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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

A.D. and C. by CAROL COGHLAN CARTER, their next friend;
S.H. and J.H., a married couple;
M.C. and K.C., a married couple;
for themselves and on behalf of a class of similarly-situated individuals,
Plaintiffs,

vs.

KEVIN WASHBURN, in his official capacity as Assistant Secretary of BUREAU OF INDIAN AFFAIRS;
SALLY JEWELL, in her official capacity as Secretary of Interior, U.S. DEPARTMENT OF THE INTERIOR;
GREGORY A. McKAY, in his official capacity as Director of ARIZONA DEPARTMENT OF CHILD SAFETY,
Defendants.

No. CV-15-1259-PHX-NVW

PLAINTIFFS' RESPONSE TO AMICUS CURIAE BRIEFS FILED BY (1) CASEY FAMILY PROGRAMS, *et al.*, AND (2) NATIONAL CONGRESS OF AMERICAN INDIANS, *et al.*

Introduction

On October 23, 2015, two sets of amicus curiae briefs were filed in support of Defendants' Motions to Dismiss. In order to ensure that this Court has the benefit of Plaintiffs' position on the contents of the amicus curiae briefs, this Court granted Plaintiffs' motion allowing Plaintiffs to file a response to amicus curiae briefs no later than 5:00 pm on November 25, 2015. This response follows.

Brief of Casey Family Programs, *et al.*

(1) Policy Arguments

The Casey Family brief is comprised entirely of policy arguments, which have limited utility in litigation generally and none in the context of a motion to dismiss. Casey Family provides five policy reasons to suggest that ICWA embodies best practices in child welfare (Br. 4–6). Casey Family only highlights the separate and unequal treatment of children deemed Indian and provides nothing to answer the question: why are Indian children disfavored under ICWA's legal regime? Casey Family provides nothing to show how Arizona state law does not meet these so-called child welfare best practices, or provide any explanation why these are even considered child welfare best practices.

The policy preferences already are fully realized in uniform race-neutral Arizona state law and Casey Family does not suggest otherwise. For example, Arizona provides services to parents and families "*before* there is any separation of a child from either parent" (Br. 4). *See* A.R.S. §§ 8-550.01, 8-816. Arizona removes children from their families "only when necessary to protect them from serious harm" (Br. 4). *See* A.R.S. § 8-821. If removal is "unavoidable, the presumptive initial goal" in Arizona "is reunification" (Br. 5). *See* A.R.S. § 8-846. Arizona law also "encourage[s] and preserve[s] a child's ties with her parents even if those ties are initially undeveloped due to early separation of the child from the parents" (Br. 5–6). *See* A.R.S. § 8-846. Arizona courts

follow pre-established, objective rules that operate under the presumption that a child's ties to her parents are in her best interest unless there are circumstances that would overcome the presumption. *See generally* A.R.S. tit. 8.

Casey Family does not identify any restrictions on state authority to apply its race-neutral rules uniformly and objectively to *all* children. Indeed, if "Congress was faced with the need to develop a body of family law" (Br. 6), congressional intrusion on the traditional authority of the states in the area of domestic relations law cannot be lightly overcome without appropriate scrutiny to determine the means-ends fit.

(2) The Best-Interest Standard

The best interests of the child standard has always been the standard through which a potential non-parent placement, including a relative placement, has to pass in order for a court to place the child with that placement. *Kent K. v. Bobby M.*, 110 P.3d 1013 (Ariz. 2005). Even some tribal courts have held that the *Smith* standard of "clear and convincing evidence" is more appropriate in termination-of-parental-rights cases and that ICWA's "beyond a reasonable doubt" standard should not be applied. *In re R.F.*, 2000 WL 33976004 (Supreme Ct. of the Muscogee (Creek) Nation 2000). The beyond a reasonable doubt standard does not strike an appropriate "balance of private interests"—between the individual rights of the child and the individual rights of the parent. *Santosky v. Kramer*, 455 U.S. 745, 771–72 (1982); *see also Kent K.*, 110 P.3d at 1020 ("the court must balance … parental interest against the independent and often adverse interests of the child in a safe and stable home life."). ICWA, thus, far from balancing private interests, "distorts the delicate balance between individual rights and group rights." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 55 (Stevens, J., dissenting).

