

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

(1) Jane Doe and (2) John Doe and)	
(3) Mary Roe and (4) Richard Roe,)	
Individually and on behalf of)	
(5) Baby Doe)	
)	
v.)	CASE NO. 2015-cv-471-JED-FHM
(1) Scott Pruitt, in his official capacity)	
as Oklahoma Attorney General,)	
(2) Todd Hembree, in his official)	
capacity as Cherokee Nation Attorney)	
General.)	
(3) Ed Lake, in his official capacity as)	
the Director of the Department of)	
Human Services)	

**PLAINTIFFS’ RESPONSE TO
HEMBREE’S MOTION TO DISMISS**

Plaintiffs hereby respond to the Motion to Dismiss (DKT #39) of the Defendant, Ed Lake (“Lake”).

INTRODUCTION

Plaintiffs bring the above-captioned action seeking injunctive relief and a declaratory judgment on grounds that 10 O.S. §§40.3, 40.4 and 40.6 violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and they are beyond the scope of the authority delegated to the State of Oklahoma by Congress. Presently, fit biological parents of Indian children are the only class of people in Oklahoma, who do not have the right to exercise their fundamental parental rights to voluntarily place their children for adoption without government interference. The Plaintiffs brought and maintain this action to ensure such interference never happens again in Oklahoma. They meet all standing and other subject matter jurisdiction requirements, and have stated claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

FACTS

1. ICWA'S NOTICE PROVISIONS FOR INVOLUNTARY PROCEEDINGS

Congress passed the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963, in response to a high number of Indian children being removed from their homes by both public and private agencies. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

Congress's intent was 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.

25 U.S.C. § 1912(b) provides tribes with a right of intervention during state court proceedings for the *involuntary* termination¹ of an Indian parent(s) parental rights:

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention...

The purpose of the tribe's intervention in these involuntary proceedings is to enable the tribe to seek enforcement of an adoptive placement in line with ICWA's preference provisions after parental rights are terminated. This was designed to be used when a state's child protection services had removed a child from a home due to abuse or neglect.

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.

¹ In Oklahoma, voluntary and involuntary adoption proceedings can be commenced through child placing agencies or private attorneys under the Oklahoma Adoption Code, 10 Okla. Stat. §7501-1.1 *et seq.* In addition, the State of Oklahoma can commence proceedings under the "deprived child" statutes in the Children's and Juvenile Code of Title 10A of the Oklahoma Statutes. The State proceedings involve the Department of Human Services and foster placements and can result in a termination of parental rights. Involuntary proceedings can occur for a number of reasons including abandonment, neglect, or failure to contribute to the support or financial aid of the child. In this case, the Plaintiffs are voluntarily consenting to adoption by the proposed adoptive parents. The final decree of adoption will terminate their parental rights under the Oklahoma Adoption Code.

25 U.S.C. § 1915(a).

25 U.S.C. § 1916 provides courts with the authority to invalidate any adoptive placement following involuntary removal of a child from its Indian parents where notice was not properly provided pursuant to 25 U.S.C. § 1912(b). But courts have repeatedly held or otherwise recognized that ICWA's notice provisions contained in Section 1912(b) do not pertain to *voluntary* adoption proceedings. *See, e.g., Navajo Nation v. Super. Court of the State of Washington*, 47 F. Supp. 2d 1233, 1238 (E.D. Wash. 1999); *see also Catholic Soc. Servs., Inc. v. C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989), *In the Matter of the Adoption of Baby Boy J*, 37 Misc.3d 198, 944 N.Y.S.2d 871 (2012). *Cohen's Handbook of Federal Indian Law*, §11.04[1] at Page 846 (Nell Jessup Newton ed. 2012)

2. THE EXTENDED REACH OF THE OKLAHOMA INDIAN CHILD WELFARE ACT

The Oklahoma Indian Child Welfare Act ("OICWA") was originally enacted in 1982, codified at 10 Okla. Stat. §40.0 et seq. This law provided notice to tribes "In any involuntary proceeding of the of the Oklahoma Indian Child Welfare Act, including review hearings, the court shall send notice to the parents or to the Indian custodians, if any, and to the tribe of the Indian child, and to the appropriate Bureau of Indian Affairs area office, by registered mail..." 10 Okla. Stat. § 40.4.

However, even as originally enacted, the law did not mandate notice to Indian tribes of voluntary proceeding where Indian parents desired to place their children for adoption. In 1994, the Oklahoma legislature expanded upon ICWA and enacted notice and intervention provisions pertaining to *voluntary* adoptions:

B. Except as provided for in subsection A of this section, the Oklahoma Indian Child Welfare Act applies to all state voluntary and involuntary child custody court proceedings involving Indian children, regardless of whether or not the children involved are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated.

10 Okla. Stat. §40.3

And:

In all Indian child custody proceedings of the Oklahoma Indian Child Welfare Act, including voluntary court proceedings and review hearings, the court shall ensure that the district attorney or other person initiating the proceeding shall send notice to the parents or to the Indian custodians, if any, and to the tribe that is or may be the tribe of the Indian child, and to the appropriate Bureau of Indian Affairs area office, by certified mail...

