Nos. 17-1135, 17-1136, & 17-1137
(Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OGLALA SIOUX TRIBE and **ROSEBUD SIOUX TRIBE**, as parens patriae, to protect the rights of their tribal members; **MADONNA PAPPAN**, and **LISA YOUNG**, individually, and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

v.

MARK VARGO, in his official capacity; **LISA FLEMING** and **LYNNE A. VALENTI**, in their official capacities; **HONORABLE CRAIG PFEIFLE**, in his official capacity,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION, HON.
JEFFREY L. VIKEN, CHIEF JUDGE

MOTION FOR LEAVE TO BRIEF OF AMICI CURIAE CHEROKEE NATION OF OKLAHOMA, NAVAJO NATION, ICWA LAW CENTER, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION

Kathryn E. Fort
Indian Law Clinic
MSU College of Law
648 N. Shaw Lane
East Lansing, MI 48824
517-432-6992

Katherine Belzowski
Navajo Nation
P.O. Box 2010
Window Rock, AZ 86515
928-871-6210

Chrissi Nimmo
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
918-316-2901

Attorneys for Proposed Amici Curiae

Pursuant to Fed. R. App. P. 29, Navajo Nation, Cherokee Nation, the ICWA Law Center, National Indian Child Welfare Association, and National Congress of American Indians respectfully requests leave to file the accompanying amici curiae brief in support of Plaintiff/Appellee Oglala Sioux Tribe and Rosebud Sioux Tribe. Defendant/Appellants Fleming, Valentie, Pfeifle, and Vargo requested to review the amici curiae brief prior to its filing and before they would consent under Fed. R. App. P. 29(2). Amici responded it would not be available for review before it was filed. Defendant/Appellants Fleming, Valentie, and Pfeifle then stated they did not consent to the filing of this amicus brief under Fed. R. App. P. 29(2). Defendant/Appellant Vargo did not subsequently communicate a position on the filing.

Amici have extensive experience in the area of the Indian Child Welfare Act from both a national and local perspective. Amici respectfully submit that the filing of their proposed brief in support of Plaintiffs/Appellees is desirable and relevant to the issues that will be addressed in this case. The brief is intended to provide specialized expertise and perspectives that may be of assistance to the Court.

The proposed brief describes the historical reasons for the Indian Child Welfare Act, including the systemic violations of due process the law was designed to prevent. The brief also provides needed contextualization of state child welfare systems in other Eight Circuit states, and how the Indian Child Welfare Act is applied in those systems. The interest of amici is both in ensuring that cases in the field are decided in a uniform manner, and protecting the due process rights of Indian families.

Accordingly, amici respectfully request that the Court grant this motion and allow the filing of their amici curiae brief.

By: *<u>/s/ Kathryn E. Fort</u>*

KATHRYN E. FORT
Indian Law Clinic
Michigan State University
College of Law
648 N. Shaw Ln.
East Lansing, MI 48823
517-432-6882

KATHERINE BELZOWSKI
Navajo Nation
P.O. Box 2010
Window Rock, AZ 86515
928-871-6210

CHRISSI NIMMO

Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
918-316-2901

Attorneys for Proposed Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2017, I electronically filed the foregoing Motion for Leave to File Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the Court's CM/ECF system. The undersigned also certifies that allparticipants in this case are registered CM/ECF users and that service of the brief will be accomplished by the CM/ECF System.

By: /s/ Kathryn E. Fort

Nos. 17-1135, 17-1136, & 17-1137
(Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OGLALA SIOUX TRIBE and **ROSEBUD SIOUX TRIBE**, as parens patriae, to protect the rights of their tribal members; **MADONNA PAPPAN**, and **LISA YOUNG**, individually, and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

v.

