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**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,

v.

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 the ARIZONA DEPARTMENT OF
CHILD SAFETY,

Defendants.

Case No. 2:15-CV-01259-PHX-NVW

**[LODGED] BRIEF OF AMICI
CURIAE NATIONAL CONGRESS
OF AMERICAN INDIANS,
ASSOCIATION ON AMERICAN
INDIAN AFFAIRS, AND
NATIONAL INDIAN CHILD
WELFARE ASSOCIATION IN
SUPPORT OF DEFENDANTS'
MOTION TO DISMISS**

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1 **INTRODUCTION**

2 Congress enacted the Indian Child Welfare Act of 1978 (ICWA or “the Act”), 25
3 U.S.C. § 1901 *et seq.*, in response to a nationwide crisis—namely, the widespread and
4 wholesale displacement of Indian children from their families by federal, state, and private
5 child welfare agencies at rates far disproportionate to those of non-Indian families.
6 Studies and Congressional testimony revealed the devastating impact of this displacement
7 on Indian tribes and families and pointed to significant and pervasive abuses in child
8 welfare and private adoption practices as contributing to these harms.¹ As a result,
9 Congress carefully crafted ICWA to protect the rights of Indian children, families, and
10 tribes by establishing uniform federal standards governing state child welfare proceedings
11 involving Indian children. In passing ICWA, Congress intended to combat the collective
12 and often deliberate abuses by child welfare systems and to restore the integrity of Indian
13 families and tribes.

14 Plaintiffs seek to have this Court undo decades of progress in child welfare made
15 possible by ICWA. Amici agree with federal, state, and tribal-intervenor Defendants
16 (collectively “the Defendants”) that the Court should decline Plaintiffs’ invitation and
17 dismiss this matter for the reasons well stated in Defendants’ respective motions to
18 dismiss. (Docs. 41, 44, and 47.) Amici write separately to address the factual and legal
19 history leading to ICWA’s enactment and the settled authority under which it was passed.

20 **INTEREST OF THE AMICI CURIAE**

21 Amici are three national organizations dedicated to the interests of American
22 Indians and tribes. Collectively, amici share a commitment to the well-being of Indian
23 children and an understanding that ICWA is essential to the continued resilience of Indian
24 children, their families, and their tribes. Amici and their members share a substantial
25 interest in promoting and securing national conformity with ICWA’s procedural and

26 _____
27 ¹ For this Court’s convenience, the legislative history underlying the enactment of the
28 Indian Child Welfare Act may be found on the public website of the National Indian Law Library,
LEGISLATIVE HISTORY, INDIAN CHILD WELFARE ACT OF 1978,
<http://www.narf.org/nill/documents/icwa/federal/lh.html>.

1 substantive mandates in state child welfare and adoption proceedings involving Indian
2 children.

3 Amicus National Congress of American Indians (NCAI) is the largest national
4 organization addressing American Indian interests, and represents more than 250
5 American Indian and Alaska Native tribes. As part of its efforts, NCAI works closely
6 with state governments and private organizations to develop productive models of state-
7 tribal cooperation, including cooperation relating to Indian child welfare.

8 Amicus Association on American Indian Affairs (AAIA) is a 93-year-old Indian
9 advocacy organization that began its active involvement in Indian child welfare issues in
10 1967. AAIA's studies were a central focus of the Congressional hearings and committee
11 reports underlying ICWA's passage. At Congress's invitation, AAIA was closely
12 involved in the drafting of the Act. Since 1978, AAIA has continued to work with tribes
13 to implement ICWA.

14 Amicus National Indian Child Welfare Association (NICWA) is a non-profit
15 membership organization founded in 1987 and dedicated to the well-being of American
16 Indian and Alaska Native children and families. NICWA is committed to protecting and
17 preserving ICWA while promoting ICWA compliance through trainings, technical
18 assistance, research, advocacy, and information sharing.