10 Okla. Stat. §40.4

10 Okla. Stat. §§40.4 and 40.6 provide tribes with an express right to intervene in voluntary adoptions. Section 40.4 provides that notice must be sent to tribes in "voluntary court proceedings" and the notice must include "a statement of the rights of the biological parents or Indian custodian, and the Indian tribe: a. to intervene in the proceeding, " Section 40.6 states that:

The placement preferences specified in 25 U.S.C. § 1915, shall apply to all preadjudicatory placements, as well as preadoptive, adoptive... placements. In all placements of an Indian child ...by any person.... the person... shall utilize to the maximum extent possible the services of the Indian tribe of the child in securing placement consistent with the provisions of the Oklahoma Indian Child Welfare Act. This requirement shall include cases where a consenting parent evidences a desire for anonymity in the consent document.... If a request for anonymity is included in a parental consent document, *the court shall give weight to such desire in applying the preferences only after notice is given to the child's tribe and the tribe is afforded twenty (20) days to intervene* and request a hearing on available tribal placement resources which may protect parental confidentiality....

[Emphasis Added]

Unlike ICWA, the OICWA, facially and as applied, gives Indian tribes the right under the color of state law to interfere with voluntary, private adoptions.

Adoption proceedings are strictly confidential under state law. 10 Okla. Stat. §7505-1.1(A). (hearings confidential except as to interested parties and their counsel). All adoption *records*, such as birth certificates (confidential under 10 Okla. Stat§7505-1.1(B) and §§7505-6.5(C) and (E)), detailed social and medical histories on the birth parents (required under 10 Okla. Stat. §§7504-1.1 and 1.2), and adoption home studies and criminal background checks on adoptive parents (required under 10 Okla. Stat§§ 7505-5.1, 5.2 and 5.3) are likewise confidential, open to inspection only by order of the court. 10 Okla. Stat. §§7505-1.1.

In private adoptive placements under the Oklahoma Adoption Code, where the parent directly places a child with adoptive parents of their choosing, notice is required to be sent only to parents with notice rights or an agency or DHS, if the agency or DHS had custody of the child previously, 10 Okla. Stat§7505-6.3. No governmental entity has the right to notice in such adoption proceedings - unless the child is an Indian child under OICWA, in which case the tribe must be notified of its right to intervene. 10 Okla. Stat§§ 40.3, 40.4, 40.6. As an intervener, the tribe has the right to discovery of all reports or other documents filed with the court. 25 U.S.C. § 1912(c). As an intervener, the tribe has the right to challenge the parents' choice of adoptive parents by invoking Section 1915(a)'s placement preferences. Section 40.6 of OICWA states that "the person or placement agency shall utilize to the maximum extent possible the services of the Indian tribe of the child in securing placement consistent with the provisions of the Oklahoma Indian Child Welfare Act. This requirement shall include cases where a consenting parent evidences a desire for anonymity in the consent document..."

ARGUMENT

I. PLAINTIFFS HAVE STATED A CLAIM AGAINST DEFENDANT LAKE

A. Plaintiffs Have Standing to Challenge Constitutionality of OICWA

Plaintiffs must allege three elements to establish standing: (1) that they have personally suffered an "injury in fact" (2) that is "fairly traceable to the challenged action of the defendant" and (3) that is "likely [to] be redressed by a favorable decision." *Consumer Data Industry Assoc v. King*, 678 F.3d 898, (10th Cir. 2012); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). At this stage, the court must accept all allegations set forth in injury to obtain preventative relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979)

Plaintiffs do not seek a declaration merely as members of the public at large. *Lujan*, 504 U.S. at 573-74. They are parties to an ongoing, private adoption proceeding involving an “Indian child,” and face complying with a *mandatory* statutory scheme enforced by the Lake for the Department of Human Services and Hembree for the Cherokee Nation. There is nothing abstract about the necessary compliance with OICWA’s notice and intervention provisions in order to complete Baby Doe’s adoption.

Under Defendants’ argument, no plaintiff could *ever* have standing to challenge OICWA’s notice and intervention provisions until *after* the adoptive parents, or “any other party” (i.e., even the birth parents) chose not to comply with them. *See* 10 Okla. Stat §40.4 Plaintiffs are not required to risk the gauntlet of consequences, such as penalties for non-compliance or the invalidation of the pursued adoption now or later. 25 U.S.C. § 1914 (invalidation of Indian child adoption for failure to provide notice); At the initiation of this suit, Plaintiffs credibly feared that a failure to comply would compromise their adoption plans, and that they would be required to notify the tribe in order to comply with the mandatory statutory scheme.

Protective orders can be implemented and a tribe can choose not to intervene, but that is beside the point. The harm to Plaintiffs already arose even though an official did not specifically threaten suit or intervene. As recognized in *Babbitt*, the *presence* of the statute is threat enough. *Babbitt* at 299, *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, (1973). For Article III standing, it is threat enough that OICWA *allows* a tribe to intervene and oppose an adoption petition under the same intrusive “best interests” test struck down in *Troxel v. Granville*, 530 U.S. 57 (2000). The Petitioners will imminently suffer an injury non-Indian parents do not face because OICWA’s intervention allows tribes to second guess the Petitioners’ decision-making and permits the tribe to demand confidential information to enforce ICWA’s placement preference regime. Non-Indian parents do not face this threat. This is a sufficient injury in fact.

