UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

NATIONAL COUNCIL FOR ADOPTION, BUILDING ARIZONA FAMILIES on behalf of itself and its birth-parent clients, birth parents D.V. and N.L., and baby boy T.W. by and through his guardian ad litem PHILIP (JAY) MCCARTHY, JR., Plaintiffs, v. SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior, KEVIN WASHBURN, in his official capacity as Assistant Secretary of Indian Affairs, BUREAU OF INDIAN AFFAIRS, and the UNITED STATES DEPARTMENT OF THE INTERIOR, Defendants.	Civil Action No. 1:15cv00675

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Pursuant to Local Rule 7(F)(1), Defendants, through their undersigned counsel, hereby respectfully submit the instant memorandum of law in opposition to Plaintiffs' Motion for Partial Summary Judgment (ECF No. 20).[1]

INTRODUCTION

The Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. § 1901 *et seq.*, implements a national policy to protect the best interests of Indian children and promote the stability and security of Indian tribes and families by establishing minimum Federal standards for state-court proceedings involving the removal of Indian children from their families and the placement of such children in foster or adoptive homes. 25 U.S.C. § 1902. In 1979, the Bureau of Indian Affairs ("BIA") issued guidelines to aid state courts in implementing ICWA. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) ("1979 Guidelines"). In 2015, those guidelines were updated and revised. *See* Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 (Feb. 25, 2015) ("2015 Guidelines"). The 2015 Guidelines reflect the Department of the Interior's ("Department's") view on how to interpret and implement ICWA in a way that best promotes the statute's letter and intent.

The 2015 Guidelines are exactly what they purport to be – guidelines – and neither the Department nor any court that has had occasion to consider them has found them to be anything different. Plaintiffs' challenge to the 2015 Guidelines therefore fails for three reasons, each of which largely turns on the fact that the 2015 Guidelines are not binding agency regulations that

[1]Although all Plaintiffs are represented by the same counsel, only National Council for Adoption ("NCFA") has moved for summary judgment on Count I. Because successive summary judgment motions are disfavored in this district, *see* L.R. 56(C), Defendants address their opposition to all Plaintiffs, and request that the Court treat NCFA's motion as if it was brought by all Plaintiffs. Defendants also note that they anticipate filing a motion for judgment on the pleadings in the near future which addresses the remaining counts of Plaintiffs' complaint.

impose legal obligations or consequences. First, they are not subject to the Administrative Procedure Act's ("APA") notice-and-comment requirement; second, they are not "final agency action" subject to challenge under the APA; and finally, for the same reason, Plaintiffs cannot establish standing to challenge this advisory document.

The conclusion that the 2015 Guidelines are not binding is reinforced by the fact that one month after issuing them, the Department initiated a notice-and-comment rulemaking for the express purpose of issuing regulations that would "incorporate many of the changes made to the recently revised guidelines . . . establishing the Department's interpretation of ICWA as a binding interpretation to ensure consistency in implementation of ICWA across all States." Proposed Rule: Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880, 14,881 (Mar. 20, 2015). Plaintiffs are certainly aware of this salient fact – NCFA and Philip (Jay) McCarthy submitted comments on the proposed regulations – but they fail to address it in either their Complaint or their opening summary judgment memorandum. The Department's separate action to establish federal standards that *would* be binding – through formal regulations not at issue in this litigation – is compelling evidence that the 2015 Guidelines are advisory in nature. Because the 2015 Guidelines are not a legislative rule, and are not a final agency action that may be challenged under the APA, and because Plaintiffs lack standing, Plaintiffs' motion should be denied.

STATUTORY AND REGULATORY BACKGROUND

The Indian Child Welfare Act. Congress enacted ICWA, pursuant to its broad authority over federally recognized tribes under the Indian Commerce Clause, to address "'the consequences to Indian children, Indian families, and Indian tribes of 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.'" *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). In particular, Congress found "that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies" and that the States had "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(4)-(5); *see also Holyfield*, 490 U.S. at 32 (noting statistics presented to the Senate which indicated "that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions"). Congress acknowledged the cultural differences between Indian tribes and non-Indians and found that "many non-Indian public and private agencies have tended to view custody of an Indian child by a member of the [Indian's] extended family as prima facie evidence of parental neglect." H.R. REP. NO. 95-1386, at 20 (1978).

With ICWA, Congress declared "that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," *id.* § 1901(3), and thus ICWA both "'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'" *Holyfield*, 490 U.S. at 37 (quoting H.R. REP. NO. 95-1386, at 23); s*ee also In the Matter of Custody of S.E.G.*, 521 N.W.2d 357, 358 (Minn. 1994) (ICWA enacted "to prevent the destruction of Indian families . . . and to relieve the difficulties

experienced by Indian children raised in non-Indian homes"). ICWA as a statute "establish[es] . . . minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." *Id.*

ICWA applies to "child custody proceedings" (defined as foster-care placements, terminations of parental rights, preadoptive and adoptive placements) involving an "Indian child," which is defined as "an unmarried person who is under age 18 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(1), (4). In such proceedings, Congress accorded tribes "numerous prerogatives . . . through the ICWA's substantive provisions . . . as a means of protecting not only the interests of individual Indian children and their families, but also of the tribes themselves." *Holyfield*, 490 U.S. at 49. ICWA also provides important procedural and substantive standards to be followed in state-administered proceedings concerning possible removal of an Indian child from her family. *See, e.g.*, 25 U.S.C. § 1912(d) (requiring party seeking foster-care placement to prove that "active efforts" designed to prevent the breakup of the Indian family have been provided); *id.* § 1912(e) (requiring expert testimony regarding potential damage to child resulting from continued custody by parent).

The "most important substantive requirement imposed on state courts," however, are the placement preferences required by ICWA for any adoption, pre-adoptive placement, or foster-care placement. *Holyfield*, 490 U.S. at 36; *see* 25 U.S.C. §§ 1915(a)-(b). "In any adoptive placement of an Indian child under State law," ICWA requires that "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); *see also id.* § 1915(b) (placement preferences for foster care or preadoptive placements). These placement preferences reflect "Federal policy that, where possible, an Indian child should remain in the Indian community." H.R. REP. NO. 1386, at 23; *see also id.* at 20 (noting that the "concept of the extended family maintains its vitality and strength in the Indian community" as a parenting unit even though unrecognized by "many non-Indian public and private agencies," and that ICWA therefore "seeks to protect" the child's interest in the extended family). If an Indian child, any parent or Indian custodian from whose custody such child was removed, or the Indian child's tribe believes that a foster-care placement or termination of parental rights violated certain provisions of ICWA, they may "petition any court of competent jurisdiction to invalidate such action." 25 U.S.C. § 1914. ICWA also provides for the withdrawal of parental consent to adoption in certain circumstances. *Id.* §§ 1921(c)-(d).