19 ARGUMENT

20 **I. CONGRESSIONAL HEARINGS IN THE 1970's REVEALED A CRISIS IN** 21 **CHILD WELFARE AND ADOPTION SYSTEMS THAT** 22 **DISPROPORTIONATELY DISPLACED INDIAN CHILDREN FROM** 23 **THEIR PARENTS AND COMMUNITIES.**

24 The Indian Child Welfare Act must be viewed in light of the historical abuses that
25 it was intended to stop. For most of American history prior to ICWA's enactment, federal
26 Indian policy favored the removal of Indian children from their homes as a means of
27 eroding Indian culture and tribes. State and private child welfare agencies later took on
28 the implementation of these policies, carrying them out with little concern for the families
or communities they affected. By the 1970's, the widespread and wholesale removal of

1 Indian children from their parents and communities resulted in a crisis recognized as “the
2 most tragic and destructive aspect of American Indian life today.” H.R. REP. No. 95-
3 1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

4 By 1973, Congress had received reports that “an alarmingly high percentage of
5 Indian children were being separated from their natural parents” as a result of abusive
6 child welfare practices. S. REP. No. 95-597, at 11 (1977); *Miss. Band of Choctaw Indians*
7 *v. Holyfield*, 490 U.S. 30, 35 (1989). Over the course of the next five years and three
8 congressional sessions, both the Senate and the House held hearings on this crisis with
9 testimony from a broad spectrum of concerned parties, including “the administration,
10 Indian people, State representatives, tribal leaders, medical and psychiatric professionals
11 and child welfare groups.” S. REP. No. 95-597 at 12; H.R. REP. No. 95-1386 at 27-28.
12 These hearings, in conjunction with the findings of various commissions and task forces,
13 confirmed that Indian children were removed from their families and placed in foster care
14 at rates far higher than non-Indian children: between 25 and 35 percent of *all* Indian
15 children nationwide had been removed from their families with about 90 percent of those
16 children placed in non-Indian homes.² *Holyfield*, 490 U.S. at 32-33 (*citing Indian Child*
17 *Welfare Program: Hearings before the Subcommittee on Indian Affairs of the Senate*
18 *Committee on Interior and Insular Affairs*, 93rd Cong, 2d Sess., 15, 75-83 (1974)
19 (statement of William Byler) (1974 Hearings)). Nationwide, the adoption rate of Indian
20 children “was eight times that of non-Indian children,” *Holyfield*, 490 U.S. at 33, while in
21 the most extreme case, it was 18.8 times the non-Indian rate. *Hearing on S. 1214 Before*
22 *the Select Comm. on Indian Affairs*, 95th Cong. 539, 598 (1977) (Indian Child Welfare
23 Statistical Survey, July 1976) (1977 Senate Hearing on S.1214).

24
25 ² The state of affairs in Arizona prior to the passage of ICWA typified the disturbing
26 trends seen nationally. When adoption, foster care, and federal boarding schools were
27 accounted for, Indian children in Arizona were separated from their families 27.3 times
28 more often than non-Indian children. 1977 Senate Hearing on S.1214 at 544. Elsewhere
the separation from American Indian children ranged from 69% in Washington State to
98% in Minnesota. *Id.* at 537-603.

1 **A. The Disparities in Removals of Indian Children Were the Direct Result**
2 **of 19th and Early 20th Century Federal Policies Designed to Displace**
3 **Indian Children and Eradicate Indian Life.**

4 These mass removals had their genesis in early federal Indian policy. Throughout
5 the late 19th and early 20th centuries, the established practice of the federal government
6 was to remove Indian children from their homes, first through the government's education
7 policy of forcibly removing Indian children to boarding schools far from their families,
8 and later through state and private agencies acting on behalf of the federal government to
9 adopt Indian children to non-Native families. See COHEN'S HANDBOOK OF FEDERAL
10 INDIAN LAW § 1.04, at 76 (Nell Jessup Newton ed. 2012) (COHEN'S HANDBOOK). As the
11 House Insular and Indian Affairs Committee later recognized, boarding school programs
12 "contribute[d] to the destruction of Indian family and community life." H.R. REP. No. 95-
13 1368 at 9.