MARK VARGO, in his official capacity; **LISA FLEMING** and **LYNNE A. VALENTI**, in their official capacities; **HONORABLE CRAIG PFEIFLE**, in his official capacity,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION, HON.
JEFFREY L. VIKEN, CHIEF JUDGE

BRIEF OF AMICI CURIAE CHEROKEE NATION, NAVAJO NATION, ICWA LAW CENTER, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, NATIONAL CONGRESS OF AMERICAN INDIANS

Kathryn E. Fort
Indian Law Clinic
MSU College of Law
648 N. Shaw Lane
East Lansing, MI 48824
517-432-6992

Katherine Belzowski
Navajo Nation
P.O. Box 2010
Window Rock, AZ 86515
928-871-6210

Chrissi Nimmo
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465
918-316-2901

Attorneys for Amici Curiae

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned declares the following:

Amici Curiae are non-corporate parties, and there are no parent corporations. Both Cherokee Nation and Navajo Nation are federally recognized Indian tribes that have no parent corporation(s) and no publicly held corporation owns 10% or more of its stock. The ICWA Law Center, NCAI, and NICWA are non-profit entities with no parent corporation(s) and no publically held corporation owns 10% or more of its stock. The parties counsel authored the brief in whole, and no money was contributed to fund the writing or preparing of the brief.

TABLE OF AUTHORITIES

Constitution

Federal Statutes

Cases

Federal

Briefs

Administrative Materials

Legislative Materials

State Materials

Secondary Materials

INTEREST OF AMICI CURIAE

Amici Cherokee Nation and Navajo Nation, the two largest tribes (by population and by land) in the United States have a vested interest in the application of Indian Child Welfare Act to proceedings across the country. In this amicus brief, they stand with their sister tribes, the Oglala Sioux and Rosebud Sioux Tribes to ensure the due process rights of their citizen families are protected and that ICWA is enforced uniformly.

The Cherokee Nation is a federally recognized Indian tribe based in Northeast Oklahoma. 81 Fed. Reg. 26,827 (May 4, 2016). There are 350,000 Cherokee citizens around the world. Of those, 143 Cherokee children are in state care in the Eighth Circuit. The Nation provides health, education, and human resource services to Cherokee citizens throughout the United States. More specifically, the Cherokee Nation Indian Child Welfare Department is responsible for monitoring, intervening, and providing social services in a range of matters involving Cherokee children and families including services in both state and tribal custody proceedings.

The Navajo Nation is a federally recognized Indian tribe whose reservation is the size of West Virginia and spans three state jurisdictions, Arizona, New Mexico, and Utah. 81 Fed. Reg. 26,829 (May 4, 2016). There are over 300,000 citizens of the Navajo Nation, many of whom reside throughout the United States. The Navajo Nation has over 1,400 children in foster care placements in over 28 states, including states located in the Eighth Circuit. The Nation participates in these cases through its Navajo Children and Family Services Office. The Office monitors all cases involving Navajo children in state court, locates Navajo family placements, facilitates visits between potential placements and Navajo families, reunites Navajo families who are located on-reservation with off-reservation children, and helps to transfer cases from state to tribal court. The Nation has an interest in all of its children and families, and asserts jurisdiction wherever the Navajo children may be located, including the Eighth Circuit, as supported by 25 U.S.C. §1911(b).

The ICWA Law Center in Minneapolis, Minnesota provides quality representation to Native parents in both state and tribal court in Minnesota. The Center is committed to the principles of ICWA and

believes the enforcement of the law by state courts protects the rights of their parent clients. The Center is particularly concerned with preserving the due process rights of parents in the Eighth Circuit.

The National Indian Child Welfare Association (NICWA) is a non-profit membership organization founded in 1987 and dedicated to the well-being of American Indian and Alaska Native children and families. NICWA is deeply committed to the efforts to protect and preserve ICWA, and promotes ICWA compliance through trainings and technical assistance, research, advocacy, and information sharing.

The National Congress of American Indians (NCAI) is the largest national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaskan Native villages since 1944. As part of its efforts, NCAI has worked closely with state governments and organizations to develop productive models of state-tribal cooperation, including cooperation relating to Indian child welfare.

SUMMARY OF THE ARGUMENT

The Indian Child Welfare Act is the culmination of hundreds of years of federal and state policies that decimated Indian families. Starting with the devastating federal boarding school era, and through the mid-1970s, Indian child welfare was the purview of the federal and state governments. After the end of the federal boarding school era, states stepped in to take control over Indian families and children. Margaret Jacobs, *A Generation Removed: The Fostering and Adoption of Indigenous Children in the Postwar World* 6 (2014). In Minnesota, for example, seven years after the boarding schools closed, American Indian children made up 9.2 percent of the child welfare caseload, despite being only 0.5 percent of the population. *Id.* Across the country, state social workers routinely removed Indian children from their homes and schools based on vague allegations of poverty and neglect. *Id.* at 97-103. By the time Congress passed ICWA in 1978, 25-35 percent of all Indian children had been taken from their families and placed in adoptive, foster, or institutional care. 25 U.S.C. § 1901(4); H.R. Rep. No. 95-1386 at 10 (1978).