The Department's Guidelines. On November 29, 1979, the BIA issued guidelines representing the Department's interpretation of ICWA and providing procedures designed to "help assure that rights guaranteed by the Act are protected when state courts decide Indian child custody matters." 44 Fed. Reg. 67,584 (1979). The Department was clear in the introduction that the guidelines were just that – non-binding guidelines distinguishable from binding agency regulations:

> [W]hen the Department writes rules needed to carry out responsibilities congress has explicitly imposed on the Department, those rules are binding. A violation of those rules is a violation of the law. When, however, the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by congress, those rules or guidelines are not, by themselves, binding. Courts will take what this Department has to say into account in such instances, but they are free to act contrary to what the Department has said if they are convinced that the Department's guidelines are not required by the statute itself.

Id. The Department explained, nevertheless, that the guidelines used the word "shall" instead of "should," notwithstanding their non-binding nature, because "commenters . . . interpreted the use of 'should' as an attempt by this Department to make statutory requirements themselves optional." *Id.* No state court considering the 1979 Guidelines ever held them to be binding.

Revision of the Guidelines in 2015. On February 25, 2015, the Department updated its guidelines, noting that "[m]uch has changed in the 35 years since the original guidelines were published, but many of the problems that led to the enactment of ICWA persist." 80 Fed. Reg. at 10,147. As the Department explained, "[t]hese updated guidelines provide guidance to State courts and child welfare agencies implementing [ICWA]." *Id.* at 10,146. The 2015 Guidelines "promote compliance with ICWA's stated goals and provisions by providing a framework for State courts and child welfare agencies to follow." *Id.* at 10,146-47. In preparing the updated version, the Department invited comments from federally recognized Indian tribes, state-court representatives, and organizations concerned with tribal children, child welfare, and adoption. *Id.* Those comments, the recommendations of the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, and developments in ICWA jurisprudence, were considered in updating the guidelines. *Id.* at 10,146.

By offering the Department's interpretation of ICWA along with "best practices for ICWA compliance," the 2015 Guidelines address issues and problems that have arisen since the guidelines' original publication. *Id.* at 10,147-50. For example, the 2015 Guidelines acknowledge that some state courts have created and applied an "existing Indian family (EIF) exception to application of ICWA," but note that "the majority of State appellate courts . . . have

rejected it as contrary to the plain language of ICWA."[2] *Id.* at 10,148. The 2015 Guidelines reflect the Department's own position which "agrees with the States that have concluded that there is no existing Indian family exception to the ICWA." *Id.* In this way, the 2015 Guidelines attempt to address various issues arising over the years that have prevented the proper and nationally-consistent implementation of this federal statute in keeping with Congress's purposes in enacting ICWA. No state court considering the 2015 Guidelines has held them to be binding.

The 2015 Formal Rulemaking. Less than one month after updating the 2015 Guidelines, on March 20, 2015, the Department began a notice-and-comment process to promulgate formal regulations to implement ICWA. The Department observed that commenters believed ICWA's purposes and goals were not being fully met due to "ineffective or inconsistent implementation in some cases." 80 Fed. Reg. at 14,880. The Department explained that "conflicting interpretations and applications" of ICWA by state courts and child-welfare agencies "can lead to arbitrary outcomes, and certain interpretations and applications threaten the rights that ICWA was intended to protect." *Id.* at 14,881. While the 2015 Guidelines assist state courts and agencies by providing a roadmap for how best to interpret and implement ICWA to ensure state child-welfare practices do not damage Indian families and their larger tribal communities, commenters – and the Department itself – recognized that the non-binding nature of the 2015

[2]The few courts that espouse the existing Indian family exception claim that even when a child meets ICWA's definition of an "Indian child," ICWA nevertheless does not apply if, in the court's eyes, the child is not being removed from an Indian environment. *See, e.g.*, *Rye v. Weasel*, 934 S.W. 2d 257, 259-60 (Ky. 1996) (adopting the exception and holding that ICWA did not apply to an enrolled Standing Rock Sioux tribal member who had never lived in a household that did not have at least one tribal member because, *inter alia*, she was "a baptized member of the Roman Catholic faith" and did not practice a tribal religion, she "attended public schools," she did not wear "tribal dress," and although "[s]he knows some words and phrases of the native Sioux language [she] cannot speak conversationally in it.").

Guidelines limits their efficaciousness. *Id.* (noting that an "overwhelming proportion of the commenters requested" that the Department both update the 1979 Guidelines and promulgate regulations). Accordingly, the Department's proposed rule "would incorporate many of the changes made to the recently revised guidelines into regulations" in order to establish "the Department's interpretation of ICWA as a binding interpretation to ensure consistency in implementation of ICWA across all States." *Id.*; *see also id.* at 14,882 ("The proposed rule makes several of the provisions issued in the recently published [2015 Guidelines] binding as regulation."). The Department's ICWA rulemaking is ongoing and no formal regulations have been published.

Commenters on the proposed regulations, both proponents and opponents (including several of the Plaintiffs), recognize the difference between the 2015 Guidelines and binding regulations. For example, Plaintiff McCarthy filed comments opposing the issuance of regulations, arguing that Congress did not intend "to impose binding federal regulations upon the states."[3] The American Academy of Adoption Attorneys commented that it "objects to many of the changes in the new Guidelines, and even more so to the proposal that they become federal regulations."[4] Supporters of the proposed regulations have noted the need to make the non-binding 2015 Guidelines binding through regulations. "While the Guidelines have been helpful," one commenter said, "it has become clear that we need binding language if we are ever going to have nation-wide compliance."[5] The "current Guidelines are useful in interpreting

[3] Philip McCarthy, Comment on the BIA Proposed Rule on ICWA (Jun. 8, 2015), http://www.regulations.gov/#!documentDetail;D=BIA-2015-0001-1856.
[4] American Academy of Adoption Attorneys, Comment on the BIA Proposed Rule on ICWA (Apr. 30, 2015), http://www.regulations.gov/#!documentDetail;D=BIA-2015-0001-0075.
[5]Victoria Sweet, Comment on the BIA Proposed Rule on ICWA (May 22, 2015),

provisions of ICWA," said another commenter, but "they nonetheless remain advisory in nature. Binding regulations are necessary to ensure consistent implementation of ICWA."[6]

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs' motion seeks review of agency action under the APA and "when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). Nevertheless, because Plaintiffs have provided a statement of "material facts," Defendants hereby provides a counter statement noting any relevant disagreements with Plaintiffs' identified "facts."