14 These policies resulted from the conventional view that Indians would be better off
15 assimilating into mainstream American life, and that the means to accomplish this goal
16 was to separate Indian children from their parents and tribal communities in order to raise
17 them in a non-Indian environment. COHEN'S HANDBOOK at § 22.03(1)(a), at 1397. As
18 one early report to Congress noted, "[a]ll experience has demonstrated the impossibility of
19 educating Indian children while they are permitted to consort and associate with their
20 ignorant, barbarous, and superstitious parents." CONDITION OF THE INDIAN TRIBES: REP.
21 OF THE J. SPECIAL COMM., APPOINTED UNDER THE J. RES. OF MARCH 3, 1865, at A3
22 (1867). This policy was later bluntly summarized by General Robert H. Milroy, the
23 Superintendent of Indian Affairs in the Washington Territory in the 1870s: "[a]ll Indian
24 children over five years old should be taken away from under the authority and influence
25 of their savage parents (from whom they absorb only poisonous barbarism) and placed
26 wholly under the control of white male and female teachers." R.H. Milroy, *Our Indian*
27 *Policy Further Considered*, 5 PRESBYTERIAN Q. AND PRINCETON REV. 624, 625-26
28 (1876).

1 By 1905, more than 20,000 Indian pupils were enrolled in government-run
2 boarding schools. DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN
3 INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928 320 (Univ. Press of Kan.
4 1995). Some of the boarding schools adopted the “outing system,” a form of temporary
5 adoption under which Indian pupils were sent to live with non-Indian families for the
6 summer or for the entire year. *Id.* at 156-63. The Bureau of Indian Affairs (“the BIA”)
7 encouraged other schools to follow the outing system’s example. DOCUMENTS OF UNITED
8 STATES INDIAN POLICY 178 (Francis Paul Prucha ed., Univ. Neb. Press 3d ed. 2000).

9
10 **B. The Federal Indian Adoption Project Supported Adopting Indian**
11 **Children to Non-Indian Households, Thereby Contributing to**
12 **Widespread Displacement of These Children.**

13 During the mid-20th century, policymakers gradually lost faith in the efficacy of
14 boarding schools, *see, e.g.*, INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF
15 INDIAN ADMINISTRATION 573-75 (1928), and turned instead to adoption through state,
16 private, and religiously-affiliated social service and adoption agencies as a less expensive
17 means of achieving Indian assimilation. One such program was the Indian Adoption
18 Project (IAP), formed by the BIA and Child Welfare League of America in 1959. TASK
19 FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION, REPORT ON FEDERAL, STATE,
20 AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW
21 COMMISSION 218 (Comm. Print July 1976) (TASK FORCE REPORT); Claire Palmiste, *From*
22 *the Indian Adoption Project to the Indian Child Welfare Act: the Resistance of Native*
23 *American Communities*, INDIGENOUS POL’Y J., Vol XXII, No. 1, at 1 (Summer 2011).
24 IAP-approved state agencies took on the responsibility of enacting a federal policy of
25 “Indian extraction,” which mandated that Indian children be adopted out to primarily
26 non-Indian families in order to reduce the populations of Indian reservations, lower the
27 federal government’s cost obligations at boarding schools, and satisfy a growing demand
28 for adoptive children. ELLEN SLAUGHTER, INDIAN CHILD WELFARE: A REVIEW OF THE

1 LITERATURE 61 (1976), available at <http://files.eric.ed.gov/fulltext/ED138422.pdf>. With
2 the IAP, the federal government looked to the “private sector to take over the expense of
3 raising Indian children and assimilating them once and for all.” MARGARET D. JACOBS, A
4 GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN
5 THE POSTWAR WORLD 6 (Univ. Neb. Press 2014) (GENERATION REMOVED).