B. Plaintiffs' Claims are Fairly Traceable to the Challenged Actions of the Defendants.

Article III standing does not require proximate causation; it only requires that the injury “be fairly traceable to the defendant’s conduct.” *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014). A favorable judgment that the OICWA provisions in question were unconstitutional would be substantially likely to redress injury in fact by prohibiting Lake and Hembree from legal action to require notice be given the Cherokees in voluntary adoptions.

In 2013, the Governor of the State of Oklahoma entered Executive Order 2013-37 which recites, in part, that "the Oklahoma Legislature, at 10 O.S. § 40.1, recognized Indian tribes and nations have an interest in the welfare of Indian children and stated the policy of the State shall be to cooperate fully with Indian tribes in Oklahoma in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced" and then ordered that Ed Lake:

- (1) Work collaboratively and collectively when able for the benefit of all children of both sovereigns;
- (2) Share any and all information relating to reports and investigations of child abuse to the extent allowable by federal, state, and tribal law;
- (3) Maintain open channels of communications between State and Tribal child welfare departments;
- (4) Adhere to any and all Tribal-State Child Welfare agreements that have been or will be properly executed and agreed to by each sovereign.

See Executive Order 2013-37 attached hereto as Exhibit A

Oklahoma law also provides an adoption may be vacated for failure to sending notice to a Tribe. *Cherokee Nation v. Nomura*, 2007 OK 40, 160 P.3d 967 (2007). If the Petitioners failed to notify the tribe, their adoption plan and the adoption itself, would be put under a cloud, with the Petitioners living under the fear and uncertainty that their family arrangement could be undone.

Therefore, the Petitioners have standing to request that Lake and Hembree be prevented from enforcing the provisions of OICWA §40.4.

C. Redressability

The real harm is requiring notice to the Tribe and authorizing it to intervene in voluntary, private adoption proceedings. That is precisely what Plaintiffs seek to avoid through injunctive relief and a declaratory judgment. If this Court declares Okla. Stat. §§40.3, 40.4 and 40.6 unconstitutional and enjoins their application, Plaintiffs are “likely” to obtain the relief they seek (i.e., no notice or intervention). *See Braden*, 588 F.3d at 591 (citing *Lujan*, 504 U.S. at 560-61).

Article III generally requires injury to the plaintiff's personal legal interests, *see Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771–72, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), but that does not mean that a plaintiff with Article III standing may only assert his own rights or redress his own injuries. To the contrary, constitutional standing is only a threshold inquiry, and “so long as [Article III] is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others.” *Id.* at 501, 95 S.Ct. 2197. In such a case, a plaintiff may be able to assert causes of action which are based on conduct that harmed him, but which sweep more broadly than the injury he personally suffered. *See Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 128 S.Ct. 2531, 2543, 171 L.Ed.2d 424 (2008) (“[F]ederal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit.”). *Braden*, 588 F.3d at 591-92.

III. THE STATE OF OKLAHOMA DOES NOT HAVE JURISDICTION TO LEGISLATE AS TO INDIAN TRIBES

It has long been established that Congress' obligations to the Indians are constitutionally based and unique. The United States overcame the Indians and took possession of their lands and assumed the duty of "furnishing that protection and with it the authority to do all that was required

to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic". *Board of Comm'rs of Creek County v. Seber*, 318 U.S. 705, 715, 63 S.Ct. 920, 926, 87 L.Ed. 1094, 1102-03 (1943); *see also United States v. Kagama*, 118 U.S. 375, 383-84, 6 S.Ct. 1109, 1114, 30 L.Ed. 228, 231 (1886)

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. *Morton v. Mancari*, 417 U.S. 535, 555, 94 S. Ct. 2474 (1974). The preference is not directed toward a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. *Id.* However, the States do not have the same history and relationship with the Indian Tribes that is held by Congress. Indian tribes owe no allegiance to the states, and receive from them no protection. *United States v. Kagama, supra*.

Maintaining this trust relationship with Indian tribes has historically been the exclusive prerogative of Congress, and states may exercise the federal trust authority only when specifically authorized to do so explicitly by a federal statute. *See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740, 768 (1979).