Factual Statements 1-6 concerning ICWA. Defendants admit that ICWA was enacted in 1978 to address the decimation of Indian families and tribes resulting from the removal of Indian children from their families and tribal communities by state courts and child-welfare agencies. The balance of Plaintiffs' "facts" in this section involves quoting selected portions of ICWA, which speaks for itself.

Factual Statements 7-11 concerning the 1979 Guidelines. Defendants admit that the BIA issued guidelines in 1979 and that they were directed to state courts because that is the venue in which child-custody proceedings generally occur. The 1979 guidelines explain that a finding of good cause to depart from ICWA's placement preferences should be based on one or more of the following considerations: (i) the request of the child's biological parents, or the child itself if of age; (ii) the "extraordinary physical or emotional needs of the child"; and (iii) the "unavailability

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http://www.regulations.gov/#!documentDetail;D=BIA-2015-0001-0516.

[6] Comment on the BIA Proposed Rule on ICWA (May 22, 2015), http://www.regulations.gov/#!documentDetail;D=BIA-2015-0001-0513.

of suitable families for placement after a diligent search" for placements meeting ICWA's preferences. 44 Fed. Reg. at 67,594. The balance of Plaintiffs' statements 7-9 involves quoting selected portions of the 1979 Guidelines, which speak for themselves.

Statement 10 collects state-court cases which have found "good cause" to depart from ICWA's placement preferences based on consideration of a "child's best interests" as defined by the relevant state authorities. Defendants deny that the cited cases are representative of the law in all States. Other courts have rejected the approach of cases cited by Plaintiffs, noting that such a wide-ranging notion of "good cause" can too easily circumvent the placement preferences established in ICWA and perpetuate the problems it was designed to remedy. For example:

> The plain language of the Act read as a whole and its legislative history clearly indicate that state courts are a part of the problem the ICWA was intended to remedy. . . . The best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture. It therefore seems "most improbable" that Congress intended to allow state courts to find good cause whenever they determined that a placement outside the preferences of [25 U.S.C.] § 1915 was in the Indian child's best interests.

S.E.G., 521 N.W.2d at 362-63; *see also In the Matter of the Adoption of Jessica Lynn Riffle*, 922 P.2d 510, 515 (Mont. 1996) (adopting *S.E.G.*'s reasoning to limit "good cause" to the factors enumerated in the 1979 Guidelines).

Statement 11 offers Plaintiffs' interpretation of *Adoptive Couple*, 133 S. Ct. 2552 (2013), a case which speaks for itself and is not material to the present motion.

Statements 12-24 concerning the Updated Guidelines. Statement 12 correctly notes that on February 21, 2014, the BIA began a consultation process with tribal leaders and others, and, in that process, "invited comments to determine whether to update its guidelines and what changes

should be made." 80 Fed. Reg. at 10,147.

Statements 13-14 correctly note that the 2015 Guidelines were published on February 25, 2015 and that the BIA did not characterize them as regulations that were the fruit of notice-and-comment rulemaking procedures under the APA.

Statement 15 correctly notes that the 2015 Guidelines were issued after considering input received. This included input from federally recognized tribes as well as comments from state-court representatives and others involved with Indian child welfare in order to effectively assess current problems with the implementation and interpretation of ICWA and how they might be resolved by updating the guidelines. *Id.*

Statement 16 asserts, without explanation, that the 2015 Guidelines are "binding, mandatory rules." ECF No. 21 at 5. This legal conclusion is denied.

Statement 17 improperly argues that the absence of language expressly explaining that the 2015 Guidelines are not binding must make them binding. This legal conclusion is denied. Nowhere do the 2015 Guidelines say they are binding. And, less than one month after their issuance, the Department began a rulemaking which, among other things, was designed to make certain provisions of the 2015 Guidelines binding. 80 Fed. Reg. at 14,882. That would not have been necessary if the 2015 Guidelines were already binding.

Statement 18 further argues that the 2015 Guidelines use mandatory language because they were intended to be binding. This legal conclusion is denied. The 2015 Guidelines are clear on their face that they are intended as a guidance to state courts.

Statement 19 incorrectly states (without support) that the 2015 Guidelines "prohibit state courts from considering" an Indian child's best interests in determining whether there is "good

cause" to deviate from ICWA's placement preferences. This legal conclusion is denied. The 2015 Guidelines contain no prohibitions on state courts beyond what is required by ICWA itself. Like the 1979 Guidelines, they state that "good cause" to deviate from the placement preferences is limited to cases where (a) the parents or the child (if of sufficient age) request a departure; (b) the extraordinary physical or emotional needs of the child can only be met by such a departure; and (c) the unavailability of a suitable placement. *Compare* 80 Fed. Reg. at 10,158 (§ F(4)(c)(1)-(4)) (2015) *with* 44 Fed. Reg. at 67,594 (§ F.3(a)(i)-(iii)) (1979). As Plaintiffs note, the 2015 Guidelines clarify that ICWA's preferences reflect the best interests of an Indian child. 80 Fed. Reg. at 10,158.[7] In so clarifying, the Department follows those state courts that have rejected an open-ended "best interests" analysis. *See S.E.G.*, 521 N.W.2d at 362 ("ICWA appears to create a presumption that placement of Indian children within the preferences of the Act is in the best interests of Indian children."). The 2015 Guidelines explain, "[e]vidence suggests that 'good cause' has been liberally relied upon to deviate from the placement preferences in the past." 80 Fed. Reg. at 10,149. Plaintiffs also note the 2015 Guidelines interpret "extraordinary physical or emotional needs" to preclude consideration of ordinary bonding that has occurred as a result of placement made in violation of ICWA. 80 Fed. Reg. at 10,158. To do otherwise would be to ratify non-compliant placements which the 2015 Guidelines also "attempt to prevent . . . from arising by encouraging early compliance with ICWA." *Id.*

Statements 20 through 22 offer various excerpts from the 2015 Guidelines, in an attempt to emphasize the mandatory nature of their phrasing. None of this alters the fact that the 2015

[7] ICWA declares that "it is the policy of this Nation to protect the best interests of Indian children . . . by . . . the establishment of minimum Federal standards for . . . the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. . ." 25 U.S.C. § 1902.