6 By its end, the IAP placed hundreds of American Indian children for adoption
7 across the country, and “virtually always with non-Indian families.”³ TASK FORCE REPORT
8 at 218, n.1. Children subject to the IAP were rarely removed from their families due to
9 actual physical abuse or neglect; instead, social workers and other child advocates often
10 equated single parents, poverty, and traditional community parenting with abandonment
11 and unfitness to parent. GENERATION REMOVED at 52. The IAP at one point “listed
12 unmarried motherhood as the top social problem—above alcoholism, gross neglect of
13 family, criminal record, and mental illness—that social workers should be concerned with
14 in possibly placing an Indian child for adoption.” *Id.* (internal quotation and citation
15 omitted). Disproportionately High Adoption Rates For Indian Children Were Exacerbated
16 by State Child Welfare Systems.

17 By the time Congress began investigating Indian child welfare in the 1970’s, state
18 child welfare systems were already complicit in the wholesale removal of Indian children
19 from their families. Many removals were the result of vague claims of “neglect” or
20 “social deprivation,” and the emotional damage the children might be subject to by
21 continuing to live with their Indian families. H.R. REP. NO. 95-1386. at 10. Social
22 workers made decisions “that [were] wholly inappropriate in the context of Indian family
23 life and so they frequently discover[ed] neglect or abandonment where none exist[ed].”
24 *Id.* State agencies deemed some children “abandoned” where they resided with non-
25 parent relatives, while others living in homes lacking amenities found in non-Indian

26 ³ Historically, nearly all Arizona Indian children placed for adoption were sent out of
27 state. 1977 Senate Hearing on S.1214 at 414. For example, when the IAP was in effect,
28 “74 Indian children, mostly from Arizona and South Dakota were placed for adoption in
New York.” TASK FORCE REPORT at 218.

1 society were considered “neglected.” *See, e.g.*, 1977 Senate Hearing on S.1214 at 77-78,
2 166, 316; *Hearings on S. 1214 before the Subcomm. on Indian Affairs and Pub. Lands of*
3 *the Comm. on Interior and Insular Affairs*, 95th Cong. 115 (1978) (statement of Nat’l
4 Urban Indian Council) (1978 House Hearing on S.1214); *Holyfield*, 490 U.S. at 35, n.4.
5 Child welfare agencies conducted these removals with “no basis for intelligently
6 evaluating the cultural and social premises underlying Indian home life and childrearing,”
7 and excluded Indian family members as the most appropriate — or even viable —
8 placements. *Holyfield*, 490 U.S. at 34-35 (*citing* 1978 House Hearing on S.1214 at 191-
9 92).⁴

10 Many state child welfare systems operated virtually unfettered by notions of due
11 process. 1977 Senate Hearing on S.1214 at 21. A House Report summarized this
12 systemic failure:

13 The decision to take Indian children from their natural homes
14 is, in most cases, carried out without due process of law . . .
15 Many cases do not go through an adjudicatory process at all,
16 since the voluntary waiver of parental rights is a device widely
17 employed by social workers to gain custody of children.
18 Because of the availability of waivers and because a great
19 number of Indian parents depend on welfare payments for
20 survival, they are exposed to the sometimes coercive
21 arguments of welfare departments.

22 H.R. REP. No. 95-1386 at 10-12. Earlier testimony revealed that when cases were
23 adjudicated, it was “rare for either Indian children or their parents to be represented by
24

25 ⁴ Congress heard testimony on this point from child welfare experts and tribal
26 representatives alike. *See, e.g.*, 1974 Hearings at 61 (testimony of Dr. Carl Mindell,
27 Department of Psychiatry and Child Psychiatry, Albany Medical College) (“[W]elfare
28 agencies tend to think of adoption too quickly without having other options available . . .
Once you’re at the point of thinking about adoption . . . welfare agencies are not making
adequate use of the Indian communities themselves. They tend to look elsewhere for
adoption type of homes.”); *Id.* at 117 (statement of Mel Sampson, Northwest Affiliated
Tribes) (“The standards that have been established by adoption agencies have created an
additional burden . . . as they are white status quo oriented . . . As you well know, this
automatically leaves the Indian out.”).