Congress enacted the Indian Child Welfare Act (ICWA) in response to this wholesale removal of Indian children from their families by State and private child welfare agencies at rates far disproportionate to those of non-Indian families. Studies and Congressional testimony revealed the devastating impact of this displacement on Indian tribes and families and identified significant and pervasive abuses in state child welfare practices contributing to these harms. As a result, ICWA was carefully crafted to protect the rights of Indian children, families, and tribes by establishing minimum federal standards to govern state child welfare proceedings involving Indian children. In passing ICWA, Congress intended to combat the deliberate, collaborative abuse of the child welfare system, to recognize tribes' inherent authority to determine the best interest of their children, and to restore the integrity of Indian families.

Despite ICWA's passage, the abuse of Indian children and families continues to the present. In this case, the district court found a South Dakota state judge and the State Department of Social Services "failed to protect Indian parents' fundamental rights to a fair hearing by not allowing them to present evidence to contradict the State's removal

documents. The defendants failed by not allowing the parents to confront and cross-examine DSS witnesses. The defendants failed by using documents as a basis for the court's decisions which were not provided to the parents and which were not received in evidence at the 48-hour hearings." *Oglala Sioux Tribe v. Van Hunnik*, 100 F.Supp.3d 749, 772 (D.S.D., 2015). This lawsuit, brought by the Oglala Sioux and Rosebud Sioux Tribes is vital to ensuring courts follow the minimum federal requirements established in ICWA, adjust their state practice accordingly, and allow for tribes to enforce due process violations against their citizens. Therefore, Amici agree with Plaintiffs-Appellees that this Court should affirm the decision below.

ARGUMENT

I. CONGRESS ENACTED ICWA PURSUANT TO ITS TRUST RESPONSIBILITY AND IN RESPONSE TO THE WIDESPREAD ABUSES COMMITTED BY STATE CHILD WELFARE SYSTEMS AGAINST INDIAN CHILDREN AND FAMILIES.

The United States has a "distinctive obligation of trust" to federally recognized tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) and the Indian Child Welfare Act 25 U.S.C. §§ 1901

et. seq. (ICWA) explicitly recognizes this obligation in no uncertain terms:

> Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources . . . there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.

25 U.S.C. §§ 1901(2)-(3). This obligation of trust extends specifically to Indian children and families. *See* Matthew L.M. Fletcher and Wenona T. Singel, *Indian Children and the Federal-Trust Relationship*, forthcoming, Neb. L. Rev. (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2772139.

ICWA's findings explicitly recognize Congress's exclusive constitutional authority to legislate in the area of Indian affairs. 25 U.S.C. § 1901(1); *see also* U.S. Const. art. I, § 8, cl. 3 (charging Congress with the exclusive authority to "regulate commerce . . . with the Indian Tribes"); *Seminole Tribe v. Fla.*, 517 U.S. 44, 62 (1996) (summarizing the Indian Commerce Clause's broad grant of authority to Congress over Indian affairs); *Rice v. Cayetano*, 528 U.S. 495, 519 (2000) ("Congress may fulfill its treaty obligations and its responsibilities to

the Indian tribes by enacting legislation dedicated to their circumstances and needs.").

These findings are a result of years of Congressionally-commissioned reports and wide-ranging testimony taken from "the broad spectrum of concerned parties, public and private, Indian and non-Indian." H.R. Rep. 95-1386 at 4 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530 http://www.narf.org/nill/documents/icwa/federal/lh/hr1386.pdf ("1978 House Report"). The legislative testimony wove together a chilling narrative—state and private child welfare agencies, with the backing of many state courts and, at times in collaboration with the federal government, had engaged in the systematic removal of Indian children from their families without evidence of harm or due process of law. By the time of ICWA's passage, state agencies had removed between 25 and 35 percent of all Indian children nationwide from their families, placing about 90 percent of those removed children in non-Indian homes. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-33 (1989) (*citing Problems that American Indian Families Face in Raising their Children and how these Problems are Affected by Federal Action*

or Inaction: *Hearings Before the Subcomm. on Indian Affairs of the S. Comm. On Interior and Insular Affairs*, 93rd Cong. 2nd Sess. 3 (1974) http://www.narf.org/nill/documents/icwa/federal/lh/hear040874/hear040874.pdf (statement of William Byler) ("1974 Senate Hearings")). Of those removals, 99 percent were cited for vague reasons of "neglect" or "social deprivation" and the emotional damage the children might be subject to by continuing to live with their Indian families. 1978 House Report at 10.

