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IN THE UNITED STATES FEDERAL DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Carol Coghlan Carter, et al., Plaintiffs,	) CASE NO. CV15-01259-PHX-NVW
v.	) **BRIEF OF THE CITIZENS EQUAL RIGHTS ALLIANCE AS AMICUS CURIAE IN SUPPORT OF THE MOTION TO CERTIFY THE CLASS ACTION**
Kevin Washburn, et al., Defendants.	)

INTRODUCTION

The Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq*., is a race based law that makes it more difficult for a child in need of assistance who can be classified as "Indian" to find a loving home. The Citizens Equal Rights Alliance (CERA) has been contacted many times on its website to help tribal members attempt to prevent the displacement of children from loving homes from New York to California because of the ICWA. [1]CERF believes that all children, including children that have an Indian ancestor, should have their best interests' protected. The best interests' standard must include

[1] No attorney or counsel for any party authored any part of this brief. Nor did any party contribute any money for its filing.

protecting the child's due process and equal protection rights as an American citizen. CERF does not believe that even Congress has the constitutional authority to deprive Indian children of their right to equal protection of the law without violating the child's substantive due process rights.

This is especially true for children that have never resided on an Indian reservation. Very few American children are descended from one discernible heritage. Most, like Baby Veronica, are a mix of heritages. CERF fully promotes the right of all people to be proud of their heritage no matter what race, creed, color or religious affiliation. But there is a huge difference in being proud of one's heritage and choosing to affiliate with people of a similar heritage and being forced by a federal law to be associated to a group based solely on one part of a child's heritage that then has the right to determine the major life decisions for that child. Certainly, no court would allow the Sons of Norway or the National Association for the Advancement of Colored People (NAACP) to proclaim what is in the best interests of a child. The Supreme Court of the United States has ruled on many cases that limit the authority of an Indian tribe to assert their jurisdiction beyond the boundaries of their reservation. So why is this acceptable for a child that is enrollable in an Indian tribe per the ICWA?

CERF understands the historical position that Indian tribes held with the United States. That history was formed in a time when it was acceptable to define people solely by their heritage. Literally in a time when racism and classifications based on religion were acceptable not only to the predominantly white male political society but acceptable to the law created by that society. The question today is whether it is now time to admit that a law defining a child's best interests solely on one part of their heritage is *de jure* discrimination as the Goldwater Institute presents in its complaint.

INTEREST OF THE *AMICUS CURIAE*

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to

protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. The Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*., adversely affects CERA members who have children and grandchildren subject to the act. The ruling also adversely impacts non-Indian parental rights and potentially violates the equal protection rights of all children to have their best interest's applied in state courts making custody decisions.

CERF submits this *amicus curiae* brief to add the perspective of its members who have been adversely affected by federal Indian policy and want that policy to significantly change. CERF promotes the belief that the equal protection of the laws should apply to all persons in the United States. The definition of "person" and the question of whether the Congress has the authority to create classifications that separate the rights of human beings within the jurisdiction of the United States has been the most contested and difficult question posed to the courts. Many of these answers in regards to former slaves were answered by the Civil War and the Amendments passed following that war. But "Indians not taxed" were specifically exempted from the requirements of the 14th Amendment. CERF believes that this omission was deliberate not to protect tribal sovereignty or the historical relations with the Indian tribes but instead was deliberately designed to preserve Congressional authority to make racial classifications. CERF believes this is the authority being asserted by Congress in the Indian Child Welfare Act (ICWA).

ARGUMENT

In this brief CERF confronts the acceptance that the historical relationship between the Indian tribes and the United States should dominate how we view the relationship between Indian tribes and the United States today. In fact, many if not most of the federal court precedents that determined that historical relationship would if prosecuted today before a court that is prohibited from making race based decisions come out very differently than they did when racism was acceptable. This brief will develop this theory by discussing three specific aspects of Indian law as it is applied today to the question of whether the ICWA creates de jure discrimination. The first section will discuss the ICWA itself as recently determined and argued in *Adoptive Couple v. Baby Girl*, 133 S.Ct 2552

(2013). The second section will discuss the on reservation versus off reservation jurisdiction of tribal courts under current law and then apply those rulings to the ICWA. Lastly, this brief will discuss whether the historical deference to the relationship between the Indian tribes and United States as protected in the ICWA should still take precedence over other individual rights considerations.