1 counsel, or to have the supporting testimony of expert witnesses.” 1974 Hearings at 15,
2 21 (statement of William Byler, AAIA). For many cases, “[t]he only guarantee that a
3 child has of Federal representation is if a private lawyer and private legal agency is
4 brought in to defend that child.” *Id.* at 168 (statement of Michael Chosa, Administrative
5 Assistant, American Indian Child Placement and Development Program). In addition,
6 there were generally “no requirements for responsible tribal authorities to be consulted
7 about or even informed of child removal actions” by state or private adoption
8 organizations. 124 Cong. Rec. 37,379, 38,102 (1978) (statement of Rep. Robert
9 Lagomarsino).

10
11 **C. Congress Determined That This Displacement Inflicted Significant**
12 **Damage Upon Indian Children, Families, and Tribes.**

13 The harmful effect of these abuses on Indian children, families, and tribes is
14 difficult to overstate. Congress expressed significant concern “over the placement of
15 Indian children in non-Indian homes . . . based in part on evidence of the detrimental
16 impact on the children themselves of such placement outside their culture.” *Holyfield*,
17 490 U.S. at 49-50. Congress heard multiple examples that Indian children placed in non-
18 Indian homes later suffered identity crises when they reached adolescence and adulthood.
19 *See, e.g.*, 1977 Senate Hearing on S.1214 at 114 (statement of James Shore, former Chief,
20 Mental Health Office, Portland Area Indian Health Service, and William Nicholls,
21 Director, Health, Welfare and Social Services, Confederated Tribes of The Warm Springs
22 Reservation). Such testimony led Congress to conclude that “[r]emoval of Indians from
23 Indian society has serious long- and short-term effects” for the “child removed from
24 his/her home environment who may suffer untold social and psychological
25 consequences.” S. REP. No. 95-597 at 43.

26 In addition, Congress heard considerable testimony on the importance of the
27 extended family in Indian cultures as well as the harms to those families when children
28 are removed. As the House Committee on Interior and Insular Affairs explained:

1 [T]he dynamics of Indian extended families are largely
2 misunderstood. An Indian child may have scores of, perhaps
3 more than a hundred, relatives who are counted as close,
4 responsible members of the family . . . The concept of the
5 extended family maintains its vitality and strength in the
6 Indian community. By custom and tradition, if not necessity,
7 members of the extended family have definite responsibilities
8 and duties in assisting in childrearing.

9 H.R. REP. No. 95-1386 at 10, 20 (1978). In some Indian cultures, all relatives have the
10 label of parent and the same responsibility for the child. *See Holyfield*, 490 U.S. at 35, n.
11 4. As Senator Abourezk summarized at the end of the 1974 Senate Hearing:

12 [w]e've had testimony here that in Indian communities
13 throughout the Nation there is no such thing as an abandoned
14 child because when a child does have a need for parents for
15 one reason or another, a relative or friend will take that child
16 in. It's the extended family concept.

17 1974 S. Hearings at 473. Congressional testimony acknowledged both the importance of
18 this unique family structure and that child welfare agencies' systematic placement of
19 children outside the tribe "threaten[ed] 'the future and integrity of...Indian families.'" *See Holyfield*, 490 U.S. at 45 n. 18 (quoting 124 Cong. Rec. 38103 (1978) (letter from
20 Rep. Morris K. Udall to Assistant Attorney General Patricia M. Wald).

21 Finally, the legislative record reflects "considerable emphasis on the impact on the
22 tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34.
23 "Child rearing and the maintenance of tribal identity" were recognized to be "essential
24 tribal relations." TASK FORCE REPORT at 86 (citation and quotation omitted); *see also*, 25
25 U.S.C. § 1901(5). The large number of Indian children placed with families outside their
26 tribes "paralyz[ed] the ability of the tribe to perpetuate itself." TASK FORCE REPORT at
27 86. The House Committee described "the failure of State officials, agencies, and
28 procedures to take into account the special problems and circumstances of the Indian
families and the *legitimate interest of the Indian tribe in preserving and protecting the*