Guidelines state, in the very first sentence of their summary, that they "provide *guidance* to State courts and child welfare agencies," not binding rules. *Id.* at 10,146 (emphasis added). Defendants further note that these provisions are already required by statute.[8]

Statements 23-24 correctly note that the Department "agrees with the States that have" rejected the judicially-created "existing Indian family (EIF) exception to application of ICWA." *Id.* at 10,148. As the Department notes, "the majority of State appellate courts . . . have rejected it as contrary to the plain language of ICWA." *Id; In the Matter of A.J.S.*, 204 P.3d 543, 548-49 (Kan. 2009) ("The majority of our sister states who have considered the existing Indian family doctrine have rejected it . . . . Other states, having once adopted the doctrine, have now abandoned it.") (internal quotations omitted) (collecting cases).[9] In fact, Plaintiffs fail to point out that Arizona has rejected the existing Indian family exception. *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. App. 2000) ("For several reasons, we join a growing number of jurisdictions in rejecting this judicially created exception."). Plaintiffs also cite the Supreme Court's *Adoptive Couple* decision as if it supports the exception, ECF No. 21 at 7, but that decision does not address the existing Indian family exception.[10] Statement 24 further asserts that the 2015 Guidelines

[8] *See* 25 U.S.C. § 1915(e) (requiring that "record of each such placement . . . of an Indian child shall be maintained by the State . . . evidencing the efforts to comply with the orders of preference"); *id.* § 1911 (granting tribal courts exclusive jurisdiction over certain proceedings); *id.* § 1912(a) (establishing duty of the party seeking to place a child in foster care or to terminate a parent's rights to notify the tribe of the pending proceeding in the event that the court "knows or has reason to know that an Indian child is involved"); *id.* § 1912(e) (prohibiting foster-care placement "in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage.").

[9] The Kansas Supreme Court's unanimous rejection of the existing Indian family exception in *A.J.S.* is particularly noteworthy because a unanimous Kansas Supreme Court had created the exception 27 years earlier. *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982).

[10] *See In re Alexandria P.*, 228 Cal.App.4th 1322, 1337, 176 Cal.Rptr.3d 468 (Cal. App. 2 Dist.

require state courts to apply ICWA to Indian children in particular circumstances. ECF No. 21 at 8. The obligation of state courts to apply ICWA's standards is defined by ICWA itself, not by the 2015 Guidelines. *See* 25 U.S.C. §§ 1903(4), 1911, 1912, 1915.

Factual Statements 25-31 concerning Plaintiff National Council for Adoption ("NCFA"). Statements 25 – 31 attempt to establish the standing of NCFA. As described in the attached declaration of counsel, Defendants dispute the alleged facts of statements 25-31, but because there has been no discovery, Defendants are not in a position to test the veracity of the allegations contained in these paragraphs. Ennis Decl. ¶¶ 3-9; *see also* Fed. R. Civ. P. 56(d); *Edwards v. Bank of New York Mellon*, 2014 WL 5594876 at *7 (E.D. Va. Oct. 31, 2015) (holding that Federal Rule 56(d) requires a nonmovant to show by affidavit what information cannot be presented for lack of discovery). Defendants have determined from publicly available information, however, that the facts Plaintiffs rely on to establish NCFA's standing may be materially inaccurate or incomplete. In particular, the 2015 Guidelines did not cause NCFA to divert resources to the education of its members, because NCFA was already engaged in this type of member education before the 2015 Guidelines were promulgated. Smith Decl. ¶¶ 5-7. Because attendees must pay to participate, *id.* ¶¶ 8-10, it is not clear that member education would necessarily impose net costs on NCFA. NCFA also claims that it diverted resources to organize a conference, but the only conference NCFA has publically advertised is its annual conference, which was indisputably not designed "to train member agencies on how to comply with the Guidelines." ECF No. 21 ¶ 27; *see* Ex. 3 to Ennis Decl. (showing that, over the course of three days, there was only one, one-hour presentation on ICWA, taught by Plaintiff McCarthy).

2014) (noting *Adoptive Couple* "does not compel" adoption of the existing Indian family doctrine).

ARGUMENT

Plaintiffs' motion for summary judgment fails for three reasons. *First*, this Court lacks subject-matter jurisdiction over Plaintiffs' first count because Plaintiffs lack standing to challenge the 2015 Guidelines. Plaintiffs have not been injured by the 2015 Guidelines because any so-called compliance with their non-binding provisions is voluntary.[11] Nor are Defendants the cause of any injury because state courts, not Defendants, will determine whether particular 2015 Guidelines provisions will be applied in the Indian child-welfare cases before them. And, Plaintiffs' alleged injuries are not redressable because even if the 2015 Guidelines are withdrawn, state courts remain free to interpret and implement ICWA in accord with the 2015 Guidelines. *Second*, this Court lacks subject matter jurisdiction over Plaintiffs' first count because the APA only gives this Court subject-matter jurisdiction to review final agency actions and the 2015 Guidelines are not a "final agency action" within the meaning of the APA because they do not create legal rights and obligations. *Third*, Plaintiffs' first count fails as a matter of law because APA notice-and-comment procedures do not apply to advisory documents like the 2015 Guidelines. For each of these reasons, Plaintiffs' summary judgment motion should be denied.

1. Standard for Summary Judgment

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Cloaninger ex rel. Estate of Cloaninger v. McDevitt*, 555 F.3d 324, 332 (4th Cir. 2009) (same). At summary judgment, this Court must "view[] all facts and inferences in the light most favorable to the nonmoving party." *Haulbrook v. Michelin N. Am.*, 252 F.3d 696, 702 (4th Cir. 2001).