The State of Oklahoma does not have the power to treat Indian Tribes differently than other groups of people. In the case of the Oklahoma Indian Child Welfare Act, there is no delegation of federal authority to the states authorizing a state to enact legislation that would give preferential treatment to tribal Indians. Neither the federal Indian Child Welfare Act nor its legislative history give explicit authority to Oklahoma, or any other state, to enter the arena of preferences and requirements dealing with Indian children in custody matters. Without an explicit federal statute which authorizes a state government to step into the shoes of Congress and enact legislation regarding Indian Tribes, the legislation is invalid. *Tafoya v. City of Albuquerque*, 751 F.Supp. 1527 (D.N.M., 1990) (City did not have authority similar to the BIA to enact ordinance preferring Indian vendors), *Malabed v. North Slope Borough*, 70 P.3d 416 (Alaska, 2003) (Borough has no legitimate basis to have hiring preference favoring one class of citizens over another), *KG Urban Enters, LLC*

v. Patrick, 839 F. Supp. 2d 388 (D. Mass., 2012) (the Federal Gaming Regulation Act authorized the states to legislate as to Indian gaming;)

Historically, the vast majority of cases dealing with a state trying to exercise authority over Indian Tribes were determined by whether the action that was challenged occurred in Indian Country or outside Indian Country. However, in the *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 the United States Supreme Court held that “absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.”²

OICWA can hardly be classified as "nondiscriminatory" or a law that is applicable to all citizens of the state. Due to the fact that the State of Oklahoma does not maintain the "federal trust" relationship with the Indian Tribes, it cannot adopt the "political status" classification of Indian Tribes enunciated by the Supreme Court in *Morton v. Mancari*, 417 U.S. 535 (1974). In discussing the difference between federal laws that allow special treatment to Indian Tribes and a similar law enacted by a city, the court in *Tafoya v. City of Albuquerque*, *supra*, stated:

As the Supreme Court so clearly stated in *Morton*, Congress' obligations to Indians are constitutionally based and unique. The City of Albuquerque does not have comparable power to treat members of federally recognized Indian tribes or pueblos or members of the Navajo Nation differently than other groups of Indians or non-Indians.

See also, Tuveson v Florida Governor's Council on Indian Affairs, 495 So. 2d 790 (FL 1986) (holding that State agency was in error in concluding that an Indian preference was legal because it was legal for the BIA under federal law)

IV. OICWA VIOLATES THE PLAINTIFFS' RIGHT TO DUE PROCESS

² The term Indian Country generally means real property that is held in the name of an Indian Tribe or held in the name of the federal government for the benefit of or in trust for an Indian Tribe, or property that is in the name of an individual Indian but is restricted from alienation by the federal government. The terms "Indian Country" and "reservations" are used almost synonymously when discussing the legal implications of Indian Law cases. While the State of Oklahoma no longer contains Indian reservations as other states do, there are many locations in Oklahoma that are considered Indian Country.

The Fourteenth Amendment to the United States Constitution precludes any state from “depriving any person of life, liberty or property, without the due process of law.” U.S. Const. amend. XIV, § 1. “The doctrine of substantive due process protects unenumerated fundamental rights and liberties under the Due Process Clause of the Fourteenth Amendment.” *Gallagher v. City of Clayton*, 699 F.3d 1013, 1017 (8th Cir. 2012) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). In order to state a substantive due process claim, a party must: (1) establish the existence of a fundamental right or liberty and (2) provide a “careful description of the asserted fundamental liberty interest.” *Washington*, 521 U.S. at 720-21 (internal quotations and citations omitted). “The Due Process Clause ‘forbids the government to infringe certain fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” *Rosenbrahn v. Daugaard*, No. 14-cv-04081, --- F. Supp. 3d ---, 2015 WL 144567, at *4 (D.S.D. Jan 12, 2015) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original)).

**A. The Right of Fit Biological Parents to Choose Child's Upbringing
is a Right that is Entitled to Strict Scrutiny³**

The right to privacy is not expressly enumerated within the Constitution, but the Supreme Court has long-recognized — since at least 1891 — “that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.” *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citation omitted). The Supreme Court has characterized two distinct interests within the scope of the constitutional right to privacy: “one is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.” *Whalen v. Roe*, 429 U.S. 589, 599-00 (1977). The fundamental rights associated with parenting fall under the second category described by the *Whalen* Court.⁴

³ Conversely, a Indian child also suffers a constitutional violation when the state prevents that child’s fit, biological parents from exercising their right or liberty to make parenting choices. See, e.g., *In the Interest of J.L., L.R., and S.G.*, 779 N.W.2d 481, 489 (Iowa Ct. App. 2009) (“A child’s liberty interest in familial association is protected by the Due Process Clause and the State may only interfere with this liberty interest after providing the child due process of law.”) (citing *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (additional citation omitted)).

⁴ 29 Plaintiffs do not concede that they do not also have a claim under *Whalen*’s first category (i.e., right to informational privacy). Plaintiffs simply choose not to raise that argument at this time and reserve the right to do so in the future.

Fundamental rights and liberties are those “which are, objectively, deeply rooted in this Nation’s history and tradition ... and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.” *Washington*, 521 U.S. at 720-21 (internal quotations and citations omitted). The Supreme Court has “long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding the right to “bring up children” is a liberty protected by the Due Process Clause); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (recognizing that choices about “the upbringing of children are among associational rights this Court has ranked as of basic importance to our society, rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect) (internal quotations omitted); *Glucksberg*, 521 U.S. at 720 (fundamental rights include the rights “to have children, to direct the education and upbringing of one’s children...” (citations omitted)).

