IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al. Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior, et al., Defendants.	Civil Action No: 4:17-cv-868-O

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs are three sets of foster parents, a mother whose child is in Nevada foster care (together, "Individual Plaintiffs"), and three states ("State Plaintiffs"), who sue the Department of the Interior ("Department") and its officers, challenging the constitutionality of the Indian Child Welfare Act of 1978 ("ICWA") and the 2016 Final Rule issued by the Department, which incorporates and clarifies various provisions of ICWA. Plaintiffs base this lawsuit almost entirely on alleged injuries arising in child-welfare proceedings pending in multiple states. Rather than raising their constitutional objections in the state courts, which are best suited to hear those challenges in the context of specific cases, Plaintiffs instead ask this Court to use its equitable powers to issue declaratory and injunctive relief as to the constitutionality of ICWA and the Final Rule. Plaintiffs ask this Court to impermissibly interfere with these ongoing state-court proceedings, yet such relief would not provide redress to Plaintiffs because state courts would not be bound to follow this Court's determination. Moreover, federal law dictates that federal courts should refrain from entertaining constitutional challenges that would interfere with pending state judicial proceedings. *See Younger v. Harris*, 401 U.S. 37 (1971). Dismissal on this ground is particularly appropriate where, as here, the state courts—if given the opportunity—may apply federal and state law in a way that obviates Plaintiffs' constitutional challenges.

The First Amended Complaint ("Complaint") includes a host of constitutional challenges, and the Court has an obligation to first consider jurisdictional defenses that either dispose of or narrow these claims, so as not to rule on constitutional claims not properly before the Court. *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."). As

an initial matter, Plaintiffs do not have standing to have this Court pre-adjudicate how state courts should apply ICWA and the Final Rule in child-welfare proceedings. Individual Plaintiffs base their constitutional challenges on speculative injuries from provisions of ICWA and the Final Rule that may not even apply to their state-court proceedings, or purported injuries that might occur equally under applicable state law. And the relief that Plaintiffs seek against the Department—which does not enforce ICWA—will not affect state-court proceedings, nor will it eliminate the State Plaintiffs' obligation to follow federal law.

In addition, Individual Plaintiffs' claims are based on proceedings in Minnesota and Nevada state courts, which involve those States' child welfare agencies and applicable child-welfare laws. Those States have a compelling sovereign interest in the adjudication of those Plaintiffs' claims; thus, the States are necessary parties to this action, but cannot be joined due to their sovereign immunity. For these reasons and as elaborated below, Plaintiffs' complaint should be dismissed in its entirety.

I. BACKGROUND

1. Congress' Plenary Authority Over Indian Affairs

The Complaint is replete with assertions that Congress lacked authority to enact ICWA. The Constitution, however, vests Congress with "plenary power over Indian affairs." *Alaska* v. *Native Vill. of Venetie*, 522 U.S. 520, 531 n.6 (1998); *United States v. Lara*, 541 U.S. 193, 200-02 (2004); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).[1] "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the

[1] *See also United States v. Ramsey*, 271 U.S. 467, 471 (1926) ("Since Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States, the question presented is not one of power but wholly one of statutory construction.")

Constitution itself." *Id*. The Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, expressly provides Congress with the power to "regulate Commerce with . . . the Indian Tribes," and the Treaty Clause, *id.* art. II, § 2, cl. 2, gives the President the power, by and with the consent of the Senate, "to make Treaties," with Indian Tribes. The "existence of federal power to regulate and protect the Indians and their property" is also implicit in the structure of the Constitution. *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943). Through "the exercise of the war and treaty powers . . . the United States assumed the duty of furnishing [] protection [to Indian Tribes], and with it the authority to do all that was required to perform that obligation." *Id*. Thus, "[n]ot only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities." *United States* v. *Sandoval*, 231 U.S. 28, 45-46 (1913); *United States* v. *Kagama*, 118 U.S. 375, 384-385 (1886).

