A.L.M. Applying that federal law, the Texas family court denied the Brackeens' adoption petition, and ordered A.L.M. transferred to an "Indian family" A.L.M. does not know, in a state A.L.M. has never even visited.

3. After the Brackeens initiated this civil action to challenge the federal law that drove the Texas family court to deny the Brackeens' petition to adopt A.L.M., the "Indian family" that federal law favored over the Brackeens apparently lost interest in caring for A.L.M. The Second Court of Appeals therefore vacated the lower court's order, and the Brackeens successfully petitioned to adopt A.L.M. Now the same federal law that prefers that an "Indian family" adopt A.L.M. may subject the Brackeens' adoption to collateral attack for two years—eighteen months more than Texas law allows.

4. Nick and Heather Libretti want to adopt Baby O., a twenty-three-month-old girl, and provide her with a safe and permanent home. The Librettis have cared for Baby O. since her birth. She left the hospital with the Libretti family when she was three days old and has been in their care ever since. The Librettis have provided a stable and loving home for Baby O., and have guided her through a series of medical challenges. Altagracia Hernandez, Baby O.'s biological mother, lives near the Librettis. Ms. Hernandez supports the Librettis' efforts to adopt Baby O., as does Baby O.'s biological father.

5. The Librettis have been threatened with separation from Baby O., and Baby O. has been threatened with removal from the only home she has

ever known, because the Ysleta del sur Pueblo Indian Tribe contends that Baby O. is an "Indian child" under federal law. The Ysleta del sur Pueblo Tribe has attempted to use that federal law to take Baby O. from her home in Nevada— where both the Librettis and her birth mother live—and move her to a reservation near El Paso, Texas, which Baby O. has never visited and where she knows no one. It is only now that the Librettis have joined this lawsuit that the Tribe has entered into settlement negotiations which may result in Baby O.'s adoption by the Librettis.

6. Jason and Danielle Clifford wish to adopt Child P., a six-year-old girl whom the Cliffords have fostered since July 2016. Child P. entered foster care in the summer of 2014, at age three, and spent nearly two years moving from one placement to another before becoming part of the Clifford family. Since entering the foster system, Child P. has been placed in at least six different homes. She finally found stability and began to thrive while living with the Cliffords. With the support of Child P.'s guardian ad litem, the Cliffords have moved to adopt her.

7. But Child P.'s maternal grandmother—who the State determined was unfit to serve as a foster placement, and who has limited rights over Child P. under state law—is a registered member of the White Earth Band of Ojibwe Indians. That Tribe argues that Child P. is an "Indian child" under federal law and has used that federal law to remove Child P. from the Cliffords—the only stable home she has ever known—and have her placed with the grandparent previously found to be an unfit placement by the State. In January 2018, Child P. was removed from the Cliffords' care and

placed her with her grandmother—even though the State had previously suspended the grandmother's foster care license. Because federal law prefers that an "Indian family" adopt Child P., the Cliffords are now separated from Child P., even though they are the only parties who have petitioned to adopt Child P.

8. The ordeals now being suffered by the Brackeens, the Librettis, and the Cliffords, and the children they care for, are occurring because Congress decided in 1978 that the federal government—and, in particular, the Department of the Interior's Bureau of Indian Affairs ("BIA")—knew best how to manage the fostering and adoption of Native American children. Though the Constitution reserves domestic relations to the States, and despite the fact that Congress possesses no enumerated power to legislate in this way, Congress enacted the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901–1963. ICWA, and the enabling regulations recently promulgated by the BIA, invade every aspect of state family law as applied to Indian children. ICWA commandeers state agencies and courts to become investigative and executive actors carrying out federal policy, and to make child custody decisions based on racial preferences.

9. By enforcing this racially discriminatory policy, the federal government places Indian children at risk for serious and lasting harm. And States that refuse to follow ICWA risk having their child custody decisions invalidated and federal child welfare funding pulled. Thus, Congress forces ICWA on the States by threatening the stability and well-being of the family lives of their youngest and most vulnerable citizens.

10. This is an action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–706, and the United States Constitution, brought to challenge the validity of a final rule entitled *Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,778 (June 14, 2016) (the "Final Rule") (codified at 25 C.F.R. pt. 23), and certain provisions of ICWA that the Final Rule purports to interpret and implement.

11. ICWA's placement preferences require that, "in any adoptive placement of an Indian child under state law, a preference shall be given in absence of good cause to the contrary to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a); *see also id.* § 1915(b); 25 C.F.R. § 23.130; *id.* § 23.131. The Final Rule provides that "good cause" to depart from ICWA's "placement preferences" should be shown by "clear and convincing evidence." 25 C.F.R. § 23.132. And ICWA further provides that any adoption of Indian child is subject for two years to collateral attack on the ground that the parent's consent "was obtained through fraud or duress." 25 U.S.C. § 1913(d).

12. Plaintiffs Chad and Jennifer Brackeen bring this action because ICWA and the Final Rule may expose the finality of their adoption of A.L.M. to attack. The Brackeens also intend to provide foster care for, and possibly adopt, additional children in need.

13. Plaintiffs Nick and Heather Libretti bring this action because ICWA and the Final Rule are interfering with their ability to adopt Baby O., and, even if their efforts to adopt Baby O. are ultimately successful, may expose the finality of their adoption to attack. The

Librettis also intend to provide foster care for, and possibly adopt, additional children in need.

14. Plaintiff Altagracia Hernandez brings this action because ICWA and the Final Rule are interfering with her wishes to have her biological child adopted in a placement that best suits Baby O.'s interests and needs.

15. Plaintiffs Jason and Danielle Clifford bring this action because ICWA and the Final Rule are interfering with their ability to adopt Child P., and have caused Child P. to be removed from their home and placed with a grandparent who was previously determined to be an unfit placement by the State.

16. If ICWA and the pertinent provisions of the Final Rule are invalidated, the Librettis and the Cliffords each would be able to adopt the children they are caring for in accordance with State law, and without regard to ICWA's and the Final Rule's discriminatory placement preferences. And the Brackeens would enjoy the finality afforded their adoption by state law. The Brackeens, the Librettis, and the Cliffords, however, cannot challenge the Final Rule under the APA in state court proceedings, because any such action must be brought in a "court of the United States." 5 U.S.C. § 702.

17. Plaintiffs Texas, Louisiana, and Indiana bring this action because ICWA and the Final Rule intrude upon their sovereign authority over domestic relations in every child custody proceeding, because ICWA demands that their child welfare agencies and courts inquire about Indian children in every foster care, preadoptive, or adoption proceeding. ICWA also commandeers States to perform executive branch functions and apply racially discriminatory preferences. Moreover, Defendants thre aten to strip States of child welfare, foster care, and adoption services funding administered by the Departm ent of Health and Human Services ("HHS") if they do not comply with ICWA's mandates. 42 U.S.C. §§ 622(b)(9), 677(b)(3)(G).

18. Plaintiffs thus bring this action for declaratory and injunctive relief and pray that this Court: (1) vacate and set aside the Final Rule; (2) declare that Sections 1901–1923, and 1951– 1952 of ICWA violate the Constitution; (3) declare that Sections 1913(d), 1914, and 1915 of ICWA violate the Constitution; (4) declare that Sections 622(b)(9) and 677(b)(3)G) of the Social Security Act violate the Constitution; (5) enjoin the defendants from implementing or administering Sections 1901–1923 and 1951–1952 of ICWA; (6) enjoin the defendants from implementing or administering Sections 1913(d), 1914, or 1915 of ICWA; and (7) enjoin the defendants from implementing or administering Sections 622(b)(9) and 677(b)(3)G) of the Social Security Act.

19. Plaintiffs Chad Everet Brackeen and Jennifer Kay Brackeen are adoptive parents to the two-year-old child A.L.M., who has lived with them since June 2016. They also are raising two biological children in their home, aged eight and six. Neither Mr. Brackeen nor Mrs.

Brackeen is "a member of an Indian tribe," 25 U.S.C. § 1903(3), and therefore the Brackeens are not an "Indian family" within the meaning of ICWA and the Final Rule.

20. Plaintiffs Nick and Heather Libretti are foster parents to Baby O., a toddler they have fostered since her birth in March 2016. Neither Mr. Libretti nor Mrs. Libretti is "a member of an Indian tribe," 25 U.S.C. § 1903(3), and therefore the Librettis are not an "Indian family" within the meaning of ICWA and the Final Rule.

21. Plaintiff Altagracia Socorro Hernandez is the biological mother of Baby O., a child fostered by the Librettis since birth. Ms. Hernandez is a resident of Reno, Nevada. She is not a "member of an Indian tribe." 25 U.S.C. § 1903(3).

22. Plaintiffs Jason and Danielle Clifford are foster parents to Child P., a six-year-old girl they raised for more than a year and a half. Neither Mr. Clifford nor Mrs. Clifford is "a member of an Indian tribe," 25 U.S.C. § 1903(3), and therefore the Cliffords are not an "Indian family" within the meaning of ICWA and the Final Rule.

23. Plaintiff Texas possesses sovereign authority over family law issues within its borders. Texas DFPS is the agency responsible for child custody proceedings and ensuring compliance with ICWA and the Final Rule. Texas courts possess jurisdiction over child custody proceedings arising under the Texas Family Code. When Texas DFPS encounters an Indian child in a child custody proceeding, almost every aspect of the matter is affected. The legal burden of proof for removal is higher, as is the legal burden of proof for obtaining any final order terminating parental rights or restricting a

parent's custody. Texas DFPS must serve specific notices regarding ICWA rights on various entities and individuals. ICWA requires the Texas DFPS caseworker to make active efforts to reunify the child and family. Texas state courts and Texas DFPS must place the child according to ICWA's racial preferences. Expert testimony on tribal child and family practices may be necessary, at a cost to Texas, to adjudicate ICWA cases. Texas DFPS and courts also must report ICWA compliance to the Department of Interior and the BIA in every child custody case involving an Indian child, and certify compliance with ICWA in annual reports to HHS as a condition of receiving child welfare, foster care, and adoption services funding under Titles IV-B and IV-E of the Social Security Act. These are just some of the burdens ICWA imposes on Texas.

24. Plaintiff Louisiana possesses sovereign authority over family law issues within its borders. The Louisiana Department of Children and Family Services ("Louisiana DCFS") is the agency responsible for child custody proceedings and ensuring compliance with ICWA and the Final Rule. Louisiana courts possess jurisdiction over child custody proceedings arising under the Louisiana Children's Code. When Louisiana DCFS encounters an Indian child in a child custody proceeding, almost every aspect of the matter is affected. The legal burden of proof for removal is higher, as is the legal burden of proof for obtaining any final order terminating parental rights or restricting a parent's custody. Louisiana DCFS must serve specific notices regarding ICWA rights on various entities and individuals. ICWA requires the Louisiana DCFS caseworker to make active efforts to reunify the child and family. Louisiana state

courts and Louisiana DCFS must place the child according to ICWA's racial preferences. Expert testimony on tribal child and family practices may be necessary, at a cost to Louisiana, to adjudicate ICWA cases. Louisiana DCFS and courts also must report ICWA compliance to the Department of Interior and the BIA in every child custody case involving an Indian child, and certify compliance with ICWA in annual reports to HHS as a condition of receiving child welfare, foster care, and adoption services funding under Titles IV-B and IV-E of the Social Security Act. These are just some of the burdens ICWA imposes on Louisiana.

25. Plaintiff Indiana possesses sovereign authority over family law issues within its borders. The Indiana Department of Child Services ("Indiana DCS") is the agency responsible for child custody proceedings and ensuring compliance with ICWA and the Final Rule. Indiana courts possess jurisdiction over child custody proceedings arising under the Indiana Family Law and Juvenile Code. When Indiana DCS encounters an Indian child in a child custody proceeding, almost every aspect of the matter is affected. The legal burden of proof for removal is higher, as is the legal burden of proof for obtaining any final order terminating parental rights or restricting a parent's custody. Indiana DCS must serve specific notices regarding ICWA rights on various entities and individuals. ICWA requires the Indiana DCS caseworker to make active efforts to reunify the child and family. Indiana state courts and Indiana DCS must place the child according to ICWA's racial preferences. Expert testimony on tribal child and family practices may be necessary, at a cost to Indiana, to adjudicate ICWA cases. Indiana DCS and courts also

must report ICWA compliance to the Department of Interior and the BIA in every child custody case involving an Indian child, and certify compliance with ICWA in annual reports to HHS as a condition of receiving child welfare, foster care, and adoption services funding under Titles IV-B and IV-E of the Social Security Act. These are just some of the burdens ICWA imposes on Indiana.

26. Texas, Louisiana, and Indiana (collectively, "State Plaintiffs") are the guardians of the health, welfare, safety, and property of their citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). State Plaintiffs represent the interests of the many children within their custody and care, whether in foster care, preadoption, or adoption services. State Plaintiffs also represent the interest of their resident parents who are thinking about fostering and/or adopting a child, and who are currently fostering or in the process of adopting a child, and who are directly and substantially injured by the application of ICWA and the Final Rule's discriminatory mandates. State Plaintiffs cannot remedy these injuries through their sovereign lawmaking powers because Defendants mandate compliance with ICWA.

27. Defendant United States of America is sued under 28 U.S.C. § 1346.

28. Defendant Ryan Zinke is the Secretary of the United States Department of the Interior. He is sued in his official capacity.

29. Defendant Bryan Rice is the Director of the Bureau of Indian Affairs within the United States

Department of the Interior. He is sued in his official capacity.

30. Defendant John Tahsuda, III, is the Acting Assistant Secretary for Indian Affairs at the Bureau of Indian Affairs within the United States Department of the Interior. He is sued in his official capacity.

31. Defendant Bureau of Indian Affairs ("BIA") is a federal agency within the Department of the Interior.

32. Defendant United States Department of the Interior (the "Interior") is a federal executive department of the United States.

33. Defendant Alex M. Azar II is the Secretary of the United States Department of Health and Human Services. He is sued in his official capacity.

34. Defendant United States Department of Health and Human Services ("HHS") is a federal executive department of the United States.

JURISDICTION AND VENUE

35. This action arises under the APA and the United States Constitution. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States defendant), and 5 U.S.C. §§ 701–706 (review of agency action). This Court has authority to award the requested declaratory and injunctive relief, 28 U.S.C. §§ 2201–02, and costs and attorneys' fees, 28 U.S.C. § 2412.

36. Venue is proper in this Court under 28 U.S.C. § 1391(e)(l) as this is an action against officers and agencies of the United States, a substantial part of the

events giving rise to this claim occurred in this district, and no real property is involved in the action.

ALLEGATIONS

I. The statutory and regulatory framework

A. State Power Over Domestic Relations

37. With few exceptions, regulation of domestic relations is an area of law over which the States possess exclusive power. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890).

38. The power of States over domestic relations is so well-settled that federal courts lack Article III jurisdiction over domestic relations issues, and child custody disputes in particular. *Burrus*, 136 U.S. at 594.

39. All States regulate domestic relations, including marriage, divorce, adoption, and the rights and responsibilities of parents and children.

40. For example, Texas regulates the domestic relations of individuals domiciled within its borders. Title 1 of the Texas Family Code regulates the formation and dissolution of marriage and marital property rights. Tex. Fam. Code §§ 1.101–9.302. Title 1-a regulates the collaborative family law process. *Id.* §§ 15.001–15.116. Title 2 regulates the status of children in relation to their parents. *Id.* §§ 31.001–47.003. Title 3 protects the public and ensures public safety through a juvenile justice code. *Id.* §§ 51.01–61.107. Title 3a regulates truant conduct of children. *Id.* §§ 65.001–65.259. Title 4 protects Texas families from domestic violence. *Id.* §§ 71.001–93.004.

And Title 5 regulates the parent-child relationship, including termination of parental rights, foster care, and adoption. *Id.* §§ 101.001–266.013.

41. Louisiana and Indiana also regulate the domestic relations of individuals domiciled within their borders. *See* La. Child. Code arts. 100–1673; Ind. Code §§ 31-9-1-1 to 31-41-3-1.

42. Texas recognizes the "best interest of the child" as the "primary consideration" for courts when determining parentage, possession, and access to the child. Tex. Fam. Code § 153.002; *see also id.* § 161.001(b)(2). Texas's "fundamental interest in parental-rights termination cases is to protect the best interest of the child." *In re M.S.*, 115 S.W.3d 534, 548 (Tex. 2003) (citations omitted). The same is true in Louisiana and Indiana. *See, e.g.*, La. Child. Code art. 1255; Ind. Code § 31-19-11-1.

43. In Texas, the best interest of the child standard "is aligned with another of the child's interests—an interest in a final decision on termination so that adoption to a stable home or return to the parents is not unduly prolonged." *In re M.S.*, 115 S.W.3d at 548 (citations omitted). "Indeed, the U.S. Supreme Court has recognized that prolonged termination proceedings can have psychological effects on a child of such magnitude that time is of the essence." *Id.* (quoting *In re J.F.C.*, 96 S.W.3d 256, 304 (Tex. 2002) (Schneider, J., dissenting) (quoting *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 513–14 (1982))). Thus, the Texas Family Code protects children by requiring prompt action on the part of trial and appellate courts when confronting cases that involve the parent-child

relationship. Tex. Fam. Code §§ 105.004, 109.002(a-1), 161.002, 162.005. The Texas Family Code further protects the parent-child bond and the health of adoptive children by providing that "the validity of an adoption order is not subject to attack after six months after the date the order was signed." Tex. Fam. Code § 162.012(a). Louisiana and Indiana also protect adoptive families by limiting the time period for collateral attacks on an adoption order. Ind. Code § 31-19-14-2; La. Child Code art. 1263.

44. ICWA and the Final Rule alter the application of Texas, Louisiana, and Indiana family law to Indian children and impose significant delays on permanency for those children.

B. The Indian Child Welfare Act

45. In the mid-1970s, there was rising concern over "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). "Congress found that 'an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.'" *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013) (quoting 25 U.S.C. § 1901(4)). "This wholesale removal of Indian children from their homes prompted Congress" to enact ICWA, 25 U.S.C. §§ 1901–1963. *Id.*

46. ICWA establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive

homes." 25 U.S.C. § 1902. An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *Id.* § 1903(4).

47. ICWA mandates placement preferences in foster care, preadoptive, and adoptive proceedings involving Indian children. 25 U.S.C. § 1915.

48. "In any adoptive placement under State law," ICWA mandates that, "in the absence of good cause to the contrary," "preference shall be given . . . to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a).

49. ICWA similarly requires that "in any foster care or preadoptive placement preference shall be given, in the absence of good cause to the contrary, to placement with – (i) a member of the child's extended family; (ii) a foster home . . . specified by the Indian child's tribe; (iii) an Indian foster home . . . approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian tribe." 25 U.S.C. § 1915(b).

50. ICWA requires state agencies and courts to defer to the alteration of the preferences established by Section 1915(a)–(b), if the Indian child's tribe establishes a different order of preference by resolution. 25 U.S.C. § 1915(c).

51. ICWA places an affirmative duty on state agencies and courts to notify potential intervenors and

the federal government about an Indian child matter. 25 U.S.C. § 1912.

52. In any involuntary child custody proceeding, ICWA commands state agencies and courts, when seeking foster care placement of, or termination of parental rights to, an Indian child, to notify the parents or Indian custodian and the Indian child's tribe of the pending proceedings and of their right to intervention under 25 U.S.C. § 1911(c). 25 U.S.C. § 1912(a); 25 C.F.R. § 23.11. Copies of these notices must be sent to the Secretary and the BIA. 25 C.F.R. § 23.11. No foster care placement or termination of parental rights proceeding may be held until at least ten days after receipt of the notice by the parent or Indian custodian and tribe or the Secretary. 25 U.S.C. § 1912(a). ICWA grants the Indian custodian or tribe up to twenty additional days to prepare for such proceedings. *Id.*

53. ICWA demands that state agencies and courts undertake additional duties and costs to implement its federal program.

54. ICWA requires state agencies charged with serving children in foster care and adoption proceedings to use "active efforts" to prevent the breakup of the family. "Any party [including state agencies] seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proven unsuccessful." 25 U.S.C. § 1912(d).

55. ICWA requires state courts to apply federal substantive rules of decision and federal procedural requirements in state law causes of action that result in state law judgments.

56. ICWA requires foster care placement and termination of parental rights proceedings, in the absence of good cause to the contrary, to be transferred to tribal courts for an Indian child, even if he or she is not domiciled or residing on the reservation. 25 U.S.C. § 1911(b).

57. ICWA commands state courts to grant mandatory intervention to an Indian custodian and the child's tribe at any point in the proceedings. 25 U.S.C. § 1911(c).

58. ICWA prohibits the termination of parental rights for an Indian child in the absence of "evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). The BIA is not required to pay for the services of expert witnesses. 25 C.F.R. § 23.81.

59. ICWA dictates when a parent or Indian custodian may consent to a foster care placement or termination of parental rights, "[a]ny consent given prior to, or within ten days after, birth of the Indian child shall not be valid." 25 U.S.C. § 1913(a). "Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian." *Id.* § 1913(b). And "[i]n any voluntary proceeding for termination of parental rights to, or

adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent." *Id.* § 1913(c).

60. ICWA permits the parent of an Indian child to withdraw consent to a final decree of adoption on the grounds that the consent was obtained through fraud or duress, and upon finding fraud or duress, a state court must vacate the final decree and return the child to the parent. The parent may withdraw consent based on fraud or duress for up to two years after the final judgment of adoption. 25 U.S.C. § 1913(d).

61. ICWA places recordkeeping duties on state agencies and courts.

62. State agencies and courts must maintain records demonstrating their compliance with the statute. "A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe." 25 U.S.C. § 1915(e).

63. State courts must maintain records and report to the Indian child his or her tribal affiliation once that child reaches age eighteen. "Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other

information as may be necessary to protect any rights flowing from the individual's tribal relationship." 25 U.S.C. § 1917.

64. State courts entering final decrees or orders in an Indian child adoption case must provide the Secretary with a copy of the decree or order, along with the name and tribal affiliation of the child, names of the biological parents, names of the adoptive parents, and the identity of any agency having files or information relating to the adoption. 25 U.S.C. § 1951.

65. Failure to comply with ICWA may result in final child custody orders or placements to be overturned on appeal or by another court of competent jurisdiction. 25 U.S.C. § 1914.

66. ICWA also overrides the provisions of state law that promote finality in adoptions by allowing an adoption order to come under collateral attack for up to two years after entry of the order. 25 U.S.C. § 1913(d).

67. ICWA ensures state agencies and courts comply with its mandates by enabling any Indian child who is the subject of any action for foster care placement or termination of parental rights under state law, any parent or Indian custodian from whose custody the child was removed, and the Indian child's tribe to petition any court of competent jurisdiction to invalidate a state court's decision for failure to comply with ICWA sections 1911, 1912, and 1913. 25 U.S.C. § 1914. Section 1914 has also been applied to allow collateral attacks to adoptions after the close of the relevant window under state law. *See, e.g., Belinda K. v. Baldovinos*, No. 10-cv-2507, 2012 WL 13571, at *4 (N.D. Cal. Jan. 4, 2012).

68. In 1994, Congress enacted another mechanism to coerce States to comply with ICWA. The Social Security Act Amendments of 1994 require states who receive child welfare services program funding through Title IV-B, Part 1 of the Social Security Act to file annual reports detailing their compliance with ICWA. Pub. L. No. 103–432, § 204, 108 Stat. 4398 (1994). According to Title IV-B:

> (a) In order to be eligible for payment under this subpart, a State must have a plan for child welfare services which has been developed jointly by the Secretary and the State agency designated pursuant to subsection (b)(1), and which meets the requirements of subsection (b).
> (b) Each plan for child welfare services under this subpart shall— . . . (9) contain a description, developed after consultation with tribal organizations (as defined in section 4 of the Indian Self-Determination and Education Assistance Act) in the State, of the specific measures taken by the State to comply with the Indian Child Welfare Act.

42 U.S.C. § 622.

69. States can use Title IV-B funding for a variety of child welfare services, including family preservation, family reunification, services for foster and adopted children, training for child welfare professionals, and adoption promotion activities.

70. HHS and Secretary Azar shall pay each State that has developed a plan in accordance with section 622. 42 U.S.C. § 624(a). However, "[i]f the Secretary determines that a State has failed to comply with subparagraph (a) for a fiscal year, then the percentage

that would otherwise apply for purposes of subsection (a) for the fiscal year shall be reduced by" a certain amount. *Id.* § 624(f)(2)(B).

71. Each State receives a base amount of $70,000 in Title IV-B funding. 42 U.S.C. § 623(a). Additional funds are distributed in proportion to the State's population of children under age 21 multiplied by the complement of the State's average per capita income.

72. Congress expanded the requirement for States to comply with ICWA to receive Social Security Act funding in 1999 and 2008, when it amended Title IV-E of the Social Security Act to require States to certify ICWA compliance to receive foster care and adoption services funding. Foster Care Independence Act of 1999, Pub. L. No. 106–169, § 101, 113 Stat. 1822 (1999); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110- 351, § 301, 122 Stat. 3949 (2008). According to Title IV-E:

> (1) A State may apply for funds from its allotment under subsection (c) of this section for a period of five consecutive fiscal years by submitting to the Secretary, in writing, a plan that meets the requirements of paragraph (2) and the certifications required by paragraph (3) with respect to the plan.
>
> …
>
> (3) Certifications
> The certifications required by this paragraph with respect to a plan are the following:
>
> …

> (G) A certification by the chief executive officer of the State that each Indian tribe in the State has been consulted about the programs to be carried out under the plan; that there have been efforts to coordinate the programs with such tribes; that benefits and services under the programs will be made available to Indian children in the State on the same basis as to other children in the State; and that the State will negotiate in good faith with any Indian tribe, tribal organization, or tribal consortium in the State that does not receive an allotment under subsection (j)(4) for a fiscal year and that requests to develop an agreement with the State to administer, supervise, or oversee the programs to be carried out under the plan with respect to the Indian children who are eligible for such programs and who are under the authority of the tribe, organization, or consortium and to receive from the State an appropriate portion of the State allotment under subsection (c) for the cost of such administration, supervision, or oversight.

