IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CHRISTINNA JANE MALDONADO, SAMANTHA DANIELLE LANCASTER, and JANE DOES 1 through 10, whose true names are unknown, Plaintiffs, v. ERIC HOLDER, in his official capacity as Attorney General of the United States, the UNITED STATES OF AMERICA, and THE CHEROKEE NATION, Defendants.	Case No. 2:13-cv-02042-DCN CIVIL ACTION

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

This case involves provisions of the federal Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901-63, which applies to any custody proceeding involving an "Indian child." Congress enacted ICWA with good intentions, in response to a real problem. More than 30 years ago, Congress observed what it perceived to be a pattern of unjustified removal of Native children from their families by biased state welfare agencies. ICWA was also intended to protect "the relationship between Indian tribes and Indian children domiciled on the reservation." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34, 52 (1989).

But the statute by its terms unfortunately was written with a much thicker pen, sweeping within it children who do not have, and would not have – but for ICWA – any connection

whatsoever to any Tribe other than biology, no matter their predominant ethnic or racial background, no matter their domicile, and irrespective of whether their sole custodial birth mothers — their only legal parents — have even a trace of Indian blood.

As relevant here, ICWA's placement provisions purport to preempt state law in these matters and command state family courts as follows: "In any adoptive placement of an Indian child under State law, a preference shall be given, in the 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). The many children who fall within the statute's grasp are specially disabled from finding stable, permanent, adoptive homes that are in their best interests – on account of an accident of ancestry. And, in derogation of ICWA's stated purpose of protecting Indian children and their families, §1915 in fact causes great harm to Indian children (solely on the basis of their race and ancestry) through the arbitrary and unconscionable destruction of the only families they have ever known and the unceremonious disregard for the rights of their birth mothers to direct their upbringing according to the children's best interest.

ICWA tells a single unmarried woman who wishes to choose adoptive parents for her unborn child—a choice that would be respected under her State's laws—that she must either terminate her pregnancy, raise the child herself, or surrender her child to a Tribe that is a total stranger to her and to the unborn child. Even if Congress is empowered to enact legislation respecting child custody matters involving children whose parents are domiciled on tribal lands, Congress may not override a woman's deeply personal decision to place her child with a loving and fit adoptive family, and impose special disabilities on that child, in the name of tribal

sovereignty. ICWA's placement provisions are a violation of the Equal Protection Clause, the Due Process Clause, and the Tenth Amendment to the United States Constitution.

Plaintiffs Samantha Danielle Lancaster, Christinna Jane Maldonado, and Jane Does 1 through 10, whose true names are unknown, by their undersigned attorneys, accordingly allege as follows:

NATURE OF ACTION

1. This is a civil action brought by Plaintiffs Samantha Danielle Lancaster, Christinna Maldonado and Jane Does 1 through 10 against Defendants Eric Holder, in his official capacity as an Attorney General of the United States, the United States of America, and the Cherokee Nation, for a declaration that the adoptive placement provisions of the Indian Child Welfare Act, codified at 25 U.S.C. §1915, are facially unconstitutional and unconstitutional as applied to Plaintiffs and their minor children, and for preliminary and permanent injunctive relief preventing the enforcement of those provisions.

PARTIES

2. Plaintiff Christinna Maldonado is a non-Indian Hispanic woman who resides in the State of Oklahoma. On September 15, 2009, she gave birth to a daughter, Veronica Rose Maldonado (also known as "Baby Girl"). Plaintiff was not married at the time of Baby Girl's birth and remains unmarried today. Plaintiff Maldonado's birth child, Baby Girl, is an "Indian Child" within the meaning of ICWA, 25 U.S.C. 1903(4), because Baby Girl's biological father is approximately 2% (3/128th) Cherokee and is a registered member of the Cherokee Nation. Baby Girl is eligible for membership in the Cherokee Nation solely because of her 3/256th (1%) Cherokee blood quantum. Baby Girl has resided in the State of South Carolina for the majority of her life and has never been domiciled on Indian lands.

3. Plaintiff Maldonado selected a non-Indian couple, Matthew and Melanie Capobianco ("Adoptive Couple"), residents of the State of South Carolina, as the adoptive parents of Baby Girl. The courts of the State of South Carolina have found that Adoptive Couple are "ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl." *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 657 (S.C. 2012).