I. ADOPTIVE COUPLE v. BABY GIRL OPENED CONSIDERATION OF WHETHER THE ICWA IS DISCRIMINATORY

The majority decision in *Adoptive Couple v. Baby Girl*, 133 S. Ct 2552 (2013) clearly questioned whether the ICWA should be applied to a child of mixed heritage when her natural father who is enrolled as a member of the Cherokee Tribe in Oklahoma raised the issue to prevent the adoption of the child by a white couple set up by the non-Indian birth mother. The adoptive couple selected by the birth mother paid the maternity expenses of the mother and had raised Baby Veronica since her birth. All agreed that the home provided by the adoptive couple was wonderful and that the couple loved Baby Veronica as their own child. The question presented was whether the ICWA could be used to disrupt the adoption set up by the natural mother before Veronica was born.

The case as argued by the Guardian *ad litem* appointed by the State of South Carolina and the adoptive couple was that the ICWA should not apply to the adoption of Baby Veronica because the father had never had custody of her. The parties did not challenge the constitutionality of the ICWA. They argued that the State court in South Carolina could not be divested of its jurisdiction over the adoption proceedings of the child because the father had abandoned Baby Veronica and could not reassert his rights to foreclose the adoption using the ICWA.

A. The issue of consent to the adoption.

The natural father of Baby Veronica initially consented to the birth mother's decision to have the baby adopted at birth. This was evidenced by a text message exchange between the natural parents before the birth of the child. The father did not want to support the child or the mother during the pregnancy. Both the father and mother had other children needing their time and limited financial resources. Normally, the proof of the

natural father's consent to the adoption in writing to the mother would have more than satisfied any state court judge in allowing the adoption of the child.

But this natural father was an enrolled Cherokee tribal member living within the former boundaries of the Cherokee reservation. When he changed his mind about consenting to the adoption of his daughter he went to his tribal attorneys and asked for their help. The Cherokee Nation then joined the natural father raising the provisions of the ICWA claiming that the father had not been properly noticed of the potential adoption of a child that could be enrolled as a tribal member and that the father had not consented to the adoption as required by the ICWA. In addition, the father demanded that per the ICWA the jurisdiction of the adoption of the child be transferred to the tribal court in Oklahoma.

The South Carolina Supreme Court made the easy decision of allowing ICWA to apply and sent a child that had never been with anyone but the adoptive couple to her natural father's home when she was 27 months old without any transition. The tribal court also ruled on its jurisdiction over Baby Veronica asserting jurisdiction over her per the ICWA. These additional ICWA requirements that give special consent rights to the tribal member and allow any Indian tribe to claim jurisdiction over the child if it does not consent to the state court proceedings are far more than a penalty against the child's rights and interests to be placed in a safe and loving home. It is a fact that tribal courts are not required to provide the constitutional rights we expect and are owed in federal and state courts subject to the application of the Constitution of the United States. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Tribal courts are Article I territorial courts subject to the direct authority of the Congress to set their jurisdiction and process requirements. See *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). Congress has not required the tribal courts to apply the best interests of the child test.

The ICWA specifically creates special rights for an Indian tribe to assert its jurisdiction over any child that could possibly be enrolled as a member. By definition in the ICWA the tribal membership is deemed by Congress to be the best interest of the child over all other factors. Applying the ICWA and changing the jurisdiction over the child from a state court to a tribal court removes the substantive due process guarantees demanded of courts subject to Article III judicial review that the child would be entitled to as an American citizen. This means the application of the ICWA not only changes the legal

process required to determine the custody of any child to which it can be argued it applies but the actual status of that child as an American citizen to the rights guaranteed under the Constitution. The Goldwater Institute's description of these children being placed into a "penalty box" is a very tame description of the harm caused to these children by the ICWA.

B. Congressional authority to bestow tribal consent over a child

No matter how ICWA is historically justified it does not change what ICWA is or does in any case where it is applied. Any child that can be classified as "Indian" is treated as a "resource" of the Indian tribe and not as an individual human being entitled to have their best interest's determined by the court. 25 U.S.C. § 1901(3). If this description sounds eerily familiar it is because it reminds us of how we used to allow African Americans to be treated before the Civil War. African Americans were resources or property of their owners. The majority opinion in *Dred Scott* upholding slavery in all of the territories of the United States is credited with being one of the main mistakes causing the Civil War. *Dred Scott v. Sandford*, 60 U.S. 393 (1857). What is not generally recognized is that the majority opinion of Chief Justice Roger B. Taney compared and contrasted the rights of Indians to the rights of slaves to justify its harsh statements that Negro persons could never become citizens. *Id*. at 404, 420. In *Dred Scott*, Chief Justice Taney only separated the Indians from former slaves by concluding that all Indians Tribes were foreign governments.