42 U.S.C. § 677(b).

73. HHS regulations state that the HHS Administration for Children and Families ("ACF") "will determine a title IV–E agency's substantial conformity with title IV–B and title IV– E plan requirements" based on "criteria related to outcomes." 45 C.F.R. § 1355.34(a).

74. "Criteria related to outcomes" includes:

> (2) A title IV–E agency's level of achievement with regard to each outcome reflects the extent to which a title IV–E agency has:

> (i) Met the national standard(s) for the statewide/Tribal service area data indicator(s) associated with that outcome, if applicable; and,
>
> (ii) Implemented the following [Child and Family Services Plan] CFSP requirements or assurances:
>
> (E) The requirements in section 422(b)(9) of the Act regarding the State's compliance with the Indian Child Welfare Act.

45 C.F.R. § 1355.34(b).

75. HHS and Secretary Azar withhold funds for failure to comply with Title IV-B and IV-E requirements, including failure to comply with and implement ICWA by State agencies and courts. 45 C.F.R. § 1355.36.

76. In Fiscal Year 2018, Texas was appropriated approximately $410 million in federal funding for Title IV-B and Title IV-E programs.

77. In Fiscal Year 2018, Louisiana was appropriated approximately $64 million in federal funding for Title IV-B and Title IV-E programs.

78. In Fiscal Year 2014, Indiana was appropriated approximately $189 million in federal funding for Title IV-B and Title IV-E programs.

79. Titles IV-B and IV-E vest Secretary Azar with discretion to approve or deny a State's compliance with the requirements of 42 U.S.C. §§ 622, 677.

80. HHS and Secretary Azar administer funding under Titles IV-B and IV-E of the Social Security Act.

81. Defendants enforce compliance with 42 U.S.C. § 622(b)(9), 677(b)(3)(G) and will reduce or deny funding to States that do not comply with ICWA.

C. The 1979 BIA Guidelines

82. Soon after ICWA's enactment, the BIA promulgated "Guidelines for State Courts; Indian Child Custody Proceedings" (the "1979 Guidelines") that were intended to assist the implementation of ICWA, but were "not intended to have binding legislative effect." 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979). The 1979 Guidelines recognized that "[p]rimary responsibility" for interpreting ICWA "rests with the courts that decide Indian child custody cases." *Id.* The 1979 Guidelines emphasized that "the legislative history of the Act states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." *Id.*

83. As state courts applied ICWA in the ensuing decades, most held that the "good cause" exception to ICWA's placement preferences requires a consideration of the child's best interests, including any bond or attachment the child had formed with her current caregivers. *See, e.g., In re Interest of Bird Head*, 331 N.W.2d 785, 791 (Neb. 1983); *In re Appeal in Maricopa Cty. Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Ariz. Ct. App. 1983); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 307–08 (Ind. 1988); *In re Adoption of M.*, 832 P.2d 518, 522 (Wash. Ct. App. 1992); *In re Adoption of F.H.*, 851 P.2d 1361,1363–64 (Alaska 1993); *In re Interest of A.E., J.E., S.E., and X.E.*, 572 N.W.2d 579, 583–85 (Iowa 1997); *People ex rel. A.N.W.*, 976 P.2d 365, 369

(Colo. Ct. App. 1999); *In re Interest of C.G.L.*, 63 S.W.3d 693, 697–98 (Mo. Ct. App. 2002); *In re Adoption of Baby Girl B.*, 67 P.3d 359, 370–71 (Okla. Ct. App. 2003); *but see Yavapai–Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. App.—Houston [14th Dist.] Aug. 24, 1995, no pet.).

84. Other state courts, developing and applying the "existing Indian family doctrine," limited ICWA's application to circumstances where the child had some significant political or cultural connection to the tribe. *See, e.g., In re Interest of S.A.M*, 703 S.W.2d 603, 608–09 (Mo. Ct. App. 1986); *Claymore v. Serr*, 405 N.W.2d 650, 653-54 (S.D. 1987); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *Hampton v. J.A.L.*, 658 So. 2d 331, 335 (La. Ct. App. 1995); *Rye v. Weasel*, 934 S.W.2d 257, 261–64 (Ky. 1996); *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 716 n.16 (Cal. App. 2001); *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at *1 (Tenn. Ct. App. Nov. 19, 1997); *Ex parte C.L.J.*, 946 So. 2d 880 (Ala. Civ. App. 2006); *In re N.J.*, 221 P.3d 1255, 1264–65 (Nev. 2009). The existing Indian family doctrine is premised, in part, on the significant equal protection concerns that would arise if ICWA applied to children with no political or cultural connection to a tribe based solely on the child's ancestry. *See In re Bridget R.*, 49 Cal. Rpt. 2d 507, 527–29 (Cal. App. 1996); cf. *Adoptive Couple*, 133 S. Ct. at 2565 (noting that interpreting ICWA's parental termination provisions as applicable in any case where a child has an Indian ancestor, "even a remote on…would raise equal protection concerns").

D. The Final Rule

85. In June 2016, almost four decades after ICWA's passage, the BIA promulgated *Indian Child Welfare Act*

Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (the "Final Rule") (codified at 25 C.F.R. pt. 23). The Final Rule purports to "clarify the minimum Federal standards governing implementation of the Indian Child Welfare Act" and to ensure that the Act "is applied in all States consistent with the Act's express language." 25 C.F.R. § 23.101.

86. The BIA characterizes the Final Rule as a "legislative rule" that "set[s] binding standards for Indian child custody proceedings in State courts" and is "entitled to *Chevron* deference." 81 Fed. Reg. at 38,782, 38,786, 38,788.

87. The Final Rule provides the "minimum Federal standards governing implementation" of ICWA, 25 C.F.R. § 23.101, and "to ensure compliance with ICWA," *id.* § 23.106(a).

88. The Final Rule requires state agencies and courts to conduct Executive Branch investigations and duties.

89. The Final Rule requires "State courts [to] ask each participant in an emergency or voluntary or involuntary child custody proceeding whether the participant knows or has reason to know that the child is an Indian child." 25 C.F.R. § 23.107(a). These inquiries "should be on the record," and "State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child." *Id.*

90. When the state agency or court believes the child is an Indian child, the court must confirm, through "a report, declaration, or testimony included in the

record," that the state agency or other party used due diligence to identify and work with all of the tribes of which there is reason to know the child may be a member (or eligible for membership). 25 C.F.R. § 23.107(b). The Final Rule specifies that the state court must confirm that the state agency conducted a "diligent search . . . to find suitable placements meeting the preference criteria." *Id.* § 23.132(c)(5).

91. The Final Rule dictates to state agencies and courts when and how notice of an involuntary foster care placement or termination of parental rights proceeding involving an Indian child must be provided to an Indian tribe, the child's parents, and the child's Indian custodian. 25 C.F.R. § 23.111. The Final Rule prohibits the continuation of foster care placement or termination of parental rights proceedings in state courts until at least 10 days after receipt of the notice by the parent or Indian custodian and by the tribe or Secretary of the Interior. 25 C.F.R. § 23.112. Upon request, the state court must grant the parent, Indian custodian, or tribe up to 20 additional days from the date upon which notice was received to prepare for the hearing. *Id.*

92. The Final Rule prescribes how a state court may proceed with an emergency removal or placement of an Indian child, including when to hold a hearing, how to notify the Indian child's custodians, how to make a court record of the proceedings, what evidence must be provided to the court, and when to end the proceeding. 25 C.F.R. § 23.113.

93. In an involuntary foster care or termination of parental rights proceeding, the Final Rule requires state courts to ensure and document that the state agency has

used "active efforts" to prevent the breakup of the Indian family. 25 C.F.R. § 23.120.

94. The Final Rule defines "active efforts" to include "assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan." 25 C.F.R. § 23.2. "To the maximum extent possible, active efforts should be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe." *Id.*

95. State agencies must tailor active efforts to the facts and circumstances of the case, which may include, for example:

> (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
>
> (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
>
> (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
>
> (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with

extended family members to provide family structure and support for the Indian child and the Indian child's parents;

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's Tribe;

(6) Taking steps to keep siblings together whenever possible;

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;

(8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;

(9) Monitoring progress and participation in services;

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;

(11) Providing post-reunification services and monitoring.

25 C.F.R. § 23.2.

96. The Final Rule requires state courts to apply federal substantive rules of decision and federal

procedural requirements in state law causes of action that result in state law judgments.

97. Only the Indian tribe of which it is believed the child is a member (or eligible for membership) may determine whether the child is a member of the tribe or eligible for membership. 25 C.F.R. § 23.108(a). "The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe." *Id.* § 23.108(b).

98. When an Indian child is a member or eligible for membership in only one tribe, that tribe must be designated as the Indian child's tribe. But when the child meets the definition of "Indian child" for more than one tribe, then the Final Rule instructs state agencies and courts to defer to "the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes," or allow "the Tribes to determine which should be designated as the Indian child's Tribe." *Id.* § 23.109(b)–(c). Only when the tribes disagree about the child's membership may the state courts designate the tribe to which the child belongs, and the Final Rule provides criteria the courts must use in making that designation. *Id.* § 23.109(c)(2).

99. The Final Rule instructs state courts that they must dismiss a voluntary or involuntary child custody proceeding when the Indian child's residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings. 25 C.F.R. § 23.110(a).

100. The Final Rule requires state courts to terminate child custody proceedings if any party or the

court has reason to believe that the Indian child was improperly removed from the custody of his parent or Indian custodian. 25 C.F.R. § 23.114.

101. The Final Rule instructs state agencies and courts on how to transfer proceedings to tribal courts. The parent, Indian custodian, or the Indian child's tribe may request transfer at any time, orally or in writing. 25 C.F.R. § 23.115. The Final Rule then requires the state court to promptly notify the tribal court in writing of the transfer petition, and it must transfer the proceeding, unless either parent objects, the tribal court declines the transfer, or good cause exists for denying the transfer. 25 C.F.R. § 23.116–117. The Final Rule establishes when good cause exists to deny the transfer. 25 C.F.R. § 23.118. If the tribal court accepts the transfer, the Final Rule instructs that the state court should expeditiously provide the tribal court with all records related to the proceeding. 25 C.F.R. § 23.119.

102. The Final Rule prohibits state courts from ordering a foster care placement of an Indian child unless clear and convincing evidence is presented, including expert testimony, demonstrating that the child is in serious emotional or physical danger in the parent's or Indian custodian's custody. 25 C.F.R. § 23.121(a).

103. The Final Rule prohibits state courts from terminating parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including expert testimony, that the child is in serious emotional or physical danger. 25 C.F.R. § 23.121(b). The evidence must demonstrate a causal relationship between the conditions in the home and the likelihood of danger to the child. 25 C.F.R. § 23.121(c)–(d). The Final

Rule prohibits the state agency caseworker from serving as an expert witness, and dictates that the Indian child's tribe will designate the expert witness. 25 C.F.R. § 23.122.

104. In voluntary child custody proceedings, the Final Rule mandates that state courts require the participants to state on the record whether the child is an Indian child, or whether they have reason to believe the child is an Indian child. 25 C.F.R. § 23.124(a). "If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status," including "contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status." *Id.* § 23.124(b).

105. The Final Rule describes what evidence a state court may consider when evaluating the voluntary consent for termination of parental rights, foster care, preadoptive, and adoptive placement by a parent or Indian custodian. 25 C.F.R. § 23.125. For foster care placement, consent may be withdrawn at any time. 25 C.F.R. § 23.125(b)(2)(i). For termination of parental rights and adoption, consent may be withdrawn any time prior to the final decree of termination or adoption. 25 C.F.R. § 23.125(b)(2)(ii)–(iii). Consent given prior to, or within 10 days after, the birth of an Indian child is not valid. 25 C.F.R. § 23.125(e). The Final Rule also dictates what information written consent must contain, 25 C.F.R. § 23.126, and how a parent or custodian may withdraw consent, 25 C.F.R. § 23.127–28.

106. The Final Rule requires state agencies and courts to follow placement preferences based on the child's Indian parentage.

107. In adoptive placements "preference must be given in descending order . . . to placement of the child with: (1) A member of the Indian child's extended family; (2) Other members of the Indian child's Tribe; or (3) Other Indian families." 25 C.F.R. § 23.130(a).

108. "If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply." *Id.* § 23.130(b).

109. In other words, in adoptive placement proceedings, the tribe designated as the Indian child's tribe may enact a resolution that prefers placement with another Indian family of another tribe, even if the Indian child has extended family with which he or she may be placed.

110. In foster care or preadoptive placement proceedings, "preference must be given . . . to placement of the child with: (1) A member of the Indian child's extended family; (2) A foster home that is licensed, approved, or specified by the Indian child's Tribe; (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs." 25 C.F.R. § 23.131(b).

111. "If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences

apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child . . . ." *Id.* § 23.131(c).

112. In other words, in foster care and preadoptive placement proceedings, the tribe designated as the Indian child's tribe may enact a resolution that prefers placement with an institution for children approved by another Indian organization, even if the Indian child has extended family with which he or she may be placed.

113. The Final Rule further requires that the State undertake "a diligent search . . . to find suitable placements meeting the preference criteria." 25 C.F.R. § 23.132(c)(5). The Final Rule also demands that the State may not assess the availability of a preferred placement according to generally applicable standards under state law, but instead must adhere to "the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties." *Id.*

114. The "diligent search" requirement usurps the State's authority to assess potential placements under the standards of the State, and instead requires the State to expend significant efforts to locate placements that conform to the Tribe's view of suitability. Because the State must adopt the Tribe's standard of suitability, the Final Rule blocks the State from seeking to promote the best interests of the child.

115. A state court may depart from the placement preferences contained in Sections 23.130–131 of the Final Rule if there is "good cause." 25 C.F.R. § 23.132.

The Final Rule prescribes circumstances in which the "good cause" standard is met. *Id.*

116. After observing that "State courts . . . differ as to what constitutes 'good cause' for departing from ICWA's placement preferences," 81 Fed. Reg. at 38,782, the Final Rule newly mandates that "[t]he party urging that the ICWA preferences not be followed bears the burden of proving ***by clear and convincing evidence*** the existence of good cause" to deviate from such a placement. 81 Fed. Reg. at 38,838 (emphasis added); *see also* 25 C.F.R. § 23.132(b). Though the Final Rule says that its regulations "do not categorically require" that state courts apply a clear-and-convincing standard of proof—the regulation itself says that a party seeking departure from the placement preferences "should bear the burden of proving by clear and convincing evidence that there is good cause," 25 C.F.R. § 23.132(b)—the Final Rule simultaneously says the clear and-convincing standard "should be followed." 81 Fed. Reg. at 38,843.

117. The Final Rule also expressly repudiates the Existing Indian Family doctrine. *See* 81 Fed. Reg. at 38,802 ("[T]here is no [Existing Indian Family] exception to the application of ICWA."). Accordingly, the Final Rule provides that state courts "may not consider factors such as the participation of the parents or Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum." 81 Fed. Reg. at 38,868 (codified at 25 C.F.R. § 23.103(c)).

118. And contrary to the idea—previously embraced by the BIA—that "the use of the term 'good cause' was

designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child," 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979), the Final Rule now claims that "Congress intended the good cause exception to be narrow and limited in scope," 81 Fed. Reg. at 38,839. Accordingly, the Final Rule sets forth "five factors upon which courts may base a determination of good cause to deviate from the placement preferences," and further "makes clear that a court may not depart from the preferences based on the socioeconomic status of any placement relative to another placement or based on the ordinary bonding or attachment that results from time spent in a non-preferred placement that was made in violation of ICWA." 81 Fed. Reg. at 38,839; *see also* 25 C.F.R. § 23.132(c)–(e).

119. The BIA threatens enforcement of the Final Rule through the invalidation of child custody proceedings involving Indian children that do not follow ICWA or the Final Rule's requirements.

120. The Final Rule requires state courts to vacate adoption decrees, up to two years after their issuance, if the parents of the Indian child file a petition to vacate the order. 25 C.F.R. § 23.136. By contrast, in Texas, "the validity of an adoption order is not subject to attack after six months after the date the order was signed." Tex. Fam. Code § 162.012.

121. The Final Rule allows an "Indian child," a parent or Indian custodian, or the child's Tribe seeking to petition a court to invalidate a foster-care placement or termination of parental rights under state law. 25 C.F.R. § 23.137. The petitioner is not required to show

that her rights were violated, only that any violation of 25 U.S.C. §§ 1911–1913 occurred during the course of the challenged child-custody proceeding. *Id.*

122. If an Indian child has been adopted, the state court must notify the child's biological parent or prior Indian custodian and the child's tribe whenever the final adoption decree has been vacated or set aside or the adoptive parent has voluntarily consented to the termination of parental rights. 25 C.F.R. § 23.139.

123. Once an Indian child reaches age 18, the state court that entered the final adoption decree must inform that person of his or her tribal affiliation. 25 C.F.R. § 23.138.

124. Whenever a state court enters a final adoption decree or an order in a voluntary or involuntary Indian child placement, the Final Rule requires the state court or designated state agency to provide a copy of the decree or order to the BIA within 30 days along with biographical information about the child, the biological parents, the adoptive parents, the state agency possessing information about the child, and information about tribal membership of the child. 25 C.F.R. § 23.140.

125. The Final Rule requires states to "maintain a record of every voluntary or involuntary foster care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary." 25 C.F.R. § 23.141.

126. Prior to adopting the Final Rule, Interior and the BIA accepted public comment on the proposed rule. Commenters raised objections to the proposed, now

final, rule on the grounds that it violated federalism, the Tenth Amendment, and equal protection principles. *See, e.g.*, 81 Fed. Reg. 38,788–89, 38,794, 38,826. Interior and the BIA dismissed those objections and promulgated the Final Rule. *Id.*

II. FACTS RELEVANT TO THE INTERESTS OF PLAINTIFFS

A. A.L.M.'s Adoption Proceedings

127. A.L.M. was born in Arizona to M.M. and J.J., an unmarried couple. A.L.M. is an "Indian child" as that term is defined in the Final Rule because he is eligible for membership in an Indian tribe, his biological mother is an enrolled member of the Navajo Nation, and his father is an enrolled member of the Cherokee Nation. *See* 25 C.F.R. § 23.2.

128. A.L.M. has been living with Chad and Jennifer Brackeen for more than 16 months and, with the support of A.L.M.'s biological parents and his paternal grandmother, the Brackeens sought to become his adoptive parents. Because of the Final Rule and Section 1915 of ICWA, the Brackeens have faced great obstacles in their efforts to adopt a child they raised for more than half his life, and A.L.M. faces the possibility of separation from both his prospective adoptive and biological families.

129. A few days after A.L.M.'s birth, his birth mother took A.L.M. to Fort Worth, Texas to live with A.L.M.'s paternal grandmother. In June 2016, when A.L.M. was ten months old, Child Protective Services ("CPS"), a division of the Texas DFPS, removed him from his grandmother and placed him in the foster care

of the Brackeens. A.L.M. was identified as an "Indian child" within the meaning of ICWA, and as required by the Final Rule, 25 C.F.R. § 23.11, both the Cherokee Nation and the Navajo Nation were notified of A.L.M.'s placement with the Brackeens.

130. Texas DFPS, the Cherokee Nation, and the Navajo Nation were unable to identify an ICWA-preferred foster placement for A.L.M., and he remained with the Brackeens.

131. The Brackeens have raised A.L.M. for over 16 months and regard him as a member of their family.

132. The parental rights of A.L.M.'s biological parents were voluntarily terminated on May 2, 2017, and he is free to be adopted under Texas law.

133. In June 2017, a year after the Brackeens took custody of A.L.M., the Navajo Nation submitted a letter to the family court suggesting they had located a potential alternative placement for A.L.M. with non-relatives in New Mexico.

134. On July 19, 2017, the Brackeens brought an original petition to adopt A.L.M. in the 323rd District Court, Tarrant County, Texas.

135. In accordance with the requirements of the Final Rule, *see* 25 C.F.R. § 23.11, the Cherokee and Navajo Nations were notified of the adoption proceeding.

136. Neither the Navajo Nation nor the prospective alternative placement located by the Navajo Nation intervened in the Texas adoption proceeding or otherwise formally sought to adopt A.L.M. The

Brackeens are the only persons before the Texas family court seeking to adopt A.L.M.

137. On August 1, 2017, the family court held a hearing regarding the Brackeens' petition for adoption.

138. At the August 1, 2017 hearing, the Navajo Nation's social worker testified that the two tribes "came up with [an] agreement" among themselves in the hallway prior to the hearing to determine the designation of A.L.M.'s tribe. The tribes ultimately decided to designate the Navajo Nation as A.L.M.'s tribe, but this "determination of [A.L.M.'s] Tribe for purposes of ICWA and [the Final Rule] do[es] not constitute a determination for any other purpose." 25 C.F.R. § 23.109(c)(3).

139. The Brackeens argued that ICWA's placement preferences did not apply in their adoption case because they were the only party before the family court formally seeking to adopt A.L.M., *see Adoptive Couple*, 133 S. Ct. at 2564, and that, in any event, good cause existed to depart from ICWA's preferences for placing A.L.M. with an Indian family because A.L.M.'s biological parents wanted him to be adopted by the Brackeens, and an expert in developmental psychology testified that A.L.M. will suffer severe emotional and psychological harm if he is removed from the Brackeens' care.

140. Although ICWA does not define "good cause," the Final Rule requires the Brackeens—who were the only party to the proceeding seeking adoption—to "bear the burden of proving by clear and convincing evidence" that there was "good cause" to allow them, as a non-Indian couple, to adopt A.L.M. 25 C.F.R. § 23.132(b).

141. To establish good cause, the Brackeens presented the testimony of A.L.M.'s biological parents, who each testified that they reviewed the placement options and preferred A.L.M.'s adoption by the Brackeens. *See* 25 C.F.R. § 23.132(c)(1). A.L.M.'s biological mother testified that A.L.M. "loves [the Brackeens]." A.L.M.'s biological father testified that the Brackeens are "the only parents [A.L.M.] knows." In addition, A.L.M.'s paternal grandmother also requested that A.L.M. remain with the Brackeens, testifying that they "have been the primaries in his life." A.L.M.'s court appointed guardian recommended that A.L.M. remain with the Brackeens. Other witnesses testified that taking A.L.M. from the Brackeens would also separate him from his biological family, with whom he currently has regular contact. Finally, the Brackeens presented an expert in psychology who concluded that the Brackeens and A.L.M. were strongly emotionally bonded, and that taking A.L.M. from his family would likely cause significant emotional and physiological harm that could last for many years. The expert further testified that A.L.M. is particularly at risk for severe emotional and psychological harm due to trauma he experienced in his infancy before he was placed with the Brackeens, and that he is "four to six times more likely" to experience that harm if he is removed from his home to live with strangers in New Mexico.

142. Texas DFPS did not dispute that the Brackeens were fit parents to adopt A.L.M., or otherwise suggest any reason unrelated to ICWA why the Brackeens' petition to adopt A.L.M. should be denied. Texas DFPS maintained, however, that notwithstanding the fact that the Brackeens were the only parties that had petitioned

to adopt A.L.M., ICWA's placement preferences applied and could be overcome only upon a showing of "good cause." To rebut the Brackeens' showing of "good cause," Texas DFPS pointed to the Final Rule's clear-and-convincing standard of proof, arguing that the Brackeens did not satisfy the heightened showing required to justify a departure from the placement preferences.

143. On August 22, 2017, the family court entered an order denying the Brackeens' adoption petition. The Brackeens' petition to adopt A.L.M. was denied solely because the family court concluded that ICWA and the Final Rule applied to the Brackeens' petition and that the Brackeens had failed to satisfy, by the Final Rule's clear and convincing burden of proof, that "good cause" exists to depart from the Final Rule's and ICWA's "placement preferences." *See* 23 C.F.R. § 23.132; *see also* Order Denying Request for Adoption of Child, *In re A.L.M., a Child*, No. 323-105593-17 (323rd Dist. Ct., Tarrant Cty., Texas Aug. 22, 2017).

144. Although the court acknowledged that "Petitioners are the only party before the Court seeking adoption," it concluded that "25 U.S.C. § 1915 preferences are applicable," and that "preference shall be given to other members of the child's tribe." Order Denying Request for Adoption of Child, *In the Interest of A.L.M.*, No. 323-105593-17 (323rd Distr. Ct., Tarrant County, Tex. Aug. 22, 2017), ¶ 5. The Court held that the Brackeens "did not meet their burden under" the Final Rule, 25 C.F.R. § 23.132 (which imposes the "clear and convincing evidence" burden on the prospective adoptive parents), to "show good cause to depart from" ICWA's preferences. *Id.*

145. Shortly after the family court denied the Brackeens' petition for adoption, Texas DFPS, applying the placement preferences applicable to foster care and preadoptive placements, *see* 25 C.F.R. § 23.131, stated its intention to immediately move A.L.M. to the Navajo Nation's proposed placement in New Mexico.

146. The Brackeens sought an emergency order staying any change in placement pending appeal. Texas appeared as *amicus curiae* in support of the Brackeens' stay request, arguing that ICWA violates the right of equal protection of the laws under the United States Constitution.