[11] Defendants will address Plaintiffs' standing to bring any and all of the claims in their complaint in a motion for judgment on the pleadings to be filed shortly.

2. Plaintiffs lack standing to challenge the 2015 Guidelines

Absent a showing of standing by Plaintiffs, there is no subject matter jurisdiction over Plaintiffs' first count. *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990). A plaintiff has standing when (1) she has suffered an injury in fact, (2) there is a causal connection between the injury and the conduct complained of, and (3) it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61 (1992); *see also South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, 789 F.3d 475, 482 (4th Cir. 2015) ("To satisfy Article III's standing requirement, the plaintiff must have suffered or be imminently threatened with a concrete and particularized injury in fact that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision.") (internal quotations and brackets omitted). Plaintiffs do not meet these standards because the 2015 Guidelines are simply a guidance document and impose no legal obligations or consequences on plaintiffs or any other party.

Injury in fact. The 2015 Guidelines do not injure Plaintiffs because they impose no duties or obligations upon Plaintiffs. NCFA asserts that it and its member adoption agencies spend time and money complying with the 2015 Guidelines, ECF No. 21 at 8, but the voluntary decision by a private adoption agency to abide by the standards set forth in the 2015 Guidelines does not give rise to injury. *See Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997) (no standing where state law prescribed "open" primaries, but plaintiff's alleged injury was caused by voluntary choice of state Republican party to determine its candidates by primary). And while NCFA's mission may be to keep its members abreast of developments in the field of adoption law and policy, that the BIA is responsible for one such development cannot, on its own, constitute an

injury to NCFA. *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) ("educating members, responding to member inquiries, or undertaking litigation in response to legislation" are "merely abstract concerns" not suitable for adjudication). Neither does NCFA's alleged use of resources to speak to the press about its opposition to the 2015 Guidelines constitute a constitutionally-cognizable injury. *Md. Minority Contractors Ass'n v. Lynch*, 203 F.3d 821, 827 (4th Cir. 2000) ("An organization cannot, of course, manufacture the injury necessary to maintain a suite from its expenditure of resources on that very suit.") (internal citations omitted). Moreover, NCFA itself effectively acknowledged that its actions are not compelled by the 2015 Guidelines in a comment it submitted in the BIA's ongoing rulemaking process, in which it notes that the 2015 Guidelines are not regulations: "We also are deeply concerned that the BIA is attempting to elevate these 2015 Guidelines to federal regulatory status."[12] Thus, while NCFA alleges for purposes of this litigation that it must educate its members about new "requirements," in other contexts it demonstrates a clear understanding that the 2015 Guidelines are not binding regulations requiring it to do anything.[13]

NCFA must show that the challenged action prompted "expenditures . . . and those

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[12] National Council for Adoption et al., Comment on the Bureau of Indian Affairs (BIA) Proposed Rule: Regulations for State Courts and Agencies in Indian Child Custody Proceedings (May 22, 2015), http://www.regulations.gov/#!documentDetail;D=BIA-2015-0001-0514. *See also* Press Release, American Adoptions, National Coalition Opposes Government Guidelines Restricting Native American Adoptions (Apr. 28, 2015), http://www.prweb.com/releases/2015/04/prweb12679701.htm (stating on behalf of a coalition including NCFA that "these guidelines do not, as of yet, have the authority of a federal law or regulation").

[13] NCFA cannot rely on injury to its members to provide standing when it has failed to plead any specific members who were harmed. *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184-85 (4th Cir. 2013) (concluding that representational standing was "doom[ed]" when plaintiff organization failed to "'make specific allegations establishing that at least one *identified member* had suffered or would suffer harm'" (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)).

expenditures perceptibly impair the organization's ability to advance its mission." *Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 720 (D. Md. 2011). NCFA does not allege that its expenditures frustrate its mission, nor could it. Organizational expenditures that fall within the organization's primary mission and are not outside of normal operations cannot constitute injury-in-fact. *See Heap v. Carter*, __ F. Supp. 3d __, 2015 WL 3999077, *9 (E.D. Va. July 1, 2015) (declining to find that humanist organization had been injured by the need to reapply to endorse a humanist Navy chaplain because "such costs do not cut to the core of the organization's mission"); *Nat'l Treasury Emps. Union v. U.S.*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) ("If a defendant's conduct does not conflict directly with an organization's stated goals, it is entirely speculative whether . . . the conduct is impeding the organization's activities."). Here, NCFA's primary mission includes education of its members, and it appears to have a long practice of educating its membership on developments in the law, including regarding ICWA, prior to the issuance of the 2015 Guidelines. *See* Ex. 1 to Ennis Decl. ("NCFA's mission is to meet the diverse needs of . . . all those touched by adoption through global advocacy, *education*, research, legislative action, and collaboration.") (emphasis added); Smith Decl. ¶¶ 5-7. This claimed injury cannot support standing.

Further, as noted above in response to Plaintiffs' statements 25 to 31, there is a question of material fact regarding the nature of the alleged injury claimed by NCFA. Pursuant to Fed. R. Civ. P. 56(d), discovery is needed before this Court can conclude NCFA has suffered an injury-in-fact for standing purposes. *See* Ennis Decl. at ¶¶ 4-9 (outlining discovery needed to assess veracity of NCFA's allegations related to standing).

Causation. For the same reasons, the 2015 Guidelines cannot be said to have caused

Plaintiffs' injuries. With regard to NCFA, the 2015 Guidelines do not require anything of the NCFA or impair its ability to pursue its mission of choice which is educating its members. *See Marshall*, 105 F.3d at 906 (no standing where it was the decision of a third-party that caused the alleged injury, not the challenged law). And for the remaining Plaintiffs, any expense and time spent complying with the 2015 Guidelines is not required by, and therefore not caused by, the 2015 Guidelines themselves. The causation requirement is "designed to ensure that the injury complained of is not the result of the independent action of some third party not before the court." *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 324 (4th Cir. 2002) (internal quotations omitted). To the extent that the 2015 Guidelines are actually applied to Plaintiffs, it is because such compliance is mandated by the independent action of a third party: a state court. The 2015 Guidelines are advisory in nature and impose no obligations unless and until a state court requires compliance with their provisions. Because "[t]he existence of one or more essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992), there is no standing.