"These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other." *Scott* at 404.

To be a foreign government, Chief Justice Taney assumed that each Indian tribe occupied its own sovereign territory.

"The situation of this population (Negroes) was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and

governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English or the colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it." *Id*. at 403-4.

Chief Justice Taney's assumptions were incorrect and were a complete change to the integration and assimilation policy that had been the federal Indian policy accepted by the original states and applied by the United States as described in the Northwest Ordinance. The Eastern States integrated the Indians that remained after the Removal Act of 1830, cite, into American society. *See generally United States ex rel. Kennedy v. Tyler*, 269 U.S. 12, 16 (1925). In the West, all of the Pueblo Indians in New Mexico were considered citizens of the Territory of New Mexico from the moment it was formed in 1848. *See United States v. Joseph*, 94 U.S. 614 (1876). Their towns or pueblos were recognized as territorial and then state municipalities. In California, the Spanish Missions had obliterated tribal affiliations leaving behind "Mission Indians" that were under the jurisdiction and protection of the State.

His incorrect assumptions did not prevent Chief Justice Taney from deciding as a matter of federal common law that the authority of the United States over all territories was unlimited by any act of Congress or any clause of the Constitution by declaring the Northwest Ordinance unconstitutional in the *Dred Scott* decision. *Id*. at 432, 442. Chief Justice Taney actually changed the definition of "sovereign people" from applying to all natural persons into a political classification determined by the Congress. *Id.* at 404. This change was intended to prevent Negro people as a race from ever being included within the definition of "sovereign people" or citizen. By including the Indians as a race of people capable of being domesticated but still in a state of tutelage the Chief Justice turned the protective Indian trust relationship of the Marshall trilogy into a potential unlimited federal weapon. All the Executive branch has to do is reclassify an area as "Indian country" or change the status of a group of persons to "Indians" to apply the separate unlimited

territorial power unleashed in the *Dred Scott* decision. *See Holden v. Joy*, 112 U.S. 94 (1872). Chief Justice Taney's federal Indian trust is completely separate from the Constitution because the Indians are completely separate from the white society that comprises the Sovereign people.

The slavery holdings of *Dred Scott* were mostly overruled by the 13th Amendment. The separate racial classification of "Indian" was deliberately preserved in the Indian Policy of 1871 as codified in the Revised Statutes of the Reconstruction era. This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War and to reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. Even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only Congress could change his status and grant citizenship *See Elk v. Wilkins*, 112 U.S. 94 (1884).

The *Dred Scott* majority opinion was the basis of the federal Indian policy of 1871 and is the basis for the congressional authority for the ICWA. Congress in ICWA is indefinitely preserving their territorial authority over "Indians" by allowing Indian tribes to classify any child an "Indian" they claim is eligible for tribal membership. This territorial war power was not the basis of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., or several other acts of Congress from 1887 until 1966. In 1966, a political deal was struck between President Johnson, Richard Nixon and Senator Robert Kennedy that allowed the passage of the Medicaid program in Congress. Buried in that legislation were two statutes presented to President Johnson by Richard Nixon. The first was a statute that intentionally copied the wording of 1 Rev. Stat. § 441 that is the basis of the 1871 federal Indian policy. 43 U.S.C. § 1457. The next section of the Revised Statutes 1 Rev. Stat, § 442 is the actual incorporation of the change of the treaty making policy in 25 U.S.C. § 71 transferring the authority of the State Department to the Secretary of the Interior to become the 1871 Indian War policy. The second statute presented by Nixon, 43 U.S.C. § 1458 allows the States and territories to be treated the same way essentially extending the Indian country definitions from the Revised Statutes back over the States to be able to coerce their compliance to any federal laws that include anything to do with Indians. The

newer statutes, 43 U.S.C. § 1457 and § 1458, arguably brought back to life the 1871 Indian policy. These statutes are the real basis of the Nixon Indian Policy declared by him in 1970 in his Message to Congress and the real basis for the ICWA.

The opinions of the Justices in *Adoptive Couple* split on whether the Indian Commerce Clause is the sole source of Congressional authority over Indians as explained in the concurring opinion of Justice Thomas or is plenary authority as has been deemed since the *Dred Scott* decision as explained in Justice Sotomayor's dissenting opinion. Justice Sotomayor did not cite *Dred Scott* but cited cases that all cite *Elk v. Wilkins*. Both sides agreed that the statutes were interpreted by Justice Alito in the majority opinion to avoid to avoid the larger questions raised by the ICWA.