The United States Supreme Court held in *Troxel v. Gransville* that “[t]he Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make parenting decisions concerning the care, custody, and control of their children.” 530 U.S. 57, 66 (2000). The Court reasoned that:

[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations ... The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. at 68. Relying in part on *Troxel*, the Iowa Supreme Court recognized a fundamental right of parenting in *In re the Interest of N.N.E.*, 752 N.W.2d 1, 16 (2008), and held that ICWA’s preference provisions violated the Due Process Clause of the Iowa Constitution when applied to a voluntary adoption proceeding. In *N.N.E.*, the court held:

[Mother] was faced with an unintended pregnancy. A woman in her position has three choices: to keep the child, put the child up for adoption, or terminate the pregnancy. Such a decision is undoubtedly gut wrenching and will forever impact her as well as the unborn child. The State has no right to influence her decision by preventing her from choosing a family she feels is best suited to raise her child. Moreover, we do not believe the federal ICWA condones state law curtailing a parent's rights in this manner.

Id. at 9. The Florida Court of Appeals similarly recognized that a birth parent's choice of adoptive parents is part and parcel of their fundamental constitutional right "to the care, custody, and control of their children." *In the Interest of S.N.W.*, 912 So.2d 368, 373, n.4 (Fla. Ct. App. 2005) (citations omitted).

Jane and John Doe's decision to pursue a private direct placement adoption for Baby Doe was a difficult decision made in accordance with their fundamental right to choose the best upbringing for their child. Jane and John Doe's immensely private decision to place Baby Doe with Mary and Richard Roe — because they believe it is in Baby Doe's best interests — is at least as private, if not more so, than parents choosing how to educate their children. *See Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (compulsory public education encroaches fundamental right of parents to direct their children's education). "Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69. Accordingly, 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.

B. ICWA Specifically Accounted for the Privacy Interest in Voluntary Adoptions.

No provision of ICWA requires notice of proceedings to be provided to tribes in voluntary adoption proceedings. *See* 25 U.S.C. § 1912(a) (notice required only in involuntary proceedings).⁵

⁵ Note that even the Bureau of Indian Affairs' recently released "Guidelines for State Courts and Agencies in Indian Child Custody Proceedings" do not mandate notice in voluntary proceedings. Instead, they state:

In voluntary proceedings, notice should [using precatory "should," not "must" as used 101 times elsewhere in Guidelines] also be sent in accordance with this section because the Indian tribe might have exclusive jurisdiction and/or the right to intervene. Further, notice to and involvement of the Indian tribe in the early

Every reported case considering the issue of notice has concluded there is no tribal right of notice for voluntary proceedings under ICWA. In *Navajo Nation v. Superior Court*, 47 F. Supp. 2d 1233 (E.D. Wash. 1999), the court held that neither ICWA nor the Constitution require notice to a tribe in voluntary proceedings:

The plain reading of section 1913 requires no notice to the tribe for a voluntary relinquishment of custody. A reading with other statutory sections does not reveal inconsistencies. No ambiguity exists...

In addition to the plain language of the statute, the legislative history of the ICWA supports the argument that there is no notice requirement for voluntary adoption proceedings of an Indian child. Congress has yet to include a notice provision for voluntary adoption proceedings.

47 F. Supp. 2d at 1238. Thus, Congress clearly did not require tribal notice in voluntary proceedings under ICWA, and Congress did not change the law in 1996 when it considered the issue or anytime thereafter. The court in *Navajo Nation* concluded that “[n]either § 1913 nor the U.S. Constitution require notice to the Navajo Nation in the circumstances of this case where the adoption was voluntary and the child was not domiciled on the Reservation of the Navajo Nation.” *Id.* at 1239.⁶

In *Catholic Social Services, Inc. v. CAA*, the Alaska Supreme Court similarly held that Congress did not grant tribes the right to notice of, or to intervene in, voluntary termination of parental rights proceedings:

The sole issue presented in this case is whether under the Indian Child Welfare Act an Indian child’s tribe is entitled to notice of a proceeding for voluntary termination of parental rights. We answer this question in the negative. Congress explicitly granted intervention rights to tribes in involuntary termination proceedings, but did not do so in voluntary termination proceedings. *Compare* 25 U.S.C.A. § 1912(a) with 25 U.S.C.A. § 1913 (West 1983)... the legislative history of the Act demonstrates that this was a considered choice by Congress. Witnesses testified on both sides of the question whether notice should be required.

stages of the proceedings aids the agency and court in satisfying their obligations to determine whether the child is an Indian child and in complying with 25 U.S.C. 1915.

80 Fed. Reg. 10,146 (Feb. 25, 2015). Furthermore, the tribe does not have exclusive jurisdiction in this case since neither the parents nor the child reside on the reservation. 25 U.S.C. § 1911 (a).

⁶ Significantly, the tribe appealed from this order, but did not challenge the district court’s findings on notice. See *Navajo Nation v. Norris*, 331 F.3d 1041 (9th Cir. 2003).