147. On September 8, 2017, the family court entered a temporary order staying any change in placement pending the outcome of the Brackeens' appeal to the Texas Second District Court of Appeals, Fort Worth, Texas, holding that such an order was necessary and appropriate to protect A.L.M.'s safety and welfare during the pendency of the appeal. *See* Tex. Fam. Code § 109.001 ("[T]he court may make any order necessary to preserve and protect the safety and welfare of the child during the pendency of an appeal as the court may deem necessary and equitable.").

148. In accordance with the Final Rule's provisions concerning preadoptive and foster care placements, Texas DFPS stated its intention to move A.L.M. to the Navajo Nation's proposed placement with non-relatives in New Mexico if the family court's ruling is affirmed.

149. In anticipation of a favorable ruling on appeal, Texas DFPS proposed that, during the pendency of the appeal, it take A.L.M., without either of the Brackeens,

to New Mexico for "transitional" overnight visits with the Navajo Nation's proposed alternative placement.

150. During the pendency of the appeal, Texas DFPS informed counsel for the Brackeens that the Navajo couple previously identified as an alternative placement for A.L.M. was no longer an available placement, and that both the Navajo Nation and Cherokee Nation lacked viable adoptive placements for A.L.M. Based on these developments, the Brackeens, Texas DFPS, and the guardian ad litem entered into a settlement agreement recognizing that the Brackeens are now the only party seeking to adopt A.L.M., that Section 1915(a)'s placement preferences therefore do not apply, and that, even if they did apply, good cause exists to depart from them. Based on that agreement, the Brackeens, Texas DFPS, and the guardian ad litem filed a joint unopposed motion to set aside the trial court's judgment and to remand to the trial court so that it could make a determination as to A.L.M.'s best interest.

151. The Second Court of Appeals granted the parties' motion on December 7, 2017, setting aside the trial court's prior judgment and remanding to the trial court. *See In the Interest of A.M., A Child*, 02-17-00298-CV, 2017 WL 6047677, at *1 (Tex. App.—Fort Worth Dec. 7, 2017, no pet. h.).

152. In January 2018, following the remand, the Brackeens successfully petitioned to adopt A.L.M. But under ICWA and the Final Rule, the Brackeens' adoption may be subject to collateral attack for two years.

153. The Brackeens are directly and deeply aggrieved by the Final Rule and ICWA because these

provisions may subject their adoption of A.L.M. to collateral attack for up to two years—eighteen months more than Texas law would otherwise allow.

154. The Brackeens also intend to provide foster care for, and possibly adopt, additional children in need. Because of their experience with the Final Rule and ICWA, however, the Brackeens are reluctant to provide a foster home for other Indian children in the future. Because the Brackeens are not an Indian family under ICWA, they know that any future foster or adoption placement involving a child who may be an Indian child could subject them and the child to years of delay and litigation. ICWA and the Final Rule threaten to repeat the trials that A.L.M. and the Brackeens have already endured with any future foster or adoptive children.

155. ICWA and the Final Rule therefore interfere with the Brackeens' intention and ability to provide a home to additional children as well. This, in turn, damages Texas by limiting the supply of available, qualified homes necessary to provide support for children in need.

B. Baby O.'s Adoption Proceedings

156. Baby O. was born in Nevada in March 2016. While pregnant with Baby O., Ms. Hernandez decided that she would be unable to provide the support that Baby O. would need to thrive and made the difficult decision to put Baby O. up for adoption at her birth.

157. Nick and Heather Libretti are a married couple living in Sparks, Nevada. Mr. Libretti is a Marine Corps veteran and works as an auto mechanic. Mrs. Libretti is a marketing and public relations manager for a major antique car show. They are heavily involved in their

community, particularly in work that serves at risk youth.

158. Nick and Heather decided to become foster and adoptive parents several years ago and took in two young boys who needed a home. They have now adopted those children and provide them, and their older brother, with the love and support of a family.

159. In 2016, the Librettis were overjoyed to have Baby O. come into their lives. Although Baby O. has significant medical needs, the Librettis were eager to welcome her into their family.

160. Ms. Hernandez met the Librettis and agreed that they would provide a loving and nurturing home to Baby O. When Baby O. was born, the Librettis came to meet her in the hospital; Baby O. went home with the Librettis three days after her birth.

161. Because of gestational difficulties, Baby O. suffers from a number of medical ailments that require extensive care and management. The Librettis have arranged and ensured that Baby O. receives all the treatment she needs to achieve full health. So far, this has required two surgeries and one extended hospital stay and frequent medical care. Baby O.'s medical needs are ongoing.

162. Ms. Hernandez, along with Baby O.'s biological siblings, lives a mere twenty-minute drive from the Librettis and has remained part of Baby O.'s life. She and the Librettis visit one another regularly so that Baby O., Ms. Hernandez, and Baby O.'s biological siblings are able to have a warm and loving relationship. She supports the Librettis' efforts to adopt Baby O. and

hopes that they are able to finalize the adoption soon. The Librettis and Ms. Hernandez have agreed to an ongoing visitation agreement which will ensure that Ms. Hernandez remains a part of Baby O.'s life.

163. Baby O.'s birth father, E.R.G., is descended from members of the Ysleta del sur Pueblo Tribe (also known as the Tigua or Tiwa Tribe), located in El Paso, Texas. At the time of Baby O.'s birth, E.R.G. was not a registered member of the Tribe. E.R.G. and Ms. Hernandez have never been married. They have two children in addition to Baby O. E.R.G. also supports the Librettis' effort to adopt Baby O.

164. Baby O.'s biological paternal grandmother is a registered member of the Ysleta del sur Pueblo Tribe. The Tribe has intervened in the court proceedings regarding custody of Baby O. Contrary to the wishes of Baby O.'s parents, the Tribe seeks to remove Baby O. from the Librettis and send her into foster care on the reservation in west Texas. In its effort to justify Baby O.'s removal, the Tribe has repeatedly brought forward potential foster placements.

165. Because of the Final Rule's "diligent search" requirements, the State cannot conduct its normal review of potential alternate placements before concluding that adoption by the Librettis is in the best interests of Baby O. Instead, the State is made an agent for the Tribe, and must conduct full reviews of any placement that the Tribe considers more socially or culturally suitable than allowing Baby O. to remain with the only family she has ever known.

166. The diligent search requirement blocks the Librettis from seeking to adopt Baby O. until the State

has completed an exhaustive review of any potential placement identified by the Ysleta del sur Pueblo Tribe. To date, in its efforts to prevent Baby O.'s adoption by the Librettis, the Ysleta del sur Pueblo Tribe approximately forty potential placements requiring full home studies. Many of these potential placements withdrew before completing home studies. None now seeks to adopt Baby O.

167. Nevada has already conducted seven home studies of individuals designated by the tribe and found them all not suitable to care for Baby O., particularly given her significant medical needs. Most recently, the Tribe has nominated an additional twenty-nine purported foster placements. Nevada child services is in the process of reviewing each.

168. Only after the Librettis joined this action challenging the constitutionality of ICWA and the validity of the Final Rule did the Tribe indicate its willingness to enter into settlement negotiations. Those negotiations are ongoing and may result in an agreement allowing the Librettis to adopt Baby O. Even if the Librettis' petition to adopt Baby O. is ultimately granted, however, ICWA may subject the their adoption to collateral attack for up to two years.

169. The Librettis intend to petition for adoption of Baby O. as soon as they are able to do so. To date, the Tribe's involvement in the Nevada custody proceeding, made possible only because of ICWA, has prevented the Librettis from petitioning to adopt. The Librettis are the only people who have indicated an intent to formally adopt Baby O., and they are the only family she has ever known.

170. The Librettis intend to provide foster care for, and possibly adopt, additional children in need. Because of their experience with the Final Rule and ICWA, however, the Librettis are reluctant to provide a foster home for other Indian children in the future. Because the Librettis are not an Indian family under ICWA, they know that any future foster or adoption placement involving a child who may be an Indian child could subject them and the child to years of delay and litigation. ICWA and the Final Rule threaten to repeat the trials that Baby O. and the Librettis have already endured with any future foster or adoptive children.

C. Child P.'s Adoption Proceedings

171. Child P. was born in July 2011. She was placed in foster care in the summer of 2014 when her biological parents were arrested and charged with various drug related offenses. For her first two years in foster care, Child P. was bounced from one placement to another, staying with various relatives or foster parents, none of whom was able to provide her with a stable or permanent home.

172. Minnesota also attempted to return Child P. to the care of her birth mother, but Child P. had to be returned to foster care after her birth mother relapsed. Finally, after Child P. had been in foster care for nearly two years, a Minnesota court terminated the parental rights of her birth parents. Later that month, Child P. joined the Clifford family.

173. Jason and Danielle Clifford, Child P.'s foster and adoptive parents, have been married since 2007. Recognizing the significant need for foster families in their area, the Cliffords chose to become foster parents

through the Hennepin County, Minnesota, adoption services, rather than pursuing an adoption internationally or through a private adoption agency. Since Child P. joined the Cliffords' family in July 2016, they have loved and cared for her, guiding her through her entrance into school and helping her through more than a year of child therapy in an attempt to heal the psychological wounds inflicted by the neglect and instability of her early life. The Cliffords love and care for Child P. as their own child. Child P. has made many friends, including through the Girl Scouts and the Cliffords' church, and has been warmly welcomed as a member of the Clifford family.

174. Child P.'s maternal grandmother is a registered member of the White Earth Band of Ojibwe Tribe. When Child P. first entered state custody, her biological mother informed the court that Child P. was not eligible for tribal membership. In the fall of 2014, several months after Child P. entered foster care, the White Earth Band wrote a letter to the Court confirming that Child P. was not eligible for membership in the tribe. Nevertheless, the Court sent notices, as required under ICWA, in the fall of 2014 and the spring of 2015 informing the White Earth Band that Child P. was in the custody of the state. Not until January 2017—some six months after Child P. was placed with the Cliffords—did the Tribe write to the court and insist, without explanation, that Child P. was eligible for membership.

175. Most recently, in an unsupported assertion made in a brief, counsel for the White Earth Band announced that Child P. was now a member of the Tribe for purposes of ICWA. Considering itself bound by this pronouncement, the Minnesota state court has concluded

that ICWA applies to all custody determinations regarding Child P.

176. To date, the Cliffords are the only party to move to adopt Child P. Because the Tribe asserts that Child P. is an "Indian child," when the Cliffords moved to adopt Child P., the Minnesota court applied federal law in holding that ICWA's placement preferences apply to Child P. The court also declined to allow the Cliffords an evidentiary hearing on their motion, which would otherwise be guaranteed to them under state law, because ICWA contains no such provision. Because ICWA prefers placement with an "Indian family," Child P. was removed from the Cliffords' home in January 2018, and placed in the care of her maternal grandmother, who was previously determined by the State to be an unfit placement.

177. The Cliffords wish to adopt Child P. to ensure that she has a permanent home and to make her a part of their family under the law, as she already is in practice. Child P.'s guardian ad litem supports their efforts to adopt and agrees that adoption by the Cliffords is in Child P.'s best interest. But because of ICWA and the Final Rule, Child P. has now been separated from the Cliffords, who face heightened legal barriers to adopting Child P. purely because of her ancestry.

D. The Impact of ICWA and the Final Rule on State Plaintiffs

178. ICWA and the Final Rule harm State agencies charged with protecting child welfare from coast to coast by usurping lawful authority over the regulation of child custody proceedings and the management of child

welfare services. It also jeopardizes millions of dollars in federal funding.

179. Three federally recognized tribes exist in Texas: Ysleta del Sur Pueblo (also known as the Tigua or Tiwa) in El Paso, Texas; Kickapoo Tribe of Texas in Eagle Pass, Texas; and Alabama-Coushatta Tribe of Texas near Livingston, Texas. The Kickapoo and Alabama-Coushatta tribes have reservations in Texas.

180. Four federally recognized tribes exist in Louisiana: Chitimacha Tribe in Charenton, Louisiana; Coushatta Tribe in Elton, Louisiana; Tunica-Biloxi Tribe in Marksville, Louisiana; and Jena Band of Choctaw Indians in Jena, Louisiana.

181. One federally recognized tribe exists in Indiana: Pokagon Band of Potawatomi Indians. This Tribe maintains its official headquarters in Dowagic, Michigan, but some Pokagon members live in Northern Indiana.

182. In 2010, the U.S. Census Bureau reported that the population of American Indian and Alaska Native persons living in Texas exceeded 315,000. *See* U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* at 7, Table 2, American Indian and Alaska Native Population for the United States, Regions, and States, and for Puerto Rico: 2000 and 2010 (Jan. 2012), *available at* https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf.

183. In 2010, the U.S. Census Bureau reported that California and Oklahoma had the largest American Indian and Alaska Native populations, over 723,000 and 482,000, respectively. *Id.* at 6–7. New Mexico had a

population of over 219,000 American Indian and Alaska Native persons. *Id.* at 7.

184. Given the three federally recognized tribes within Texas's borders, Texas's shared borders with Oklahoma and New Mexico, and the trend of Californians moving to Texas[1], Texas maintains frequent and ongoing contact with Native Americans.

185. Similarly, given the number of federally recognized tribes within Louisiana and Indiana's borders, and their shared borders with States that also host tribes, Louisiana and Indiana maintain frequent and ongoing contact with Native Americans.

186. State Plaintiffs possess sovereign authority over family law issues within their borders. *Sosna*, 419 U.S. at 404.

187. ICWA and the Final Rule place significant responsibilities and costs on State agencies and courts to carry out federal Executive Branch directives.

188. Texas DFPS, Louisiana DCFS, and Indiana DCS each handle several Indian child cases every year.

189. Texas DFPS, Louisiana DCFS, and Indiana DCS are authorized to file suits affecting the parent-child relationship, Tex. Fam. Code § 262.001; La. Child. Code art. 1004; Ind. Code § 31-34-9-1, and in some circumstances take possession of a child without a court order, *see, e.g.*, Tex. Fam. Code § 262.104. Moreover, when a child must be removed from their home, a Texas

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[1] Katey Psencik, "Everyone is moving to Texas, according to new report," *Austin American-Statesman*, Jan. 31,2017, *available at* http://austin.blog.statesman.com/2017/01/05/everyone-is-moving-to-texas-according-to-new-report.

family court appoints Texas DFPS to be a "conservator" of the child, meaning Texas DFPS is legally responsible for the child's welfare. Tex. Fam. Code §§ 262.101, 262.113, 263.404. As of December 2017, there were thirty-nine children in the care of Texas DFPS who were verified to be enrolled or eligible for membership in a federal recognized tribe, and many of these children lived in Texas DFPS homes.

190. ICWA and the Final Rule affect each and every child custody matter handled by Texas DFPS, Louisiana DCFS, and Indiana DCS and State Plaintiffs' courts because they must first determine if the child is an Indian child.

191. Texas, Louisiana, and Indiana law requires their respective State agencies and courts to act in the best interest of the child in foster care, preadoptive, and adoptive proceedings.

192. ICWA and the Final Rule replace State Plaintiffs' best-interest-of-the-child standard with one that mandates racial or ethnic preferences.

193. The State Plaintiffs prohibit their agencies and courts from using racial preferences in foster care, preadoptive, and adoptive proceedings. Tex. Fam. Code §§ 162.015, 264.1085; La. Const. art. 1, § 3. Federal law also prohibits racial discrimination in adoption or foster care placements, but exempts child custody proceedings covered by ICWA. 42 U.S.C. § 1996b. Texas law exempts ICWA cases from these nondiscrimination rules, but the public policy of Texas is to prohibit racial or ethnic discrimination in foster care placements and adoptions. But for ICWA, the State Plaintiffs' courts would apply nondiscrimination laws to child custody proceedings.

194. In an adoption proceeding, the State Plaintiffs' agencies and courts must give preference, in the absence of good cause to the contrary, to placement of an Indian child with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 25 U.S.C. § 1915(a).

195. In a foster care or preadoptive proceeding, the State Plaintiffs' agencies and courts give preference, in the absence of good cause to the contrary, to placing the child with (1) a member of the child's extended family; (2) a foster home specified by the Indian tribe; (3) an Indian foster home; or (4) an institution for children approved by the Indian tribe or operated by an Indian tribe. 25 U.S.C. § 1915(b).

196. ICWA requires the State Plaintiffs' agencies and courts to follow a resolution by the Indian child's tribe to alter the order of preferences related to the child's placement in any foster care or adoption proceeding, even if Texas and the Constitution do not recognize that tribe as an equally footed sovereign deserving full faith and credit. 25 U.S.C. § 1915(c).

197. ICWA and the Final Rule require the State Plaintiffs' child protective services to undertake additional responsibilities, inquiries, and costs in every child custody matter it handles.

198. For example, the Texas CPS Handbook contains Texas DFPS's policies and procedures for compliance with ICWA and the Final Rule. A true and correct copy of the relevant sections of the Texas CPS Handbook is attached as Exhibit 1 to the Complaint.

199. Section 1225 of the CPS Handbook states: "CPS policy requires workers in every abuse or neglect case to determine whether a child or the child's family has Native American ancestry or heritage. If Native American ancestry is claimed, CPS workers are required to follow specific procedure to ensure compliance with ICWA." Ex. 1, Texas DFPS, CPS Handbook § 1225, *available at* https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_1200.asp#CPS_1225.

200. Section 5340 of the Texas CPS Handbook provides that "[i]f a DFPS lawsuit involves a Native American child, the Indian Child Welfare Act (ICWA) applies and the legal requirements change dramatically." Texas DFPS, CPS Handbook § 5340, *available at* https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_5300.asp#CPS_5340.

201. Even though ICWA does not apply in every case, Texas CPS case workers must "*inquire* about Native American history in *every* case." *Id.* (emphasis in original).

202. Sections 5840–5844 of the Texas CPS Handbook instruct Texas DFPS caseworkers on when and how to apply ICWA and the Final Rule to child custody matters.

203. Section 5841 of the Texas CPS Handbook notes that "[f]ailure to comply with the ICWA can result in a final order being reversed on appeal." Texas DFPS, CPS Handbook § 5841, *available at* https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_5800.asp#CPS_5840.

204. Texas DFPS caseworkers must "routinely ask[] families whether they are Native American; document[] the families' responses; and consult[] with the attorney

representing DFPS and the regional attorney, if the caseworker believes that a case may involve a Native American child." *Id.*

205. Section 5844 of the CPS Handbook provides that if an Indian child "is taken into DFPS custody, almost every aspect of the social work and legal case is affected." Texas DFPS, CPS Handbook § 5844, *available at* https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_5800.asp#CPS_5840. If ICWA applies, the legal burden of proof for removal, obtaining any final order terminating parental rights, and restricting a parent's custody rights is higher; DFPS must serve the child's parent, tribe, Indian custodian, and the BIA with a specific notice regarding ICWA rights, DFPS and its caseworkers "must make active efforts to reunify the child and family"; the child must be placed according to ICWA statutory preferences; expert testimony on tribal child and family practices may be necessary; and a valid relinquishment of parental rights requires a parent to appear in court and a specific statutory procedure, just to name a few. *Id.*

206. Texas DFPS caseworkers must fill out and submit Form 1706 for approval in any ICWA matter. A true and correct copy of Form 1706 is attached as Exhibit 2 to this Complaint. *See* Texas DFPS Form 1706, Indian Child Welfare Act Checklist, *available at* https://www.dfps.state.tx.us/Application/FORMS/showFile.aspx?Name=1706.doc.

207. Texas DFPS Form 1706 requires CPS case workers to: (1) assess possible Indian child status during the initial interview of every child and family it encounters, and every time an additional family member is located; (2) contact Texas DFPS lawyers regarding

possible ICWA cases and consult with them regularly throughout the case; (3) modify removal of custody affidavits to include ICWA information; (4) verify that any foster or adoptive placement follows ICWA's preferences unless the tribe alters those preferences or the court finds good cause not to alter them; (5) send membership query letters to each identified tribe in every Indian child case; (6) send notice of pending custody proceedings involving Indian children to each parent, any Indian custodian, each identified tribe, the Secretary of Interior, and the BIA area director; (7) send notice to the Secretary of Interior and the BIA area director if any parent, custodian, or tribe is unknown or cannot be located; (8) contact the tribe by telephone and fax if CPS receives no response to the formal notice; (9) file notices with proof of service in the relevant court; (10) make active efforts to preserve the Indian family by conferring with tribal social workers and document the services provided; and (11) consult with DFPS attorneys regarding ICWA requirements for in court procedures.

208. Texas DFPS promulgated Appendices 1226-A and 1226-B of the CPS Handbook, which contain guidelines and checklists for CPS staff, to ensure Texas complies with ICWA and the Final Rule. *See* Ex. 1, Texas DFPS, CPS Handbook, Appendix 1226-A: Child-Placing Requirements of the Indian Child Welfare Act and Related Guidelines and Regulations, *available at* https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_px_1226a.aspafd; Ex. 2, Texas DFPS, CPS Handbook, Appendix 1226-B: Checklist for Compliance with the Indian Child Welfare Act, *available at* https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_px_1226b.asp.

209. Indiana DCS publishes a Child Welfare Manual that includes a section on ICWA compliance. A true and correct copy of the Indiana DCS Child Welfare Manual, Chapter 2, section 12 is attached as Exhibit 3 to the Complaint.

210. Indiana DCS requires staff to use active efforts to determine if a child is an Indian child and sustain those efforts throughout its involvement with the child and family. Ex. 3.

211. Indiana DCS requires staff to inquire about Indian child status prior to any initial removal from the parents; at any detention hearing; prior to any change in foster care placement; prior to any adoptive placement; at review hearings and at permanency hearings; and prior to the filing of any termination of parental rights petition. *Id.*

212. Indiana DCS family case managers must engage the child and family during the initial contact, to assist in determining whether the child and/or family are of Indian heritage or if the child is eligible for membership in a tribe. They must document the child's tribal identity, complete a verification of tribal membership or eligibility, and continue to review the child and family's Indian status throughout the life of the case. A family case manager supervisor must ensure the family case manager asked each child and family member if he or she is a member of an Indian tribe or eligible for membership, ensure proper completion of the Indian status forms, and otherwise assist the family case manager to ensure adherence to ICWA. The Indiana DCS local office attorney must review the documentation

of Indian status and serve notification of that information on BIA and the tribe. *Id.*

213. Louisiana DCFS publishes Document No. 6-240, "Working with Native American Families," that includes information on how it must comply with ICWA. A true and correct copy of Document No. 6-240 is attached as Exhibit 4 to the Complaint.

214. Louisiana DCFS must use "active efforts" to reunite an Indian child with his or her family or tribal community. "Active efforts constitute more than reasonable efforts as required by Title IV-E of the Social Security Act (42 USC 671(a)(15))." Ex. 4 at 1.

215. Louisiana DCFS states that "active efforts" include:

- Engaging the Indian child, the Indian child's parents, the Indian child's extended family members, and the Indian child's custodian(s);
- Taking steps necessary to keep siblings together;
- Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
- Identifying, notifying, and inviting representatives of the Indian child's tribe to participate;
- Conducting or causing to be conducted a diligent search for the Indian child's

extended family members for assistance and possible placement;

- Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting assistance of representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards;
- Offering and employing all available and culturally appropriate family preservation strategies;
- Completing a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
- Notifying and consulting with extended family members of the Indian child to provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child;
- Making arrangements to provide family interaction in the most natural setting that can ensure the Indian child's safety during any necessary removal;
- Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or extended family in utilizing and accessing those services;

- Monitoring progress and participation in services;
- Providing consideration of alternative ways of addressing the needs of the Indian child's parents and extended family, if services do not exist or if existing services are not available;
- Supporting regular visits and tribal home visits of the Indian child during any period of removal, consistent with the need to ensure the safety of the child; and,
- Providing post-reunification services and monitoring.

Id. at 1-2.

216. Louisiana's "active efforts" must be conducted while investigating whether the child is a member of a tribe, is eligible for membership in a tribe, or a biological parent of the child is or is not a member of a tribe. *Id*. at 2.

217. Louisiana "[s]tate courts must ask if there is reason to believe the child subject to the child custody proceeding is an Indian child by asking each party to the case, including the child's attorney and Department representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian child. If the court does not inquire of the child's Indian status, the FC case manager must ensure documentation is included in the report to the court of the child's Indian status and the responses of all parties asked." *Id*.

218. Louisiana DCFS publishes Document No. 8-440, "Services to Native American Children-Indian Child Welfare Act Provisions." A true and correct copy of Document No. 8-440 is attached as Exhibit 5 to the Complaint.

219. Document No. 8-440 states that ICWA "affects all placements of Indian children including changes or possible changes in placement of Indian children under DCFS authority." *Id.*

220. Once Louisiana DCFS becomes involved with an Indian child it must maintain ongoing contact with the child's tribe because each tribe may elect to handle ICWA differently. *Id.*

221. The foregoing requirements and responsibilities are just some of those imposed on the State Plaintiffs, and all States, by ICWA and the Final Rule.

222. In voluntary child custody proceedings, if the child is an Indian child, State Plaintiffs' courts must ensure that the party seeking placement, often Texas DFPS, Louisiana DCFS, and Indiana DCS, has taken "all reasonable steps" to verify the child's status. 25 C.F.R. § 23.124.

223. ICWA and the Final Rule require State Plaintiffs' courts to perform federal Executive Branch functions, such as gathering and distributing information for the federal government.

224. ICWA and the Final Rule require state judges to ask each participant, on the record at the commencement of child custody proceedings, whether the person knows or has reason to know the child is an

Indian child and to instruct the parties to inform the court of any such information that arises later. 25 C.F.R. § 23.107(a). If the state court believes the child is an Indian child, it must document and confirm that the relevant state agency (1) used due diligence to identify and work with all of the tribes that may be connected to the child and (2) conducted a diligent search to find suitable placements meeting the preference criteria for Indian families. *Id.* §§ 23.107(b), 23.132(c)(5).