Casey Family cites (Br. 7) *In re Adam R.*, 992 A.2d 697 (N.H. 2010) to create the illusion that some states have adopted the beyond a reasonable doubt standard in

termination of parental rights proceedings. Nothing can be farther from the truth. *All fifty states* and *the District of Columbia* have adopted the clear and convincing evidence standard in termination of parental rights proceedings.[1] New Hampshire, through legislation, abandoned the beyond a reasonable doubt standard three years after *Adam R.* was decided. N.H. Rev. Stat. Ann. § 170-C:10. If ICWA were indeed the "gold standard" (Br. 2), Casey Family would have been successful in convincing at least one state legislature or a court to adopt it. Nor can it, because courts and legislatures across the United States recognize that "psychiatric evidence … is rarely susceptible to proof beyond a reasonable doubt." *Santosky*, 455 U.S. at 768-69. But ICWA subjects some children,

[1] (1) Ala. Code § 12-15-319, (2) Alaska Stat. Ann. § 47.10.088, (3) A.R.S. §§ 8-533, 8-537; *Kent K.*, 110 P.3d 1013, 1018 (Ariz. 2005), (4) Ark. Code. Ann. § 9-27-341, (5) Cal. Welf. & Inst. Code § 366.26, (6) Colo. Rev. Stat. Ann. § 19-3-604, (7) Conn. Gen. Stat. Ann. § 45a-717, (8) *In re Heller*, 669 A.2d 25 (Del. 1995); *Wilson v. Div. of Family Servs.*, 988 A.2d 435 (Del. 2010), (9) *In re C.T.*, 724 A.2d 590 (D.C. 1999), (10) Fla. Stat. Ann. § 39.809, (11) Ga. Code Ann. § 15-11-320, (12) Haw. Rev. Stat. § 587A-33, (13) Idaho Code Ann. § 16-2009, (14) 705 Ill. Comp. Stat. Ann. 405/2-21, (15) Ind. Code Ann. § 31-37-14-2, (16) Iowa Code Ann. § 232.117, (17) Kan. Stat. Ann. § 38-2269, (18) Ky. Rev. Stat. Ann. § 625.090, (19) La. Child. Code Ann. art. 1035, (20) Me. Rev. Stat. Ann. tit. 22, § 4055, (21) Md. Code Ann. Fam. Law § 5-323, (22) *In re Adoption of Nancy*, 822 N.E.2d 1179 (Mass. 2005), (23) Mich. Comp. Laws Ann. § 712A.19b, (24) Minn. Stat. Ann. § 260C.317, (25) Miss. Code Ann. § 93-15-109, (26) Mo. Rev. Stat. § 211.447, (27) Mont. Code Ann. § 41-3-609, (28) Neb. Rev. Stat. Ann. § 43-279.01 (29) Nev. Rev. Stat. Ann. § 128.105; *In re N.J.*, 8 P.3d 126 (Nev. 2000), (30) N.H. Rev. Stat. Ann. § 170-C:10, (31) N.J. Stat. Ann. § 30:4C-20; *N.J. Div. of Youth & Family Servs. v. A.W.*, 512 A.2d 438 (N.J. 1986), (32) N.M. Stat. Ann. § 32A-4-29, (33) *Matter of Joyce T.*, 478 N.E.2d 1306 (N.Y. 1985), (34) N.C. Gen. Stat. Ann. § 7B-1109, (35) N.D. Cent. Code Ann. § 27-20-44, (36) Ohio Rev. Code Ann. § 2151.414; *In re D.A.*, 862 N.E.2d 829 (Ohio 2007), (37) *In re Okla. Unif. Jury Instructions for Juvenile Cases*, 116 P.3d 119 (Okla. 2005), (38) *State ex rel. Juvenile Dept. of Multnomah Cnty. v. Geist*, 796 P.2d 1193 (Or. 1990), (39) *In re G.T.M.*, 483 A.2d 1355 (Pa. 1984), (40) R.I. Gen. Laws Ann. § 15-7-7, (41) *S.C. Dept. of Soc. Servs. v. Cochran*, 589 S.E.2d 753 (S.C. 2003), (42) S.D. Codified Laws § 26-8A-27, (43) Tenn. Code Ann. § 36-1-113, (44) Tex. Fam. Code Ann. § 161.001, (45) Utah Code Ann. § 78A-6-508, (46) Vt. Stat. Ann. tit. 15A, § 3-504, (47) Va. Code Ann. § 16.1-283, (48) Wash. Rev. Code Ann. § 13.34.190, (49) W. Va. Code Ann. § 49-4-601; *In re K.L.*, 759 S.E.2d 778 (W. Va. 2014), (50) *In re Alexander V.*, 678 N.W.2d 856 (Wis. 2004), (51) Wyo. Stat. Ann. § 14-2-309.

based on their race or ancestry, to a more onerous burden of proof under which they have to be more obviously abused, neglected, or abandoned, before the parental rights of their parents can be terminated. Even in situations where reunification has properly been ruled out as an option, ICWA considerably weakens the best-interest standard that all potential placements have to successfully pass before the child can be placed with them.