783 P.2d 1159, 1160 (Alaska 1989). *See also Duncan v. Wiley*, 657 P.2d 1212, 1213 (Okla. Ct. App. 1982) (“[t]he notice requirements of § 1912 are mandatory in involuntary actions. The requirements do not apply to voluntary court proceedings.”⁷); *In re Baby Girl A*, 230 Cal. App. 3d 1611, 1620-21 (Cal. 1991) (“section 1913(a) permits an Indian parent or custodian to voluntarily consent to a foster care placement or termination of parental rights without first notifying the tribe, and *In the matter of the petition of Philip A.C.*, 149 P.3d 51, 60 (Nev. 2006) (“a tribe is not entitled to receive notice of [voluntary] adoption actions.”). In the Matter of the Adoption of Baby Boy J., 37 Misc. 3d 198, 944 N.Y.S. 2d 871 (2012) (“the absence of any notice requirement in the voluntary placement statute (25 USC § 1913), as contrasted with the inclusion of notice requirements for involuntary proceedings (25 USC § 1912), clearly compel the conclusion that the tribe is not entitled to notice of this proceeding”)

Even the Bureau of Indian Affairs previously agreed that notice was not required to tribes in voluntary proceedings. In stating so, the Bureau highlighted a parent’s right to confidentiality and anonymity in voluntary proceedings:

Under the Act confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones. For voluntary placements, ... the Act specifically directs state courts to respect parental requests for confidentiality. The most common voluntary placement involves a newborn infant....

Confidentiality has traditionally been a high priority in such placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones.

1979 Guidelines, 44 Fed. Reg. at 67,586. The Bureau’s position at that time reflected that of the tribes.’ Calvin Issac, Tribal Chief of the Mississippi Band of Choctaw Indians stated: “The ultimate responsibility for child welfare rests with the parents and we would not support legislation which interfered with that basic relationship.” *Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs*, 95th Cong., 2d Sess., 62 (1978).

⁷ The *Duncan* decision was issued before OICWA was amended in 1994

Congress, in enacting ICWA, recognized the critical difference between the voluntary and involuntary termination of parental rights. The voluntary termination of parental rights is a decision made by a legally fit parent in accordance with their fundamental right to choose the best upbringing for their child. Congress's intentional omission of notice and intervention provisions pertaining to voluntary adoption gives recognition of fundamental, parental rights. But what Congress giveth, the state has here taken away.

C. OICWA is Not Narrowly Tailored to Serve a Compelling State Interest.

Legislation that infringes upon a fundamental right must survive strict scrutiny, which means the law must be “narrowly tailored to serve a compelling state interest.” *Glucksberg*, 521 U.S. at 721 (additional citation omitted). “Under both the Due Process and Equal Protection Clauses, interference with a fundamental right warrants the application of strict scrutiny.” *Bostic v. Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014) (citing *Glucksberg*, 521 U.S. at 719-20). “Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests.” *Johnson v. California*, 543 U.S. 499, 505 (2005) (internal quotation omitted); *see also Rosenbrahn*, 2015 WL 144567, at *9 (“Defendants bear the burden of demonstrating that South Dakota’s laws banning same-sex marriage meet this exacting standard.”) (citing *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2420 (2013)). Furthermore, “the state’s ‘justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.” *Rosenbrahn*, 2015 WL 144567, at *9 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Accordingly, this Court must “carefully analyze the purpose and effect” of OICWA and the provisions contained in Sections 40.3, 40.4 and 40.6 that provide a tribe with a right to notice and to intervene whenever an Indian child is the subject of a voluntary adoption. *See Karsjens v. Jesson*, 6 F. Supp. 3d 916, 928 (D. Minn. 2014) (finding, in part, that inmates pleaded viable claims for Due Process violations).

The Supreme Court recently recognized that “the primary mischief the ICWA was designed to counteract was the unwarranted *removal* of Indian children from Indian families due to the

cultural insensitivity and biases of social workers and state courts.” *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2561 (2013) (emphasis in original). ICWA’s text expressly states this concern:

that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions...

25 U.S.C. § 1901(4). Section 40.1 of the Oklahoma version of ICWA states:

The purpose of the Oklahoma Indian Child Welfare Act is the clarification of state policies and procedures regarding the implementation by the State of Oklahoma of the federal Indian Child Welfare Act, P.L. 95-608.2 It shall be the policy of the state to recognize that Indian tribes and nations have a valid governmental interest in Indian children regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated. It shall be the policy of the state to cooperate fully with Indian tribes in Oklahoma in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced.

While Plaintiffs in no way acquiesce to the constitutionality of ICWA, this Court need look no further than ICWA to recognize that OICWA notice and intervention provisions, 10 O.S. 40.3, 40.4, 40.6 are not narrowly tailored. The purpose of this state and federal legislation is to preserve heritage and curtail racially insensitive abuses when an Indian family is *involuntarily* broken up by non-tribal parties and private agencies (*i.e.*, involuntary removals of children in child protection proceedings and the involuntary termination of parental rights).

ICWA, despite its own constitutional shortcomings not at issue in this litigation, is far more narrowly tailored than OICWA in addressing tribal concerns about their need to receive notice in order to monitor, or “police”, state court cases involving the breakup of an Indian family. As noted above, ICWA does not require tribal notice when Indian parents decide to pursue a voluntary adoption, no doubt because Congress recognized the privacy rights Indian parents have to make decisions about their children without a tribal, state, or federal government oversight. Moreover, under ICWA, the *court* is charged with the duty to monitor proceedings and certify that a parent voluntarily terminating parental rights is fully informed of the decision the parent is making. *See* 25 U.S.C. § 1913.