4. Plaintiff Samantha Danielle Lancaster, is a Caucasian woman who resides in Minnesota and who believes she may be 1/64th Cherokee. She is the mother of Abigail Arlene Lancaster, born on June 19, 2013. The biological father of the child also is Caucasian (with no Indian ancestry). They jointly seek to place their biological child with an adoptive couple of their choice in an open adoption. Plaintiff Lancaster has chosen the prospective adoptive parents because she believes they will provide a bright, stable, and happy future for her child.

5. Plaintiff Lancaster chose a non-Indian couple, Joseph and Sarah Bateman, whom she met through an adoption agency, Bethany Christian Services. Despite the fact that neither biological parent is a member of an Indian tribe, she has been advised that the Cherokee Nation has been notified of her suspected Indian heritage and that ICWA's preferred placement provisions may apply to block the planned adoption, because the Cherokee Nation has taken the position that it may deem her child a member of the Nation solely on account of a trace of Indian blood, over her fit parents' objection.

6. Plaintiffs Jane Does 1 through 10 (hereinafter "Birth Mothers"), whose true names are unknown, are unwed non-Indian birth mothers of children who are "Indian" within the meaning of ICWA, because the unwed biological fathers of such children have at least one Native American ancestor and have registered with a federally recognized Indian tribe. Birth Mothers' children are eligible for membership in a tribe on account of their Indian blood quantum.

7. Birth Mothers have selected for their unborn or infant children adoptive parents who are disfavored placements under ICWA on account of the prospective adoptive parents' race, ethnicity, and/or citizenship status.

8. Plaintiffs were, at all relevant times, the sole legal custodians of their birth children. Neither Plaintiffs nor their birth children have ever been domiciled on Indian lands.

9. Defendant Eric Holder, in his official capacity of Attorney General of Defendant the United States, is entrusted with the responsibility of defending the constitutionality of the laws of the United States.

10. Defendant Cherokee Nation is a recognized Indian Tribe with more than 300,000 enrolled members and is headquartered in Tahlequah, Oklahoma.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as the complaint presents a federal question arising under the laws of the United States.

12. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events giving rise to at least one Plaintiff's claim occurred in this district.

13. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

14. As alleged herein, an actual, substantial, and immediate controversy is presented regarding the rights of the parties and the constitutionality of 25 U.S.C. § 1915. The controversy is justiciable in character, and speedy relief is necessary to preserve Plaintiffs' rights.

15. The injury to plaintiffs is capable of repetition yet evading review.

16. The relief sought herein will redress Plaintiffs' constitutional injury. A preliminary injunction, enjoining Defendants from taking any action to enforce the challenged provisions of the Act, will protect Plaintiffs' rights while these proceedings are pending. A permanent

injunction, enjoining Defendants from enforcing the challenged provisions of the Act, will protect Plaintiffs' rights after the final resolution of these proceedings.

GENERAL ALLEGATIONS

17. On September 15, 2009, Plaintiff Maldonado gave birth to Baby Girl.

18. Prior to Baby Girl's birth, Plaintiff Maldonado was briefly engaged to Baby Girl's biological father, Dusten Brown (also known as "Dustin Brown"). Mr. Brown did not provide any financial or other support to Ms. Maldonado at any time during the pregnancy, despite his acknowledged ability to do so. When Maldonado was approximately 6 months pregnant, in June 2009, Maldonado asked Brown whether he would like to retain his parental rights and pay child support or would rather give up his parental rights. Brown responded in a series of text messages that he wanted to give up his parental rights. Consistent with his stated intentions, Brown did not provide any financial or other support to Maldonado for the duration of the pregnancy.

19. Because Brown willfully failed to provide any support and "made no meaningful attempts to assume his responsibility of parenthood," he legally abandoned Baby Girl and his consent to the adoption of Baby Girl is not required under applicable state law. *Adoptive Couple v. Baby Girl*, 570 U.S. ___, No. 12-399, slip op. at 4-5 (U.S. June 25, 2013); *Adoptive Couple*, 398 S.C. at 677.