Apparently, we are told "children are best served" by "maximizing the likelihood that they will be raised by relatives" (Br. 2). Casey Family provides the following categorical rule: "extended family first and foremost, and placements within a child's broader community as a secondary option. … [T]he first choice … for an alternative placement is the child's extended family, for both temporary and adoptive placements" (Br. 8). But "generalizations about children being better off with relatives than with non-relatives have only limited value in assessing how well a particular foster parent serves the best interests of a particular child." *Lipscomb ex rel. DeFehr v. Simmons*, 962 F.2d 1374, 1383 (9th Cir. 1992). Indeed, Arizona has a relative placement preference (A.R.S. § 8-514), but a particular relative still needs to pass the best-interest standard before a child can be placed with the relative. *Antonio M. v. Ariz. Dept. of Econ. Sec.*, 214 P.3d 1010 (Ariz. App. 2009); *Antonio P. v. Ariz. Dept. of Econ. Sec.*, 187 P.3d 1115, 1116 (Ariz. App. 2008) ("the preferences for placement contained in [A.R.S. § 8-514(B)] do not mandate placing a child with a person with an acceptable higher preference if the juvenile court finds it in the child's best interests to be placed with someone with a lower preference"). Under ICWA, on the other hand, placement with the child's relative, which is oftentimes not "within a child's community" is *presumed* to be in the child's best interest.

The best interest standard achieves a "balance of private interests," including protecting the child's individual rights. *Santosky*, 455 U.S. at 771–72. Biological

relationships "are not exclusive determination of the existence of a family"; instead, "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843–44 (1977). These existing "loving and interdependent relationship[s]," *Id.* at 844, are accordingly granted "a substantial measure of sanctuary from unjustified interference by the State", *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984), in which a child as well as a parent may seek shelter.

Casey Family contends that the best interest of the child standard "allow[s] unguided judicial decisionmaking" (Br. 8). But the provisions of ICWA challenged here go far beyond protecting parental rights, which are also protected under state law and federal constitutional law. Casey Family fails to explain why ICWA is necessary and why it is necessary to disfavor the individual rights of Indian children by discarding the best interest standard in their child custody proceedings.

(3) Existing Relationship

Throughout its brief, Casey Family uses terms such as "preserve and reunify families" (Br. 3), and "maintaining their ties with their parents" (Br. 3), all of which presuppose an existing relationship between a parent and a child. But ICWA is inapplicable absent such an existing relationship, for example, in a situation where there is an absent birth father. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013). The problem is all the more pronounced under ICWA because it requires reunification not only with the birth parents, but with extended family members *and tribes*. BIA Guidelines (2015), 80 Fed. Reg. 10146, 10150, § A.2. Casey Family offers no explanation as to why children deemed Indian are singled out for this treatment. Congress, far from "embrac[ing], for Indian children, the key best practices that in *amici*'s experience serve

the best interests of all children" (Br. 6), has actually hurt Indian children by treating them not as individuals, but instead, stereotyping them based on their race, presumed culture, or presumed political affiliation.

Casey Family admits that in all child custody proceedings, it is "critical[ly] importan[t]" to "*support*[] or *maintain*[] a child's ties with an extended family beyond blood relatives and a child's larger social network" (Br. 11) (italics added), all of which *presume existing relationships*. If it is critically important to support and maintain the child's ties with the child's larger social network, it follows that if the only family that a child has known is the child's foster parents, those foster parents are part of the child's "social network" and it is critically important to support and maintain that relationship. Arizona law does not allow government to intrude into the lives of children and require them to create relationships where none existed before; but ICWA does.

(4) Active Efforts

ICWA, and the Adoption Assistance and Child Welfare Act that Casey Family calls "similar" (Br. 13), are actually two completely different statutes with the latter expressly "encourag[ing]" (Br. 13) states to provide more protections to all children but the former "requiring" (Br. 13) states to provide less protections to children deemed Indian. This reinforces the Plaintiffs' position regarding the best interest standard and the separate and inherently unequal treatment given to children deemed Indian, and does nothing to further Casey Family's.