OICWA on the other hand, contains notice and intervention provisions for voluntary adoptions without providing any rationale or justification for the state of Oklahoma to require tribal notice and the right of tribes to intervene in voluntary adoption proceedings. OICWA expands ICWA to provide tribes with these rights, mandating unwanted, unnecessary and extremely burdensome state and tribal intervention in the privacy and decision-making of Indian parents.⁸ The result is that OICWA's notice and intervention provisions usurp fit, biological parents' right (singling out only Indian parents) to make their fundamentally protected and private decisions related to the upbringing of their children. Accordingly, Sections 40.3, 40.4 and 40.6 of the Oklahoma Statutes cannot survive strict scrutiny.

V. OICWA VIOLATES THE PLAINTIFFS' RIGHTS TO EQUAL PROTECTION.

The Equal Protection Clause of the Fourteenth Amendment states that a state shall not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Analysis under the Equal Protection clause is necessary when a state law creates disparate treatment between similarly circumstanced persons. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Generally, state laws are constitutional if the disparity is “rationally related to a legitimate government interest.” *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996) (citations omitted). When the disparate treatment infringes upon a fundamental right or affects a suspect class the law is subject to strict scrutiny, “by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling government interest.” *Plyler*, 457 U.S. at 216-17; *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (“The general rule gives way, however, when a statute classifies by race, alienage, or national origin.”); *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, 417-18 (2013) (ethnicity also subject to strict scrutiny).

A. Biological Indian Parents are Treated Differently than Non-Indian Parents and Non-Indian Children.

The fit, biological parents of Indian children are the only class of parents in the State of Oklahoma deprived of the right to *privately* pursue an adoption without being forced to give notice

⁸ Thus, it is not even rationally related to a legitimate government interest. *See Glucksberg*, 521 U.S. at 728.

to a government, their community, or their family. Similarly, these parents are the only class of persons in Oklahoma where third parties are given the opportunity to intervene and interfere with fit, biological parents’ decision to pursue a private direct placement adoption of their child. As a result, Indian children are the only class of persons in Oklahoma who are deprived of their fundamental right to have their parents make the best choices pertaining to their upbringing. *See Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

As Justice Alito articulated in *Adoptive Couple*:

The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court’s reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child in utero and refuse any support for the birth mother—perhaps contributing to the mother’s decision to put the child up for adoption—and then could play his ICWA trump card at the eleventh hour to *override the mother’s decision* and the *child’s best interests*. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation *would raise equal protection concerns...*

Id. (emphasis added). There is little doubt that disparate treatment exists here. Indian parents and children are treated differently than every other similarly situated set of parents and children in Oklahoma when it comes to voluntary adoption.

B. OICWA is Subject to Strict Scrutiny Because it Discriminates on the Basis of Race.⁹

Defendant cites to *Morton v. Mancari*, 417 U.S. 535 (1974)¹⁰ for the proposition that being “Indian” is a political rather than national origin or racial classification, thus subjecting the challenge to the rational basis test. In *Mancari*, there was a Due Process challenge to the Bureau of Indian Affairs’ policy of hiring Indian applicants over non-Indians. *Id.* at 538-39. The Court recognized that the preference there was “an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to its constituent

⁹ As discussed above, OICWA, is also subject to strict scrutiny — regardless of the parents’ so-called “political” class status — because it infringes upon Jane and John Doe’s and Richard and Mary Roe’s *fundamental right* to parent. Plaintiffs fully incorporate that argument into their Equal Protection argument as well.

¹⁰ Note that this case is referred to by courts in short-form as either *Mancari* or *Morton*, but *Mancari* appears to be the prevailing form at the Supreme Court.

groups.” *Id.* at 554. The Court further explained that “[t]he preference applies only to employment in the Indian service.” *Id.* at 554. Accordingly, the Court narrowly held that “where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress’ classification violates due process.” *Id.* at 555.

The Supreme Court’s holding in *Mancari* and its scope has increasingly come under scrutiny. *See, e.g., Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997) (interpretation of Reindeer Industry Act that prohibited non-natives in Alaska from entering into reindeer herding industry not protected by *Mancari* because the interest was not “uniquely native”); *see also KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012) (recognizing that states do not have same broad authority afforded under *Mancari*).

The cases cited by Defendant Hembree that hold that only the rational basis test must be applied all concern the characterization of Indian Tribes from a FEDERAL point of view. The political characterization of Indians cannot be applied by the State of Oklahoma because it does not have “trust relationship” with the Indian Tribes as the federal government does. Therefore, a state’s special treatment of Indians is based upon race and must receive strict scrutiny. *Tafoya v. City of Albuquerque*, 751 F.Supp. 1527 (D.N.M., 1990) *Malabed v. North Slope Borough*, 70 P.3d 416 (Alaska, 2003) *See also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (“absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.”)