1 *Indian family as the wellspring of its own future.’’* H.R. REP. No. 95-1386 at 19
 2 (emphasis added); *see also*, 124 Cong. Rec. at 38,103 (1978) (statement of Rep.
 3 Lagomarsino) (“[f]or Indians generally and tribes in particular, the continued wholesale
 4 removal of their children by nontribal government and private agencies constitutes a
 5 serious threat to their existence as ongoing, self-governing communities”); *id.* at 38,102
 6 (statement of sponsor Rep. Morris Udall) (“Indian tribes and Indian people are being
 7 drained of their children and, as a result, their future as a tribe and a people is being placed
 8 in jeopardy.”).

9 **II. CONGRESS RESPONDED TO THESE ABUSES BY ENACTING ICWA**
 10 **PURSUANT TO ITS CONSTITUTIONAL AUTHORITY OVER INDIAN**
 11 **AFFAIRS.**

12 Following years of hearings and deliberation, Congress enacted ICWA to remedy
 13 the widespread harms that non-Indian governments and agencies had perpetrated upon
 14 Indian people. Congress did so through well-established constitutional authority to
 15 legislate concerning Indian affairs. *See* 25 U.S.C. § 1901(1) (*citing* U.S. CONST. art. I, §
 16 8, cl. 3 (charging Congress with the exclusive authority to “regulate commerce . . . with
 17 the Indian Tribes”)); *see also*, *Seminole Tribe v. Florida*, 517 U.S. 44, 62-63 (1996)
 18 (summarizing the Indian Commerce Clause’s broad grant of authority over Indian affairs
 19 to Congress); *Rice v. Cayetano*, 528 U.S. 495, 519 (2000) (“Congress may fulfill its treaty
 20 obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to
 21 their circumstances and needs.”).⁵ ICWA’s findings further acknowledge both Congress’s
 22

23 ⁵ Plaintiffs’ assert that “a child with Indian ancestry is not an item of commerce.”
 24 Compl., Doc. 1, at ¶ 110. But this truism elides the fact that ICWA was enacted *in*
 25 *response* to unscrupulous market-based practices in the adoption Indian children. *See*
 26 1974 S. Hearings at 70 (testimony of Bertram Hirsch, AAI) (describing the “tremendous
 27 pressure” felt by child welfare workers to adopt Indian children as a “grey market”); 1977
 28 S. Hearing at 359 (statement of Don Milligan, State of Washington, Department of Social
 and Health Services) (“[s]ome people will pay thousands of dollars for a child. It is also
 well-known that Indian children have always been a prize catch in the field of adoption.”).

1 responsibility to “protect and preserve Indian tribes,” and its “direct interest, as trustee, in
2 protecting Indian children who are members of or are eligible for membership in an Indian
3 tribe.” 25 U.S.C. § 1901(2); (3); *see also*, *Seminole Nation v. United States*, 316 U.S. 286,
4 296-97 (1942) (recognizing the United States’ “distinctive obligation of trust” to federally
5 recognized tribes). Where Congress enacts “legislation that singles out Indians for
6 particular and special treatment” pursuant to its unique relationship with Indian tribes,
7 “such legislative judgments will not be disturbed” by the courts. *Morton v. Mancari*, 417
8 U.S. 353, 554-55 (1974). The Congressional findings make “clear that the underlying
9 principle of the bill is in the best interest of the Indian child.” H.R. REP. No. 95-1386 at
10 19.

11 ICWA, like other statutes singling “out Indians for particular and special
12 treatment,” *Mancari*, 417 U.S. at 555-56, easily survives Plaintiffs’ due process and equal
13 protection challenges. For example, in *Mancari* the Supreme Court rejected the claim that
14 a BIA hiring preference for tribal members constituted racial discrimination in violation of
15 the Fifth Amendment. *Id.* at 553-54. In upholding the hiring preferences, the Court
16 explained:

17 The preference is not directed towards a “racial” group
18 consisting of “Indians;” instead, it applies only to members of
19 “federally recognized” tribes. This operates to exclude many
20 individuals who are racially to be classified as “Indians.” In
21 this sense, the preference is political rather than racial in
22 nature.

