IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) JANE DOE; (2) JOHN DOE; (3) MARY ROE; (4) RICHARD ROE, individually and on behalf of (5) BABY DOE, Plaintiffs, vs. (1) SCOTT PRUITT, in his official capacity as Oklahoma Attorney General; (2) TODD HEMBREE, in his official capacity as Cherokee Nation Attorney General; and (3) ED LAKE, in his official capacity as the Director of the Department of Human Services. Defendants.	)	Case No. 2015-CV-471-JED-FHM

DEFENDANT TODD HEMBREE'S REPLY BRIEF
IN SUPPORT OF HIS MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION
AND FAILURE TO STATE A CLAIM

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Defendant Todd Hembree submits this brief in further support of his Motion to Dismiss ("Motion," Dkt. No. 23) and in reply to Plaintiffs' Response to that Motion ("Response," Dkt. No. 28). As shown below and in the Motion, the Court should dismiss this action.

INTRODUCTION

In his Motion, General Hembree demonstrates that the challenged provisions of the Oklahoma Indian Child Welfare Act ("OICWA") expand upon the federal Indian Child Welfare Act ("ICWA"), in only two ways relevant to this case.[1] First, OICWA requires a state court adjudicating a voluntary adoption proceeding involving an Indian child to ensure that the child's tribe receives notice of the proceeding. Okla. Stat. tit. 10, § 40.4. Second, OICWA provides that a person who is involved in placing an Indian child should enlist the assistance of the relevant Indian tribe "to the maximum extent possible" in securing placement consistent with the provisions of ICWA and OICWA. *Id.* § 40.6.

Plaintiffs make no attempt to show that enforcement of these two provisions would deprive them of their constitutional rights. Instead, they focus on the harm that allegedly would flow from the Cherokee Nation's intervention in Baby Doe's adoption proceedings and the state court's use of certain placement preferences applicable to an Indian child. Plaintiffs ignore the fact that ***federal law***—*i.e.,* ICWA itself—establishes the right to tribal intervention and the requirement to utilize the placement preferences in Baby Doe's adoption. As shown in the Motion, the Supreme Court and the Tenth Circuit have recognized that 25 U.S.C. § 1911(c) "expressly gives [a] child's Indian tribe the right to intervene in state court proceedings involving the child's custody," regardless of whether the proceedings are voluntary. *Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587, 592 (10th Cir. 1985); *see Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 38 n.12 (1989)

[1] OICWA also differs from ICWA insofar as it makes the placement preferences of 25 U.S.C. § 1915 applicable to "all preadjudicatory placements." Okla. Stat. tit. 10, § 40.6. This difference is not relevant here.

(recognizing tribe's right to intervene in private placement adoption).[2] Plaintiffs do not even attempt to distinguish these cases.[3] Nor do they contest the fact that the placement preferences of § 1915(a) expressly apply in "***any*** adoptive placement of an Indian child under State law." 25 U.S.C. § 1915(a) (emphasis added). Thus, Plaintiffs' primary challenges to OICWA are actually challenges to ***ICWA***—the constitutionality of which has been upheld countless times in the last 35 years. Because the Amended Complaint does not seek a ruling regarding ICWA and Plaintiffs admit that ICWA is "not at issue in this litigation" (Resp. at 20), the Court need not resolve those challenges here. Instead, this case is limited to the two narrow provisions by which OICWA supplements ICWA, *i.e.*, the tribal notice requirement and the provision recommending utilization of tribal placement resources. Both provisions are purely pragmatic, rationally related to legitimate governmental purposes, and clearly constitutional.

ARGUMENT AND AUTHORITIES

I. *Younger* Abstention Is Appropriate And Required.

Plaintiffs do not deny that a "child custody proceeding" relating to Baby Doe is ongoing in state court or that the state court bears responsibility for complying with ICWA and OICWA, including by "ensur[ing] that the . . . person initiating the proceeding" has sent the appropriate notice to "the tribe that is or may be the tribe of the Indian child." Okla. Stat. tit. 10, § 40.4. Further, Plaintiffs do not—and cannot—dispute that by seeking a declaration that the challenged provisions of OICWA are unconstitutional and attempting to enjoin their enforcement, Plaintiffs seek a ruling from this Court that, if granted, would purport to tell the state court how to do its job. This is impermissible under *Younger* and its progeny.