225. ICWA and the Final Rule require State Plaintiffs' agencies and courts to maintain indefinitely records of placements involving Indian children, and subject those records to inspection by the Secretary and the child's Indian tribe at any time. 25 U.S.C. §§ 1915(e), 1917; 25 C.F.R. §§ 23.140–41. This increases costs for State Plaintiffs' agencies and courts which have to maintain additional records not called for under state law and hire or assign additional employees to maintain these records indefinitely.

226. ICWA and the Final Rule require State Plaintiffs' agencies and courts to provide various forms of notification to individuals and entities potentially impacted by a child custody matter above and beyond what they are required to do under state law. This means State Plaintiffs' agencies and courts must spend additional money to comply with ICWA by hiring and training additional employees, and creating and publishing notifications, just to name a few things.

227. ICWA and the Final Rule (1) require Texas DFPS, Louisiana DCFS, and Indiana DCS to notify an Indian custodian and a tribe of its absolute right to intervene in the proceedings of an Indian child bearing

that tribe's heritage; (2) require Texas, Louisiana, and Indiana courts to grant the Indian custodian or tribe additional time to prepare for such proceedings; (3) require Texas DFPS, Louisiana DCFS, and Indiana DCS to satisfy the State courts of active efforts to provide remedial services and rehabilitative programs to keep the family together; and (4) require proof beyond a reasonable doubt that serious emotional or physical damage to the child will result if parental rights are not terminated. 25 U.S.C. §§ 1911–1912; 25 C.F.R. § 23.111–23.121. The State Plaintiffs' laws do not similarly provide for these rights and responsibilities, and permits the termination of parental rights based on clear and convincing evidence. *See, e.g.*, Tex. Fam. Code §§ 161.001(b), 161.206.

228. For example, Texas and Louisiana laws require their state agencies to make reasonable efforts in child custody proceedings, but ICWA requires "active efforts." This substantially changes the cost and burden imposed on Texas DFPS and Louisiana DCFS. When referring a family or parent to services, reasonable efforts means providing a referral, but leaving the family to seek out assistance on their own, while the active efforts required by ICWA means arranging services and helping families engage in those services.

229. State Plaintiffs' courts must notify an Indian child's biological parents, prior Indian custodian, and tribe if a final adoption decree is vacated. 25 C.F.R. § 23.139.

230. State Plaintiffs' courts must affirmatively notify the Indian child once he or she reaches age eighteen of his or her tribal affiliation, increasing costs of

maintaining records and resources to keep track of children for nearly 20 years of their lives in some cases. 25 C.F.R. § 23.138.

231. ICWA section 1911(c) and the Final Rule change the rules of civil procedure for Texas state family courts, by dictating that an Indian child's custodian and the child's tribe must be granted mandatory intervention. Texas Rule of Civil Procedure 60 permits Texas courts to strike the intervention of a party upon a showing of sufficient cause by another party, but ICWA prevents application of this standard for child custody cases involving Indian children. In Louisiana, any person with a justiciable interest in an action may intervene. La. Code Civ. Proc. art. 1091. In Indiana, a person may intervene as of right or permissively, similar to the Federal Rules of Civil Procedure governing intervention. Ind. R. Tr. Proc. 24. ICWA, however, eliminates these requirements and allows the Indian child's custodian and the child's tribe mandatory intervention.

232. State Plaintiffs' agencies and courts must defer to the decisions of the child's Indian tribe when evaluating membership or eligibility for membership. 25 C.F.R. §§ 108–09.

233. In a termination of parental rights proceedings, ICWA requires evidence beyond a reasonable doubt, and requires Texas DFPS, Louisiana DCFS, and Indiana DCS to hire expert witnesses at the State's expense. 25 U.S.C. § 1912(f). Texas, Louisiana, and Indiana laws require only clear and convincing evidence. Tex. Fam. Code §§ 161.001(b), 161.206; La. Child. Code art. 1035(A); Ind. Code § 31-37-14-2.

234. ICWA and the Final Rule purport to override Texas law with respect to when a parent may voluntarily consent to relinquish parental rights. Texas law permits voluntary relinquishment of parental rights 48 hours after birth of the child, Tex. Fam. Code § 161,103(a)(1), Louisiana allows voluntary surrender of paternal rights prior to or after birth of the child and surrender of maternal rights five days after birth of the child, La. Child. Code art. 1130, and Indiana permits voluntary termination of parental rights after birth of the child, Ind. Code § 31-35-1-6, but ICWA and the Final Rule prohibit any consent until 10 days after birth, 25 U.S.C. § 1913(a); 25 C.F.R. § 23.125(e).

235. ICWA purports to override Texas and Louisiana laws with respect to voluntary relinquishment of parental rights. Texas law permits revocable and irrevocable voluntary relinquishment of parental rights. If the relinquishment is revocable, the revocation must be made before the eleventh day after the revocation affidavit is executed. Tex. Fam. Code § 161.103(b)(10). Louisiana law prohibits a parent from annulling his or her surrender of parental rights 90 days after its execution or after a decree of adoption has been entered, whichever is earlier. La. Child. Code art. 1148. ICWA alters these state laws by permitting revocation of consent for foster care at any time, 25 U.S.C. § 1913(b), and revocation of voluntary termination of parental rights any time prior to entry of a final decree of termination, *id.* § 1913(c).

236. ICWA significantly alters how long a final adoption decree may be challenged. Under ICWA, the State Plaintiffs' courts must vacate a final decree of adoption involving an Indian child and return the child to

the parent if the parent of the child withdraws consent to the final adoption decree on the grounds that the consent was obtained through fraud or duress. The parent may withdraw consent based on fraud or duress for up to two years after the adoption. 25 U.S.C. § 1913(d); 25 C.F.R. § 23.136. This conflicts directly with Texas, Louisiana, and Indiana law, which provide that an adoption order is subject to direct or collateral attack six months to one year after the date the order was signed by the court. Tex. Fam. Code § 162.012(a) (up to six months); *Goodson v. Castellanos*, 214 S.W.3d 741, 748–49 (Tex. App.—Austin 2007, pet. denied); La. Child. Code art. 1263; Ind. Code § 31-19-14-2. It also betrays the Texas common law principle and Indiana statutory law that the best interest of the child is to reach a final child custody decision so that adoption to a stable home or return to the parents is not unduly delayed. *In re M.S.*, 115 S.W.3d at 548; Ind. Code § 31-19-14-2.

237. ICWA permits the invalidation, by another court of competent jurisdiction, of a State court's final child custody order if a State agency or court did not comply with ICWA. 25 U.S.C. § 1914; 25 C.F.R. § 23.137.

238. Thus, ICWA requires the State Plaintiffs' agencies and courts to undertake additional responsibilities, actions, and costs when caring for an Indian child, and provides Indian custodians and tribes additional procedural protections not expressly afforded other parties to the proceedings.

239. For example, Texas, Louisiana, and Indiana must spend time and money on caseworkers searching for extended family members of the Indian child,

contacting those persons, and consulting with them on the case.

240. Texas, Louisiana, and Indiana also must hire expert witnesses, identified by the Indian child's tribe, to testify in the foster care and termination of parental rights proceedings.

241. Texas, Louisiana, and Indiana also must spend money transporting Indian children to their parents or Indian custodian, and to their trial homes.

242. The requirement that Texas, Louisiana, and Indiana maintain records for nearly 20 years in some child custody cases and provide various forms of notification to the federal government and potential ICWA parties, requires additional money and personnel dedicated to compliance. A good example of this is the Texas CPS Handbook, which dedicates several sections and appendices to documenting and describing how Texas DFPS and Texas courts must comply with ICWA.

243. If Texas, Louisiana, or Indiana fail to comply with ICWA, they would risk losing funding for child welfare services under Title IV-B and Title IV-E of the Social Security Act, which would threaten the elimination of many important social services.

244. Failure to certify under 42 U.S.C. §§ 622 & 677 that Texas, Louisiana, or Indiana complies with ICWA allows Interior and HHS to withhold or discontinue Title IV-B and Title IV-E funding.

245. If Texas, Louisiana, and Indiana fail to comply with ICWA, Defendants Zinke, Rice, Tahsuda, and Azar will determine whether these States may continue to receive Title IV-B and Title IV-E funding, which will

jeopardize millions of dollars in grants for child welfare, foster care, and adoption services.

246. If Texas, Louisiana, and Indiana failed or refused to follow ICWA and the Final Rule, Defendants would bring an action to enforce federal law, as Defendants do on a regular basis. *See, e.g., United States of America v. California*, Case No.: 2:18-cv-00490-JAM-KJN (E.D. Cal.) (pending); *Arizona v. United States*, 567 U.S. 387 (2012); *United States v. Texas*, 457 F.3d 472 (5th Cir. 2006).

CLAIMS ALLEGED BY ALL PLAINTIFFS

COUNT I

VIOLATION OF ADMINISTRATIVE PROCEDURE ACT

(Not in Accordance with Law – Equal Protection, Tenth Amendment, Article I)

247. Plaintiffs incorporate previous paragraphs as if fully restated here.

248. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the Final Rule complained of herein is a "rule" under the APA, *id.* § 551(4), and constitutes "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court," *id.* § 704.

249. The APA prohibits agency actions that are "not in accordance with law." 5 U.S.C. § 706(2)(A). The Final Rule is not in accordance with law for a number of independent reasons.

250. The Final Rule violates the APA because the placement preference regime contained in the unit

entitled "Dispositions," 25 C.F.R. § 23.129 *et seq*., violates the individual plaintiffs' and citizens of State Plaintiffs' equal protection rights under the Fifth Amendment of the United States Constitution. *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954). The Final Rule imposes a naked preference for "Indian families" over families of any other race; the Final Rule puts non-Indian families who wish to adopt an "Indian child" to the extraordinary burden of demonstrating good cause to depart from the placement preferences by clear and convincing evidence, while any Indian family would enjoy a presumption that the adoption is in the child's best interests. The Final Rule's classification of Indians and non-Indians, and its discrimination against non-Indians, is based on race and ancestry and violates the constitutional guarantee of equal protection.

251. The Final Rule further violates the APA because the placement preference regime contained in the unit entitled "Dispositions," 25 C.F.R. § 23.129 *et seq*., unlawfully discriminates against "Indian children" (as defined by the Final Rule) in violation of the Constitution's guarantee of equal protection, by subjecting them to a heightened risk of a placement that is contrary to their best interests and based solely on their race and ancestry. Under State Plaintiffs' laws, a child's placement generally will be made in accordance with his or her best interests. But the Final Rule's placement preferences, its new restriction on evidence that can be considered as a part of an analysis of "good cause" for departing from those preferences, and the new regulation providing that good cause should be shown by clear and convincing evidence combine to substantially increase the risk that an Indian child will

be placed in accordance with the placement preferences even when that placement would be contrary to his best interests. This burden applies to Indian children solely by dint of their or their parents' membership in an Indian tribe—eligibility that often (as in this case) turns on blood quantum. The Final Rule thus discriminates against Indian children in State child custody proceedings in violation of equal protection principles under the Fifth Amendment.

252. The Final Rule further violates the APA because the adoption and foster care and preadoptive placement of "Indian children"—the topics regulated by the unit of the Final Rule entitled "Dispositions," 25 C.F.R. § 23.129 *et seq.*,—are not permissible subjects of regulation under the Tenth Amendment. The Final Rule claims that federal regulation of the placement of Indian children is authorized by the Indian Commerce Clause. *See* 81 Fed. Reg. at 38,789; *see also* 25 U.S.C. § 1901(1). But children are not articles of commerce, nor can their placement be said to substantially affect commerce with Indian nations. *See Adoptive Couple*, 133 S. Ct. at 2566–70 (Thomas, J., concurring). The Final Rule therefore is not a valid exercise of federal authority and is unconstitutional.

253. The Final Rule further violates the APA because the provisions concerning post-adoption collateral attacks, 25 C.F.R. §§ 23.136, 23.137, violate the Individual Plaintiffs', citizens of State Plaintiffs', and Indian children's equal protection rights under the Fifth Amendment of the United States Constitution. The Final Rule subjects the adoption of an "Indian child" to a period of collateral attack of not less than two years, overriding state laws that provide for shorter periods to

attack a voluntary adoption, and thereby disadvantages Indian children and the families that adopt Indian children. This discrimination against Indian children and those that adopt them is based on race and ancestry and violates the constitutional guarantee of equal protection.

254. The Final Rule further violates the APA because the Final Rule regulates the placement of Indian children not directly, but through State Plaintiffs' governments in violation of the Tenth Amendment. The Final Rule makes this plain when it purports to issue minimum federal standards for "placement of an Indian child *under State law*." 25 C.F.R. §§ 23.130(a), 23.131(a) (emphasis added). And it is not just the portion of State Plaintiffs' child custody regulatory regime administered by state courts that the Final Rule commandeers. The Final Rule also demands that State Plaintiffs' apply the placement preferences in foster care and preadoptive placements, which, in State Plaintiffs at least, are administered in part by State Plaintiffs' agencies. Even when Congress has power to regulate under one of its enumerated powers, the federal government cannot require a State agency or official to administer a federal regulatory program. *United States v. Printz*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). The Final Rule thus violates the anti-commandeering principle under the Tenth Amendment and is unconstitutional.

255. The Final Rule further violates the APA because the Final Rule delegates to Indian tribes the legislative and regulatory power to pass resolutions in

each Indian child custody proceeding that alter the placement preferences state courts must follow in violation of Article I of the Constitution. The Constitution provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. 1, § 1. The Constitution authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its general powers. U.S. Const. art. 1, § 8. The Constitution bars Congress and the BIA from delegating to others the essential legislative and administrative functions with which they are vested. The Final Rule thus violates the non-delegation doctrine of Article I, Section 1 of the Constitution and is unconstitutional.

256. The APA prohibits agency actions that are "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). The Final Rule is arbitrary and capricious agency action for a number of reasons, including that it is an unexplained and unsupported departure from the position adopted in the 1979 Guidelines and held by the defendants for nearly forty years.

257. The Final Rule further violates the APA because its provision that "[t]he party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences," 81 Fed. Reg. at 38,874 (codified at 25 C.F.R. § 23.132(b)), is contrary to Section 1915 of ICWA and is arbitrary and capricious.

258. The Final Rule further violates the APA in that its limitation on the evidence that may be considered in the analysis of "good cause," *see* 25 C.F.R. § 23.132(c)–(e), is contrary to Section 1915 of ICWA and is arbitrary and capricious.

259. The Brackeens are directly, personally, and substantially injured by ICWA's collateral attack provisions, 25 U.S.C. §§ 1913(d), 1914, and the provisions of the Final Rule purporting to implement those provisions, 25 C.F.R. §§ 23.136, 23.137, because they subject the Brackeen family to a period of uncertainty and mental anguish substantially longer than otherwise would be permitted under Texas law. The Brackeens are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915, and the portions of the Final Rule purporting to implement those provisions, threaten to repeat the trials that A.L.M. and the Brackeens have already endured with any future foster or adoptive children.

260. The Librettis are directly, personally, and substantially injured by Section 1915's placement preferences and the provisions of the Final Rule purporting to implement those preferences, including the "diligent search" requirement, because they are causing delay, and perhaps denial, of their adoption of Baby O., and because they impose heightened standards and substantial burdens (both time and money) in connection with their efforts to adopt Baby O. Even if the Librettis' petition to adopt Baby O. is ultimately granted, ICWA and the Final Rule may subject the Librettis' adoption to collateral attack for up to two years. The Librettis are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915,

and the portions of the Final Rule purporting to implement those provisions, threaten to repeat the trials that Baby O. and the Librettis have already endured with any future foster or adoptive children.

261. Ms. Hernandez is directly aggrieved by the Final Rule's application to Baby O. and by its imposition of heightened standards and substantial burdens (both time and money) in connection with her wishes to have her biological child adopted in a placement that best suits Baby O.'s interests and needs.

262. The Cliffords are directly, personally, and substantially injured by ICWA's placement preferences and the provisions of the Final Rule purporting to implement those preferences, because they are causing delay, and perhaps denial, of their adoption of Child P., and they impose heightened standards and substantial burdens (both time and money) in connection with the Cliffords' efforts to adopt Child P.

263. State Plaintiffs are directly aggrieved by the Final Rule's application to each and every child custody proceeding in their States, and, particularly, to those proceedings in which State Plaintiffs' agencies or courts discover that the child is an Indian child as defined by ICWA. The Final Rule imposes a substantial burden on State Plaintiffs through the expenditure of resources and money in connection with their efforts to comply with the Final Rule for each child custody proceeding. And because of the Final Rule's burden, it necessarily limits prospective foster and adoptive parents so clearly needed to care for children, as now demonstrated by the Brackeens' reluctance to foster additional Indian children.

264. Plaintiffs have no adequate remedy at law to redress the burdens now being imposed by Final Rule because claims arising under the APA cannot be litigated in State courts.

265. This Court should declare the Final Rule invalid and set it aside.

COUNT II

VIOLATION OF ARTICLE I OF THE CONSTITUTION

(Commerce Clause)

266. Plaintiffs incorporate previous paragraphs as if fully restated here.

267. The Commerce Clause of the United States Constitution provides: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

268. At the time the original Constitution was ratified, commerce consisted of selling, buying, and bartering, as well as transporting for these purposes. *See Adoptive Couple*, 133 S. Ct. at 2567 (Thomas, J., concurring).

269. At the time the original Constitution was ratified, the Indian Commerce Clause was intended to include "trade with Indians." *See Adoptive Couple*, 133 S. Ct. at 2567 (Thomas, J., concurring).

270. The Indian Commerce Clause provides Congress with the power to regulate commerce with Indian tribes, but not any Indian person. *See Adoptive Couple*, 133 S. Ct. at 2567 (Thomas, J., concurring).

271. ICWA locates Congress's authority for the statute in the Indian Commerce Clause. *See* 25 U.S.C. § 1901(1).

272. Children are not articles of commerce, nor can their placement be said to substantially affect commerce with Indian nations. *See Adoptive Couple*, 133 S. Ct. at 2566–70 (Thomas, J., concurring).

273. No other enumerated power supports Congress's intrusion into this area of traditional state authority.

274. ICWA Sections 1901–1923 and 1951–1952 are therefore unconstitutional under the Commerce Clause of Article I.

275. The Brackeens are directly, personally, and substantially injured by ICWA's collateral attack provisions, 25 U.S.C. §§ 1913(d), 1914, and the provisions of the Final Rule purporting to implement those provisions, 25 C.F.R. §§ 23.136, 23.137, because they subject the Brackeen family to a period of uncertainty and mental anguish substantially longer than otherwise would be permitted under Texas law. The Brackeens are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915, and the portions of the Final Rule purporting to implement those provisions, threaten to repeat the trials that A.L.M. and the Brackeens have already endured with any future foster or adoptive children.

276. The Librettis are directly, personally, and substantially injured by Section 1915's placement preferences and the provisions of the Final Rule purporting to implement those preferences, including

the "diligent search" requirement, because they are causing delay, and perhaps denial, of their adoption of Baby O., and because they impose heightened standards and substantial burdens (both time and money) in connection with their efforts to adopt Baby O. Even if the Librettis' petition to adopt Baby O. is ultimately granted, ICWA and the Final Rule may subject the Librettis' adoption to collateral attack for up to two years. The Librettis are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915, and the portions of the Final Rule purporting to implement those provisions, threaten to repeat the trials that Baby O. and the Librettis have already endured with any future foster or adoptive children.

277. Ms. Hernandez is directly aggrieved by the Final Rule's application of Section 1915's placement preferences and the provisions of the Final Rule purporting to implement those preferences to Baby O. because they are causing delay, and perhaps denial, of Ms. Hernandez's preferred placement of Baby O. for adoption by the Librettis, and because they impose heightened standards and substantial burdens (both time and money) in connection with the Librettis' efforts to adopt Baby O.

278. The Cliffords are directly aggrieved by the Final Rule's application of Section 1915's placement preferences and the provisions of the Final Rule purporting to implement those preferences to Child P. because they are causing delay, and perhaps denial, of their adoption of Child P., and they impose heightened standards and substantial burdens (both time and money) in connection with the Cliffords' efforts to adopt Child P.

279. The State Plaintiffs are directly aggrieved by ICWA Sections 1901–1923 and 1951–1952 because those provisions require State Plaintiffs' agencies and courts to carry out the policy objectives of the federal government and execute the federal government's regulatory framework for Indian child in child custody proceedings. State Plaintiffs must abide by ICWA in each and every child custody proceeding, and, particularly, to those proceedings in which State Plaintiffs' agencies and courts discover that the child is an Indian child as defined by ICWA. ICWA imposes a substantial burden on State Plaintiffs through the expenditure of resources and money in connection with its efforts to comply with ICWA for each child custody proceeding.

280. Plaintiffs have no adequate remedy at law to redress the injuries they are suffering because of ICWA.

281. Plaintiffs thus seek a declaration that Sections 1901–1923 and 1951–1952 of ICWA violate Article I of the United States Constitution and are unconstitutional and unenforceable, and an injunction barring the Defendants from implementing or administering that provision by regulation, guideline, or otherwise.

COUNT III

VIOLATION OF THE TENTH AMENDMENT

(Domestic Relations & Anti-Commandeering)

282. Plaintiffs incorporate previous paragraphs as if fully restated here.

283. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to

the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

284. ICWA Sections 1901–1923 and 1951–1952 are not permissible subjects of regulation under the Tenth Amendment.

285. ICWA's provisions concerning the adoption and foster care and preadoptive placement of "Indian children" are not permissible subjects of regulation under the Tenth Amendment.

286. Since the adoption of the Constitution, family law and domestic relations have been regarded as being within the virtually exclusive province of the States. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930).

287. Adoption proceedings are adjudicated exclusively in state family courts.

288. Foster care and preadoptive placements also are administered exclusively by States; in Texas, Louisiana, and Indiana they are administered in the first instance by Texas DFPS, Louisiana DCFS, and Indiana DCS.

289. ICWA locates Congress's authority for the statute in the Indian Commerce Clause. 25 U.S.C. § 1901(1). The Indian Commerce Clause grants Congress the authority "[t]o regulate commerce . . . with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

290. Children are not articles of commerce, nor can their placement be said to substantially affect commerce with Indian nations. *See Adoptive Couple*, 133 S. Ct. at 2566–70 (Thomas, J., concurring).

291. No other enumerated power supports Congress's intrusion into this area of traditional state authority.

292. ICWA's provisions concerning the adoption and foster care and preadoptive placement of "Indian children" are unconstitutional under the Tenth Amendment because they regulate the placement of Indian children not directly, but through state governments. Even when Congress has power to regulate under one of its enumerated powers, the federal government cannot require a State agency or official to administer a federal regulatory program. *United States v. Printz*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

293. ICWA thus violates the anti-commandeering principle under the Tenth Amendment and is unconstitutional.

294. ICWA impermissibly commands state governments to administer adoptions and foster care and preadoptive placements according to Congress's instructions. Here, ICWA commands the state family courts to apply ICWA's placement preferences under 25 U.S.C. § 1915(a) to the Individual Plaintiffs' petitions for adopting their children. And it further commands the State Plaintiffs to make foster care or preadoptive placements in accordance with the placement preferences of 25 U.S.C. § 1915(b). ICWA impermissibly commandeers state governments and therefore is unconstitutional.

295. ICWA Sections 1911, 1912, and 1913, and the Final Rule alter the content of State Plaintiffs' laws by requiring their courts to apply federal substantive rules of decision and federal procedural requirements in state law causes of action that result in state law judgments that form part of the corpus of state law.

296. ICWA Section 1911 impermissibly alters State Plaintiffs' rules of procedure for foster care placement and termination of parental rights proceedings with federal rules of decision. ICWA grants an Indian custodian of a child and the child's tribe mandatory intervention at any point in the proceedings.

297. ICWA Section 1912 and the Final Rule increase the standard for termination of parental rights for an Indian child to "evidence beyond a reasonable doubt" and demand expert witness testimony.

298. ICWA Section 1913 and the Final Rule impermissibly command state governments and courts to change their laws and rules respecting when and how a parent of an Indian child or Indian custodian may give voluntary consent to foster care placement or termination of parental rights.

299. ICWA Section 1913 also impermissibly commands state courts to allow for revocation of voluntary termination of parental rights any time prior to the final decree of termination.

300. The Final Rule dictates what State Plaintiffs' agencies and courts must do in cases of emergency removal or placement of an Indian child.

301. The Final Rule prohibits State Plaintiffs' agencies and courts from making a determination as to

an Indian child's membership status with a tribe. State Plaintiffs must defer to the membership determination of the tribe.

302. The Final Rule commands State Plaintiffs' courts to allow the invalidation of child custody proceeding final orders for up to two years, which is twelve to eighteen months beyond what is permitted under State Plaintiffs' laws. Tex. Fam. Code § 162.012; La. Child. Code art. 1263; Ind. Code § 31-19-14-2.

303. ICWA requires State Plaintiffs' agencies and courts to undertake administrative actions of the federal government.

304. ICWA Sections 1911 and 1912 and the Final Rule require state agencies and courts to notify potential intervenors about a proceeding, send copies of the notices to Defendants, and suspend proceedings for at least 10 days.

305. The Final Rule commands state government agencies and state courts to inquire about Indian child status throughout child custody proceedings.

306. ICWA Section 1912 and the Final Rule require Texas DFPS, Louisiana DCFS, and Indiana DCS to use "active efforts" to prevent the breakup of an Indian family.

307. The Final Rule requires State Plaintiffs' courts to confirm that State Plaintiffs' agencies used "due diligence" to work with all of the tribes in which the child may be a member and conducted a "diligent search" for tribal placement of the child.