II. TRIBAL COURT JURISDICTION IS USUALLY DIFFERENT ON RESERVATION AND OFF RESERVATION

Generally, tribal court jurisdiction has been divided two different ways by Congress and the courts. Tribes have been held to have very little criminal jurisdiction over Indians and no criminal jurisdiction over non-Indians. *See Oliphant v. Suquamish Tribe*, 435 U.S.191, 209-210 (1978). Tribal courts have retained more civil jurisdiction. Civil jurisdiction over non-Indians has been very limited in a series of Supreme Court decisions. Tribal court civil jurisdiction over Indians and non-Indians normally distinguishes between on and off reservation activities and occurrences. *See Montana v. U.S.*, 450 U.S. 544 (1981). On reservation impacts are assumed to have more direct impact on the tribe's authority to rule itself while the opposite is true for off reservation events. Most federal statutes make the same distinction between the tribes on reservation and off reservation authority.

The ICWA makes no distinction in tribal court jurisdiction regarding the location of an Indian child. All "Indian" children are deemed to be under the inherent jurisdiction of the tribal courts as defined by the federal statute. 25 U.S.C. § 1911. This presents a major constitutional question of whether this section of ICWA is a federally delegated power to the Indian tribal courts by Congress or is within the tribes inherent sovereign authority. This distinction is very similar to the question presented in *U.S. v. Lara,* 541 U.S. 93 (2004) but with very different facts.

A. The ICWA should differentiate between children that reside on the reservation and those that are off the reservation.

No case has described the reasons for the limitations imposed upon tribal court jurisdiction by the Congress and the Courts better than *U.S. v. Lara*. Billy Jo Lara was an Indian who struck a federal police officer on his wife's reservation. He was tried in the tribal court and convicted to the maximum sentence allowed by federal law. The United States then chose to prosecute him in federal court. At that time, after the conviction and the serving of the sentence of the tribal court judgment he raised his constitutional claims to equal protection, due process and the double jeopardy clause. Because he had not raised the due process and equal protection claims in the initial tribal court proceedings all of the federal courts concluded they had no jurisdiction to hear those claims. The case went all the way to the Supreme Court on the double jeopardy claim.

The double jeopardy claim posed a major question in itself as to what the policy of the United States is in regards to the Indian tribes. If the criminal jurisdiction of the tribe is inherent because they are separate sovereigns and only limited by Congress then double jeopardy does not apply. If the criminal jurisdiction is delegated to the tribal courts under the plenary authority of the Congress over the tribes under the Indian policy of 1871 then it is double jeopardy. This squarely presented the question of whether the Indian tribes are still domestic dependent nations that have retained some aspects of their inherent sovereignty as Chief Justice Marshall described in *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831) or are the Indian tribes wholly subject to the Congress under its plenary authority per the war power Indian policy of 1871 as described in *U.S. v. Kagama*, 118 U.S. 375, 382-383 (1886). This issue raised major constitutional considerations in *Lara* as described in the majority opinion and the concurrences. The actual decision in *Lara* was much easier than in this case because the act of striking the federal police officer was on the reservation, making it much simpler to find that tribal court jurisdiction was based on the inherent authority of the tribe and therefore not double jeopardy.

In both this case and in *Lara* the question of whether the authority of the tribal courts was delegated or is based on their inherent authority determines whether the exercise of tribal court jurisdiction is within the authority of the Constitution or outside of it and therefore unconstitutional. The Goldwater Institute and this *amicus* agree that for

children residing on the reservation that it can be found, just as it was reasoned in *Lara*, that Congress was merely adjusting the limitations it had placed on inherent tribal sovereignty and that the tribal courts do have inherent jurisdiction to determine the custody of the Indian children on the reservation.

The difficult question is how inherent tribal court jurisdiction can apply to a child that has never resided or even been upon an Indian reservation. This presents all of the factors about equal protection and due process as well as what federal Indian policy really is that raised such consternation in *Lara* but were not actually decided in *Lara*.

B. Does Congress have the authority to designate that all of the United States is subject to tribal court jurisdiction?

How far tribal court jurisdiction extends has never been expressly answered. Given that even if this authority is based on the inherent sovereign authority of the Indian tribe over its members that sovereignty has always been limited by the United States giving the Indian tribes the status of domestic dependent nations. The tribal court jurisdiction extended under ICWA in 25 U.S.C. § 1911 means that inherent tribal sovereignty could apply to any person that might be considered an Indian because they have some minute quantity of Indian blood, not just actual tribal members, off the reservations in every state and territory. This is how the law reads and how it has been enforced since it was promulgated. Is this constitutional and is it subject to judicial review?