For states within the Eighth Circuit, the situation was particularly dire. In South Dakota, one out of every eighteen Indian children were adopted, almost always out of their communities, compared with one out of every 28.7 non-Indian children. Task Force Four, *Report on Federal, State, and Tribal Jurisdiction*, Final Report to the American Indian Policy Review Commission, 231 (1976) http://www.narf.org/nill/documents/icwa/federal/lh/76rep/76rep.pdf ("Task Force Four Report"). Worse, one out of every 22 Indian children were in foster care, as opposed to one out of every 492 non-Indian children. *Id.* at 232. Other states in the Eighth Circuit had similar numbers. In both Minnesota and North Dakota, Indian children were

5.2 times more likely to be removed and placed in either adoptive or foster care than non-Indian children. *Id.* at 210, 221.

In addition, the removals were often done with no respect for due process, and with no legal standards at the initial removal hearing. As in the case at bar, the initial removal and subsequent emergency or initial hearing involved some of the worst violations of fundamental due process. In the testimony of Cheryl DeCoteau, describing the removal and hearings of her children in South Dakota, Ms. DeCoteau testified she did not receive notice of two hearings regarding the removal and placement of her son. 1974 Senate Hearings at 67 (statement of Cheryl DeCoteau). During her testimony her attorney interjected that the process was the "grossest violations of due process" he had ever seen. *Id.*

In conducting removals of Indian children, not only did state officials, agencies, and procedures "fail . . . to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future," 1978 House Report at 19, they also failed to prove up basic standards of unfitness against Indian parents. 1974 Senate Hearings at 67 (Testimony of Bertram

Hirsch) ("It was never proven in court that she was unfit. We had a hearing in the district county court. . . . The burden of proof was very clearly shifted on Mrs. DeCoteau to prove that she was fit, rather than the State proving she was unfit.").

In fact, Congress found that "many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists." 1978 House Report at 10. Further, Congress found that "the decision to take Indian children from their natural homes is, in most cases, carried out without due process of law. For example, it is rare for either Indian children or their parents to be represented by counsel or have the supporting testimony of an expert witness. . . . The conflict between Indian and non-Indian social systems operates to defeat due process." *Id.* at 11.

Abusive child welfare practices also proved harmful to Indian children. In ICWA, Congress was concerned about "the placement of Indian children in non-Indian homes . . . based in part on evidence of the detrimental impact on the children themselves of such placement outside their culture." *Holyfield*, 490 U.S. at 499-500. Congress heard

manifold examples of Indian children placed in non-Indian homes later suffering from identity crises when they reached adolescence and adulthood. *See, e.g.*, 1974 Hearings at 114 (statement of James Shore, former Chief, Mental Health Office, Portland Area Indian Health Service, and William Nicholls, Director, Health, Welfare and Social Services, Confederated Tribes of The Warm Springs Reservation.). Such evidence led Congress to conclude that "[r]emoval of Indians from Indian society has serious long-and short-term effects . . . for the individual child . . . who may suffer untold social and psychological consequences." S. Rep. No. 95-597 at 43 (1977). More recent studies have also shown the harm of putting children in foster care. *See* Joseph J. Doyle Jr, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 Amer. Eco. Rev. 1583 (2007)("Large marginal treatment effect estimates suggest caution in the interpretation, but the results suggest that children on the margin of placement tend to have better outcomes when they remain at home, especially older children."). The higher standard Congress adopted in ICWA for removing Indian children not only addresses the cultural bias of state social workers, but also the harm caused to children by the removal.

Congress explicitly recognized and attempted to remediate this national crisis through ICWA—a statute designed to establish "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes" 25 U.S.C. § 1902. ICWA thus contains protections that provide notice, court-appointed counsel, and require the testimony of a qualified expert witness to place a child in foster care. 25 U.S.C. 1912(a), (b), (e); *see also* 1978 House Report at 22. One of the most important provisions of ICWA, the notice provision, ensures that parents know when the state is going to have a hearing about their child, and ensures the tribe knows the state has removed or otherwise has exercised jurisdiction over a tribal child. 25 U.S.C. § 1911(a).