308. ICWA Sections 1915, 1917, and 1951 and the Final Rule demand that State Plaintiffs' agencies and courts collect information and perform recordkeeping functions for the federal government for child custody proceedings involving Indian children.

309. Social Security Act Sections 622(b)(9) and 677(b)(3)(G) commandeer States by requiring them to comply with all aspects of ICWA to receive federal funding.

310. ICWA is unconstitutional under the Tenth Amendment for the additional reason that it violates the equal footing doctrine and the Full Faith and Credit Clause of the Constitution.

311. The Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const., art. IV, § 1. The "Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494 (2003) (citations omitted).

312. The Full Faith and Credit Clause extends only between States, not States and Indian tribes. *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). "The equal footing clause has long been held to refer to political rights and to sovereignty. . . . The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty." *United States v. Texas*, 339 U.S. 707, 716 (1950) (internal citations and quotation marks omitted).

313. ICWA demands that State Plaintiffs and other States defer to the resolutions of tribes altering the ICWA placement preferences for Indian children, even though those tribes are not on equal footing with the States and do not deserve full faith and credit under Article IV.

314. The Final Rule requires State Plaintiffs' agencies and courts to transfer child custody matters to tribal courts when the Indian parent, custodian, or tribe requests it, even though those tribes are not on equal footing with the States and do not deserve full faith and credit under Article IV.

315. ICWA is unconstitutional for the additional reason that it violates the Guarantee Clause of Article IV, Section 4 of the Constitution, which guarantees to every State a republican form of government. The Guarantee Clause provides that Congress many not interfere with states' autonomy to such an extent that it prevents them from enjoying untrammeled self-government. States are "endowed with all the functions essential to separate and independent existence." *Lane Cty. v. Oregon*, 74 U.S. 71, 76 (1868). A separate and independent state judiciary is an indispensable element of a republican form of government that Congress may not invade.

316. State Plaintiffs' courts adjudicate family law and domestic relations cases, including child custody proceedings. ICWA violates the Tenth Amendment by removing the guarantee that State Plaintiffs' provide a republican form of government to its citizens, including an independent judiciary that may develop its own substantive law within the areas of responsibility

granted it by the United States Constitution and State Plaintiffs' constitutions.

317. The Brackeens are directly, personally, and substantially injured by ICWA's collateral attack provisions, 25 U.S.C. §§ 1913(d), 1914, and the provisions of the Final Rule purporting to implement those provisions, 25 C.F.R. §§ 23.136, 23.137, because they subject the Brackeen family to a period of uncertainty and mental anguish substantially longer than otherwise would be permitted under Texas law. The Brackeens are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915, and the portions of the Final Rule purporting to implement those provisions, threaten to repeat the trials that A.L.M. and the Brackeens have already endured with any future foster or adoptive children.

318. The Librettis are directly, personally, and substantially injured by Section 1915's placement preferences and the provisions of the Final Rule purporting to implement those preferences, including the "diligent search" requirement, because they are causing delay, and perhaps denial, of their adoption of Baby O., and because they impose heightened standards and substantial burdens (both time and money) in connection with their efforts to adopt Baby O. Even if the Librettis' petition to adopt Baby O. is ultimately granted, ICWA and the Final Rule may subject the Librettis' adoption to collateral attack for up to two years. The Librettis are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915, and the portions of the Final Rule purporting to implement those provisions, threaten to repeat the trials

that Baby O. and the Librettis have already endured with any future foster or adoptive children.

319. Ms. Hernandez is directly aggrieved by the Final Rule's application of Section 1915's placement preferences and the provisions of the Final Rule purporting to implement those preferences to Baby O. because they are causing delay, and perhaps denial, of Ms. Hernandez's preferred placement of Baby O. for adoption by the Librettis, and because they impose heightened standards and substantial burdens (both time and money) in connection with the Librettis' efforts to adopt Baby O.

320. The Cliffords are directly, personally, and substantially injured by Section 1915's placement preferences and the provisions of the Final Rule purporting to implement those preferences to Child P. because they are causing delay, and perhaps denial, of their adoption of Child P., and they impose heightened standards and substantial burdens (both time and money) in connection with the Cliffords' efforts to adopt Child P.

321. State Plaintiffs are directly aggrieved by ICWA's and the Final Rule's commandeering of State power because they require State Plaintiffs' agencies and courts to carry out the directives and policy objectives of the federal government and execute the federal government's regulatory framework for Indian child in child custody proceedings. State Plaintiffs must abide by ICWA in each and every child custody proceeding, and, particularly, to those proceedings in which State Plaintiffs' agencies and courts discover that the child is an Indian child as defined by ICWA. ICWA

imposes a substantial burden on State Plaintiffs through the expenditure of resources and money in connection with its efforts to comply with ICWA and the Final Rule for each child custody proceeding.

322. Plaintiffs have no adequate remedy at law to redress the injuries they are suffering because of ICWA.

323. Plaintiffs thus seek a declaration that Sections 1901–1923 and 1951–1952 of ICWA violate the Tenth Amendment and are unconstitutional and unenforceable, and an injunction barring the Defendants from implementing or administering that provision by regulation, guideline, or otherwise.

COUNT IV

VIOLATION OF THE FIFTH AMENDMENT

(Equal Protection)

324. Plaintiffs incorporate previous paragraphs as if fully restated here.

325. The Due Process Clause of the Fifth Amendment mandates the equal treatment of people of all races without discrimination or preference. *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

326. ICWA defines an "Indian child" as an "unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

327. ICWA classifies A.L.M. as an "Indian child."

328. ICWA classifies many children in State Plaintiffs' custody and care as Indian children.

329. The Brackeens, Librettis, and Cliffords are not "Indian families" within the meaning of ICWA.

330. Many prospective foster parents and adoptive parents in Texas, Louisiana, and Indiana are not "Indian families" within the meaning of ICWA.

331. ICWA's placement preferences applicable to an adoption or preadoptive placement of an "Indian child," 25 U.S.C. § 1915(a)–(b), impose a naked preference for "Indian families" over families of any other race and puts non-Indian families who wish to adopt an "Indian child" to the burden of demonstrating good cause to depart from the placement preferences, while any Indian family would enjoy a presumption that the adoption or preadoptive placement is in the child's best interests. ICWA's classification of Indians and non-Indians, and its discrimination against non-Indians, is based on race and ancestry and violates the constitutional guarantee of equal protection.

332. The Brackeens are directly, personally, and substantially injured by ICWA's collateral attack provisions, 25 U.S.C. §§ 1913(d), 1914, and the provisions of the Final Rule purporting to implement those provisions, 25 C.F.R. §§ 23.136, 23.137, because they subject the Brackeen family to a period of uncertainty and mental anguish substantially longer than otherwise would be permitted under Texas law. The Brackeens are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915, and the portions of the Final Rule purporting to implement those provisions, threaten to repeat the trials that A.L.M. and the Brackeens have already endured with any future foster or adoptive children.

333. The Librettis are directly, personally, and substantially injured by Section 1915's placement preferences and the provisions of the Final Rule purporting to implement those preferences, including the "diligent search" requirement, because they are causing delay, and perhaps denial, of their adoption of Baby O., and because they impose heightened standards and substantial burdens (both time and money) in connection with their efforts to adopt Baby O. Even if the Librettis' petition to adopt Baby O. is ultimately granted, ICWA and the Final Rule may subject the Librettis' adoption to collateral attack for up to two years. The Librettis are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915, and the portions of the Final Rule purporting to implement those provisions, threaten to repeat the trials that Baby O. and the Librettis have already endured with any future foster or adoptive children.

334. Ms. Hernandez is directly aggrieved ICWA's placement preferences and the provisions of the Final Rule purporting to implement those preferences to Baby O. because they are causing delay, and perhaps denial, of Ms. Hernandez's preferred placement of Baby O. for adoption by the Librettis, and because they impose heightened standards and substantial burdens (both time and money) in connection with the Librettis' efforts to adopt Baby O.

335. The Cliffords are directly, personally, and substantially injured by ICWA's placement preferences and the provisions of the Final Rule purporting to implement those preferences to Child P. because they are causing delay, and perhaps denial, of their adoption of Child P., and they impose heightened standards and

substantial burdens (both time and money) in connection with the Cliffords' efforts to adopt Child P.

336. State Plaintiffs, on behalf of themselves, their residents, parents, and the children in their care, are directly aggrieved by ICWA's placement preferences because they require State Plaintiffs' agencies and courts to violate the Equal Protection Clause of the Fourteenth Amendment and state law, which prohibit racial preferences in child custody proceedings. ICWA requires State Plaintiffs to carry out the racially discriminatory policy objectives of the federal government and execute the federal government's discriminatory framework against potential foster and adoptive parents who wish to care for Indian children. State Plaintiffs must abide by ICWA in each and every child custody proceeding, and, particularly, to those proceedings in which State Plaintiffs' agencies and courts discover that the child is an Indian child as defined by ICWA. ICWA imposes a substantial burden on State Plaintiffs through the expenditure of resources and money in connection with their efforts to comply with Section 1915(a) and Section 1915(b) for each child custody proceeding.

337. Plaintiffs have no adequate remedy at law to redress the injuries they are suffering because of ICWA.

338. Plaintiffs thus seek a declaration that Section 1915(a) and Section 1915(b) of ICWA violate principles of equal protection and are unconstitutional and unenforceable, and an injunction barring the Defendants from implementing or administering that provision by regulation, guideline, or otherwise.

CLAIMS ALLEGED BY THE INDIVIDUAL PLAINTIFFS

COUNT V

VIOLATION OF ADMINISTRATIVE PROCEDURE ACT

(Not in Accordance with Law – Substantive Due Process)

339. Plaintiffs incorporate previous paragraphs as if fully restated here.

340. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the Final Rule complained of herein is a "rule" under the APA, *id.* § 551(4), and constitutes "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court," *id.* § 704.

341. The APA prohibits agency actions that are "not in accordance with law." 5 U.S.C. § 706(2)(A).

342. In addition to the reasons set forth in Count I of this Complaint, the Final Rule further violates the APA because the placement preference regime contained in the unit entitled "Dispositions," 25 C.F.R. § 23.129 *et seq.*, violates the substantive due process rights of non-Indian prospective adoptive couples raising Indian children, and the rights of those Indian children, insofar as it permits—indeed, requires—the disruption of intimate familial relationships without a showing of an adequate state interest to do so. The intimate familial relationship between a prospective adoptive parent and a child is a substantial liberty interest under the Due Process Clause of the Fifth Amendment that can be vitiated only when necessary to vindicate an important

governmental interest. The Final Rule articulates no adequate justification for vitiating an intimate familial relationship between a child and prospective adoptive parents in favor of placement with non-relatives who happen to be "Indian" within the meaning of ICWA, and there is none. The Final Rule thus violates the substantive due process rights under the Fifth Amendment of the prospective adoptive parents of an Indian child, and the rights of that Indian child.

343. The Final Rule further violates the APA because the placement preference regime contained in the unit entitled "Dispositions," 25 C.F.R. § 23.129 *et seq*., violates the substantive due process rights of non-Indian prospective adoptive couples raising Indian children—and the rights of those Indian children—by excluding from the "good cause" analysis bonding and attachment resulting from their relationship if that relationship later is determined to be "in violation of ICWA." 25 C.F.R. § 23.132(e). The intimate familial relationship between a prospective adoptive parent and a child is a substantial liberty interest under the Due Process Clause of the Fifth Amendment that can be vitiated only when necessary to vindicate an important governmental interest. Ensuring that prospective adoptive couples are not "reward[ed]" by a state agency's or state court's error in failing to comply with ICWA's and the Final Rule's many requirements is not an interest of the government sufficiently important to justify disrupting the familial bonds between a prospective adoptive couple and the child they are raising. Therefore, the Final Rule's categorical exclusion from consideration of an Indian child's bonding and attachment when it resulted from a placement later

determined to be in violation of ICWA violates the substantive due process component of the Fifth Amendment.

344. The Brackeens are directly, personally, and substantially injured by ICWA's collateral attack provisions, 25 U.S.C. §§ 1913(d), 1914, and the provisions of the Final Rule purporting to implement those provisions, 25 C.F.R. §§ 23.136, 23.137, because they subject the Brackeen family to a period of uncertainty and mental anguish substantially longer than otherwise would be permitted under Texas law. The Brackeens are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915, and the portions of the Final Rule purporting to implement those provisions, threaten to repeat the trials that A.L.M. and the Brackeens have already endured with any future foster or adoptive children.

345. The Librettis are directly, personally, and substantially injured by Section 1915's placement preferences and the provisions of the Final Rule purporting to implement those preferences, including the "diligent search" requirement, because they are causing delay, and perhaps denial, of their adoption of Baby O., and because they impose heightened standards and substantial burdens (both time and money) in connection with their efforts to adopt Baby O. Even if the Librettis' petition to adopt Baby O. is ultimately granted, ICWA and the Final Rule may subject the Librettis' adoption to collateral attack for up to two years. The Librettis are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915, and the portions of the Final Rule purporting to implement those provisions, threaten to repeat the trials

that Baby O. and the Librettis have already endured with any future foster or adoptive children.

346. Ms. Hernandez is directly aggrieved by the Final Rule's application to Baby O. and by the imposition of substantial burdens (both time and money) in connection with the Librettis' efforts to adopt Baby O.

347. The Cliffords are directly, personally, and substantially injured by ICWA's placement preferences and the provisions of the Final Rule purporting to implement those preferences to Child P. because they are causing delay, and perhaps denial, of their adoption of Child P., and they impose heightened standards and substantial burdens (both time and money) in connection with the Cliffords' efforts to adopt Child P.

348. The plaintiffs have no adequate remedy at law to redress the burdens now being imposed by Final Rule because claims arising under the APA cannot be litigated in state court.

349. This Court should declare the Final Rule invalid and set it aside.

COUNT VI

VIOLATION OF THE FIFTH AMENDMENT

(Due Process—ICWA § 1915)

350. Plaintiffs incorporate previous paragraphs as if fully restated here.

351. The United States has a deeply rooted tradition of honoring intimate family relationships. The Brackeens possess a fundamental right of liberty to intimate familial relationships.

352. ICWA's placement preferences applicable to an adoption or preadoptive placement of an "Indian child," 25 U.S.C. § 1915(a)–(b), violate the Brackeens' substantive due process rights. The preferences permit the disruption of their intimate familial relationship with A.L.M. without a showing of an adequate state interest to do so.

353. The Brackeens' intimate familial relationship with A.L.M. is a substantial liberty interest under the Due Process Clause of the Fifth Amendment that can be vitiated only when necessary to vindicate an important governmental interest.

354. Placing A.L.M. with non-relatives who happen to be members of the Navajo Nation is not narrowly tailored to any important government interest.

355. Unless the existence of an intimate familial relationship such as that which exists between the Brackeens and A.L.M. categorically constitutes "good cause" to depart from the placement preferences under Section 1915(a) and Section 1915(b), ICWA's placement preferences are unconstitutional under the Due Process Clause of the Fifth Amendment.

356. The Brackeens are directly, personally, and substantially injured by ICWA's collateral attack provisions, 25 U.S.C. §§ 1913(d), 1914, and the provisions of the Final Rule purporting to implement those provisions, 25 C.F.R. §§ 23.136, 23.137, because they subject the Brackeen family to a period of uncertainty and mental anguish substantially longer than otherwise would be permitted under Texas law. The Brackeens are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915, and the portions of the

Final Rule purporting to implement those provisions, threaten to repeat the trials that A.L.M. and the Brackeens have already endured with any future foster or adoptive children.

357. The Librettis' intimate familial relationship with Baby O. is a substantial liberty interest under the Due Process Clause of the Fifth Amendment that can be vitiated only when necessary to vindicate an important governmental interest.

358. Ms. Hernandez's intimate parental relationship with Baby O. and her right to direct the upbringing of Baby O. is a substantial liberty protected by the Due Process Clause of the Fifth Amendment that can be vitiated only when necessary to vindicate an important governmental interest.

359. Placing Baby O. with non-relatives who happen to be members of an Indian tribe is not narrowly tailored to any important government interest.

360. Unless the existence of an intimate familial relationship such as that which exists between the Librettis and Baby O. categorically constitutes "good cause" to depart from the placement preferences under Section 1915(a) and Section 1915(b), ICWA's placement preferences are unconstitutional under the Due Process Clause of the Fifth Amendment.

361. The Librettis and Ms. Hernandez are directly, personally, and substantially injured by Section 1915's placement preferences and the provisions of the Final Rule purporting to implement those preferences, including the "diligent search" requirement, because they are causing delay, and perhaps denial, of the

Librettis' adoption of Baby O., and because they impose heightened standards and substantial burdens (both time and money) in connection with the Librettis' efforts to adopt Baby O. Even if the Librettis' petition to adopt Baby O. is ultimately granted, ICWA and the Final Rule may subject the Librettis' adoption to collateral attack for up to two years. The Librettis are further aggrieved because the extraordinary burdens imposed by Sections 1913–1915, and the portions of the Final Rule purporting to implement those provisions, threaten to repeat the trials that Baby O. and the Librettis have already endured with any future foster or adoptive children.

362. The Cliffords' intimate familial relationship with Child P. is a substantial liberty interest under the Due Process Clause of the Fifth Amendment that can be vitiated only when necessary to vindicate an important governmental interest.

363. Placing Child P. with non-relatives who happen to be members of an Indian tribe, or with relatives who would otherwise be unsuitable but are preferred to the Cliffords because of their race, is not narrowly tailored to any important government interest.

364. Unless the existence of an intimate familial relationship such as that which exists between the Cliffords and Child P. categorically constitutes "good cause" to depart from the placement preferences under Section 1915(a) and Section 1915(b), ICWA's placement preferences are unconstitutional under the Due Process Clause of the Fifth Amendment.

365. The Cliffords are directly, personally, and substantially injured by ICWA's placement preferences because they are causing delay, and perhaps denial, of

their adoption of Child P. and they are requiring the Cliffords to expend substantial resources in an effort to demonstrate "good cause" to depart from them.

366. The plaintiffs have no adequate remedy at law to redress the injuries they are suffering because of ICWA.

367. The plaintiffs thus seek a declaration that Section 1915(a) and Section 1915(b) of ICWA violate principles of substantive due process and are unconstitutional and unenforceable, and an injunction barring the Defendants from implementing or administering those provisions by regulation, guideline, or otherwise.

CLAIMS ALLEGED BY STATE PLAINTIFFS

COUNT VII

VIOLATION OF ARTICLE I OF THE CONSTITUTION

(Non-Delegation Doctrine)

368. Plaintiffs incorporate previous paragraphs as if fully restated here.

369. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. 1, § 1.

370. The Constitution authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its general powers. U.S. Const. art. 1, § 8, cl. 18.

371. The Constitution bars Congress from delegating to others the essential legislative functions with which it is vested.

372. ICWA Section 1915(c) and the Final Rule Section 23.130(b) delegate to Indian tribes the legislative and regulatory power to pass resolutions in each Indian child custody proceeding that alter the placement preferences state courts must follow.

373. The Final Rule prohibits State Plaintiffs' agencies and courts from making a determination as to an Indian child's membership status with a tribe. State Plaintiffs must defer to the membership determination of the tribe.

374. State Plaintiffs are directly and substantially injured by the delegation of power over placement preferences because it violates the Constitution's separation of powers through abdication of Congress's legislative responsibility and requires State Plaintiffs to honor the legislation and regulation passed by tribes in each child custody matter, which can vary widely from one child to the next and one tribe to another.

375. State Plaintiffs have no adequate remedy at law to redress the injuries they are suffering under ICWA.

376. State Plaintiffs thus seek a declaration that ICWA Section 1915(c) and Final Rule Section 23.130(b) violate Article I, sections 1 and 8, and are unconstitutional and unenforceable, and an injunction barring the Defendants from implementing or administering those provisions by regulation, guideline, or otherwise.

PRAYER FOR RELIEF

Plaintiffs pray that this Court:

1. Declare that the Final Rule violates the APA, hold it invalid, and set it aside;

2. Issue a declaratory judgment that ICWA, 25 U.S.C. §§ 1901–1923, 1951–1952, is unconstitutional and unenforceable;

3. Issue a declaratory judgment that Sections 1913(d), 1914, and 1915 of ICWA are unconstitutional and unenforceable;

4. Issue a declaratory judgment that 42 U.S.C. §§ 622(b)(9) and 677(b)(3)(G) are unconstitutional and unenforceable.

5. Issue an injunction prohibiting Defendants from implementing or administering 25 U.S.C. §§ 1901–1923, 1951–1952 by regulation, guidelines, or otherwise;

6. Issue an injunction prohibiting Defendants from implementing or administering Sections 1913(d), 1914, 1915 of ICWA by regulation, guidelines, or otherwise;

7. Issue an injunction prohibiting Defendants from implementing or administering 42 U.S.C. § 622(b)(9) and 677(b)(3)(G) by regulation, guidelines, or otherwise;

8. Award Plaintiffs costs and reasonable attorneys' fees as appropriate; and

9. Grant such further and other relief as this Court deems just and proper.

Respectfully submitted,

Dated: March 16, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2018, I electronically filed the foregoing document through the Court's ECF system, which automatically serves notification of the filing on counsel for all parties.

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[Texas DFPS Child Protective Services Policy Handbook]

1225 Indian Child Welfare Act

CPS February 2013

The Indian Child Welfare Act (ICWA) is a federal law aimed at keeping Native American children who are involved in child welfare cases with Native American families. The stated intent of the legislation is to protect the best interests of Native American children and to promote stability amongst Native American families.

ICWA sets federal requirements that apply to state child custody proceedings involving Native American children who are members of, or eligible for membership in, a federally recognized tribe. ICWA establishes standards for removing Native American children from their families and for placing them in foster and adoptive homes. It also allows for a child's tribe to intervene in the legal proceedings.

A child must meet the criteria of an "Indian child" as defined by federal law in order for ICWA to apply. However, CPS policy requires workers in every abuse or neglect case to determine whether a child or the child's family has Native American ancestry or heritage. If Native American ancestry is claimed, CPS workers are required to follow specific procedure to ensure compliance with ICWA.

See:

Indian Child Welfare Act

Federally Recognized Tribes

For information on CPS policy related to ICWA, see:

Form 1706 Checklist for Compliance with the Indian Child Welfare Act

For information about the ICWA and DFPS's responsibilities under it, see:

Appendix 1226-A: Child-Placing Requirements of the Indian Child Welfare Act and Related Guidelines and Regulations

Appendix 1226-B: Checklist for Compliance with the Indian Child Welfare Act

* * *

5340 Indian Child Welfare Act (ICWA)

CPS December 2013

If a DFPS lawsuit involves a Native American child, the Indian Child Welfare Act (ICWA) applies and the legal requirements change dramatically.

The legal requirements related to ICWA are discussed primarily in 5840. The Indian Child Welfare Act (ICWA); however, while ICWA requirements do not apply in every case, it is critically important that the caseworker *inquire* about Native American history in *every* case.

The only way to determine whether a child may be a Native American child is to ask available parents, relatives, and children who are old enough to be interviewed whether there is any family history connected to a Native American tribe. The caseworker documents the responses by individual family members, whether a native American history is reported or denied.

If there is any indication that a child may have a family member or ancestor affiliated with a tribe, the caseworker follows ICWA policies at 5840. The Indian Child Welfare Act (ICWA).

* * *

5840 The Indian Child Welfare Act (ICWA)

5841 Purpose of ICWA

CPS December 2013

The Indian Child Welfare Act (ICWA) is a federal law that applies to any DFPS case involving an Indian child, as the term is defined by ICWA. See 25 U.S.C. §1901 et seq.

Although the law refers to and applies only to an Indian child, as defined by the ICWA, *this policy uses the term Native American where the context allows, because it is accurate and is generally preferred for its recognition of Native American origins.*

The purpose of the ICWA is to preserve Native American tribal cultures (including Native Alaska tribal cultures), by giving legal rights to the

children, parents, and tribes protected by this law.

Failure to comply with the ICWA can result in a final order being reversed on appeal.

To avoid having a final order reversed and a child's chance for a permanent home affected, the caseworker:

- routinely asks families whether they are Native American;
- documents the families' responses; and
- consults with the attorney representing DFPS and the regional attorney, if the caseworker believes that a case may involve a Native American child.

5842 Identifying a Native American Child

CPS December 2013

The law defines a Native American child as an unmarried person under age 18 who is either:

- a member of a Native American tribe; or
- eligible for membership in a Native American tribe and the biological child of a tribal member. See 25 U.S.C. §1903(4).

To find out whether a child has Native American family history, the caseworker routinely asks:

- any child old enough to be interviewed;
- any parent of the child who is available to be interviewed; and

- any relatives who are available to be interviewed.

Because key facts about a child's family history may not be available when a case is first investigated, the caseworker routinely asks, throughout the case, about whether a child has Native American family history, especially when new family members are identified.

Whether family members deny or report tribal family history, the caseworker documents the information on:

- the removal affidavit; and
- any reports filed with the court.

For example:

> Information about the Child's Native American Status: Mother denies tribal family history; father reports that his great-grandfather may be Sioux. Paternal grandmother says that her husband's father was from the Cherokee tribe in Oklahoma.

If the caseworker obtains information indicating that there is a possible tribal heritage, the caseworker:

- completes Form 1705 Indian Child and Family Questionnaire;
- confers with the regional attorney and attorney representing DFPS as soon as possible; and
- refers to the following CPS policies:

As much information must be provided on Form 1705 as possible to determine whether a child is a member of a tribe or is eligible for membership in the tribe.

5843 Decision Regarding Native American Status

CPS December 2013

There are more than 500 federally recognized native American tribes in the U.S., and children from any one of these tribes may be living in Texas. Three federally recognized tribes have reservations in Texas: the Kickapoo, near Eagle Pass, the Alabama-Coushatta Tribe, near Livingston, and the Ysleta del Sur, also known as Tigua, near El Paso.