The fact that state courts might consider the 2015 Guidelines and find them persuasive does not satisfy the causation inquiry. It is not enough for an agency to encourage a third party to act in a particular way if the agency is not actually directing the party or mandating a specific result. *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976); *Pritikin v. Dept. of Energy*, 254 F.3d 791, 799 (9th Cir. 2001) (plaintiffs sued wrong agency where the defendant agency is not "responsible for implementing the program"). Rather, standing can be established based on the effect of agency action on third parties only where "that action authorized the conduct

or established its legality," or, put differently, the "injurious conduct would have been illegal without that action." *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994) (internal quotations omitted). That is patently not the case here.

Redressability. To be redressable, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000). But even if this Court orders the 2015 Guidelines withdrawn, state courts and child welfare agencies may still apply the interpretations and practices recommended there. Indeed, many of the best practices identified in the 2015 Guidelines merely memorialize the decisions of state courts and state guidance documents regarding ICWA implementation. *See, e.g.*, 80 Fed. Reg. at 10148 (rejecting Existing Indian Family exception in keeping with precedent in the majority of state courts); *id*. at 10149 (articulating "best interests" analysis adopted by *S.E.G.*, 521 N.W.2d at 362 and *Jessica Lynn Riffle*, 922 P.2d at 515). For example, no matter how this Court rules on the 2015 Guidelines, the Existing Indian Family exception will not be available to Plaintiffs in Arizona because Arizona state courts concur with the 2015 Guidelines' position that the exception is contrary to ICWA. *See Michael J., Jr.*, 7 P.3d at 963. Because redress of Plaintiffs' alleged injuries is at best speculative, they lack standing to challenge the 2015 Guidelines.

3. This Court lacks Subject Matter Jurisdiction to Hear Count One under the APA

Summary judgment should be denied because this Court lacks subject matter jurisdiction to hear Count One under the APA. The APA authorizes judicial review of an agency action "only when a statute makes the action reviewable or the action was a 'final agency action for which there is no other adequate remedy.'" *Wollman v. Geren*, 603 F. Supp. 2d 879, 883 (E.D. Va. 2009)

(quoting 5 U.S.C. § 704). If the agency action at issue is not "final" under the APA, a court lacks subject matter jurisdiction over the issue and dismissal is proper. *Id*. at 883; *see also Invention Submission Corp. v. Rogan*, 357 F.3d 452, 460 (4th Cir. 2004). Plaintiffs shoulder the burden of demonstrating final agency action within the meaning of the APA. *Wollman*, 603 F. Supp. 2d at 883; *Shipbuilders Council of Am., Inc. v. DHS*, 481 F. Supp. 2d 550, 555 (E.D. Va. 2007).

In order for agency action to be final, it must (1) mark "the consummation of the agency's decision making process," and (2) determine rights, obligations, or legal consequences. *Bennett v. Spear*, 520 U.S. 154, 178 (1997); *see also COMSAT Corp. v. National Sci. Found.*, 190 F.3d 269, 274 (4th Cir.1999). In this case, the 2015 Guidelines do not meet the second prong of this test because they are not action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178; *see also Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S.E.P.A.*, 313 F.3d 852, 859 (4th Cir. 2002) ("Agency action which carries no 'direct or appreciable legal consequences' is not reviewable under the APA."). Rather, the 2015 Guidelines are advisory in nature, providing the Department's guidance for state courts and child-welfare agencies on best practices for interpreting and implementing ICWA. *See* 80 Fed. Reg. 10,146 ("These updated guidelines provide guidance to State courts and child welfare agencies implementing [ICWA]"). As such, they constitute "advisory information that has no legal impact [and which] has consistently been found inadequate to constitute final agency action[.]" *Salt Inst. v. Thompson*, 345 F. Supp. 2d 589, 602 (E.D. Va. 2004) (Lee, J), *aff'd*, 440 F.3d 156 (4th Cir. 2006).

Nothing compels state courts, state agencies, or any other party to adhere to the 2015 Guidelines. Indeed, in the thirty-five years that the 1979 Guidelines were in place, state courts

accorded them varying degrees of deference but did not find them binding. Numerous courts have made clear that the 1979 Guidelines are helpful but not controlling.[14] Other state-court decisions have referenced the guidelines in support of an interpretation of ICWA reached by the court.[15] And other state courts interpreting ICWA have not cited the 1979 Guidelines at all, or have rejected arguments that they should control in a particular case.[16]

The 2015 Guidelines have been treated no differently. Courts may consider them as deserving of deference but not binding, leaving the courts free to either apply or not apply the provisions of the 2015 Guidelines in specific cases. *See Oglala Sioux Tribe v. Van Hunnik*, No. CIV. 13-5020-JLV, 2015 WL 1466067, at *14 (D.S.D. Mar. 30, 2015) ("The DOI Guidelines are not binding on the court but are an administrative interpretation of ICWA entitled to great weight."); *In the Matter of M.K.T.*, Case No. 113, 110, 6-9 (Okla. Civ. App. May 1, 2015) (considering and ultimately rejecting the 2015 Guidelines' suggestions regarding good cause to deviate from ICWA's placement preferences because "[t]he BIA Guidelines are not binding and are instructive only")[17]; *Payton S. v. State*, 349 P.3d 162, 173 (Alaska 2015) ("We have looked to the BIA Guidelines for guidance in determining whether a proposed witness meets the heightened ICWA expert requirements[,]" and acknowledging that the 1979 Guidelines have been updated).

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[14] *See, e.g., People ex rel. M.H.*, 691 N.W.2d 622, 625 (S.D. 2005) ("guidelines do not have binding legislative effect"); *Adoption of N.P.S.*, 868 P.2d 934, 936 (Alaska 1994) ("The guidelines assist but do not bind this court."); *In re J.J.C.*, 302 S.W.3d 896, 900 (Tex. Ct. App. 2009) ("guidelines do not have binding legislative effect" but are used in interpreting ICWA); *People ex rel. S.R.M.*, 153 P.3d 438 (Colo. Ct. App. 2006) (1979 Guidelines are not binding but are persuasive).

[15] *See, e.g., L.G. v State, Dep't of Health & Soc. Servs.*, 14 P.3d 946, 952, 954-55 (Alaska 2000); *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 351 (Minn. Ct. App. 2007).