Uniquely, ICWA must be implemented by state and private agencies and applied by state courts with the intention "to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. The Congressional findings further "make[] clear that the underlying principle of the bill is in the best interest of the Indian child." 1978 House Report at 19; 25 U.S.C. § 1902 ("Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian

children . . ."). At its core, ICWA "seeks to protect the rights of the Indian child *as an Indian* and the rights of the Indian community and tribe in retaining its children in its society . . . by establishing 'a Federal policy that wherever possible, an Indian child should remain in the Indian community.'" *Holyfield*, 490 U.S. at 37 (*quoting* 1978 House Report at 23) (emphasis added).

II. BECAUSE ICWA IS IMPLEMENTED BY STATE COURT SYSTEMS, STATE LAWS MUST WORK ALONGSIDE ICWA, NOT IN CONFLICT WITH IT.

A. State Child Welfare Systems Overwhelmingly Address Cases of Neglect, and ICWA Provides the Gold Standard for Supporting Children and Families.

Children removed by state child welfare systems, are, in the vast majority of cases, removed for neglect, which usually involves poverty, mental health or chemical dependency issues of the parents. Child Trends, *Child Maltreatment Indicators of Child and Youth Well-Being* 5 (September, 2016), https://www.childtrends.org/wp-content/uploads/2016/09/40_Child_Maltreatment.pdf ("In 2014, 7.1 per thousand children were reported victims of neglect, compared with 1.6 for physical abuse, 0.8 for sexual abuse, and 0.6 for psychological or emotional abuse."). This means that for the vast majority of children,

real wrap-around, in-home care and services, the kind ICWA envisions in 25 U.S.C. § 1912(d), may alleviate the need for an emergency removal of a child, because she is not facing imminent physical damage or harm required by ICWA. 25 U.S.C. § 1922.

The history of Indian child welfare policies indicated to Congress that Indian children and families in particular needed federally ensured, heightened standards before a child could be removed. ICWA provides the framework for its application, defining to whom it applies and under what circumstances. It also provides various procedural and substantive provisions to protect Indian families and children under the jurisdiction of state court systems. *Holyfield*, 490 U.S. at 36. The law applies only to child custody proceedings involving an "Indian child." 25 U.S.C. § 1903(4). ICWA's application is directly tied to the child's membership or eligibility for membership in a federally recognized tribe. *Id.* ICWA's provisions apply to four defined types of state child custody proceedings: (1) foster care placement; (2) termination of parental rights; (3) preadoptive placement; and (4) adoptive placement. 25 U.S.C. § 1903(1). These include any "emergency proceedings." Indian Child Welfare Act Final Rule, 81 Fed. Reg. 38,868, (to be codified at 25

C.F.R. pt. 23.103(a)(2)). Any proceeding that could end up with a child placed in foster care is an ICWA proceeding. *Id.* at 38,799.

The Act also delineates the division of jurisdiction in proceedings between tribal and state courts, *see* 25 U.S.C. § 1911(a)-(b), and provides explicit protections for families in state court proceedings that involve the involuntary removal of an Indian child from her parent or Indian custodian, *see, e.g.* 25 U.S.C. § 1912(d) and (e) (requiring that the party seeking to place a child in foster care prove to a court that "active efforts have been made to prevent the breakup of the Indian family" and prove that the continued custody of the child by the parent or Indian custodian is "likely to result in serious emotional or physical damage" through the testimony of a qualified expert witness.). ICWA requires that "[i]n 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 . . . ." 25 U.S.C. § 1912(a).

In situations where children are removed due to an immediate emergency, ICWA mandates they should be returned to their homes

once the emergency has passed. 25 U.S.C. § 1922. That standard, addressed at length in the principal briefs, requires the removal be terminated immediately when the removal is no longer necessary to prevent imminent physical damage or harm to the child. *Id.* This standard is consistent with social science research finding long-term harm of non-kin foster care. *See* Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 J. of Child and Adolescent Psychiatric Nursing 70 (2008); Doyle Jr, *Child Protection and Child Outcomes* at 1584. This is a standard higher than that of most state child welfare codes, but it has not prevented other states from ensuring this standard is met for Indian children.