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[2] The *Holyfield* Court also noted that 25 U.S.C. § 1914 authorizes a tribe to challenge a voluntary adoption after the fact by petitioning any court of competent jurisdiction to invalidate a termination of parental rights in certain circumstances. 490 U.S. at 38 n.12.

[3] Plaintiffs only cite *Holyfield* for its description of Congress' purpose in enacting ICWA. (Resp. at 2.) They make no reference to *Kiowa Tribe* at all.

Citing *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584 (2013), Plaintiffs contend that "*Younger* abstention is strictly limited to criminal or quasi-criminal contexts and does not extend to 'all parallel state and federal proceedings' involving an 'important state interest.'" (Resp. at 6-7 (quoting *Sprint*, 134 S. Ct. at 593).) But the *Sprint* Court recognized that *Younger* abstention applies in a third "exceptional circumstance," *i.e.,* "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." 134 S. Ct. at 591.

In the two years following *Sprint*, numerous courts have held that this third "exceptional circumstance" exists where, as here, the federal plaintiffs seek a ruling that, if granted, would usurp the role of the state court in pending state proceedings. *See, e.g., Conry v. Barker*, 2015 WL 5636405, at *7 (D. Colo. Aug. 11, 2015) (abstaining from claim seeking determination that state court judgment was invalid where state appeal of judgment was pending; federal court "must abstain from exercising jurisdiction over claims for declaratory relief that would impair the 'state courts' ability to perform their judicial functions . . . .'") (citation omitted); *Buzzard v. Indeterminate Sentence Review Bd.*, 2015 WL 4459255, at *1 (W.D. Wash. July 21, 2015) (citing third *Sprint* category, federal court abstained from reviewing challenge to sentencing review board's decision to extend plaintiffs' prison terms where plaintiffs' ongoing state court action challenged the constitutionality of state's parole procedures); *Dandar v. Church of Scientology Flag Serv. Org.*, 24 F. Supp. 3d 1181, 1194-95 (M.D. Fla. 2014) (abstaining where federal plaintiff challenged state court's ability to impose sanctions under court rule for breach of settlement reached in court-ordered mediation because "interfering with the state court's ability to grant relief under [the rule] would indeed interfere with an order 'uniquely in furtherance of the State courts' ability to perform their judicial functions'") (citation omitted); *Thomas v. Piccione*, 2014 WL 1653066, at *5 (W.D. Pa. Apr. 24, 2014) (applying third *Sprint* exception where federal

plaintiffs sought injunction requiring recusal of state judge because state "has an important interest in protecting the authority and judicial function of its court, including the recusal process").

Courts have held that cases involving child custody decisions fit "squarely into the third category of exceptional cases" recognized by *Sprint*. *Karl v. Cifuentes*, 2015 WL 4940613, at *4 (E.D. Pa. Aug. 13, 2015); *see Mikhail v. Kahn*, 991 F. Supp. 2d 596, 624 (E.D. Pa. 2014) ("[C]hild custody proceedings are a strong candidate for *Younger* abstention."). In *Karl*, the federal court held that abstention was required where a father sought an order granting him primary custody of his children. 2015 WL 4940613, at *3-4. The court noted that a state court custody proceeding was ongoing, in which the father had already obtained a temporary order granting him physical custody of the children. *Id.* at *4. Invoking *Sprint*'s third category of "exceptional cases," the *Karl* court reasoned that "[d]eciding the federal case would interfere with an order that is uniquely critical to the state court's ability to perform its judicial function, that is, to decide what is in the best interest of the children." *Id.*; *see also Lamons v. Jordan*, 2014 WL 1346244, at *6 (N.D. Fla. Apr. 4, 2014) (dismissing action seeking to void state court dependency petition filed against plaintiff by child protective services after dependency court placed plaintiff's child in a shelter home because such relief would "interfere with the dependency court's orders in furtherance of its ability to perform its judicial functions under Florida's dependency statutes. So long as the dependency proceeding is pending in the state courts, proper respect for the ability of the Florida courts to resolve Plaintiff's challenges to the dependency process mandates that the federal court stay its hand."); *Likely v. Verschueren*, 2014 WL 667711, at *5 (N.D. Fla. Feb. 20, 2014) (*Younger* abstention appropriate where federal plaintiff sought injunction requiring state court to extend deadline for plaintiff to complete written case plan regarding child custody because injunction "would interfere with the [state] court's orders in furtherance of its performance of the judicial functions within the time frames set forth in Florida's dependency statutes . . . .").