The only means by which Congress could claim to delegate to an Indian tribal court jurisdiction over any person or child that could be classified as an Indian is under the war powers the same way it designates Indian country. The federal courts in our early history struggled with how to characterize the land status of areas within sovereign states involved in Indian conflicts. As a matter of federal Indian common law, the federal courts interpreted these conflict zones as "Indian country." "Indian country" developed as a sort of temporary federal territory designation. *See generally United States v. Donnelly*, 228 U.S. 243 (1913). The Constitution contains two clauses that address federal land ownership but does not contain any definitions for land areas within States that are under the temporary control of the United States military to suppress an Indian uprising or rebellion.

The Seneca uprising in New York in 1779 required the federal courts to create a temporary federal common law designation to deal with New York's temporary loss of

jurisdiction assumed by the United States Army. Acknowledging a temporary status of "Indian country" because of an Indian uprising did not change the underlying ownership or jurisdiction of the land. *See Fletcher v. Peck*, 10 U.S. 87 (1810). As a matter of federal law, the Seneca lands in the State of New York never left state jurisdiction. *See United States ex rel Kennedy v. Tyler,* 269 U.S. 13 (1925).

The Indian policy of 1871 is a war power policy. *Lara* at 201. In the Revised Statutes setting the Indian Policy of 1871 are numerous statutes defining different types of Indian country. These expanded definitions of Indian country were trimmed by Congress to become 18 U.S.C. § 1151. *See Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998). As described in the first section of this brief, the Nixon Indian policy deliberately reached back to the 1871 Indian policy and ICWA is based on that policy. It is possible that Congress assumed that the previously very expansive definitions of Indian country contained in the Revised Statutes were still within its constitutional authority. The ICWA was passed by Congress before the Supreme Court decision in *Native Village of Venetie*.

This Court is bound to apply the definition of Indian country contained in 18 U.S.C. § 1151 as interpreted in the Native Village of Venetie decision that denies that Congress has the authority to expand the Indian country definition to encompass all lands of the United States outside of the exterior boundaries of Indian reservations for the ICWA or any other statute. Congress does not have the authority to extend tribal court jurisdiction as they have done in 25 U.S.C. § 1911 of ICWA.

Not only is this extension of tribal court jurisdiction beyond the authority of Congress, it also demonstrates that the statute creates *de jure* discrimination on a purely racial basis against any child that could be considered an Indian under the ICWA. Any child that can be labeled an Indian resource immediately loses all rights to equal protection and the right to be heard and reviewed in an Article III court subject to constitutional protections.

To label this grant of tribal court jurisdiction over any child that can be classified as an Indian resource a political enactment rather than a racial enactment does not cure the constitutional defects in this case. All that happens in this case is that one unconstitutional result is substituted for another by compelling a child who has no political affiliation to be

associated with a group because of the child's ethnicity or race. Nothing can be more heinous than government forcing political choices on our children.

III. HISTORICAL DEFERENCE TO THE INDIAN TRUST RELATIONSHIP CANNOT EXTEND BEYOND CONSTITUTIONAL BOUNDS.

The Nixon Indian Policy can be defined as a way to create unlimited federal authority. This is not an acceptable federal policy. In 2004, when *Lara* was decided the U.S. Supreme Court still believed what they were told by the Department of the Interior through the Solicitor General's Office about federal Indian policy being benign and only for the benefit of the Indians. That deference all changed in *Carcieri v. Salazar*, 555 U.S. 379 (2009) when it was proven that the Department of the Interior had deliberately not told the truth about the underlying Congressional intent of the Indian Reorganization Act in the federal courts. Many of the assumptions based on the presentation of the United States discussed in the *Lara* case would not be deferred to today. The federal courts now require actual documentary evidence to back the federal assertions of jurisdiction and authority. Justice Thomas in his concurring opinion in *Lara* called federal Indian policy schizophrenic because the original assimilation policy and the Indian war policy of 1871 are contradictory. *Id*. at 219. Whether Congress in the 1871 policy completely subjugated tribal sovereignty to its plenary authority makes how the United States articulates what federal Indian policy actually is today anyone's guess.

It is time that a federal court step up and force a closer examination of what federal Indian policy really is. Protecting the rights of these Indian children is the perfect vehicle to do this.

CONCLUSION

This Court should hear this case and certify the class action.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2015, I electronically filed this Brief of *Amicus Curiae* to the Clerk's Office using the CM/ECF System and service to counsel of record in this proceeding:

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