20. Following Brown's abandonment of Baby Girl, Plaintiff Maldonado chose to place Baby Girl with adoptive parents in an open adoption that would allow her to have continued contact with her child. She ultimately chose Matthew and Melanie Capobianco ("Adoptive Couple")—a married couple residing in this district, whom Maldonado met through the Nightlight Christian Adoptions Agency. Adoptive Couple share Plaintiff Maldonado's religious beliefs and values,

and agreed to an open adoption, through which Maldonado would remain involved in Baby Girl's life. Absent ICWA, Maldonado's choice of adoptive parents for her birth child would have been governed by and respected by state law.

21. Applicable state law recognizes that fit birth mothers who are not married and have sole custodian rights have the right to select adoptive parents for their children, subject only to the traditional state-law inquiry into the "best interests of the child."

22. Recognizing the importance of this right, many of the nation's leading adoption agencies (including the many affiliates of Catholic Charities) assure women dealing with unplanned pregnancies that if they choose adoption, they will be able to select the family with whom their child will be placed. *See generally* Carol Sanger, *Placing the Adoptive Self*, in Child, Family, and State 58, 77-78 (Stephen Macedo & Iris Marion Young eds., 2003). Indeed, the evolution from "closed" to "open" adoptions—adoptions in which the adoptive family is chosen by, or at least known to, the birth mother—was grounded on a recognition that such openness is "central to sustaining adoption as a social institution." *Id.* at 81 & n.66.

23. Adoptive Couple raised Baby Girl as their daughter for the first 27 months of her life. Plaintiff Maldonado remained close with the family and involved in her biological daughter's life, receiving frequent updates from Adoptive Couple and visiting Baby Girl in Adoptive Couple's home on at least two occasions. Adoptive Couple initiated adoption proceedings in the Family Court of Charleston County on September 18, 2009, days after bringing Baby Girl home.

24. On January 6, 2010, Brown was served with timely notice of the adoption proceedings pursuant to S.C. Code §§ 63-9-310(A), 63-9-730(E). In addition to his unequivocally expressed desire to terminate his parental rights and his willful failure to provide any financial support during the pregnancy, Brown did not attempt to provide any financial or emotional support

between Baby Girl's birth and the date on which he was served with timely notice of the adoption, despite his acknowledged ability to do so. Indeed, despite knowing Maldonado's due date, Brown did not inquire with Maldonado about Baby Girl's health and wellbeing and did not even know whether Baby Girl had been born until he was served notice of the adoption proceedings.

25. The courts of South Carolina and the Supreme Court of the United States have determined that, due to his willful abandonment of Baby Girl, Brown's consent to an adoption of Baby Girl is not required under applicable South Carolina law. *See Adoptive Couple*, 398 S.C. at 643 n. 19; *Adoptive Couple*, slip op. at 13.

26. Brown initially signed a formal notice and consent, which stated that he is Baby Girl's biological father and does not contest the adoption by Adoptive Couple. Nevertheless, on January 11, 2010, Brown requested and obtained a stay of the South Carolina adoption proceedings.

27. Three days later, Brown filed a complaint in Oklahoma state court against Ms. Maldonado and Adoptive Couple seeking custody of Baby Girl. The Cherokee Nation intervened in the Oklahoma action on March 30, 2010. The Oklahoma court dismissed for lack of jurisdiction on June 28, 2010, because of the pending South Carolina action.

28. On April 7, 2010, Defendant Cherokee Nation intervened in the South Carolina adoption proceedings. No other party intervened in the adoption proceedings seeking to adopt Baby Girl. Nor did the Cherokee Nation propose an alternative adoptive placement for Baby Girl.

29. As the only contesting parties in the South Carolina family court adoption proceedings, Brown and the Cherokee Nation sought to prevent Adoptive Couple from adopting Baby Girl on the ground that Brown's consent was required under ICWA and that his parental rights could not

be involuntarily terminated under ICWA. Alternatively, Brown and the Cherokee Nation argued that Adoptive Couple could not adopt Baby Girl because Adoptive Couple had failed to establish "good cause" to deviate from the placement preferences set forth in § 1915.