Because the relief Plaintiffs seek would directly impact the state court's ability to perform its judicial function by preventing the court from taking actions expressly required by state law, this case squarely falls within the third category recognized by *Sprint*. Accordingly, the *Younger* doctrine clearly applies here.

Finally, contrary to Plaintiffs' assertion (Resp. at 7), the Supreme Court did not "expressly overrule[]" the three-factor test established in *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423 (1982). Rather, the Court merely held that the three *Middlesex* factors are "not dispositive" of the abstention issue but are "***additional*** factors appropriately considered by the federal courts before invoking *Younger*." *Sprint*, 134 S. Ct. at 593. Plaintiffs have not even attempted to argue that the *Middlesex* factors are not satisfied here. As shown in the Motion, application of those factors compels the conclusion that the Court should abstain from adjudicating Plaintiffs' challenge to the constitutionality of a statute that must be applied by the state court in an ongoing state court proceeding.[4]

II. Plaintiffs Have Not Stated A Claim For Relief.

A. Plaintiffs do not state a claim against General Hembree.

In his Motion, General Hembree noted that Plaintiffs do not allege that he did anything to deprive them of their alleged rights under the Constitution. Plaintiffs fail even to mention this argument in their Response. The Court should dismiss any claims against General Hembree.

B. The challenged statutes do not threaten Plaintiffs' constitutional rights.

1. Plaintiffs' attempt to establish an equal protection violation fails.

[4] Plaintiffs devote three pages of their Response (at 8-11) to an argument that they have standing to pursue their claims. This is extremely curious in light of the fact that General Hembree ***did not challenge Plaintiffs' standing*** in his Motion. The most likely explanation for the inclusion of this unnecessary argument is that there is a similar case pending in Minnesota federal court in which the defendants ***did*** challenge the plaintiffs' standing. Plaintiffs appear to have utilized the plaintiffs' response brief in that case as a resource here. *See* Combined Resp. to Defs.' Mot. to Dismiss in Case No. 15-cv-02639, D. Minn. (filed 07/16/15) ("Minnesota Brief").

Plaintiffs concede that the "relationship between the federal government and the Indian Tribes is a trust relationship that allows Congress to enact laws that provide Indian Tribes with special treatment which would otherwise be unconstitutional." (Resp. at 11 (citing *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).) But they assert that states do not share this authority to differentiate between tribal members and non-members unless they have been "specifically authorized to do so explicitly by a federal statute." (Resp. at 12 (citing *Wash. v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) ("*Yakima*")).) Plaintiffs wrongly contend that OICWA is subject to strict scrutiny review because its federal counterpart, ICWA, does not "give explicit authority to Oklahoma . . . to enter the arena of preferences and requirements dealing with Indian children in custody matters." (Resp. at 12.)

First, Plaintiffs mischaracterize OICWA, which does not "give preferential treatment to tribal Indians." (*Id.*) Rather, the challenged provisions merely establish procedures to assist state courts in implementing ICWA.[5] For example, the notice provision requires that tribes have an opportunity to participate in the early stages of any Indian child custody proceeding, rather than learning of an adoption and challenging it months or even years later. Okla. Stat. tit. 10 § 40.4. Similarly, section 40.6 calls for tribal resources to be utilized "to the maximum extent possible" in securing placement consistent with the provisions of ICWA and OICWA. *Id.* § 40.6. Both provisions create procedures that permit the court and parties to have the benefit of tribal expertise

[5] Plaintiff Jane Doe contends that, as a member of the Cherokee Nation, she is discriminated against because non-Indians who consent to the voluntary adoption of their children do not have to comply with ICWA and OICWA. She ignores the fact that ICWA provides protections to birth parents that are unavailable to non-tribal members. For example, ICWA ensures that parental consents are fully voluntary, prohibits relinquishment of parental rights for ten days after birth, and provides for a period during which a birth parent can revoke consent. *See* 25 U.S.C. § 1913. These protections are not available under state law but are consistent with the "best practices" for adoptions promoted by adoption policy groups. *See* Evan B. Donaldson Adoption Institute, *Safeguarding the Rights and Well-Being of the Birthparents in the Adoption Process*, at 5 (2007).

in navigating ICWA. In other words, ICWA already has invited tribes to participate in adoption proceedings involving Indian children; OICWA seeks to ensure that participation occurs at a time and in a manner that is helpful to the state courts and the parties.