Each tribe has its own membership requirements and only the tribe can decide whether a child is a Native American child, as defined by the Indian Child Welfare Act (ICWA).

A child may be a native American child, even if:

- the child's Native American relative is a distant one:

- the child's parent or grandparent was never enrolled as a tribal member;
- one or both parents are opposed to the tribe being involved;
- the child and family do not observe tribal traditions and practices; or
- the child is not enrolled in the tribe

If there is any indication that a child's family may have a tribal connection, the caseworker gives the relevant information to the tribe and ask the membership or eligibility be confirmed or denied.

5844 Legal Requirements If the ICWA Applies

CPS December 2013

If a Native American child, as defined by the Indian Child Welfare Act (ICWA), is taken into DFPS custody, almost every aspect of the social work and legal case is affected, including as follows:

- The legal burden of proof for removal is higher, as is the legal burden of proof for obtaining any final order terminating parental rights or restricting a parent's custody rights.
- DFPS must serve the child's parents, tribe, Native caretakers, and the Bureau of Indian Affairs with a specific notice regarding ICWA rights.

- ICWA requires that the caseworker must make active efforts to reunify the child and family.
- The child must be placed according to ICWA statutory preferences.
- Expert testimony on tribal child and family practices may be necessary.
- A valid relinquishment of parental rights requires a parent to appear in court and a specific statutory procedure.

All of these requirements apply to both a Native American parent and a parent who is not Native American.

For a quick reference, see:

Form 1700 Indian Child Welfare Act Resource Guide

Form 1705 Indian Child and Family Questionnaire

Form 1706 Indian Child Welfare Act Checklist

Texas Department of Family and Protective Services

Child Protective Services Handbook

Appendix 1226-A: Child-Placing Requirements of the Indian Child Welfare Act and Related Guidelines and Regulations

CPS 92-7

I. Introduction

The Indian Child Welfare Act (ICWA) seeks to protect the best interests of eligible Indian children and to promote the stability and security of eligible Indian tribes and families. The ICWA establishes federal standards for the removal of eligible Indian children from their families and for placement of the children in foster or adoptive homes that reflect the unique values of Indian culture. The Act also provides for assistance to eligible Indian tribes to operate child and family service programs.

Three documents govern implementation of the ICWA:

1. **The Indian Child Welfare Act (ICWA) of 1978 (PL 95-608)**

   The ICWA has the force of law without reference to interpretations. However, the Department of the Interior's Bureau of Indian Affairs has interpreted portions of the ICWA in the two documents described below.

2. Guidelines for State Courts: Indian Child-Custody Proceedings

(See the Federal Register, Volume 44, No. 228/Monday, November 29, 1979)

The Bureau of Indian Affairs issued these guidelines to help courts interpret the portions of the ICWA that courts must implement. Under the ICWA, state courts and tribal courts are responsible for conducting most aspects of Indian child-custody proceedings. Each court must establish rules and procedures for carrying out its responsibilities under the ICWA.

The Guidelines for State Courts do not have the force of law. They are intended to help state and tribal courts guarantee rights protected under the ICWA. Courts have the authority to disregard the guidelines when they consider them unnecessary to implement ation of the ICWA.

3. Federal Regulations (25 CFR, Part 23)

These regulations govern the Bureau of Indian Affair's responsibilities under the ICWA.

The ICWA and the guidelines and regulations specified above apply to DFPS, other state agencies, and private child-placing agencies whenever they place eligible Indian children in protective placements covered under the ICWA.

II. Definitions

The following definitions are derived from Section 4 of the ICWA, the Guidelines for State Courts, and the federal regulations specified above. The definitions have been rephrased to match state laws and other requirements governing DFPS services.

A. Indian — Any member of an Indian tribe.
Note: The ICWA and related guidelines and regulations do not include criteria for determining membership in specific Indian tribes. Each tribe is responsible for establishing membership criteria and determining who meets them. Information about tribal membership is available from the tribes themselves and from the Bureau of Indian Affairs. (For information about contacting the Bureau of Indian Affairs, see item K below.)

B. Indian tribe — Any Indian tribe, band, nation, or other organized group or community of Indians that is eligible for services provided to Indians by the Secretary of the Interior.

Note: The ICWA applies to the following tribes in Texas:

1. the Traditional Kickapoo Indians of Texas, who live on land near Eagle Pass in Region 09 (The tribe is part of the Kickapoo Tribe of Oklahoma.);

2. the Alabama-Coushatta Indian tribe and reservation near Livingston in Region 10; and
3. the Tigua Indian tribe and reservation near El Paso in Region 12.

The ICWA also applies to children who are members of federally recognized tribes when the children are in Texas, even though the tribe and reservation are not in Texas. The ICWA does not apply to children who are not members of federally recognized tribes.

C. **Indian child** — Any person who fits the definition of a child under Chapter 11 of the Texas Family Code (TFC) and who
   1. is a member of an Indian tribe; or
   2. is both
      a. eligible for membership in an Indian tribe, and
      b. the biological child of a member of an Indian tribe.

   Note: Part B.1. of the Guidelines for State Courts addresses the determination of eligibility as an Indian child.

D. **Indian child's tribe** — Either
   1. the tribe in which the child is
      a. a member, or
      b. eligible for membership; or
   2. the tribe with which the child has the most significant contacts, if the child is a member of more than one tribe or is eligible for membership in more than one tribe.

Note: Part B.2. of the Guidelines for State Courts addresses the determination of an Indian child's tribe.

E. Indian parent — Any Indian who fits the definition of a parent under TFC, Chapter 11, including a parent who has adopted a child under tribal law or custom.

F. Extended family member — Either

1. a member of an Indian child's extended-family as defined by tribal law or custom; or
2. in the absence of a tribal definition, an adult who is an Indian child's grandparent, aunt, uncle, brother, sister, brother-in-law, sister-in-law, niece, nephew, first or second cousin, or stepparent.

G. Indian custodian — Any Indian

1. who has legal custody of an Indian child under tribal law or custom or under state law; or
2. to whom an Indian child's parent has temporarily transferred the child's physical care, custody, or control.

H. Child-custody proceeding — Any of the following:

1. A suit affecting the parent-child relationshipunder TFC, Title II, or a judicial proceeding for an Indian status-offender under TFC, Title III, when the suit or proceeding involves a foster care placement, the termination of parental rights, a pre-adoptive placement, or an

adoptive placement. This definition includes proceedings that involve any action in which

- an Indian child is removed from his parent or Indian custodian for any length of time, and
- the parent or custodian does not have the right to return of the child upon demand.

2. An affidavit of relinquishment of parental rights executed under TFC, §15.03, with respect to an Indian child.
3. The voluntary placement of an Indian child by the child's parents.

Note: The term "child-custody Proceeding" does **not** apply to

- a divorce proceeding, parental separation, or similar action in which the child is placed in the managing conservatorship of one of the parents; or
- a delinquency proceeding under TFC, Title III, caused by an action which would be a crime if committed by an adult.

Note: Part B.3. of the Guidelines for State Courts provides criteria for deter mining whether a child-custody proceeding is covered by the ICWA.

I. Tribal court — A court that

1. has jurisdiction over child-custody proceedings; and
2. is
   - a court of Indian offenses,

- a court established and operated under the code or custom of an Indian tribe, or
- any other administrative body of a tribe that has authority over child-custody proceedings.

J. State court — Either

1. a district court that has jurisdiction over suits affecting the parent child relationship, as defined in TFC, §11.01; or
2. a juvenile court that has jurisdiction over children in need of supervision (CHINS), as defined in TFC, §51.03.

K. Bureau of Indian Affairs — The Bureau of Indian Affairs (BIA) is part of the Department of the Interior. There are 12 BIA offices in the United States. The office to contact for court proceedings involving Indians in Texas is located in Anadarko, Oklahoma. Every BIA office offers the following services:

1. assistance in locating a child's tribe and his biological parents or Indian custodian to prevent involuntary removal when
   - the child is involved in involuntary state-court action, or
   - the child's adoption is terminated (see 25 CFR 23.11(f) and 23.93);
2. arrangements for paying court-appointed attorney fees for indigent parents or Indian custodians when

applicable requirements are met in involuntary state-court action (see 25 CFR 23.13);

3. assistance to the court, the child-placing agency, or any other party in identifying qualified expert witnesses for involuntary state court action (see 25 CFR 23.91); and
4. assistance to the court, the child-placing agency, or any other party in identifying interpreters for an Indian child-custody proceeding (see 25 CFR 23.92).

The BIA's Division of Social Services in Washington, D.C., maintains a central file of all Indian adoptions.

L. Qualified expert witness — An expert who

- can give competent testimony, and
- is qualified to specifically address the question whether continued custody by the parents or Indian custodian is likely to result in serious physical or emotional damage to the child. (See Part D.4. of the Guidelines for State Courts.)

III. Services to the Indian Child and Family to Prevent Involuntary Removal

Under ICWA, §102(d), before seeking involuntary removal of a child, the child-placing agency must try to provide remedial services and rehabilitation programs designed to prevent the breakup of the child's family.

Under Part D.2 of the Guidelines for State Courts, the child-placing agency must demonstrate to the court that

A. it has tried to provide remedial services and rehabilitation programs to prevent removal as specified above; and

B. its efforts to do so

- took into account the prevailing social and cultural conditions and way of life of the Indian child's tribe; and
- involved and used the available resources of the extended family, the tribe, Indian social-service agencies, and Indian care givers.

IV. Removal of the Indian Child

Under ICWA, §101(a), a child-placing agency may only seek state-court jurisdiction when the Indian child is not the ward of a tribal court.

A. Involuntary Removal of an Indian Child by a Court

If the suit is not transferred to an Indian court, ICWA, §102(e) and (f), prohibits the court from ordering involuntary foster-care placement or termination of parental rights of an Indian child unless the proceedings include both

1. the testimony of a qualified expert witness; and
2. a determination that the parents' or Indian custodian's continued custody of the child is likely to result in serious emotional or physical damage to the child.

B. Emergency Removal

Under ICWA, §112, Indian children may be protected by an emergency removal under TFC, Chapter 17.

Under Part B.7. of the Guidelines for State Courts, the petition for the emergency hearing under TFC, §§17.02 or 17.03, must be accompanied by an affidavit containing

1. the name, age, and last known address of the Indian child;
2. the names and addresses of the child's parents and Indian custodian, if any (If these persons are unknown, a detailed explanation must be given of the efforts made to locate them.);
3. the facts necessary to determine the residence and domicile of the Indian child (If the residence and domicile is on an Indian reservation, the name of the reservation must be stated.);
4. the tribal affiliation of the child and the child's parents or Indian custodian;
5. a specific and detailed account of the circumstances that led to emergency removal of the child;
6. if the child is believed to live on a reservation over which the tribe exercises exclusive jurisdiction in matters of child-custody, a statement of the efforts made to transfer the matter to the tribe's jurisdiction; and

7. a statement of the actions taken to provide services to the parents or to the Indian custodian to permit the child to be safely returned to the parents' or the custodian's custody.

Under ICWA, §112, the child-placing agency must ensure that the emergency placement ends as soon as it is no longer necessary to prevent imminent physical harm or danger to the child. However, this requirement does not apply if a court orders or the parents consent to continued placement.

C. Voluntary Placements (Temporary and Permanent)

Provisions for voluntary placements under the ICWA apply both to temporary and permanent voluntary placements made by child-placing agencies. Under ICWA, §103(a), the parents' or Indian custodian's consent to foster care placement or to termination of parental rights is not valid unless the following conditions are satisfied.

1. The child's parents or Indian custodian cannot consent to the placement or to the termination of parental rights until at least 10 days after the child's birth. No child-placing agency, therefore, may place an Indian child in foster care based on the parent's or custodian's consent until 10 days after the child's birth.

2. The parents' or Indian custodian's consent must be recorded before a district judge of a court of competent jurisdiction. The judge must certify in writing that
   a. the terms and consequences of the consent were explained fully and in detail to the parent or Indian custodian; and
   b. the parent or Indian custodian either
      - fully understood the explanation in English, or
      - fully understood it after it was interpreted or translated into a language the parent or custodian knows.

Affidavit of relinquishment. Under Part E.2 of the Guidelines for State courts, in addition to containing all of the information required in TFC, §15.03, an affidavit of relinquishment of parental rights must contain

1. the name of the Indian child's tribe; and
2. the identifying number or other indication of the child's membership in the tribe, if any.

Withdrawal of consent. Under ICWA, §103(b), a child's parent or Indian custodian has the right to withdraw consent to the child's fostercare placement at any time, except as noted below. If a parent or Indian custodian withdraws consent, the child-placing agency must return the child to the parent or Indian custodian immediately.

If a child-placing agency has managing conservatorship of a child or has validly evoked the provisions of TFC, Chapter 17, as a basis for the child's continued placement in foster care, the child's parent or Indian custodian cannot withdraw consent to the child's foster care placement.

Note: This citation (TFC Ch. 17) is out of date since the 1995 reorganization of the Texas Family Code. We can tell where some of these clauses went, but we couldn't find this one. Please request the correct citation from Legal staff. --H&RS

Withdrawal of an affidavit of relinquishment. Under ICWA, §103(c), an Indian parent may withdraw an affidavit of relinquishment of parental rights that designates a child-placing agency as managing conservator of the parent's child. The parent may withdraw the affidavit of relinquishment for any reason and at any time before the court's decree of termination. This provision may take precedence over Section 15.03(d), Texas Family Code, which states that an affidavit of relinquishment designating DFPS as the child's managing conservator is irrevocable.

If an Indian parent withdraws an affidavit of relinquishment as specified above, the child-placing agency must return the child to the parent unless the child-placing agency obtains court-ordered managing conservatorship or validly evokes the provisions of TFC, Chapter 17, as a basis for the child's continued placement in foster care.

V. Choosing Placements for Indian Children

A. Preferred Placement Settings

Foster care placements. Under ICWA, §105(b), the child-placing agency must apply the following criteria when placing Indian children in foster care.

1. The placement must meet all the special needs of the child that the child-placing agency has identified.
2. The placement setting must be
   a. reasonably close to the child's home, and
   b. the least restrictive and most family-like setting available.
3. The following foster-care placement settings are preferred in the order listed unless there is good cause to the contrary (For definition of the term "good cause to the contrary," see item C below.):
   a. a member of the child's extended family;
   b. a foster home licensed, approved, or specified by the Indian child's tribe;
   c. an Indian foster home licensed by DFPS or certified by a non-Indian, licensed, child-placing agency;
   d. a child-caring institution approved by an Indian tribe or operated by an Indian organization which has a program to meet the Indian child's need.

Adoptive placements. Under ICWA, §106(b), the following adoptive placement settings are preferred for Indian children in the order listed unless there is good cause to the contrary:

1. a member of the child's extended family,

2. another member of the Indian child's tribe,
3. another Indian family.

Additional considerations. Under ICWA, §105(d), the child-placing agency determines what foster-care or adoptive placement is most appropriate for a particular Indian child based on the prevailing social and cultural standards of the Indian community in which the child's parents or extended family reside or with which they maintain social and cultural ties.

Under ICWA, §106(b), subsequent foster care and adoptive placements are made according to provisions of the ICWA unless the child is returned to the person from whom he was removed.

B. Good Cause to Modify Preferences

Under ICWA, §105(c), the following conditions constitute good causes to change the order or types of preference specified in item A above:

1. The Indian child's tribe establishes a different order of preference by resolution. The tribe's order of preference must be followed subject to one condition: In a foster care placement, the tribe's preferred placement setting must be the least restrictive setting available that meets the child's particular needs.
2. The Indian child or his parent has a different, but appropriate preference. The child-placing agency must take the child's and the parent's preferences into consideration.

   Note: When a parent requests anonymity in a voluntary placement, the child-placing

agency must apply the preferences specified above in a way that meets the parent's need for anonymity.

C. Good Cause to the Contrary

Under Part F.3(a) of the Guidelines for State Courts, good cause to the contrary is based on

1. the request of the biological parents or the older child (The guidelines do not specify the meaning of "older."),
2. the extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness, or
3. the unavailability of a suitable placement setting after the child-placing agency has searched for one that meets the preference criteria.

Under Part F.3(b) of the Guidelines for State Courts, the burden of establishing good cause to the contrary rests on the party that requests an exception to the order or types of preferences specified above.

D. Documentation of Consideration Given to Placement Choice

Under ICWA, §105(e), the child-placing agency must document each fostercare or adoptive placement of an Indian child, and the efforts made to comply with the order and types of preference specified above. The child-placing agency must provide a record of these efforts to the Secretary of the Interior or to the Indian child's tribe on request.

VI. Agreements between Child-Placing Agencies and Indian Tribes

Under ICWA, §109, a child-placing agency may enter into agreements with an Indian tribe regarding the care and custody of Indian children and regarding the agency's and the tribe's respective jurisdictions in child custody proceedings. Agreements about jurisdiction may include provisions for

A. the orderly transfer of jurisdiction on a case-by-case basis; and
B. concurrent jurisdiction of both the child-placing agency and the tribe.

Either party may revoke such an agreement upon 180 days written notice to the other party. The revocation cannot affect any action or proceeding over which a court has assumed jurisdiction, unless the agreement provides otherwise.

VII. Observing the Rights of Adult Indian Adoptees

A. State Court

Under ICWA, §107, if a court with jurisdiction receives a request from an Indian adoptee who is 18 or older, the court must inform the adoptee about:

1. the adoptee's tribal affiliation, if any;
2. the identity of the adoptee's biological parents; and
3. any other information necessary to protect the rights pertaining to the adoptee's tribal relationship.

If the court does not reveal the identity of the adoptee's biological parents, the adoptee may obtain help from the Bureau of Indian Affairs to secure the necessary information for enrollment of the adoptee in a tribe.

> When presented with a valid court order, [DFPS's] Special Services Division provides information necessary for the adoptee's enrollment in a tribe, subject to the requirements regarding the charge and receipt of reasonable fees for determining and sending information specified in TFC, §11.17 (c).

B. Bureau of Indian Affairs (BIA)

Under ICWA, §301(b), and 25 CFR 23.81(b), the BIA must give the foster or adoptive parent or the tribe of an Indian adoptee who is 18 or older and eligible under the ICWA all information needed to enroll the adoptee in a tribe or to determine the adoptee's rights and benefits associated with tribal membership. If the adoptee's biological parent has filed an affidavit of confidentiality with the court and the affidavit has been forwarded to the Bureau of Indian Affairs, the BIA will not reveal the parent's name.

Texas Department of Family and Protective Services

Child Protection Services Handbook

Appendix 1226-B: Checklist for Compliance with the Indian Child Welfare Act

CPS 92-7

To ensure compliance with the Indian Child Welfare Act (ICWA) in any court action regarding an Indian Child, staff may refer to the following checklist.

Note: To determine whether a court action falls under the ICWA, see Appendix 1226A, Child-Placing Requirements of the Indian Child Welfare Act and Related Guidelines and Regulations.

1. Does the petition for custody include the following elements?
   - the child's name, age, and address;
   - the parents' names and addresses;
   - a record of the diligent search for each missing parent, if any;
   - information needed to determine the child's residence (including the name and location of the reservation, if applicable);
   - the child's and the parents' tribal affiliation(s);
   - a record of the efforts made to transfer the proceeding to a tribal court;
   - the facts leading to the child's removal from his home; and
   - a specification of the reasonable efforts made to provide remedial and rehabilitative

services to the parent(s) in order to prevent removal.

2. Has the court served notice of the suit on the parents and the Indian tribe? The notice must include
   - the child's name;
   - the child's date of birth;
   - the child's place of birth;
   - the names of the child's parents, the dates and places of their births, and the mother's maiden name;
   - a copy of the petition;
   - the name of the petitioner and his attorney;
   - a notice of the right to intervene;
   - a notice of the right to appointed counsel;
   - a notice of the right to request 20 additional days to answer or prepare for the suit;
   - a notice of the right to transfer the suit to tribal court;
   - the number or name, the mailing address, and the phone number of the court;
   - a notice of the potential consequences to the parents' rights; and
   - a notice of the confidential nature of the proceeding.
3. Have staff verified the child's status with the tribe? If the tribe is unknown, have staff sent notice of the suit by registered mail with return receipt requested to the following address?

   Anadarko Area Director,
   Bureau of Indian Affairs,
   P.O. Box 368,

Anadarko, Oklahoma 73005

4. Have all notices of the suit and all responses (if any) from the parents, the tribe, or the Bureau of Indian Affairs been filed with the court?
5. Have the parents hired an attorney? If not, has one been appointed for them?
6. Have staff made a diligent effort to find a suitable placement according to the orders of preference specified in Appendix 1226A?
7. If the orders of preference specified in Appendix 1226A have not been followed, has good cause to the contrary been shown as specified in the same appendix?
8. Have staff kept a written record of the placement decision in order to document their efforts to observe the orders of preference specified in Appendix I/1226A?
9. Have staff ensured that the Indian child is enrolled in his tribe before referring him for adoption?

[2018 Title IV-B APSR – Texas DFPS]

Currently, the Kickapoo Traditional Tribe of Texas advised that their placement preferences are those as stated in Appendix 1226-A. The Ysleta Del Sur Pueblo/Tigua Tribal Council reviewed their placement preferences and advised that their placement preferences are those as stated in Appendix 1226-A. The Alabama-Coushatta-Tribe of Texas advised that their placement preferences differed from those in Appendix 1226-A. Their placement preferences are on file with DFPS.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants, CHEROKEE NATION, et al., Intervenor-Defendants.	Civil Action No. 4:17-cv-868-O

DECLARATION OF DANIELLE EMILY CLIFFORD

I, Danielle Clifford, hereby declare that the following is true and correct, to the best of my knowledge.

1. My husband Jason and I were the foster parents and seek to be the adoptive parents of Child P.

2. My husband and I have been married for ten years. In order to help the children in our community, we

became foster parents through Hennepin County adoption services rather than trying to adopt through a private agency or international adoption. Child P. is our only child. Neither my husband nor I am eligible for membership in a federally recognized Indian Tribe.

3. We became the foster parents to Child P. in July 2016. Before she came into our home, Child P. had a difficult life. She was born in July 2011 and entered foster care at three years of age in the summer of 2014 when her biological parents were arrested on various drug charges.

4. During her first two years in foster care, Child P. moved from one placement to another, staying with a variety of related and unrelated foster parents. None of these placements provided Child P. with stability.

5. Minnesota family services attempted to reunify Child P. with her birth mother once her birth mother left state custody. The family court determined, however, that Child P.'s biological parents could not provide her with a safe and stable home and returned Child P. into the foster care system. In July 2016, the court involuntarily terminated the parental rights of Child P.'s biological parents. That court order is attached as Attachment 1.

6. When Child P. came into our home she was a sad and troubled little girl. She had difficulty forming emotional connection with other people and was withdrawn. We arranged for extended child therapy for Child P. and slowly introduced her into our community. Child P.'s therapist has said that she has suffered extensive psychological harm and due to the instability of her childhood is an emotionally vulnerable child. Because of the

frequent instability in her life—removal from her birth parents, her foster placements, a brief time back with her mother, and her entry into our family—Child P. is overcome with fear that she will never be allowed to maintain a lasting attachment with the people around her.

7. When Child P. first came to live with us in July 2016 she was very quiet and subdued with us. As we, together with her therapist, learned how to provide the type of emotional environment that Child P. needs, she began to open up with us. She began to share her emotions with us, and, because she felt safe in our family, was able for the first time to express and begin to deal with the grief and fear that her constant relocations have caused. We have been dedicated to working with her therapist to ensure that we are able to give Child P. the best emotional environment for her. Her therapist was very pleased with the progress Child P. was making while she was in our care.

8. Child P. made many friends while part of our family through both the Girl Scouts and our local church. She has been warmly welcomed into our family. We have also taken significant efforts to ensure that Child P. was not cut off from her biological family's cultural heritage. We have taken Child P. to a number of pow wows held in our area, as well as an American Indian dance production, a Native American Family Day at the Minnesota Historical Society and to several Native American Family Involvement Days at her school.

9. Child P.'s maternal grandmother, R.B., is an enrolled member of the White Earth Band of Ojibwe Indians. Because of a prior conviction, Minnesota officials

revoked R.B.'s foster license. County officials contacted the Tribe when Child P. first entered foster care. In 2015, more than a year before Child P. was placed with us, the Tribe wrote to inform the state court that Child P. was not eligible for membership. The Tribe's letter is attached as Attachment 2.

10. In January 2017, the Tribe intervened in Child P.'s state court custody proceeding and changed its position, suggesting Child P. was eligible for membership. In a brief filed later in 2017, the White Earth Band informed the Court that Child P. was now a member of the Tribe for purposes of ICWA and that Child P. must be placed in accordance with ICWA's preferences.

11. Prior to the Tribe's assertion, County officials supported our efforts to adopt Child P. and advised against any contact with R.B. But, since the Tribe declared its involvement and because of the Tribe's authority under ICWA, County officials have deferred to the Tribe on decisions regarding the appropriate placement for Child P. Assistant County Attorney Nancy Jones explained the County's abrupt change of position in a letter to the family court. That letter is attached as Attachment 3.

12. We asked the Minnesota court to transfer Child P.'s foster placement with us to a pre-adoptive placement with us to allow us to petition to adopt Child P. Child P.'s guardian ad litem supported our request and indicated that Child P. should be adopted by us and should not be sent to live with members of the Tribe. Instead, at the Tribe's insistence, the court ordered County family services to immediately remove Child P. from our home so that she could be placed for adoption elsewhere. The

Court held that ICWA's placement preferences would apply to Child P. and that, because Child P.'s case would be governed by the ICWA regime, we were not entitled to the evidentiary hearing that we could have had under state law. The state court's order is attached as Attachment 4.