The standards required by ICWA are considered the gold standard for protecting children and families. *See* Brief of Casey Family Programs & Child Welfare League of America, et al. as Amici Curiae Supporting Respondent, Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013) 2013 WL 1279468 at *1 ("Amici are united in their view that, in the Indian Child Welfare Act, Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children . . ."). Similarly, Casey Family Programs and twelve other child

welfare organizations argued in their amicus brief in support of a motion to dismiss a challenge to ICWA that, "although the protection of children is paramount, children's well-being is best served if they are removed from their families only when necessary to protect them from serious harm" Brief of Casey Family Programs and Twelve Other National Child Welfare Organizations as Amici Curiae Supporting Defendants, Carter v. Washburn, 2017 WL 1019685, 4 (Ariz. Dist. Ct. Oct. 23, 2015) (No. CV-15-01259).

B. Unlike South Dakota, Other Eighth Circuit States Have Adopted ICWA's Heightened Standards at the Initial Emergency Proceeding.

As federal law, ICWA provides the *minimum* floor from which states *must* operate. 25 U.S.C. § 1902. States can adopt higher protections for families, and ensure that families in child welfare proceedings receive both due process protections and the highest levels of reunification efforts and kinship placement. *See* Minn. Indian Family Preservation Act, Minn. Stat. §§ 260.751-260.835 (2015). Multiple states in the Eighth Circuit have state ICWA laws, to guarantee the state laws interact smoothly with ICWA's federal requirements. These laws provide the heightened standard of section 1922 along with

ensuring a prompt ending to the emergency removal, notice to the parents and tribes, and ensuring that the standards of 25 U.S.C. § 1912 are applied as early as possible in the proceedings.

Minnesota, Nebraska, and Iowa all have comprehensive state ICWA laws providing heightened protections to Native children and families. Minn. Stat. §§260.751-260.835 (2015); Neb. Rev. Stat. §§43-1501-43-1517 (2015); Iowa Code Ann. §§232B.1-232B.14 (2003). In addition, other states in this Circuit provide some kind of evidentiary standard for determining if the placement should continue at the first hearing, and a timeframe for hearings. *See* Mo. Sup. Ct. R. 123.05(f)("at the protective custody hearing, the court shall determine and make findings on the following issues: whether the juvenile can safely return home immediately . . ."); Mo. Sup. Ct. R. 124.01(a)(a protective custody hearing shall happen within 3 days, and an adjudication hearing within 60 days). South Dakota's assertion of having an "informal proceeding" within forty-eight hours and then keeping the child in foster care up to another 60 days without a hearing is contrary to best practices in child welfare as well as other state practices in this Circuit. *See Oglala Sioux Tribe*, 100 F.Supp.3rd. at 770-772.

Iowa, for example, requires the court to determine whether there is an "imminent risk to the child's life and health" to keep the child out of the house. Iowa Code Ann. § 232.79(4)(b). Iowa also limits the time frame of an emergency proceeding to 30 days. Iowa Code Ann. § 232B.6(4). In addition, Iowa's ICWA law has extensive direction on emergency procedures for Indian children. In fact, the newly issued Federal Regulations on ICWA implementation closely mimic Iowa's ICWA law. 81 Fed. Reg. 38,872, (to be codified at 24 C.F.R. §23.113). Iowa's law requires that

> In a case of emergency removal of an Indian child, regardless of residence or domicile of the child, the state shall ensure that the emergency removal or placement terminates immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this chapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the child's parent or Indian custodian, as may be appropriate.

Iowa Code Ann. § 232B.6(1). In addition, Iowa law requires the:

> emergency removal or placement of an Indian child shall immediately terminate, and any court order approving the removal or placement shall be vacated, when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child. In no case shall an emergency removal or placement order remain in effect for more than *fifteen days* unless, upon a showing that

> continuation of the order is necessary to prevent imminent physical damage or harm to the child, the court extends the order for a period not to exceed an additional thirty days. If the Indian child's tribe has been identified, the court shall notify the tribe of the date and time of any hearing scheduled to determine whether to extend an emergency removal or placement order.

Iowa Code Ann. § 232B.6(4)(emphasis added).