Further, even if the provisions created preferences in favor of Indian tribes, they would still not be subject to strict scrutiny. Contrary to Plaintiffs' suggestion (Resp. at 12), *Yakima* does not require that a federal statute contain an express provision authorizing specific state action. Rather, it recognizes that federal trust authority extends to state laws "enacted in response" to federal law. *Yakima*, 439 U.S. at 501; *see Greene v. Comm'r of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 727 (Minn. 2008) (citing *Yakima* and noting that "[g]enerally, courts have applied rational basis review to state laws that . . . implement or reflect federal laws"). *Yakima* arose out of a federal statute giving the consent of the United States "to any . . . State . . . to assume jurisdiction" over Indians and Indian land. It did not require the states to do so, nor did it provide any guidelines for how jurisdiction should be assumed. In response, the Washington legislature enacted a statute directing the state to assume jurisdiction over Indians and Indian territory within the state, subject to conditions that resulted in a "'checkerboard' pattern of jurisdiction" on some reservations that the Ninth Circuit deemed "bizarre." *Id.* at 463, 499-500. The Yakima Tribe challenged the statute on a number of bases, including equal protection grounds. The Supreme Court held that a strict scrutiny analysis was not appropriate, noting that although states do not enjoy the "same unique relationship with Indians" as the federal government, the challenged law was "not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians." *Id.* at 501.

Similarly, OICWA was enacted in direct response to a federal statute explicitly designed to readjust the manner in which state courts adjudicate Indian child custody proceedings.[6] In ICWA, Congress expressly recognized that states have "jurisdiction over Indian child custody proceedings," 25 U.S.C. § 1901(5), and that state law governs those proceedings, *see, e.g., id.* § 1914 ("Any Indian child who is the subject of any action for . . . termination of parental rights under State law . . . ."); § 1915(a) (reciting placement preferences applicable to "any adoptive placement of an Indian child under State law"). By enacting ICWA, Congress established procedures and safeguards for Indian families and tribes to be utilized in these state court proceedings. It necessarily left to the states the responsibility to implement ICWA, which the Oklahoma legislature did. Okla. Stat. tit. 10, § 40.1 (purpose of OICWA is to "clarif[y] . . . state policies and procedures regarding the implementation . . . of [ICWA]").[7] Thus, Congress delegated to the states its trust authority regarding Indian child custody proceedings, and the Oklahoma legislature acted pursuant to that authority when it enacted OICWA.

Indeed, at least one court has held that in enacting laws to implement ICWA, state legislatures share the trust authority of the federal government. *In re A.W.*, 741 N.W.2d 793, 808

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[6] Plaintiffs' authorities are inapposite because they relate to discriminatory actions taken by private individuals or organizations, *Spirit Lake Tribe of Indians ex rel. Comm. of Understanding & Respect v. Nat'l Collegiate Athletic Ass'n*, 715 F.3d 1089 (8th Cir. 2013); *Albers v. Mellegard, Inc.*, 2008 WL 7122683 (D.S.D. Oct. 27, 2008), or local laws that neither implemented nor reflected a specific federal law, *Tafoya v. City of Albuquerque*, 751 F. Supp. 1527 (D.N.M. 1990); *Malabed v. N. Slope Borough*, 70 P.3d 416 (Alaska 2003).