30. Congress enacted ICWA in 1978 in response to abusive child welfare practices that resulted in a large number of Indian children "involuntarily separated" from their families. ICWA was also intended to protect "the relationship between Indian tribes and Indian children domiciled on the reservation." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34, 52 (1989).

31. In light of that purpose, ICWA provides, in relevant part, that state courts may not terminate the parental rights of a parent of an Indian child unless "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 proved unsuccessful." 25 U.S.C. § 1912(d).

32. Further, the Act provides that "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).

33. Section 1915(a) of the Act provides that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the 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).

34. After a trial, when Baby Girl was 27 months old, the South Carolina family court concluded that ICWA not only gave Dusten Brown the right to contest the adoption but also mandated an immediate transfer of custody from Adoptive Couple to him.

35. Pursuant to the family court's order, on the evening of December 31, 2011, Adoptive Couple surrendered Baby Girl—then nearly two-and-a-half years old—to the custody of Dusten Brown, with whom Baby Girl had had no prior contact because of Brown's willful abandonment of her. The day after Baby Girl was surrendered to Brown, Brown terminated all contact with Adoptive Couple and birth mother Maldonado, and prevented any further contact between Baby Girl and her adoptive parents and birth mother.

36. On appeal, a sharply and closely divided Supreme Court of South Carolina affirmed the transfer of custody "with a heavy heart." *Adoptive Couple*, 398 S.C. at 657. The three-justice majority believed that ICWA compelled the result. The majority stated, among other things, that placement with Adoptive Parents, who are not Indian, did not comport with ICWA's "hierarchy of preferences" for adoptive placement with Indian families. *Id.* at 655.

37. The two dissenting justices would have ordered immediate finalization of Baby Girl's adoption and "the immediate return" of Baby Girl to Adoptive Couple.

38. The United States Supreme Court granted certiorari on January 4, 2013.

39. Plaintiff Maldonado filed briefs in the U.S. Supreme Court as an *amica curiae*, arguing that the state courts' interpretation of ICWA unconstitutionally interfered with her selection of Adoptive Couple, whom she had hand-picked for her baby as the sole legal custodian and fit birth mother of Baby Girl. She also argued that state courts' interpretation of ICWA violated Baby Girl's rights to due process and equal protection of the laws. *See* Brief of *Amica Curiae* Birth Mother in Support of Petitioners and Baby Girl (Feb. 26, 2013) (merits); Brief of *Amica Curiae* Birth Mother in Support of Petitioners (Oct. 31, 2012) (in support of cert.).

40. On June 25, 2013, the Supreme Court of the United States reversed, holding that ICWA did not give Brown the right to object to the adoption. *Adoptive Couple*, 570 U.S. ___, slip op. at

13. The Court further held that ICWA's preferred placement provisions were not implicated, because § 1915(a)'s adoption placement preferences "are inapplicable in cases where no alternative party has formally sought to adopt the child," "because there simply is no 'preference' to apply if no alternative party that is eligible to be preferred under §1915(a) has come forward." Slip Op. at 15. Because Adoptive Couple was "the only party that sought to adopt Baby Girl" in the South Carolina courts, neither the "paternal grandparents," nor any "other members of Cherokee Nation" or "other Indian families" could be considered as alternative placement. Slip Op. at 15-16. The Court further held that Brown himself cannot invoke §1915(a) because, as the biological father, he did not seek to adopt Baby Girl but merely argued that he had a parental right to custody. Slip Op. at 15.

41. The Supreme Court further stated that if ICWA's provisions were interpreted to allow Brown to "play his ICWA trump card at the eleventh hour to override [Maldonado's] decision and the child's best interests," the statute "would raise equal protection concerns." Slip Op. at 16-17.

42. The U.S. Supreme Court remanded the case for further proceedings not inconsistent with its opinion.

43. The U.S. Supreme Court expedited the issuance of its mandate to the South Carolina Supreme Court, at Adoptive Couple's request and over the objections of Dusten Brown and the Cherokee Nation.