Nebraska also requires the emergency removal of Indian children to meet the ICWA standard of preventing "imminent physical damage or harm to the child." Neb. Rev. St. §43-1514 (2015). In addition, there "must be a nexus between the State ground for removal and the ICWA requirement that such removal or placement is necessary in order to prevent imminent physical damage or harm to the child." Neb. Juv. Ct. Law and Practice, Emergency removal of the child § 13:7 (2016). Nebraska state law fully adopts 25 U.S.C. § 1922 into state law. Neb. Rev. St. §43-1514 (2015).

An example of Nebraska's child welfare timeline can be found in *In re Interest of Shayla H.* 764 N.W.2d 119 (Neb. Ct. App. 2009). In that case, when the children were removed from the home, the first hearing was scheduled within five days of the state's ex parte temporary custody petition. *Id.* at 122. That hearing was continued for a week, and at the

temporary custody hearing, among other things, the court "heard testimony from [Department's safety worker], [the father], and children's mother." *Id.* An adjudication hearing happened within 60 days of the temporary custody hearing. *Id.*

Minnesota may have the best practice in the Eighth Circuit, as codified in state law and in practice. In Minnesota, tribes and parents receive notice of the hearing *prior* to the emergency hearing, which must be held within 72 hours of the child's removal. Minn. Stat. Ann. § 260.761 Subd. 2 (c). This practice is likely one of the reasons Minnesota's numbers of Indian children in care is so high, as they are one of the very few states accurately identifying their Native children at such an early stage. At that hearing, active efforts are discussed, as is the placement of the child to ensure she is close to home and with family when possible. Minn. Stat. Ann. 260.762 Subd. 3. The standard to keep the child out of her home at that hearing is the standard of section 1922—that she is in imminent physical danger if she is returned home. 25 U.S.C. § 1922.

Finally, there is very little case law on the intersection of the emergency proceedings and ICWA and there are none in this Circuit—

outside of South Dakota. While the South Dakota Supreme Court held in *Cheyenne River Sioux v. Davis* that the emergency standards of ICWA did not apply at the initial hearing, the decision misreads section 1922. 822 N.W.2d 62 (S.D. 2012)(distinguished by *Oglala Sioux Tribe v. Hunnik*, No. Civ 13-5020-JLV (D.S.D., Feb. 9, 2016)). If the initial emergency hearings regarding Indian children are subject to jurisdiction under section 1922, then they are necessarily also subject to the heightened standards. 81 Fed. Reg. 38,872 (to be codified at 25 C.F.R. pt. 23.113); *see In re T.S.*, 315 P.3d 1030 (Okla. Ct. App. 2013)("The second sentence of § 1922 contains two mandates for State, . . . '[the State] *shall insure* that the emergency removal or placement terminates immediately when such removal or placement is *no longer necessary to prevent imminent physical damage or harm to the child.*'" (emphasis in the original.); *In re Esther V.*, 248 P.3d 863 (N.M. 2011); *In re S.B.*, 30 Cal. Rptr. 3d 726 (Cal. Ct. App. 2005); *D.E.D. v. State*, 704 P.2d 774 (Alaska, 1985). The Department of the Interior, in its agency commentary preceding the ICWA regulations, emphasized the "immediacy of the threat is what allows the State to temporarily suspend the initiation of a full 'child-custody proceeding' subject to

ICWA. Where harm is not imminent, issues . . . may be addressed either without removal, or with a removal on a non-emergency basis." 81 Fed. Reg. 38,794.

III. When States Refuse to Follow ICWA, Tribes Have the Ability to Sue on Behalf of Their Families to Enforce the Law.

In ICWA cases, tribes have an interest distinct from, but on par with, Indian parents. *Holyfield* at 51 (quoting *In re Adoption of Hallowell*, 732 P.2d 962, 969-970 (Utah 1986). These interests include the protection of the child, the relationship of the child to the tribe, and in addition, the protection of vulnerable citizen parents. This last prong is evident by section 1914 of ICWA, which allows tribes to "petition any court of competent jurisdiction" to invalidate an action that "violated any provisions of 1911, 1912, and 1913 of this title." 25 U.S.C. § 1914. These sections are the bulk of ICWA's procedural and substantive provisions, but importantly for this discussion, they include the notice provision and the appointment of counsel to indigent parent provision. 25 U.S.C. § 1912(a), (b). This means the tribe has the right to petition a court to address practices that violate *parents'* rights, not just tribal

rights. In this case, the tribes rightly used the *parens patriae* doctrine to appeal those violations.