13. After the Minnesota District Court ordered Child P. removed from our home, we asked the Court of Appeals to block the removal. The Court of Appeals denied our emergency motions and declined to reverse the actions the District Court had taken under ICWA. The Court of Appeals' order is attached as Attachment 5.

14. The County moved immediately to remove Child P. from our home. County officials instructed us not to discuss her impending departure with Child P. and not to discuss Child P.'s removal with Child P.'s therapist during her next counseling session. County officials then told us to bring Child P. to the County Health Services building and gave us and our parents, Child P.'s grandparents for the past year and a half, twenty minutes to say goodbye. The County official returned to the room after a mere five minutes to inform us that the room we were in had been reserved. He then relocated us to a different, smaller space in the building. He told us we would have only a further five minutes with Child P. and that this was just a courtesy on his part. Throughout this conversation, Child P., who had been withdrawn when first told she was being taken from us, was crying uncontrollably.

15. After Child P. was transferred to R.B.'s custody, R.B. indicated that she was very upset about Child P.'s depression following the transfer and indicated that she

was concerned she had made a mistake. R.B. was unsure that Child P. would thrive in her care and expressed that she was considering returning Child P. to our home if Child P. remained unhappy. Before we were able to negotiate a return, the County instructed R.B. not to contact us and not to allow Child P. to contact us.

16. We have since learned that Child P. is experiencing serious emotional harm from the dislocation of losing the home and family she has known for nearly two years. Child P. does not understand why she cannot see us and has regressed to the emotionally withdrawn state that she was in before she first entered our home.

17. R.B. has not filed a petition for adoption. Child P. remains in limbo and remains separated from the only stable home she has known.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: April *26,* 2018

/s/ Danielle Clifford
Danielle Clifford

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants, CHEROKEE NATION, et al., Intervenor-Defendants.	Civil Action No. 4:17-cv-868-O

DECLARATION OF JENNIFER KAY BRACKEEN

I, Jennifer Kay Brackeen, hereby declare that the following is true and correct, to the best of my knowledge.

1. My husband Chad and I are the adoptive parents of A.L.M., a two-year-old boy who has lived with us since June 2016, when he was ten months old.

2. My husband and I have been married for twelve years and, in addition to A.L.M., we are the parents of two biological children who are nine and six. Neither my husband nor I am descended from a member of an Indian

Tribe or eligible for membership in a federally recognized Tribe.

3. A.L.M. was born to an unmarried couple in New Mexico in the fall of 2015. A.L.M.'s mother is an enrolled member of the Navajo Nation and his father is an enrolled member of the Cherokee Nation. A.L.M.'s mother left the Navajo reservation when she was 24 years old and established her residence outside the reservation. Seven years later, while pregnant with A.L.M., she returned to the reservation and gave birth to A.L.M.

4. Two days after A.L.M.'s birth, his birth mother relocated to Texas and took A.L.M. with her to live with A.L.M.'s paternal grandmother. Neither A.L.M. nor his biological parents were domiciled on a reservation during his life nor, excepting the day he was born and the next day, did they live on the reservation.

5. A.L.M. was removed from his grandmother's home by the Texas Department of Family and Protective Services in June 2016, when he was ten months old. Because A.L.M's parents are enrolled members of recognized tribes, Texas DFPS notified both Tribes that A.L.M. was being placed in foster care. Neither Tribe offered a foster placement to A.L.M. and he was placed with my husband and me.

6. In May 2017, after we had cared for A.L.M. for nearly a year, his biological parents agreed that we should be able to adopt A.L.M. and voluntarily terminated their parental rights to allow us to petition for his adoption. A.L.M.'s biological parents have remained in Texas and reside near our home. A.L.M. has been able to remain in contact with his paternal grandparents, who were his primary caregivers for the first ten months of his life. My

husband and I have taken A.L.M. to visit his grandparents in Stillwater, Oklahoma, where they recently moved, and have visited the Cherokee Heritage Center with him. We have also kept A.L.M. in touch with his paternal biological cousins, who live nearby in Fort Worth, and we intend to continue fostering A.L.M.'s relationships with his biological cousins and paternal grandparents.

7. After A.L.M.'s biological parents voluntarily terminated their parental rights and indicated their support for our adoption, the Navajo Nation wrote to the family court overseeing the proceedings to suggest A.L.M. should be removed from our home and relocated to live with members of the Tribe to whom he was not related in New Mexico. This removal would have separated A.L.M. from the only home he knew, where he had lived for more than half of his life, and would also have removed him from contact with his biological family.

8. In July 2017, after we became eligible to seek to adopt A.L.M., my husband and I filed a petition to adopt him. A.L.M.'s biological parents and his paternal grandmother supported our petition. Once again, the court notified the Cherokee and Navajo Nations of the proceedings. Neither the alleged foster family identified by the Navajo Nation nor the Navajo Nation sought to participate in the Texas court proceeding or sought to adopt A.L.M.

9. On August 1, 2017, the Texas family court held a hearing regarding our petition to adopt A.L.M. A.L.M.'s biological father testified at the hearing that my husband and I are the only parents A.L.M. knows and that he supported our adoption. A.L.M.'s biological mother testified that A.L.M. loves us and should be adopted by us.

A.L.M.'s paternal grandmother also testified that A.L.M. loves us and should be adopted by us. A.L.M.'s guardian ad litem recommended that A.L.M. remain with us.

10. We also offered testimony at the hearing from a child psychologist, who is an attachment expert and who testified that A.L.M. had grown attached to us and would be psychologically injured by removal from our home.

11. On the day of the hearing on our adoption petition, representatives of the Cherokee and Navajo Nations appeared and, as the Navajo Nation's social worker later testified, reached an agreement in the hallway outside the hearing room that A.L.M. would become a member of the Navajo Nation because only the Navajo had identified a potential foster placement.

12. Texas DFPS did not contest that we were appropriate adoptive parents for A.L.M. Instead, Texas DFPS argued that we had not shown good cause to depart from ICWA's preferences and that we had not satisfied the clear-and-convincing evidence standard.

13. The Texas court denied our petition to adopt A.L.M. and, although acknowledging that we were the only party seeking to adopt A.L.M., held that ICWA's placement preferences governed the proceedings. The court held that we had not met our burden under ICWA and the related regulations to show good cause to depart from the adoptive preferences. We immediately appealed.

14. After the court ruled against our adoption petition, Texas DFPS stated that they intended to remove A.L.M. from our home immediately and place him in foster care on the reservation in New Mexico. We sought an

emergency order from the Texas appellate court blocking Texas DFPS from removing A.L.M. before our appeal was considered. After we made this filing, Texas DFPS informed us, via text message, that A.L.M. would be removed from our custody three days later at 6:30 am. Before Texas DFPS could remove A.L.M., the Texas appellate court granted our emergency petition for a stay pending our appeal.

15. We filed this lawsuit while our appeal was pending before the Texas appellate court. Texas DFPS then informed us that the Navajo couple previously identified as a potential foster placement for A.L.M. was no longer a viable placement and that no other placements were available for A.L.M. Based on these developments, Texas DFPS, A.L.M.'s guardian ad litem, and my husband and I entered into a settlement agreement. The settlement specified that, because we were the only individuals seeking to adopt A.L.M., ICWA's placement preferences did not apply. The settlement also specified that, even if the preferences did apply, we had demonstrated good cause to depart from them.

16. Based on the settlement agreement, the appel1ate court sent the case back to the trial court and we were able to successfully petition for adoption of A.L.M. Our adoption of A.L.M. was finalized on January 8, 2018.

17. Prior to our experience with A.L.M., my husband and I intended to foster and adopt other children in the future. But we are reluctant to place ourselves or our potential future foster and adoptive children in a position where we will be unexpectedly separated from them because they are not of the same race as us. The Tribes' efforts to force A.L.M.'s removal from our home more

than a year after we had taken him in caused serious emotional and psychological harm to both A.L.M. and us. Had the Tribes been successful in removing him, the harm would likely have been much more severe. While we hope to provide a loving and supportive home to other children in need in the future, we do not wish to relive the experience of racial discrimination that we and A.L.M. suffered.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: April *25,* 2018

/s/ Jennifer Kay Brackeen
Jennifer Kay Brackeen

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants, CHEROKEE NATION, et al., Intervenor-Defendants.	Civil Action No. 4:17-cv-868-O

DECLARATION OF HEATHER LYNN LIBRETTI

I, Heather Lynn Libretti, hereby declare that the following is true and correct, to the best of my knowledge.

1. I live in Sparks, Nevada, with my husband Nick. Nick is a veteran and currently employed as an auto-mechanic. I am a marketing and public relations manager for the largest nostalgic and classic car festival in the world.

2. My husband and I are active in service to our community. In 2009 we became foster-to-adopt parents, and in 2012 finalized our adoption of, two young boys. Their

older brother, who was 19 at the time, joined our family in 2014 and has become a third son to us. Our sons live with us and, along with their brother, are a central part of our family.

3. Neither Nick nor I am of Indian descent, nor are we eligible for membership in any federally recognized Indian Tribe.

4. Baby O. was born in Nevada in March 2016. Before Baby O.'s birth, her birth mother, Gracie Hernandez, determined that she would not be able to care for Baby O. and decided to put her up for adoption. She informed Renown Regional Medical Center of her decision. The Medical Center connected Gracie with Washoe County Human Services Agency, which arranged to place Baby O. for adoption.

5. We were overjoyed to bring Baby O. into our home. We first met Baby O. in the hospital two days after her birth. We were able to take her home with us on the third day after her birth.

6. Because of complications during her mother's pregnancy, Baby O. has serious medical needs. She has already required two surgeries and has another scheduled for later this summer. She has also had one extended hospital stay in the two years since her birth. Her needs continue to be ongoing. We have arranged all of her treatments with providers including her pediatrician, two pulmonary specialists, an ear, nose and throat specialist, an allergist, a gastrologist, and a neurologist in addition to a psychiatrist to assist with her anxiety and behavioral disorders and three therapists (occupational, developmental, and speech) to assist with her delays. These providers are all here in Nevada. We have played

an active and intricate role in managing her complex care throughout her life.

7. Baby O.'s biological father, E.R.G., has not played a part in her life. Through his attorney, he has indicated that he supports Gracie's decision to place Baby O. for adoption and that he supports our adoption of Baby O.

8. We began the process necessary for us to adopt Baby O. shortly after her birth more than two years ago. We are listed with the County as foster-to-adopt parents, which means that the County would place a child with us only if we would be able to adopt and provide a permanent home for the child.

9. One month after Baby O. was born, we were contacted by the County and learned that E.R.G. wanted a paternity test to prove that he was not Baby O.'s biological father. The test showed that he was Baby O.'s father.

10. On May 16, 2016, County officials came to our home and told us that Baby O. could no longer stay with us. They took her from her family and placed her in foster care. Later that month, Baby O.'s pediatrician observed that there was a decline in her progress during her time in foster care.

11. On June l, 2016, after extensive negotiations with County and city officials, the County agreed to return Baby O. to our home. At this point, Baby O. was just over three months old and had been taken from her home for more than two weeks.

12. On June 16, 2016, County officials brought E.R.G. to meet Baby O. This one visit is the only contact Baby O. has ever had with her biological father.

13. The following day, Gracie, Baby O.'s biological mother, contacted us to assure us that she wanted us to adopt Baby O. and to offer her support in any way she could help. We have remained in touch with Gracie since then. Gracie lives in Reno, Nevada, approximately a twenty-minute drive from our home in Sparks. Baby O.'s biological siblings live with Gracie. Beginning in the fall of 2017, we have brought Baby O. to visit with Gracie and with her biological siblings on many occasions. Baby O. has also met Gracie's family members, including Baby O.'s biological aunts and uncles. Gracie and Baby O.'s biological siblings remain an important part of Baby O.'s life. We have entered into a voluntary post-adoption agreement plan with Gracie that will allow Baby O. to remain in contact with her biological family.

14. After Baby O. was returned to us, we learned that the Ysleta del sur Pueblo Tribe, of which E.R.G.'s mother is a registered member, has intervened in these proceedings to block our adoption of Baby O. The Tribe has asserted that E.R.G. is a member of the Tribe and, without our consent or the consent of Baby O.'s biological mother, the Tribe claims to have registered Baby O. as a member of the Tribe. The Tribe has sought to remove Baby O. from our care in order to transport her to the reservation in Texas.

15. The Tribe also asserted its rights under ICWA to require Washoe County Human Services Agency officials to make an exhaustive search of Tribal members before contemplating placing Baby O. for adoption with us. The Tribe submitted more than forty members as potential placements and insisted that the County's Human Services Agency mail out fostering connection letters and complete home studies with each responsive

potential placement. Nevada officials completed nearly ten home studies, but most of the potential placements withdrew from consideration or were determined to be unfit placements. None of the Tribe's identified individuals sought to adopt Baby O. and none seeks foster custody over Baby O. Nick and I are the only people seeking to adopt Baby O.

16. After we joined this lawsuit and began to challenge the constitutionality of ICWA, the Ysleta del sur Pueblo Tribe agreed to enter into discussions to settle Baby O.'s adoption. Because of the Tribe's ability to delay and possibly derail the adoption proceeding under ICWA, we are eager to enter into a settlement that would allow us to adopt Baby O. As part of the settlement agreement that we negotiated with the Tribe, the Tribe has agreed not to contest our adoption of Baby O. We have agreed to continue to educate Baby O. about her father's cultural heritage and we have agreed to make visits to the Tribe's Reservation every three years during her childhood. These visits will be a financial burden on my husband and me.

17. Once the Court has reviewed our agreement with the Tribe, we anticipate that we will be able to move forward with adopting Baby O. As soon as we are able, we will formally petition for Baby O.'s adoption.

18. In addition to the anguish these delays have caused us, the threat to our adoption of Baby O. has also emotionally impacted our other children. Because of our experience with Baby O.'s adoption, our sons now fear that they could also be unexpectedly taken away from us. These disruptions and delays, including Baby O.'s

removal from our home, have destabilized and distressed our entire family.

19. My husband and I intend to provide foster care for, and possibly adopt, other children in the future. Prior to taking in Baby O., we have adopted two sons and lovingly accepted our sons' biological older brother into our family. Providing a home and a loving family to children in need has been one of the great joys of our lives together. But our experience with Baby O.'s adoption gives us great concern. We are concerned that we will encounter the same discriminatory experience with a future adoptive child that we have encountered with Baby O. Prior to our experience with Baby O., my husband and I intended to foster and adopt other children in the future. But we are reluctant to place ourselves or our potential future foster and adoptive children in a position where we will be unexpectedly separated from them because they are not of the same race as us.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: April *25*, 2018

/s/*Heather Lynn Libretti*
Heather Lynn Libretti

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al., Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants, CHEROKEE NATION, et al., Intervenor-Defendants.	Civil Action No. 4:17-cv-868-O

DECLARATION OF ALTAGRACIA SOCORRO HERNANDEZ

I, Altagracia Socorro Hernandez, hereby declare that the following is true and correct, to the best of my knowledge.

1. I live in Reno, Nevada, with my children. I live near the Libretti family and am in frequent contact with the Librettis and with Baby O.

2. Baby O. is my biological daughter. She was born in Nevada in March 2016.

3. For more than a decade, I was in a relationship with E.R.G., Baby O.'s biological father. We have never been married.

4. While I was pregnant with Baby O., I decided that I would not be able provide for her as I would have liked. When I delivered Baby O., I decided to place her for adoption. I spoke with the county's Social Services, and decided to surrender Baby O. for adoption placement.

5. Several months after Baby O. was born, I learned that E.R.G., Baby O.'s biological father, had been in contact with Social Services to contest my designation of him as Baby O.'s father. After he was determined to be Baby O.'s father, I learned that the Ysleta del Sur Pueblo Tribe planned to contest the adoption. To my knowledge, E.R.G. was not a member of the Tribe during our relationship or when Baby O. was born and has never lived on the reservation nor has he ever been to Texas. But E.R.G.'s mother is a member of the Tribe.

6. When the Tribe became involved, I learned that Social Services had removed Baby O. from the Librettis' home and planned to place Baby O. in a different home. When I learned that the Tribe intended to oppose Baby O.'s adoption, I connected with the Librettis to tell them that I would support them in any way that I could. I saw that Baby O. had found a home with the Librettis and that having the Librettis adopt Baby O. would be in her best interests.

7. Because I live in Reno, about twenty minutes from the Librettis, Baby O. has been able to visit with me and with her biological siblings. Baby O.'s biological siblings and I remain an important part of Baby O.'s life. The Librettis have agreed to a post-adoption plan that will

ensure that Baby O. stays in touch with her biological family.

8. Baby O.'s biological father, E.R.G., has not played a part in her life. He did not support me during my pregnancy and has never played a role in Baby O's care. E.R.G. has made contact with me in person and left a voicemail on my phone indicating his support for the Librettis to proceed with the adoption of Baby O. Through his attorney, he has also indicated that he supports my decision to place Baby O. for adoption and that he supports the Librettis' adoption of Baby O.

9. Baby O. has significant medical needs. The Librettis have ensured that these needs are met and have worked with all of Baby O.'s doctors and therapists to ensure she is constantly provided with the care that she needs. I do not believe that Baby O. would receive a similar level of care if she were sent to live with a foster family on the reservation in Texas. Out of concern for Baby O.'s medical and emotional needs, I strongly oppose any effort to relocate her away from the Librettis or out of Nevada to a strange place to live with people she has never met and who have no experience with the level of care that she requires.

10. When the Librettis petition to adopt Baby O., I will fully support their efforts. The Librettis have loved Baby O. as their own daughter and have lovingly welcomed her into their family. I believe being adopted by the Librettis is in Baby O.'s best interests.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: April *25,* 2018

/s/ Altagracia Hernandez

Altagracia Socorro Hernandez

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al.	§	
	§	
and	§	
	§	
STATE OF TEXAS, STATE OF LOUISIANA, and STATE OF INDIANA,	§	
	§	
Plaintiffs,	§	
	§	Civil Action No.
v.	§	4: l 7-cv-868-0
	§	
RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior, et al.	§	
	§	
Defendants,	§	
	§	
and	§	
	§	
CHEROKEE NATION, et al.	§	
Intervenor-Defendants.	§	

DECLARATION OF LINDA O'LEARY

The Undersigned states the following:

1. My name is Linda O'Leary. I am the duly appointed and confirmed Registrar of the Cherokee Nation. In this position, I am responsible for overseeing the management and supervision of the operations of the Tribal Registration office. My duties include ensuring federal and tribal compliance for the issuance of Cherokee Nation citizenship.

2. To enroll as a citizen with the Cherokee Nation, a citizenship applicant must be an original enrollee or a descendant of an original enrollee listed on the Dawes Commission Rolls, including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May, 1867, and the Shawnee Cherokees of Article II of the Shawnee Agreement dated the 9th day of June, 1869, and/or their descendants. Constitution of the Cherokee Nation, Article IV, Section 1 (attached as **Exhibit 1**). The Dawes Commission was established to make a count of all individuals living under the jurisdiction of each of the Five Civilized Tribes, which included the Cherokee Nation, for the purpose of allotting land. The Rolls for the Cherokee Nation were compiled in the early 1900s.

3. Original enrollees listed on the Dawes Commission Rolls will be found in the following sections of the Cherokee Dawes Roll:

A. Cherokees by Blood Section - this section contains Cherokee Indians, Shawnee Indians, Shawnee Adopted Whites, Delaware Indians who were not on the 1867 Delaware Registry, Adopted Whites that were descendants of Missionary Evan

Jones, and Adopted Whites that were descendants of white trader Joseph Hardin Bennett (with fifty-one individuals total listed as Adopted White);

B. Cherokee Minors by Blood Section - this section contains the children of those listed on the Cherokee by Blood Section who were born after September 1, 1902 and before March l, 1906;

C. 1914 Section - this section contains individuals who were left off previous enrollments, but were eligible for enrollment with the Cherokee Nation. This section was created by a Congressional act of Congress to open the rolls to include these individuals who were left off previous enrollments;

D. Freedmen section - this section contains Freedmen who were enrolled between 1899 and 1902;

E. Freedmen Minors section - this section contains Freedmen minors enrolled between September 1, 1902 and March 1, 1906;

F. Intennarried White section - this section contains white women and men married to Cherokee Indians prior to November 1, 1875;

G. Delaware Cherokee section - this section contains Delaware's who were on the 1867 registry of Delaware's who removed from Kansas to the Cherokee Nation per the Delaware-Cherokee agreement.

4. Freedmen refers to emancipated slaves owned by Cherokees and "all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants." Treaty with the Cherokee, 1866. A total of 4,971 Freedmen were listed on the Dawes Roll.

5. Pursuant to Cherokee Nation law, 11 CNCA §14 (attached as **Exhibit** 2), a Cherokee Nation citizenship application must be accompanied by documentation showing the applicant is a descendant of an original enrollee listed on the Dawes Commission Rolls.

6. The Cherokee Nation does not require a minimum quantum of Cherokee Indian blood to be a citizen of the Cherokee Nation. The only requirement is that a person be a descendant of an original enrollee of the Dawes Commission Rolls. Cherokee Freedmen are listed in the Freedmen sections of the Cherokee Dawes Roll. A descendent of an original enrollee of the Freedmen section is eligible for citizenship in the Cherokee Nation. Additionally, Adopted Whites are listed in the by blood section of the rolls. A notation next to the original enrollee of "AW" distinguishes these individuals from the Cherokee Indians on the by blood section. The Freedmen and Adopted Whites do not have any Cherokee blood. Nonetheless, the descendants of Freedmen and Adopted Whites are eligible for citizenship in the Cherokee Nation, as the requirement to be a citizen of the Cherokee Nation is not tied to the amount of lndian blood an individual possesses, but rather a connection to an original enrollee on the Cherokee Dawes Roll.

7. A citizen of the Cherokee Nation may relinquish their citizenship through a formalized process which includes the filing of a tribal citizenship relinquishment form, provided by the Registrar, with the District Court of the Cherokee Nation. A civil case will be opened wherein the Court or Nation's attorney shall make inquiries as to whether the

relinquishment process should proceed. A written order authorizing the citizen to submit the tribal citizen relinquishment form to the Registrar must be approved by the Court before submission. A citizen who relinquishes their citizenship shall be ineligible to re-enroll as a citizen for a period of 5 (five) years following the effective date of the relinquishment. 11 CNCA §34 (attached as **Exhibit 3**).

I declare under penalty of perjury that the foregoin g is true and correct and that it was executed on 5/23/18.

/s/ Linda O'Leary
Linda O'Leary

EXHIBIT 1

The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of March 3, 1893.

Article III. Bill of Rights

The People of the Cherokee Nation shall have and do affirm the following rights:

Section 1. The judicial process of the Cherokee Nation shall be open to every person and entity within the jurisdiction of the Cherokee Nation. Speedy and certain remedy, and equal protection, shall be afforded under the laws of the Cherokee Nation.

Section 2. In all criminal proceedings, the accused shall have the right to: counsel; confront all adverse witnesses; have compulsory process for obtaining witnesses in favor of the accused; and, to a speedy public trial by an impartial jury. The accused shall have the privilege against self-incrimination; and the Cherokee Nation shall not twice try or punish an accused for the same offense. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Section 3. The right of trial by jury shall remain inviolate, and the Cherokee Nation shall not deprive any person of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

Section 4. The Council shall make no law prohibiting the free exercise of religion or abridging the freedom of speech, or the press, or the right of the People to

peaceably assemble, or to petition the Nation for a redress of grievances.

Article IV. Citizenship

Section 1. All citizens of the Cherokee Nation must be original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls, including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May, 1867, and the Shawnee Cherokees of Article III of the Shawnee Agreement dated the 9th day of June, 1869, and/or their descendants.

Notwithstanding any provisions of the Cherokee Nation Constitution approved on October 2, 1975, and the Cherokee Nation Constitution ratified by the people on July 26, 2003, upon passage of this Amendment, thereafter citizenship of the Cherokee Nation shall be limited to those originally enrolled on, or descendants of those enrolled on, the Final Rolls of the Cherokee Nation, commonly referred to as the Dawes Rolls, for those listed as Cherokees by blood, Delaware Cherokees pursuant to Article II of the Delaware Agreement dated the 8th day of May, 1867, and the Shawnee Cherokees pursuant to Article III of the Shawnee Agreement dated the 9th day of June, 1869.

The Cherokee Nation recognizes the basic rights retained by all distinct People and groups affiliated with the Cherokee Nation, retained from time immemorial, to remain a separate and distinct People. Nothing in this Constitution shall be construed to prohibit the Cherokee–Shawnee or Delaware–Cherokee from pursuing their inherent right to govern

themselves, provided that it does not diminish the boundaries or jurisdiction of the Cherokee Nation or conflict with Cherokee law.

Section 2. There shall be established a Cherokee Register, to be kept by the Registrar, for the inclusion of any Cherokee for citizenship purposes in the Cherokee Nation who presents the necessary evidence of eligibility for registration. The Council may empower the Registrar to keep and maintain other vital records.

(a) A Registration Committee shall be established. It shall be the duty of the Registration Committee to consider the qualifications and to determine the eligibility of those applying to have their names entered in the Cherokee Register. The Registration Committee shall consist of a Registrar and two (2) assistants. All members shall be appointed by the Principal Chief and confirmed by the Council.

(b) There shall be a number assigned to every name, which is approved and entered into the Cherokee Register. This number shall be preceded by the three words, "Cherokee Registry Number."

(c) The decisions of the Registration Committee shall be subject to de novo review by the lower courts created by Article VIII.

Section 3. Registration as used in this Article refers to the process of enrolling as a citizen of the Cherokee Nation and is not the same as registration for voting purposes.