44. But before the U.S. Supreme Court's mandate issued, and notwithstanding the U.S. Supreme Court's holding that §1915 is inapplicable to Baby Girl's particular custody proceedings, Dusten Brown together with his wife Robin, filed a petition for adoption of Baby Girl in Nowata County court in Oklahoma. At the same time, Tommy and Alice Brown (Dusten

Brown's parents) filed a conditional petition for guardianship in the District Court for the Cherokee Nation. These petitions were prepared and filed after the U.S. Supreme Court ruled against Brown on the applicability of ICWA, and *three years* after Brown and Defendant Cherokee Nation intervened in Baby Girl's ongoing South Carolina adoption proceedings.

45. The Browns and the Cherokee Nation assert that these new adoption petitions entitle them to preferential treatment over Birth Mother's choice, Adoptive Couple, who are not Indian, pursuant to the placement preferences set forth in § 1915 of ICWA.

46. On July 17, 2013, the South Carolina Supreme Court issued an order granting Adoptive Couple's Emergency Motion for Final Order Following Remand and denying Brown's Motion to Remand, in which the Cherokee Nation joined, in its entirety. *See* 7/17/2013 Order.

47. Noting that "[a] majority of the Supreme Court has cleared the way for this Court to finalize Adoptive Couple's adoption of Baby Girl," *id.* at 2, the majority rejected Brown's contentions that the recently-filed adoption petitions by Brown, his wife, and his parents in Oklahoma and tribal court are entitled to consideration under §1915.

48. Plaintiff Maldonado has never been, and is not currently, a party to the pending state court proceedings.

49. On July 22, 2013, in Petitions for Rehearing with the South Carolina Supreme Court, the Browns and Defendant Cherokee Nation argued that one or more of Baby Girl's new temporary guardians is an "Indian custodian" for purposes of ICWA and they also reiterated their argument that §1915 forbids Birth Mother from choosing Adoptive Couple, who are not Indian, to adopt Baby Girl.

50. The South Carolina Supreme Court denied these petitions for rehearing, confirming once again that adoption by Adoptive Couple is in the best interest of Baby Girl and that its "orders

following remand from the USSC leave nothing further to be decided by the family court," other than the specific transition plan that will be followed to return Baby Girl home to Adoptive Couple. *See* 7/24/2013 Order, Case No. 2011-205166 (SC Sup. Ct. 2013).

51. Brown and the Cherokee Nation have stated in court filings that they intend to seek review of that decision in the United States Supreme Court, again invoking §1915 in an effort to overrule Plaintiff Maldonado's choice of Adoptive Couple to raise her child.

52. Threatened application of §1915 to prevent finalization of Baby Girl's adoption by Adoptive Couple throughout these proceedings has and continues to threaten imminent constitutional injury to Plaintiff Maldonado and her minor child.

53. Threatened application of §1915 to prevent finalization of Abigail Lancaster's adoption by her adoptive parents has and continues to threaten imminent constitutional injury to Plaintiff Lancaster and her minor child.

54. The injury inflicted on Birth Mothers and their minor children is also capable of repetition yet evading review. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 117 (1976) ("A woman who is no longer pregnant may nonetheless retain the right to litigate the point because it is 'capable of repetition yet evading review.'") (citing *Roe v. Wade*, 410 U.S. 113, 124-25 (1973)).

55. Birth Mothers, whose true names are unknown, are the unwed mothers of Indian children who have been placed with non-Indian pre-adoptive placements. There is an imminent risk that those adoptions will not be finalized due to the operation of §1915 of ICWA. Their injuries are also capable of repetition yet evading review. Birth Mothers therefore have standing.

COUNT I

(Declaratory Judgment that 25 U.S.C. §1915, as applied to the facts stated herein, violates the Equal Protection Clause)

56. Plaintiffs incorporate Paragraphs 1 through 55 above as if fully restated here.

57. As applied to trump a non-Indian birth mother's otherwise lawful choice of fit adoptive parents, §1915 discriminates on the basis of race, ethnicity, and/or citizenship in violation of the equal protection component of the Fifth Amendment to the U.S. Constitution.

58. The placement preference as applied to non-Indian women and their children who have never been domiciled on Indian lands does not relate to Indian self-government. The discriminatory placement preferences are therefore subject to strict scrutiny.

59. The placement preferences fail strict scrutiny as they are not narrowly tailored to advance a compelling state interest.