[7] The Oklahoma legislature even adopted ICWA's definition of "Indian child," which hinges on tribal membership, not Indian ancestry. *Compare* Okla. Stat. tit. 10, § 40.2(2) *with* 25 U.S.C. § 1903(4). Thus, although Plaintiffs claim that OICWA treats an "Indian child" "disparately based solely on his or her ***eligibility*** for tribal membership" (Resp. at 24 (emphasis added)), this is simply not true. OICWA (like ICWA) defines "Indian child" to include either (1) a member of an Indian tribe, or (2) one who is "eligible for membership in an Indian tribe ***and*** is the biological child of a member of an Indian tribe." Okla. Stat. tit. 10, § 40.2(2) (emphasis added). OICWA differs from the Minnesota statute in this regard, which may explain Plaintiffs' misstatement. (*See* Minnesota Brief at 4, 40-41.)

(Iowa 2007). Construing Iowa's Indian Child Welfare Act, the court reasoned:

> The federal ICWA clearly invokes the federal government's trust authority as its basis. 25 U.S.C. § 1901(1), (2). ***Because all child custody proceedings occur in state courts, the federal ICWA is necessarily a delegation of the federal trust authority to the states for the protection of Indian tribes***. The General Assembly enacted the Iowa ICWA pursuant to this delegation of the federal trust authority. It therefore may legislate . . . within the bounds of Congress's authority to enact legislation favoring Indians.

Id. (emphasis added) (internal citation omitted); *see also Squaxin Island Tribe v. Wash.*, 781 F.2d 715, 719, 722 n.10 (9th Cir. 1986) (by providing that liquor transactions in Indian country are not prohibited under federal law if they conform with state law, federal statute delegated to the states the authority to regulate such sales; thus, state liquor control board's actions discriminating in favor of tribes were subject only to rational basis analysis); *Greene*, 755 N.W.2d at 727 (state law requiring tribal members residing within tribe's service area to seek employment services from tribe rather than county was "a direct response to the federal government's enactment" of law providing federally recognized Indian tribes with opportunity to administer their own welfare programs and thus classification was political rather than racial); *cf. Livingston v. Ewing*, 601 F.2d 1110, 1115-16 (10th Cir. 1979) (rejecting claim of reverse discrimination where local laws prohibited non-Indians from selling jewelry within the Plaza in Santa Fe).

Congress necessarily understood that implementation of ICWA ***must*** occur at the state level because state courts adjudicate the majority of Indian child custody cases. The Oklahoma legislature adopted OICWA in direct response to this charge, and OICWA both reflects and effectuates ICWA's provisions and purpose. Accordingly, Congress delegated its trust authority to the State of Oklahoma, and the resulting statute need only bear a rational relationship to the State's objectives. *See Yakima*, 439 U.S. at 501.

The Motion demonstrates that the challenged provisions of OICWA bear a rational relationship to the State's objectives to ensure the finality of judgments addressing child custody decisions and to utilize tribes as resources for complying with ICWA's requirements, in addition

to the well-established goal of ICWA and OICWA to further Indian self-government. Plaintiffs fail even to mention these arguments, much less to rebut them. Accordingly, Plaintiffs have not alleged a violation of their rights under the Equal Protection Clause.

2. Plaintiffs do not identify the infringement of a "fundamental right."

Plaintiffs concede that to state a substantive due process claim, they must "establish the existence of a fundamental right or liberty." (Resp. at 13.) They invoke the "'fundamental rights of parents to make parenting decisions concerning the care, custody, and control of their children'" (*id.* at 15 (citation omitted)), and contend that "any state restriction that prevents or otherwise interferes with two, fit, biological parents from freely choosing with whom they can place their adoptive children, must be subject to strict scrutiny" (*id.* at 16). But even assuming for purposes of this Motion only that such a fundamental right exists, it is federal law that imposes those restrictions, not OICWA. The challenged provisions of OICWA merely require notice to the tribes and encourage utilization of tribal resources in placement decisions "to the maximum extent possible." Plaintiffs fail to articulate how these procedural provisions infringe on their alleged fundamental right. Thus, the provisions need only have a rational relationship to a legitimate state interest. *See Seegmiller v. LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008). As shown above and in the Motion, they do. Plaintiffs' due process claim should be dismissed.[8]

CONCLUSION

For the reasons set forth above and in the Motion, Plaintiffs' Amended Complaint should be dismissed.

[8] Plaintiffs fail to respond to Hembree's arguments for the dismissal of Counts III and IV of the Amended Complaint. These should be dismissed for the reasons set forth in the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2015, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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