Parens patriae allows a sovereign entity to protect its citizens by bringing litigation on their behalf. The doctrine is recognized by the Supreme Court as the inherent power of every sovereign "to be exercised in the interest of humanity, and for the prevention of injury to those who cannot protect themselves." *Late Corp. of Church of Jesus Christ v. United States*, 136 U.S. 1, 57 (1890). Under *parens patriae*, the sovereign entity acts an advocate for its injured citizens. *See Kan. v. Utilicorp United, Inc.*, 497 U.S. 199, 219 (1990). Native American tribes, as federally recognized sovereigns, have the inherent right to bring *parens patriae* suits. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1137 (8th Cir. 1974)(granting the tribe *parens patriae* standing to recover state taxes illegally collected from its members).

When a tribe is suing in its *parens patriae* capacity it needs to meet three requirements. First, the tribe must articulate a separate interest from private parties in the suit. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601-08 (1982). Tribes have an interest in the application of ICWA in state courts based on their own

rights under ICWA, separate and apart from individual tribal members.

Second, the tribe must express a quasi-sovereign interest concrete enough to meet the actual controversy requirement of constitutional standing. *Id.* While the determination of a quasi-sovereign interest "is a matter for a case-by-case development", the Supreme Court has recognized certain characteristics of a quasi-sovereign interest which it has split into two categories: 1) a state's interest in the physical and economic health and well-being of its residents, and 2) a state's interest in securing its rightful place in the federal system. *Id.* ICWA cases fall into the first category as they raise concerns of the health, welfare, and family integrity of tribal members. *Id.* As discussed above, Congress passed ICWA to prevent the unnecessary removal of Indian children. In doing so Congress recognized the importance of children to the survival of a Tribe and created rights for tribes in state court custody proceedings. Tribes have a sovereign interest in ensuring the rights afforded under ICWA are enforced and that ICWA is followed by state courts.

Third, the tribe must be acting on behalf of a substantial number of its citizens and not just a special interest. *Id.* The Supreme Court has

held this number may vary, such as when the absolute number of affected citizens was small but the effect on the State as a whole could be substantial. *Id.*

> The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population. *One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as* parens patriae *is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.*

458 U.S. at 607 (emphasis added).

Unfortunately, federal district courts have imposed a more stringent standard of this rule on tribes. The court in *Assiniboine & Sioux Tribes v. Montana*, 568 F. Supp. 269 (D. Mont. 1983), and courts in subsequent cases, have ruled that tribes lack standing to bring *parens patriae* suits because they were not representing the interest of all its members. *See Kickapoo Tribe of Okla. v. Lujan*, 728 F. Supp. 791, 795 (D.D.C. 1990); *Alabama & Coushatta Tribes of Tex. v. Tr. Of the Big Sandy Independent School Dist.*, 817 F. Supp. 1319, 1327 (E.D. Tex.

1993). However, these holdings are in contradiction with the Supreme Court's decision in *Snapp* and the decision below. The district court below properly held, and Defendant-Appellees do not contest, that tribes have a right of *parens patriae* standing for ICWA cases.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request the Court affirm the district court's holdings.

Respectfully submitted this 8th day of June, 2017.

/s/ Kathryn E. Fort

KATHRYN E. FORT
Indian Law Clinic
Michigan State University
College of Law
648 N. Shaw Ln.
East Lansing, MI 48823
517-432-6992

Katherine Belzowski
Navajo Nation
P.O. Box 2010
Window Rock, AZ 86515
928-871-6210

Chrissi Nimmo
Cherokee Nation

P.O. Box 948
Tahlequah, OK 74465
918-316-2901

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i). Exclusive of the exempted portions identified in Fed. R. App. P. 32(f), the brief contains 5,534 words. (The undersigned in relying on the word-count utility in Microsoft Word 2017, the word processing system used to prepare the brief, consistent with Fed. R. App. P. 32(g)(1).

Furthermore, the Brief has been determined to be virus free in compliance with the Eighth Circuit Rule 28(A)(h)(2). This Brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional spaced typeface using Microsoft Word 2017 software in 14 point Century font.

By: /s/ Kathryn E. Fort

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June 2017, I electronically filed **Brief of Amici Curiae Navajo Nation & Cherokee Nation et al.** in this matter with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: /s/ Kathryn E. Fort