60. Subsection 1915(a)(3) is a naked racial preference and is not severable from the remainder of 1915.

61. Pursuant to the Federal Declaratory Judgment Act (28 U.S.C. § 2201 *et seq*.) and Rule 57 of the Federal Rules of Civil Procedure, therefore, Plaintiffs seek a declaratory judgment that 25 U.S.C. §1915 of the Indian Child Welfare Act violates the Equal Protection Clause as applied to the facts stated herein.

62. Plaintiffs have no adequate remedy at law.

COUNT II

(Declaratory Judgment that 25 U.S.C. §1915, facially and as applied to the facts stated herein, violates the Due Process Clause)

63. Plaintiffs incorporate Paragraphs 1 through 62 above as if fully restated here.

64. As applied on these or similar facts, to nullify the otherwise lawful selection of fit adoptive parents by a non-Indian fit birth mother who is the sole legal custodian of the child, on

the basis of the child's race, ethnicity, and/or citizenship status, §1915 violates Plaintiffs' due process rights to direct the upbringing of their children and to secure a suitable adoptive placement that is in their children's best interest.

65. Pursuant to the Federal Declaratory Judgment Act (28 U.S.C. § 2201 *et seq*.) and Rule 57 of the Federal Rules of Civil Procedure, therefore, Plaintiffs seek a declaratory judgment that 25 U.S.C. §1915 of the Indian Child Welfare Act violates the Due Process Clause of the Fifth Amendment to the United States Constitution, facially and as applied to the facts stated herein.

66. Plaintiffs have no adequate remedy at law.

COUNT III

(Declaratory Judgment that 25 U.S.C. §1915(a)(3) is facially unconstitutional under the Equal Protection Clause)

67. Plaintiffs incorporate Paragraphs 1 through 66 above as if fully restated here.

68. Section 1915(a)(3) imposes a unique disability on Indian children on the basis of ancestry or race by creating a naked ancestry- or race-based preference for persons of Native American descent over persons of other races.

69. Because 1915(a)(3) discriminates in favor of *any* Indian placement—not limited to the tribe with which the Indian child's biological parent is affiliated—it manifestly is not related to "Indian self-government" and is a naked racial preference that is subject to strict scrutiny.

70. The preference fails strict scrutiny as it is not narrowly tailored to advance a compelling state interest.

71. The preference would also fail a lesser standard of review, as there is no rational basis for concluding that it is presumptively in the best interest of all children who have a single drop of Indian blood and a biological parent who is registered with an Indian tribe to be placed with an Indian adoptive parent—of *any* tribe—over other fit adoptive placements.

72. Pursuant to the Federal Declaratory Judgment Act (28 U.S.C. § 2201 et seq.) and Rule 57 of the Federal Rules of Civil Procedure, therefore, Plaintiffs seek a declaratory judgment that 25 U.S.C. §1915(a)(3) of the Indian Child Welfare Act violates the Equal Protection Clause.

73. Section 1915(a)(3) is not severable from the remainder of 1915.

74. Plaintiffs have no adequate remedy at law.

COUNT IV

(Declaratory Judgment that 25 U.S.C. §1915(a)(3) is unconstitutional under the Due Process Clause)

75. Plaintiffs incorporate Paragraphs 1 through 74 above as if fully restated here.

76. Section 1915(a)(3) establishes a preference for "other Indian families"—not members of the tribe in which the Indian child is eligible for enrollment—over the adoptive parents chosen by the non-Indian mother.

77. As such, §1915(a)(3) violates Plaintiffs' due process rights as sole custodian parents who otherwise have a right to direct and control their children's care, including by selecting a suitable open adoptive placement.

78. Pursuant to the Federal Declaratory Judgment Act (28 U.S.C. § 2201 et seq.) and Rule 57 of the Federal Rules of Civil Procedure, therefore, Plaintiffs seek a declaratory judgment that 25 U.S.C. §1915(a)(3) of the Indian Child Welfare Act violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

79. Plaintiffs have no adequate remedy at law.

COUNT IV

(Tenth Amendment)

80. Plaintiffs incorporate Paragraphs 1 through 79 above as if fully restated here.

81. ICWA's placement provisions are a unique and unwarranted intrusion into matters of family relations traditionally reserved to the States.