Article V. Distribution of Powers

The powers of the government of the Cherokee Nation shall be divided into three (3) separate branches: Legislative, Executive and Judicial; and except as provided in this Constitution, the Legislative, Executive and Judicial branches of government shall be separate and distinct and no branch shall exercise the powers properly belonging to either of the others.

Article VI. Legislative

Section 1. The legislature shall consist of one legislative body to be called the Council of the Cherokee Nation.

Section 2. The Council shall establish rules for its credentials, decorum, and procedure, and shall elect a Speaker and a Deputy Speaker from its own membership to officiate over Council meetings. The Speaker may vote in all matters before the Council. The Speaker shall be third in line of succession to serve as Acting Principal Chief in case of removal, death, resignation or disability of both the Principal Chief and Deputy Principal Chief until the disability be removed or a successor shall be elected.

EXHIBIT 2

A. Tribal citizenship is derived only through proof of Cherokee blood based on the Final Rolls.

B. The Registrar will issue tribal citizenship to a person who can prove that he or she is an original enrollee listed on the Final Rolls by Blood or who can prove to at least one direct ancestor listed by blood on the Final Rolls.

§ 13. Procedures

A. Applications for tribal citizenship should be completed by the applicant. A sponsor may complete the application, if the person is legally incompetent or a minor child.

B. Requests for applications for tribal citizenship should be made to the Registrar.

C. If the Registrar determines that the person has failed to submit acceptable documentation to establish his or her identity as the tribal citizen named in the records or his or her relationship to an ancestor by blood named in the records, the Registrar must deny the request. The denial must be in writing and mailed by certified mail. It must be received by the addressee only and a return receipt requested. The denial letter shall explain fully the reason(s) for rejecting the application and the right of appeal of the applicant.

§ 14. Documentation

A. Tribal citizenship applications must be completed and submitted with required documentation.

1. Acceptable forms of documentation for establishing relationship are:

a. Birth certificates. The document must be a state-certified, full image/photocopy of the original birth record showing parentage and containing the state seal, state registrar's signature, and the state file number. In those states where state law prohibits the release of full photocopies without a court order, computer generated or transcribed records are acceptable; however, these must be verified by a sworn statement or affidavit from the Indian parent. Individuals born outside the United States must obtain a certified copy of the official State Department record showing parentage. In cases where the State Department record is not available, then the foreign agency responsible for recording vital records must be contacted for a certified copy of the birth record. The certified foreign record must be submitted with the State Department notice of no record on file and a certified translation if needed.

b. Delayed certificates of birth. This document must be state-certified, full image/photocopy showing parentage and containing the state seal, state registrar's signature, and the state file number. State regulations cover the requirements for issuing these; however, for this purpose they are not fully acceptable by themselves and must be verified by at least one supporting document.

c. Certificate of death. This record must be state-certified, full image photocopy of the original record showing parentage and containing the state seal, state registrar's signature, and state file number. Death certificates must be verified by at least one of the supporting documents for verification that must help define the relationships as claimed.

d. Certificate of Degree of Indian Blood (CDIB). This record is the formal certification document issued by the Bureau of Indian Affairs.

2. Acceptable supporting documents must be original or certified copies and are listed as follows:

a. County and district court records

b. Hospital birth certificates

c. Birth certificates issued by the Bureau of Census

d. U.S. federal census records

e. Per capita payment records

f. Enrollment census cards

g. Social Security numident or extract

h. Affidavits. Affidavits are written declarations made under oath before a notary public, must be submitted in original form and are used for the following:

(1) For identification. Many people use more than one name. An affidavit may be used to certify that one person goes by two names or that two or more names actually refer to the same person.

(2) To clarify discrepancies in names for identification purposes. If identification is not questioned, minor variations in spelling, etc., may not require further proof.

(3) To help establish relationship.

(4) To establish paternity of children born out of wedlock. An acknowledgment of paternity must be signed by the natural father and presented to the Bureau of

Vital Statistics and his name must be added to the birth record.

i. Other documents. Other documents that define relationship may be considered.

3. Adoption documentation:

a. Adoption decree signed by the judge of the county where adoption proceedings occurred.

b. Replacement birth certificate showing new name and name(s) of the adoptive parent(s).

c. In some cases, the name(s) of the natural parent(s) will not appear on the adoption decree; therefore, other pertinent records will be required for verification of the Indian parent(s). These records may include the original birth certificate established at birth, hospital birth certificate containing the name(s) of the natural parent(s), or other legal documents at the discretion of the Registrar.

CHAPTER 3

APPEAL FROM ADVERSE ENROLLMENT ACTION

§ 21. Who may appeal

A person who is the subject of an adverse enrollment action may file or have filed on his or her behalf an appeal.

§ 22. Appeals generally

A. The requirements in this part are to provide procedures for the filing and processing of appeals from adverse enrollment actions by the Registrar.

B. Appeals from actions taken by the Registrar must be in writing and must be filed pursuant to 11 CNCA § 23.

C. The decision of the Supreme Court shall be final.

§ 23. Appeal procedure

A. An appeal must be in writing and must be filed with the Registrar designated in the notification of an adverse enrollment action.

B. A sponsor may file an appeal on behalf of another person who is subject to an adverse enrollment action.

C. An appeal filed by mail or filed by personal delivery must be post-marked and received in the office of the Registrar by close of business within thirty (30) days of the notification of an adverse enrollment action, unless the appeal is mailed from outside the United States, in which case the appeal must be postmarked and received by the close of business within sixty (60) days of the notification of an adverse enrollment action.

D. The appellant or sponsor shall furnish the appellant's mailing address in the appeal. Thereafter, the appellant or sponsor shall promptly notify the Registrar with whom the appeal was filed of any change of address; otherwise, the address furnished in the appeal shall be the address of record.

E. An appellant or sponsor may request additional time to submit supporting evidence. A ninety- (90) day period for such submission may be granted by the Registrar with whom the appeal is filed.

However, no additional time will be granted for the filing of the appeal.

EXHIBIT 3

however, prior to issuing the form the Registrar shall enter thereon the name of the citizen, the citizen's Registry number, the sponsor's name (if any), and the date of issuance of the form. No authorization form issued pursuant to this section may be used to obtain information or records relating to any citizen other than the citizen whose name and Registry number is entered on the form by the Registrar.

D. Whenever authority to release information or records cannot be obtained from the tribal citizen or sponsor, the Principal Chief or the Principal Chief's designee may authorize the release of such records or information to any person if the Principal Chief or the designee determines that the release of same would be appropriate under the circumstances of the request.

E. Nothing in this section shall prevent the Registrar from releasing copies of records or information pursuant to a bona fide request from a law enforcement official.

F. Listings, statistics, and labels from the tribal citizenship database must be approved by the Principal Chief or designee. The receiving of such requests are routed through the Registrar, who obtains the Chief's approval, and coordinates with other departments to facilitate the request.

G. The status of a person as an enrolled citizen of Cherokee Nation is hereby deemed to be public information. In addition to any other tribal citizenship information that the Registrar is now or may hereafter be authorized to release or otherwise make public under the laws of the Cherokee Nation, the Registrar is

authorized to disclose to any person, upon request, the following tribal citizen information:

1. Whether or not a person is currently enrolled as a citizen of Cherokee Nation, and, if so, the date on which the person became enrolled as a tribal citizen;

2. Whether or not a person has relinquished his or her tribal citizenship one or more times, and, if so, the date or dates on which the relinquishment of his or her tribal citizenship became effective under 11 CNCA § 34; and

3. Whether or not a person, having relinquished his or her tribal citizenship one or more times, has re-enrolled as a tribal citizen, and, if so, the date or dates upon which such person re-enrolled as a tribal citizen.

H. The Registrar shall maintain and keep current a list of the names of all persons who have relinquished their tribal citizenships, together with their former enrollment numbers and the effective dates of relinquishments of tribal citizenship. If any person appearing on the list re-enrolls pursuant to the Tribal Citizenship Act, the person's name shall remain on the relinquishment list but notation shall be made thereon of the re-enrollment and each of the date or dates on which such person re-enrolled as a citizen.

§ 34. Relinquishment

A. Any citizen or sponsor of a citizen of Cherokee Nation may request a tribal citizenship relinquishment form, which shall be furnished directly to the citizen or sponsor by the Registrar. Provided, however, if the person whose citizenship is to be relinquished is a minor child, the sponsor, in addition to the

requirements of 11 CNCA § 3(O), must also be that minor child's biological parent or adoptive parent. A sponsor who is not a minor child's biological parent or adoptive parent shall have no authority to act on such minor child's behalf in the relinquishment of the minor's tribal citizenship. The request for a tribal citizenship relinquishment form shall be made in person or in a writing signed by the citizen or the citizen's sponsor and delivered to the Registrar.

B. The Office of the Attorney General of Cherokee Nation is hereby authorized to prepare the tribal citizenship relinquishment form and any other necessary forms, which shall be consistent with the provisions of this section, to be used in connection with the relinquishment of tribal citizenship.

C. Upon receipt of a request pursuant to subsection (A) of this section, the Registrar shall issue to the citizen or sponsor a tribal citizenship relinquishment form. Provided, however, prior to issuing the form the Registrar shall enter thereon the name of the citizen, the citizen's registry number, the sponsor's name (if any) and the date of issuance of the form. No tribal citizenship relinquishment form may be used to relinquish the citizenship of any person other than that of the citizen whose name and registry number is entered on the relinquishment form by the Registrar.

D. The tribal citizen or sponsor shall complete and sign the tribal citizenship relinquishment form before a notary public, and file the notarized form with the Clerk of the District Court of Cherokee Nation, who shall open a civil case styled "In re the

relinquishment of citizenship of ____, a Tribal Citizen," without charging a filing fee, and shall assign the case a number. The relinquishment case so opened shall be set for an initial hearing on a date not more than thirty (30) days after the date of filing of the notarized form. The court clerk shall cause notice of the initial hearing to be delivered to the citizen at the time of filing or subsequently by first-class mail. Notice of the hearing shall also be mailed to the Cherokee Nation Department of Justice.

E. At the initial hearing, the tribal citizen or sponsor shall be placed under oath, and the Court or the Nation's attorney shall inquire of the citizen or sponsor who is relinquishing citizenship:

1. in any case where the tribal citizen whose citizenship is being relinquished is a minor, whether the sponsor is the biological parent or adoptive parent of the minor citizen and is otherwise qualified to act as a sponsor under 11 CNCA § 3(O); whether the minor citizen is currently the subject of a deprived child, juvenile delinquency, adoption or other proceeding involving the custody of the minor; and whether any person with parental or custodial rights to the child disputes the relinquishment or who, if unaware of the relinquishment proceeding, would likely dispute the relinquishment if he or she were aware of same;

2. whether the tribal citizen or sponsor is aware that by relinquishing tribal citizenship, all benefits and privileges to which the citizen is entitled as a consequence of being a citizen will be forfeited upon the effective date of relinquishment of citizenship; and

3. if the person whose citizenship is being relinquished is eighteen (18) years of age or older or will be of such age by the time the relinquishment form will be submitted to the Registrar pursuant to subsection (A) of this section, whether the tribal citizen or sponsor is aware that said person will not be eligible to re-enroll as a tribal citizen for a period of five (5) years following the effective date of the relinquishment.

F. At the conclusion of the initial hearing, the Court shall issue a written order authorizing the citizen or sponsor to submit the tribal citizen relinquishment form to the Registrar unless, based on the citizen's or sponsor's testimony, the Court finds:

1. in any case where the person whose citizenship is to be relinquished is a minor, that the person acting as a sponsor is not the child's biological parent or adoptive parent or is not qualified to act as a sponsor under the provisions of 11 CNCA § 3(O); that the minor citizen is the subject of a deprived child, juvenile delinquency, adoption or other custodial proceeding pending in any court; or that another person with parental or custodial rights with regard to the minor citizen disputes the relinquishment or, if such other person is unaware of the relinquishment request, he or she would likely dispute the relinquishment if he or she were aware of same; or

2. that the citizen or sponsor indicates that he or she had been unaware of the consequences of relinquishment and requests of the Court additional time in order to reconsider the decision to relinquish, in which event the Court shall reschedule the hearing for a

later date to determine whether the citizen or sponsor wishes to proceed with relinquishment. If at the rescheduled hearing the citizen or sponsor thereafter indicates that he or she no longer wants to relinquish citizenship, or fails to appear at the rescheduled hearing without first requesting a continuance, the Court shall dismiss the action without prejudice. Otherwise, the Court shall issue an order authorizing submission of the relinquishment form to the Registrar in accordance with this section.

G. If at the conclusion of the initial hearing the Court finds that the person whose citizenship is to be relinquished is a minor child and that the person seeking the relinquishment of the minor child's citizenship is not the child's biological parent or adoptive parent or is not otherwise qualified to act as the child's sponsor, the Court shall issue an order dismissing the case without prejudice. If the Court finds that the person is qualified to act as the minor child's sponsor but that the minor is the subject of a deprived child, juvenile delinquency, adoption or other custodial proceeding, or that another person has parental or custodial rights with regard to the child and disputes or would likely dispute the relinquishment, the Court shall schedule another hearing no more than thirty (30) days after the initial hearing and shall require that notice of same be given to all persons known to the Court to have parental or custodial rights with regard to the minor citizen. All such persons, including the Nation through its attorneys, may appear at the subsequent hearing and present evidence and testimony of witnesses on the issue of whether or not relinquishment of tribal citizenship would be in the best interest

of the minor citizen. Within fifteen (15) days after the conclusion of the subsequent hearing the Court shall issue its order and decision on whether relinquishment would be in the best interests of the minor citizen. The party seeking to have the child's citizenship relinquished shall have the burden of proving such by a preponderance of the evidence.

H. All Cherokee Nation District Court hearings required under this section involving minor citizens, and the Court files associated therewith, shall be confidential and closed to the public as in other juvenile cases; provided, copies of any court order authorizing or denying relinquishment shall be made available to the Registrar for filing in the minor child's citizenship records in accordance with this section but shall not otherwise be subject to public disclosure under this or any other law of Cherokee Nation. The Registrar shall not reproduce, release or disclose the contents of any such order to any person except as expressly authorized by order of Cherokee Nation District Court or Supreme Court.

I. If after any hearing authorized by this section the Court, having determined that the relinquishment process should proceed, issues an order allowing the citizen or sponsor to submit the tribal citizenship relinquishment form to the Registrar, the citizen or sponsor must, within sixty (60) days following the issuance of the order, deliver certified copies of the order and the notarized relinquishment form to the Registrar, which copies shall be made available to the citizen or sponsor by the court clerk without charge. Upon timely receipt of the certified copies of the Court's order and the relinquishment form, the

Registrar shall stamp both with the date on which they were received by the Registrar and place them in the tribal citizen's file. The Registrar shall not accept the relinquishment form without the certified copy of the Court's order authorizing relinquishment to proceed. The relinquishment of the person's tribal citizenship shall become effective sixty (60) days after the date on which the certified copies of the Court's order and tribal citizenship relinquishment form were delivered to the Registrar in accordance with this subsection, unless prior to the expiration of said sixty- (60) day period the Registrar receives a written request from the citizen or sponsor that the tribal citizenship relinquishment form be revoked or withdrawn. If a written request by the tribal citizen or sponsor to revoke or withdraw his or her tribal citizenship relinquishment form is delivered to the Registrar prior to the expiration of the sixty- (60) day period, the tribal citizenship relinquishment form shall be deemed withdrawn and the person's status as a tribal citizen shall continue as if the relinquishment form had never been received by the Registrar.

J. Except as provided in subsections (K) and (M) of this section, any person who has relinquished his or her tribal citizenship may re-enroll at any time as a tribal citizen pursuant to 11 CNCA §§ 11, 12, 13 and 14.

K. Any person who relinquishes his or her own tribal citizenship in accordance with the provisions of this section shall be ineligible to re-enroll as a tribal citizen for a period of five (5) years following the effective date of his or her relinquishment of tribal citizenship if, but only if:

1. the certified copies of the notarized tribal citizenship relinquishment form and the Court's order authorizing relinquishment to proceed were received by the Registrar on or after the effective date of the Tribal Citizenship Relinquishment and Technical Amendments Act of 2002, LA 16–02; and

2. the tribal citizen whose citizenship was relinquished was eighteen (18) years of age or older on the date on which the certified copies of said relinquishment form and order were received by the Registrar.

Upon the expiration of said five- (5) year period following the effective date of his or her relinquishment, such person shall be eligible to re-enroll as a citizen in accordance with the provisions of this Title; provided, however, no person subject to the five- (5) year ineligibility period of this subsection shall be eligible to re-enroll as a citizen if, at any time after the effective date of his or her relinquishment, the person was convicted of a felony or of any crime involving moral turpitude under the laws of any federally-recognized Indian tribe, state or the United States; and provided further that in addition to all other requirements for enrollment under this Title, any person subject to the five- (5) year ineligibility period of this subsection who thereafter seeks to re-enroll as a tribal citizen must also execute an affidavit affirming under oath that at no time subsequent to the effective date of his or her relinquishment had he or she been convicted of any such felony or crime of moral turpitude. Said affidavit must be presented to the Registrar together with the application to re-enroll.

L. The provisions of subsection (K) of this section shall not apply to any person who was under the age of eighteen (18) years of age at the time his or her tribal citizenship relinquishment form was received by the Registrar or whose citizenship was relinquished through a sponsor, or to any person, regardless of age, whose tribal citizenship relinquishment form or other document requesting or declaring his or her relinquishment of tribal citizenship was received by the Registrar prior to the effective date of the Tribal Citizenship Relinquishment and Technical Amendments Act of 2002, LA 16–02.

M. Any person who relinquished his or her citizenship but, as of the effective date of the Tribal Citizenship Relinquishment and Technical Amendments Act of 2002, L.A. 16–02, had not re-enrolled as a citizen, may apply for re-enrollment by delivering to the Registrar a completed application to re-enroll no later than two hundred seventy (270) days following the effective date of said Act. Any such person who fails to deliver to the Registrar a completed application to re-enroll prior to the expiration of said two hundred seventy- (270) day period following the effective date of the Tribal Citizenship Relinquishment and Technical Amendments Act of 2002 shall be ineligible to re-enroll as a citizen for the remainder of the five- (5) year period commencing on the effective date of said act. Provided, however, the re-enrollment ineligibility period of this subsection shall not apply to any person who was at the time of his or her relinquishment less than eighteen (18) years of age or whose relinquishment was procured through a sponsor. For the purposes of this subsection, the term **"completed**

application" means an application to re-enroll as a citizen that substantially complies with the provisions of 11 CNCA §§ 11, 12, 13 and 14 and is submitted to the Registrar simultaneously with all documentation required by 11 CNCA § 14. No later than thirty (30) days after the effective date of LA 16–02, the Registrar shall cause notice of the provisions of this subsection (M) to be sent by first-class mail to the last known address of all persons who are subject to the re-enrollment ineligibility period of this subsection. The Registrar shall also cause notice of this subsection to be published in the next issue of the *Cherokee Phoenix* and *Indian Advocate* published after the effective date of said LA 16–02.

N. Commencing on the effective date of the Tribal Citizenship Relinquishment and Technical Amendments Act of 2002 (LA 16–02), all tribal citizenship relinquishment forms shall include the following language above the signature line:

NOTICE: THE RELINQUISHMENT OF YOUR TRIBAL CITIZENSHIP HAS SERIOUS CONSEQUENCES

I, THE UNDERSIGNED, UNDERSTAND THAT ANY PERSON 18 YEARS OF AGE OR OLDER WHO RELINQUISHES HIS OR HER TRIBAL CITIZENSHIP DOES THEREBY ALSO WAIVE THE RIGHT TO RE–ENROLL AS A CITIZEN OF CHEROKEE NATION FOR A PERIOD OF FIVE YEARS FOLLOWING THE EFFECTIVE DATE OF THE CITIZENSHIP RELINQUISHMENT.

I UNDERSTAND THAT BY RELINQUISHING MY TRIBAL CITIZENSHIP I WILL LOSE ALL BENEFITS THAT I MAY BE ENTITLED TO BY

VIRTUE OF MY STATUS AS A CITIZEN OF CHEROKEE NATION.

I UNDERSTAND THAT THIS RELINQUISHMENT OF TRIBAL CITIZENSHIP WILL BECOME EFFECTIVE 60 DAYS AFTER THE DATE ON WHICH THIS RELINQUISHMENT FORM IS RECEIVED BY THE REGISTRAR UNLESS, BEFORE THE END OF THAT 60–DAY PERIOD, I DELIVER TO THE REGISTRAR A WRITTEN REQUEST TO REVOKE OR WITHDRAW THIS RELINQUISHMENT FORM.

§ 35. Recognition of Delaware Tribe of Cherokee Nation—Rights and duties of Delaware Tribe and Cherokee Nation and citizens thereof—Proposal of and conduct of referendum upon governing document for Delaware Tribe—Election of tribal officers

A. Cherokee Nation hereby recognizes that since 1867 the Delaware Tribe of Indians has maintained a separate, distinct identity within Cherokee Nation with its citizens having full rights of Cherokee citizenship.

B. Cherokee Nation does recognize the Delaware citizens to be citizens of the separate, domesticated Delaware Tribe with all inherent rights retained by the Delaware Tribe not specifically restricted by the Congress of the United States.

C. Cherokee Nation shall assist, as requested by Delaware Tribal resolution, to purchase and have placed in trust, land on which to develop income generating economic business and industry. No monies shall be

committed for this purpose from Cherokee Nation except as shall be authorized and appropriated by Cherokee Nation. Revenues derived from land so placed in trust or businesses established are to be used for the exclusive benefit of the Delaware Tribal Council by such resolutions as may be appropriate.

D. Cherokee Nation will permit independent operation of the Delaware Tribe, its elected officials, citizens and businesses, except upon request by resolution from Cherokee Nation.

E. The Delaware Tribe will conduct its business in a manner to permit independent operation of Cherokee Nation, its elected officials, citizens and businesses, except upon request by resolution from Cherokee Nation.

F. Delaware Tribal citizens that are on or descendants from the Dawes Roll, June 21, 1906 (34

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al., And STATE OF TEXAS, STATE OF LOUISIANA, and STATE OF INDIANA, Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the United States Department Of the Interior, et al., et al., Defendants, THE CHEROKEE NATION, et al., Intervenor-Defendants,	Civil Action No. 4:17-cv-868-O

DECLARATION OF CHERYL J. SKOLASKI

I, Cheryl J. Skolaski, declare as follows:

1. I am making this Declaration in support of the Oneida Nation's Motion for Summary Judgment and in opposition to the Plaintiffs' Motions for Summary Judgment in the above-captioned case.

2. I am the Director of Enrollments for the Oneida Nation located on the Oneida Indian Reservation in Wisconsin. I have been continuously employed in this capacity since 1994. My duties include supervision of the staff of the Nation's Enrollment Department; preparation of the Department' s budget; oversight per capita distributions to the membership; and validation of new enrollments, descendancy determinations, and relinquishments.

3. The Oneida Trust Enrollment Committee is a nine-member board which is responsible for maintaining the official rolls of the Oneida Nation and has developed procedures governing the enrollment process. Eight members of the Committee are elected at large by the qualified voters of the Oneida Nation, and the ninth member is appointed by the Oneida Business Committee from among its own ranks.

4. The Constitution of the Oneida Nation and Chapter 124 of the Oneida Code of Laws provide that the membership of the Nation shall consist of those who appear on the membership roll of the Oneida Nation in accordance with the Act of September 27, 1967 (81 Stat. 229), Public Law 90-93 and children of those members on the roll who satisfy additional membership requirements.

5. The Oneida Membership Ordinance prohibits dual enrollment, i.e., simultaneous enrollment in the

Oneida Nation and another tribe, and provides that a member may voluntarily relinquish his or her membership. *Id.* §§ 12.4-3 and 12.4-4.

6. Under the Oneida Constitution and the Oneida Membership Ordinance, a person of Oneida Indian Blood, even if she is full-blood Oneida, is not entitled to enrollment if the person cannot trace his or her ancestry to the 1967 base roll, or if the person is enrolled in another Indian tribe.

I declare under the penalty of perjury that the foregoing is true and correct and that it was executed by me on 5/24/2018.

/s/ Cheryl J. Skolaski
Cheryl J. Skolaski

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 6, 2021
Lyle W. Cayce
Clerk

No. 18-11479

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,

Plaintiffs — Appellees,

versus

DEB HAALAND, *Secretary, United States Department of the Interior;* DARRYL LACOUNTE, *Acting Assistant Secretary for Indian Affairs*; BUREAU OF INDIAN AFFAIRS; UNITED STATES OF AMERICA; XAVIER BECERRA, *Secretary, United States Department of Health and Human Services;* UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants — Appellants,

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants — Appellants.

[SEAL]

Certified as a true copy and issued
as the mandate on Jun 01, 2021

Attest: *Lyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:17-CV-868

Before OWEN, *Chief Judge*, and JONES, SMITH, WIENER, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, DUNCAN, ENGELHARDT, and OLDHAM, *Circuit Judges*.[2]

JUDGMENT ON REHEARING EN BANC

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED IN PART, REVERSED IN PART and RENDERED.

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[2] JUDGE HO was recused and did not participate. JUDGE WILSON joined the court after the case was submitted and did not participate.

PRISCILLA R. OWEN, *Chief Judge*, concurring in part, dissenting in part.

JACQUES L. WEINER, JR., *Circuit Judge*, dissenting in part.

HAYNES, *Circuit Judge*, concurring.

STEPHEN A. HIGGINSON, *Circuit Judge*, concurring part, with whom Judge Costa joins.

GREGG COSTA, *Circuit Judge*, concurring in part and dissenting in part.