In addition, *Mancari* is distinguishable because it does not address instances where legislation discriminates *against* members of Indian tribes — especially tribal Indians exercising fundamental due process rights. Recent Eighth Circuit case law reflects that members of Indian tribes do, in fact, constitute a race in instances where an Indian is being discriminated against. *See Spirit Lake Tribe of Indians ex rel. Committee of Understanding and Respect v. National Collegiate Athletic Ass’n*, 715 F.3d 1089, 1092 (8th Cir. 2013) (undisputed that Indian tribe was a race for

purposes of a 42 U.S.C. § 1981 racial discrimination claim); *see also Albers v. Mellegard, Inc.*, Case No. 06-4242, 2008 WL 7122683, at *6 (D.S.D. 2008) (status of plaintiffs as Indian tribe members was sufficient to allege Section 1981 racial discrimination claim). The Ninth Circuit has similarly recognized that “discrimination in employment on the basis of membership in a particular tribe constitutes national origin discrimination ... under Title VII.” *See Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 154 F.3d 1117, 1120 (9th Cir. 1998). Regardless of whether this Court treats discrimination *against* Indians as an issue of race or national origin, the result is the same — Defendants bear the burden of meeting strict scrutiny.

It cannot be ignored that inclusion in many tribes, including the Cherokee Nation at issue here, is based on racial factors (*i.e.*, bloodlines). “Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name.” *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (striking down Hawaiian electoral system based on heritage). An “Indian child” is treated disparately based solely on his or her “eligibility” for tribal membership, which is, in turn, based exclusively on racial factors. *See*

OICWA’s notice and intervention provisions in voluntary adoptions are not uniquely Indian, are not related to Indian self-governance, and do not work solely to give preference to or benefit Indians over non-Indians. These provisions *discriminate* against Indian parents and children based solely on their race and should be subject to strict scrutiny.

C. OICWA is not Narrowly Tailored to Serve a Compelling Government Interest.

As discussed in the context of Due Process above, 10 Okla. Stat. §§40.3, 40.4 and 40.6 cannot survive strict scrutiny. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (“Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests.”) (internal quotation omitted). OICWA’s notice and intervention provisions as to voluntary adoption facially, and as applied, are not narrowly

tailored to serve the true government interest of preventing the improper and insensitive breakup of Indian families.

Instead, these notice and intervention provisions have the effect of taking a subset of families and making them unequal in the fundamental right of parenting. *Cf. United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013) (recognizing that DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal). Indeed, these notice and intervention provisions reflect a bias against Indian parents — that unlike all other parents in Oklahoma — they, as a class, are incapable of making the same fundamental decisions other Oklahoma parents make regarding the upbringing of their children. It tells the world that parenting choices made by Indians are unworthy of State recognition. It demeans Indian parents and children by depriving them of parental decision-making in the best interest of the child. And because of this presumed parental infirmity, it allows the tribal government the opportunity to try and override their choice.

No doubt, had Jane and John Doe decided Jane should have had an abortion, *Roe v. Wade* unquestionably would protect their privacy and liberty interest to make that choice. Yet under OICWA, the Does’ decision to have the baby, and place it for adoption, is not afforded the same protection. The Fourteenth Amendment does not favor abortion over adoption, creating greater rights of choice in the former than in the latter. Likewise, state law cannot single out Indian parents and tell them: “you can freely abort, but you can’t freely place for adoption.”

CONCLUSION

OICWA’s notice and intervention provisions pertaining to voluntary adoptions infringe upon Plaintiffs’ fundamental rights and liberty interests facially and when applied to ICWA’s preferences. As state action, these provisions also discriminate on the basis of race. Therefore, the instant Due Process and Equal Protection analysis must be subject to strict scrutiny. Defendants cannot pass strict scrutiny because the subject provisions are not narrowly tailored to serve a

compelling government interest. The Court should deny the Motion to Dismiss of the Defendant,
Ed Lake

PAUL E. SWAIN P.L.C.

/s/ Paul E. Swain

Paul E. Swain OBA #8785
406 S. Boulder Ave., Suite 423
Tulsa, OK 74103
Phone: (918) 599-0100
Fax: (918) 599-0136
Email: pswain@swainlaw.com

*Attorney for Plaintiffs
John and Jane Doe*

-and-

/s/ Rebecca Murphy

Rebecca Ann Murphy OBA#19895
120 W. 3rd St
Tulsa, OK 74103
Phone: (918) 895-8200
Fax: (918) 592-0040
Email: murphy.becki@gmail.com

*Attorneys for Plaintiffs
Richard and Mary Roe*

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2016, I electronically transmitted the foregoing to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Mithun Mansinghani
mithun.mansinghani@oag.ok.gov

Dean Luthey
dluthey@gablelaw.com

David E. Keglovits
dkeglovits@gablelaw.com

Amelia A. Fogleman

afogleman@gablelaw.com

Rebecca Ann Murphy
bmurphy@gmail.com

Chrissi Nimmo
Chrissi-nimmo@cherokee.org

Richard W. Freeman, Jr.
Richard.Freeman@okdhs.org

s/ Paul E. Swain

Paul E. Swain