[16] *See, e.g., In re Candace A.*, 332 P.3d 578, 584 (Alaska 2014) (rejecting argument that expert witness failed to meet standards in 1979 Guidelines because controlling Alaska precedent addressed expert-witness standard).

[17] A copy of this case is attached as Exhibit 6 to the Ennis Declaration.

In fact, some courts have, subsequent to the 2015 Guidelines, continued to look to the 1979 Guidelines in interpreting ICWA's requirements. *See In re Interest of Nery V.*, 864 N.W.2d 728, 736 (Neb. Ct. App. 2015) (analyzing good cause to deviate from ICWA's placement preference and noting, with respect to the 1979 Guidelines, "the Bureau of Indian Affairs has published nonbinding guidelines for determining whether good cause exists"). And yet another state court used suggestions from *both* the 1979 Guidelines and the 2015 Guidelines to form its position on good cause to deviate from ICWA's placement preferences under 25 U.S.C. § 1915(b). *State ex rel. Children, Youth & Families Dep't v. Casey J.*, No. 33,409, 2015 WL 3879548, at *4 (N.M. Ct. App. June 22, 2015).

To the extent Plaintiffs may attempt to argue that the 2015 Guidelines may influence courts and agencies and indirectly impose legal obligations, such argument fails. "[E]ven when agency action significantly impacts the choices available to the final decisionmaker, this distinction does not transform the challenged action into reviewable agency action under the APA." *Flue-Cured Tobacco*, 313 F.3d at 860. Thus, for example, where an agency classified second-hand smoke as a known human carcinogen, the Fourth Circuit observed that, "while the Report's persuasive value may lead private groups to impose tobacco-related restrictions, these decisions are attributable to independent responses and choices of third parties" and thus the "actions and consequences complained of . . . do not legally flow from the Report nor are they the result of legal rights or consequences created by the Report." *Id.* at 861. State courts – not the Department – are the "final decisionmakers" with regard to state-court child-welfare standards.

If merely influencing third parties' actions could create a right of judicial review, then virtually any agency legal interpretation or opinion would be subject to challenge. But the law

requires more. For example, in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the Supreme Court found a Secretary of Commerce's report to the President on census data for the purpose of reapportioning the U.S. House of Representatives was not final agency action because the report itself had "no direct effect on reapportionment until the President takes affirmative steps to calculate and transmit the apportionment to Congress." *Id*. at 796-99; *see also National Ass'n of Homebuilders v. U.S. Army Corps of Engineers*, 2000 WL 433072 at *5 (Mar. 9, 2000) (agency "Guidance Memorandum [instructing agency field offices how to enforce statute] does not fix or alter legal rights of the plaintiffs, and is not, in itself, a final agency action subject to judicial review under the APA"). As *Flue-Cured Tobacco* aptly stated,

> [A]s a practical matter and of considerable importance, if we were to adopt the position that agency actions producing only pressures on third parties were reviewable under the APA, then almost any agency policy or publication issued by the government would be subject to judicial review. We do not think that Congress intended to create private rights of actions to challenge the inevitable objectionable impressions created whenever controversial research by a federal agency is published. Such policy statements are properly challenged through the political process and not the courts.

313 F.3d at 861.

Similarly, any voluntary compliance by Plaintiffs with the 2015 Guidelines does not elevate them to "final agency action." *See Ctr. for Auto Safety v. N.H.T.S.A.*, 452 F.3d 798, 811 (D.C. Cir. 2006) (holding that "de facto compliance is not enough to establish that the guidelines have had legal consequences"). The BIA has made no enforcement threats to the public, let alone to Plaintiffs, regarding compliance with the 2015 Guidelines. In fact, part of the reason the BIA has commenced a formal rulemaking after updating the 2015 Guidelines was because the BIA itself does not regard the 2015 Guidelines as binding or enforceable. Because the 2015 Guidelines are not a final agency action, Plaintiffs' first count fails to state a claim.

4. The 2015 Guidelines are not Legislative Rules

Summary judgment should also be denied because the 2015 Guidelines are not legislative rules and are not subject to notice and comment rulemaking procedures. Title 5, Section 553 of the U.S. Code requires public notice of a rulemaking in the Federal Register and an opportunity for the general public to comment on the proposed rule. 5 U.S.C. § 553(b)-(c). However, the same provision exempts "interpretive rules" and "general statements of policy." *Id.* § 553(b)(A). Largely for the same reasons that the 2015 Guidelines do not constitute final agency action, they are not a legislative rule: they do not impose legal obligations upon any party.

Legislative rules "create new rights and have the force and effect of law." *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340 (4th Cir. 1995); *see also Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989) ("a substantive or legislative rule, pursuant to properly delegated authority, has the force of law, and creates new law or imposes new rights and duties"). Interpretive rules, by contrast, "simply state what the administrative agency thinks a statute means, and only remind affected parties of existing duties." *Chen Zhou*, 48 F.3d at 1340-41; *see also Jerri's Ceramic Arts*, 874 F.3d at 207 (same).

Thus, for example, an EPA guidance which advised EPA staff implementing the Clean Water Act to ask state-permitting authorities to assess the potential for "elevated conductivity" in issuing permits was not legislative in nature, in part because "state permitting authorities and permit applicants may ignore EPA's Final Guidance without facing any legal consequences." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014). Like the guidance at issue in *Nat'l Mining Ass'n*, state courts may ignore the 2015 Guidelines without facing legal consequences. By contrast, a guidance could be found to be a legislative rule if it created new

duties and could be enforced. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (EPA Clean Air Act guidance which required state-issued permits to provide for periodic monitoring is a legislative rule where, as a result of the guidance, "regional EPA offices have solid legal grounds for objecting to State-issued permits if the State authorities [decline to comply with the guidance].").

The Fourth Circuit's decisions look at a variety of factors when determining whether an agency rule is legislative, and they all support finding the 2015 Guidelines are not legislative. First, the Fourth Circuit has made clear that an agency's "own conduct . . . is highly relevant." *North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 765 (4th Cir. 2012) (agency attempts to comply with the APA's notice-and-comment requirement "support the conclusion that those procedures were applicable") (internal quotations omitted). In this case, the Department made no effort to comply with the APA's notice-and-comment requirements but did, less than a month after issuing the 2015 Guidelines, initiate that process for proposed regulations. Thus, the Department has done far more than characterize the 2015 Guidelines as non-binding in that document. It has committed agency time and resources to a notice-and-comment process designed to transform parts of the 2015 Guidelines into agency regulations – something that would be wholly unnecessary were the 2015 Guidelines already binding.