22 *Id.* at 554 n.24; *see also*, *United States v. Antelope*, 430 U.S. 641, 646 (1977) (rejecting
23 equal protection challenge to federal criminal statute applying only to “Indians”). And
24 indeed, ICWA’s membership-based definition of “Indian child” is such that it is similarly
25 likely to exclude many children who may otherwise be racially to be classified as
26 “Indians” but that do not otherwise qualify for membership. 25 U.S.C. § 1903(4).
27 Fundamentally, if ICWA, “derived from historical relationships and explicitly designed to
28 help only Indians,” constituted impermissible racial discrimination, “an entire Title of the

1 United States Code (25 U.S.C.) would be effectively erased and the solemn commitment
2 of the Government toward the Indians would be jeopardized.” *Mancari*, 417 U.S. at 552.

3 **III. ICWA HAS IMPROVED INDIAN CHILD WELFARE SYSTEMS, BUT**
4 **THE FULL BENEFITS OF ITS PROTECTIONS REMAIN ELUSIVE.**

5 ICWA’s substantive and procedural mandates were carefully tailored to address the
6 harms identified during Congressional hearings, thereby reflecting “a Federal policy that,
7 where possible, an Indian child should remain in the Indian community.” *Holyfield*, 490
8 U.S. at 37 (*quoting* H.R. REP. No. 95-1386, at 23). Although ICWA’s procedural
9 mandates have significantly improved Indian child welfare systems, this progress is not
10 universal. For example, states such as Minnesota and Alaska still have vastly
11 disproportionate rates of Native children in out-of-home placements compared to the
12 general child population.⁶ In addition, serious due process violations persist in states such
13 as South Dakota, where a federal court recently enjoined a state judge from conducting
14 cursory removal hearings sometimes lasting no more than a few minutes and at which
15 parents were not allowed even to view case documents outlining the case against them.
16 *See Oglala Sioux Tribe v. Van Hunnik*, No. CIV. 13-5020-JLV, 2015 WL 1466067 *1, *6
17 (D.S.D March 30, 2015).

18 Certain state welfare programs and courts such as those in South Dakota have
19 continued to resist ICWA’s provisions and goal. That resistance led the BIA to recently

20
21 ⁶ In Minnesota, Indian children have been placed in out-of-home care at a rate more
22 than twice that of any other group and were 12 times more likely than a Caucasian child to
23 spend time in placement. CENTER FOR ADVANCED STUDIES IN CHILD WELFARE, POLICY
24 BRIEF, CHILD WELL-BEING IN MINNESOTA 2 (2013), (*citing* Minnesota Department of
25 Human Services statistics), *available at* [http://cascw.umn.edu/wp-](http://cascw.umn.edu/wp-content/uploads/2013/11/policyreport3_web-versionFINAL.pdf)
26 [content/uploads/2013/11/policyreport3_web-versionFINAL.pdf](http://cascw.umn.edu/wp-content/uploads/2013/11/policyreport3_web-versionFINAL.pdf). In Alaska, Alaska
27 Native children comprise roughly 20% of the statewide child population, but represent
28 over 60% of children removed by the state and placed in out-of-home care. INDIAN LAW
& ORDER COMMISSION, A ROADMAP FOR MAKING NATIVE AMERICAN SAFER 43 (Nov.
2013) (*citing* ALASKA DEPT. OF HEALTH & SOC. SERV’S, OFFICE OF CHILDREN’S
SERVICES, DATA OVER-VIEW OF DISPROPORTIONALITY IN ALASKA’S CHILD WELFARE
SYSTEM (2012), *available at* <http://dhss.alaska.gov/ocs/Documents/icwa/pdf/Disproportionality-data.pdf>).

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2015, that I electronically filed with the Clerk the foregoing using the Court's Electronic CM/ECF System and that service was thereby accomplished upon:

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