Casey Family admits openly that ICWA's "active efforts" requirement is different from and more onerous than the "reasonable efforts" requirement (Br. 13). Casey Family states that those two separate requirements are "similar" (*id.*) but not identical. "Separate" standards, of course, are "inherently unequal," *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), and Casey Family provides no reasons why the active efforts requirement, which

disfavors children deemed Indian, is "confined and tailored" to Indian children (Br. 13). The federal statutes Casey Family cites to purportedly show that Congress has encouraged states to adopt the "reasonable efforts" standard and apply it to all children except those deemed Indian, by their own terms show the *de jure* discriminatory treatment given to children deemed Indian. For example, Casey Family states that Congress determined the reasonable efforts standard is *inapplicable* where there are "aggravated circumstances" (Br. 13), such as those described in 42 U.S.C. § 671(a)(15)(D) ("includ[ing] but … not … limited to abandonment, torture, chronic abuse, and sexual abuse"). But these protections are unavailable to children deemed Indian; consequently, state and private agencies are required to continue to take "active efforts" to reunify an Indian child with the parent even where such "aggravated circumstances" are present. Similarly, 42 U.S.C. § 671(a)(19), which Casey Family cites (Br. 14), does not require states to give preference to an adult relative over a non-related caregiver; the placement preference operates only where "the relative caregiver meets all relevant State child protection standards." Also, 42 U.S.C. § 675(5)(A) that Casey Family cites (Br. 14), urges states to make a determination "consistent with the best interest and special needs of the child." ICWA on the other hand, expressly requires governmental actors to not consider the best interests of children deemed Indian. Casey Family, thus, undermines its own argument.

Brief of NCAI, *et al.*

The Indian groups' brief should have been retitled as being in favor of the Plaintiffs. All legislative history they cite shows the federal government primarily created the on-reservation problem for which its purported solution was to impose ICWA on off-reservation residents of the states.[2] For Plaintiffs' response to the sparse substantive

[2] NCAI states the following:

arguments, Plaintiffs will rely on the arguments they presented in their response to Motions to Dismiss.

NCAI asserts that it is rare for Indian children or their parents to be represented by counsel or have supporting testimony of expert witnesses (Br. 7–8). But the right-to-counsel provision of ICWA, 25 U.S.C. § 1912(b), is not challenged in this lawsuit. *See also* A.R.S. §§ 8-221, 8-872(D) (state law right-to-counsel provisions for children and parents). Nor do they address the fact that the best interest of the child standard fully permits and encourages expert witness testimony on the unique circumstances of a particular child in a child custody proceeding. *See, e.g.*, *DePasquale v. Super. Ct.*, 890 P.2d 628, 631 (Ariz. App. 1995) (courts are required to "weigh the evidence to determine

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- "*federal* Indian policy favored the removal of Indian children from their homes" (Br. 2) (italics added).
- "*federal* boarding schools" (Br. 3 n.2) (italics added).
- "mass removals had their genesis in early federal Indian policy" (Br. 4).
- "established practice of the federal government was to remove Indian children from their homes" (Br. 4).
- "The *federal boarding school and dormitory programs* also contribut[ed] to the destruction of Indian family and community life." H.R. Rep. No. 95-1386 at 9 (1978) (italics added), cited by NCAI (Br. 4).
- Federal "assimilat[ion]" policy (Br. 4), *citing* Cohen's Handbook of Federal Indian Law, § 22.03(1)(a) at 1397 (2012) ("In 1969, the federal government acknowledged that its educational policy was 'a failure of major proportions.'").
- "*federal* Indian Adoption Project supported adopting Indian children to non-Indian households" (Br. 5) (italics added). The Indian Adoption Project was formed by the BIA (Br. 5), and the "federal policy of 'Indian extraction'" was implemented by "IAP-approved state agencies" (Br. 5).
- "With the IAP, *the federal government* looked to the 'private sector'" (Br. 6) (italics added).

Thus, there is no legislative historical evidence of *state* social workers entering onto Indian land and removing Indian children from Indian homes. NCAI admits that whatever anecdotal evidence there is on the subject shows that state and private social workers removed Indian children only because of federal directive. NCAI leaps from denouncing federal Indian policy to the statement that state and private agencies are somehow responsible (Br. 4). NCAI's bait and switch is startling, not to mention unsubstantiated.

the best interests of the child. A court may consider expert opinion in making such decisions, but a court can neither delegate a judicial decision to an expert witness nor abdicate its responsibility to exercise independent judgment. The best interests of the child—even on an interim custodial basis—are for the court alone to decide."). NCAI also asserts that prior to ICWA there was no consultation with tribal authorities or tribal authorities were not informed of child removal actions (Br. 8). But ICWA's notice provision, 25 U.S.C. § 1912(a), is not challenged here.

If Congress can require states or private agencies to round up children deemed Indian, thus creating a disaster purportedly to cure a previous federal policy disaster, and ship them off to unfamiliar homes or ship them off to reservations by severing their existing loving relationships, then such statutory provisions raise serious constitutional concerns that can be alleviated only after a searching, exacting scrutiny.

Conclusion

The amicus briefs have no utility in this litigation. The limited policy or legislative history discussion they provide only strengthen Plaintiffs' position.

RESPECTFULLY SUBMITTED this 25th day of November, 2015 by:

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CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 25th day of November, 2015.

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