The Fourth Circuit also looks to how the agency characterizes the document itself. *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 105-106 (4th Cir. 2011); *see also West Virginia v. Thompson*, 475 F.3d 204, 211 n.2 (4th Cir. 2007) (manual provision not legislative where it made clear "that it does not bind the states to any mandatory requirements beyond those in the Medicaid statute"). As noted above, the 2015 Guidelines purport only to provide a framework for courts

and state agencies to follow, and this is how courts have treated them. Plaintiffs urge the Court to look past this and create a new standard that an "agency rule . . . is a legislative rule if it 'reads like an (*sic*) ukase.'" ECF No. 21 at 11, 12. They cite the D.C. Circuit's *Appalachian Power Co.* for this proposition, but the D.C. Circuit never suggested that legislative rules can be distinguished from interpretive rules by seeing if they read like a ukase. To the contrary, the D.C. Circuit has warned that a court should not set much store by whether or not a rule uses mandatory language. *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) ("Nor is there much explanatory power in any distinction that looks to the use of mandatory as opposed to permissive language."). That is because even interpretations can use mandatory language: "an interpretation will use imperative language – or at least have imperative meaning – if the interpreted term is part of a [statutory] command; it will have use permissive language – or at least have a permissive meaning – if the interpreted term is in a permissive provision." *Id.* The 1979 Guidelines noted as much, explaining that drafts not employing mandatory language had been rejected because they could be construed as making discretionary things that Congress made mandatory in ICWA. 44 Fed. Reg. at 67,584. Plaintiffs' tabulation of the number of occurrences of the word 'must' therefore says nothing about whether the 2015 Guidelines are interpretive or legislative, because the use of the word occurs in the context of a document that, on its face, is characterized as providing no more than a "guidance" or "framework" to "promote compliance with ICWA's stated goals and provisions." 80 Fed. Reg. 10,146.

In *Appalachian Power Co.*, the D.C. Circuit did more than note that an EPA guidance "reads like a ukase." 208 F.3d at 1023. It concluded that the guidance at issue created "obligations on the part of the State regulators and those they regulate," obligations EPA could

enforce by objecting to proposed permits. *Id.* Thus, even though the 2015 Guidelines use mandatory language, that fact alone is not dispositive, and the Court must still determine whether it creates an enforceable obligation on the part of state courts and the parties before them.[18]

Unsurprisingly, the Fourth Circuit also looks to the actual or intended effect of the rule. "A rule is a general statement of policy if it does not establish a binding norm and leaves agency officials free to exercise their discretion." *Chen Zou*, 48 F.3d at 1341; *Jerri's Ceramic Arts, Inc.*, 874 F.2d at 208 (rule was legislative where it "has the clear intent . . . of providing the Commission with power to enforce violations of a new rule"). In this case, the 2015 Guidelines are not directed toward agency officials enforcing an agency rule, but rather to state courts and child-welfare agencies. As noted above, the 2015 Guidelines do not purport to bind state courts and agencies, and state courts have not regarded the 2015 Guidelines as binding. In short, state courts are free to disagree with the 2015 Guidelines and interpret ICWA differently, and even in the short period of time since the 2015 Guidelines were published, some have. *See M.K.T.*, Case No. 113, 110, at 7-8 (rejecting the 2015 Guidelines interpretation of "good cause"). Under such circumstances, the 2015 Guidelines have not established a "binding norm." And, the fact that the 2015 Guidelines were immediately followed with notice-and-comment procedures for proposed regulations designed to incorporate and make binding many of the 2015 Guidelines' provisions demonstrates that the Department did not intend that they should have binding effect.

The only evidence that Plaintiffs offer that the updated Guidelines are binding is that Plaintiffs are supposedly taking steps to comply with them. ECF No. 21 at 12. The 2015

[18] The D.C. Circuit has articulated a comprehensive four-part test to determine when a rule has "legal effect" and is therefore legislative. *Am. Mining Congress*, 995 F.2d at 1112. None of these factors incorporate Plaintiffs' approach of counting the occurrences of mandatory sounding words.

Guidelines represent the Department's considered interpretation of ICWA, deserving of deference, and Plaintiffs are right to attempt to comply with them. But to the extent they disagree with that interpretation, they are also free to urge their own view of ICWA upon the relevant state courts overseeing the child welfare proceedings in which Plaintiffs are involved. And those courts, in turn, are free to consider Plaintiffs' arguments in determining how ICWA should be applied. Those state courts, and not the Department, will determine whether particular provisions of the 2015 Guidelines should guide their implementation of ICWA.

Finally, Plaintiffs note the Fourth Circuit's statement in *Jerri's Ceramic Arts* that an agency's change of a "long-standing position cannot readily be discounted." 874 F.2d at 208. Plaintiffs assert that the 2015 Guidelines constitute such a change in position. Many of those changes, however, are the result of the passage of time since the initial version of the 2015 Guidelines and the Department taking a position, for the first time, on interpretive disagreements over ICWA that have arisen among state courts in the decades since ICWA's enactment and since the 1979 Guidelines. *See supra* Factual Statements 19, 23-24. In any event, neither the APA nor the Fourth Circuit requires notice and comment before an agency can change its interpretation of a statute, and *Jerri's Ceramic Arts* does not hold to the contrary. That decision made clear that heightened scrutiny of changes in position

> does not mean that an agency may never reconsider its interpretation of a regulation. But it must do so with regard to the effects of such a decision, and the greater such effects, the less likely the change can be considered merely interpretive.

874 F.2d at 208. Thus, more is required than a change in long-standing policy to require notice-and-comment procedures. The Court must examine the effects of that change and determine whether they establish new duties on state courts and agencies. Here, unlike in *Jerri's*

Ceramic Arts, the changes do not create new legal rights or duties because state courts and agencies are not obliged to follow them, just as they were not obliged to follow the 1979 guidelines. Accordingly, Plaintiffs' claim fails as a matter of law.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for partial summary judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing ("NEF") to the following:

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