82. Congress may not override state law on a matter relating to family relations unless application of state law would do "major damage" to "clear and substantial federal interests." *Rose v. Rose*, 481 U.S. 619, 625 (1987). But there is *no* federal interest—much less a substantial one—in vitiating a non-Indian sole-custodian birth mother's state-law right to secure a fit and stable adoptive placement for her birth child and delegating that decision to a legal stranger (a tribe), on the basis of the child's ancestry. *See In re Adoption of T.R.M.*, 525 N.E.2d 298, 304 n.1 (Ind. 1988), cert. denied, 490 U.S. 1069 (1989) (noting that "'the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power'" and observing that "the Supreme Court has not yet addressed the constitutionality of the ICWA under the Tenth Amendment or general principles of federalism" (citation omitted)).

83. States, not the federal government, ordinarily occupy the sphere of domestic relations. And states, not the federal government—and certainly not Indian tribes—have been reserved the authority to regulate the rights of persons who do not belong to any tribe, including the non-Indian birth mothers of "Indian children" who are classified as such not because of any political affiliation, but solely because of race or ancestry. States, not tribes, ultimately bear responsibility for abandoned children within their borders, whatever their heritage. And unlike tribal members, non-Indian parents and their unborn children never consented to tribal governance. As Judge Wald correctly warned, any federal interest in such circumstances is "so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power" in custody disputes. H.R. Rep. No. 95-1386, at 40 (1978). Judge Wald's concern is only amplified when neither mother nor child were ever domiciled on a reservation, and ICWA is applied to strip the state-law rights of persons who are not a member of

any tribe. "[E]fforts by a tribe to regulate non-members, especially on non-Indian fee land, are 'presumptively invalid'" and self-evidently do not constitute self-government. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)).

84. Pursuant to the Federal Declaratory Judgment Act (28 U.S.C. § 2201 et seq.) and Rule 57 of the Federal Rules of Civil Procedure, therefore, Plaintiffs seek a declaratory judgment that 25 U.S.C. §1915 of the Indian Child Welfare Act violates the Tenth Amendment to the United States Constitution.

85. Plaintiffs have no adequate remedy at law.

COUNT V
(Request for a Preliminary Injunction)

86. Plaintiffs incorporate Paragraphs 1 through 85 above as if fully restated here.

87. Plaintiffs have no adequate remedy at law.

88. Plaintiffs thus seek the entry of a preliminary injunction, enjoining Defendants from enforcing 25 U.S.C. §1915 as challenged herein, while these proceedings are pending.

COUNT VI
(Request for a Permanent Injunction)

89. Plaintiffs incorporate Paragraphs 1 through 88 above as if fully restated here.

90. Plaintiffs have no adequate remedy at law.

91. Plaintiffs thus seek the entry of a permanent injunction, enjoining Defendants from enforcing 25 U.S.C. §1915 as challenged herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

(A) enter a judgment declaring that ICWA's adoptive placement provisions, 25 U.S.C. §1915, violate Plaintiffs' equal protection rights under the Fourteenth Amendment to the United States Constitution;

(B) enter a judgment declaring that ICWA's adoptive placement provisions, 25 U.S.C. §1915, violate Plaintiffs' due process rights under the Fifth Amendment to the United States Constitution;

(C) enter a judgment declaring that ICWA's preference for any adoptive Indian family over all non-Indian families in 25 U.S.C. §1915(a)(3) is facially unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

(D) enter a judgment declaring that ICWA's preference for any adoptive Indian family over all non-Indian families in 25 U.S.C. §1915(a)(3) is facially unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution;

(E) enter a judgment declaring that ICWA's adoptive placement provisions, 25 U.S.C. §1915, are unconstitutional because they exceed Congress's powers and intrude on the police powers of the States in violation of the Tenth Amendment of the United States Constitution;

(F) enter, after a hearing, a preliminary injunction pending final resolution of this action, enjoining Defendants from enforcing 25 U.S.C. §1915 as challenged herein;

(G) enter a permanent injunction enjoining Defendants from enforcing 25 U.S.C. §1915 as challenged herein; and

(H) such additional or different relief as this Court deems just and proper, including an award of reasonable attorneys' fees and the costs of this action.

Dated: July 24, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all ECF users registered with the Court for this case.

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