2. Indian Child Welfare Act

Pursuant to its broad constitutional authority over Indian affairs, Congress enacted ICWA forty years ago, in furtherance of "the special relationship between the United States and the Indian tribes and their members and the federal responsibility to Indian people," 25 U.S.C. § 1901, declaring that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," *id.* § 1902; *see also id.* § 1903(3) (discussing the United States' "direct interest, as trustee"). The catalyst for Congress' in-depth investigation into foster care and adoption of Indian children, and ultimately the passage of ICWA, was Congress' recognition of "'the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large

numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.'" *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013) (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989)). In particular, Congress found "that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901(3)-(4); *see also Holyfield*, 490 U.S. at 32 (noting "that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions"). Congress additionally found that "States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* § 1901(5). The testimony before Congress demonstrated both a betrayal of the best interests of Indian children, as well as "the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34.

To address this crisis, which threatened the core of Indian tribes' continuing existence, Congress established "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 directly addresses one of the most critical sovereign interests of tribes—preventing the slow demise of tribes through systematic loss of their children, *Holyfield*, 490 U.S. at 52-53, while also protecting the best interests of the children.

ICWA's legislative history also makes clear that Congress intended to both protect tribes and the best interests of Indian children while maintaining the interest of the states in family law matters occurring within their jurisdictions:

> While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

H.R. REP. NO. 95-1386, at 19 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7541, 1978 WL 8515. Thus, child-custody proceedings involving Indian children in state courts continue to be almost exclusively governed by state child-welfare law, with ICWA's protections applying only as necessary and relevant to certain aspects of a particular case. *See e.g., In re J.J.C.*, 302 S.W.3d 896, 899 (Tex. App. 2009) (noting that ICWA only preempts otherwise governing state law where there is a conflict between the two).[2]

ICWA applies solely to "child custody proceedings" (defined as foster-care placements, terminations of parental rights, and preadoptive and adoptive placements) involving an "Indian child."[3] 25 U.S.C. § 1903(1), (4). Within these state-court child-custody proceedings, ICWA provides important procedural and substantive standards to be followed. The "most important substantive requirement" of ICWA is the placement preferences. *Holyfield*, 490 U.S. at 36; *see* 25 U.S.C. § 1915(a)-(b). "In any adoptive placement of an Indian child under State law," ICWA requires that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a) ("adoptive preferences"). These

[2] State courts regularly interpret ICWA and determine how it applies in a state-court child-welfare proceeding. *See e.g. Matter of Adoption of T.R.M.*, 525 N.E.2d 298, 311 (Ind. 1988) ("Primary responsibility for interpreting the language of [ICWA] rests with the courts deciding the custody proceedings of Indian children").

[3] The term "Indian child" is defined as "an unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

preferences reflect "Federal policy that, where possible, an Indian child should remain in the Indian community." H.R. REP. NO. 95-1386, at 23.

3. Final Rule: Indian Child Welfare Act

On June 6, 2016, after notice and comment, the Department issued a Final Rule to "promote[] the uniform application of Federal law designed to protect Indian children, their parents, and Indian Tribes." *Indian Child Welfare Act Proceedings*, Final Rule, 81 Fed. Reg. 38,778-01 (published June 14, 2016).[4] The Final Rule addresses the fact that "implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State." *Id.* The Final Rule seeks to promote consistent application by clarifying various key components of ICWA, including, when the statute applies, 25 C.F.R. § 23.103, when a state court is required to provide notice of a child-custody proceeding to parents and the applicable Indian tribe(s), *id.* § 23.111, how an Indian child's membership in an Indian tribe is determined, *id.* § 23.103, when a proceeding should be transferred from state court to tribal court, *id.* §§ 23.115-23.119, and what constitutes good cause to deviate from the placement preferences, *id.* §§ 23.129-23.132.

For example, the Final Rule both incorporates ICWA's adoptive preferences and interprets them to ensure uniform application by courts and others. *Compare* 25 U.S.C. § 1915(a) *with* 25 C.F.R. § 23.130(a). It provides, like ICWA, for deference to a tribe's placement preferences for its children where expressed by resolution, c*ompare* 25 U.S.C. § 1915(c) *with* 25

[4] The Department previously issued both regulations and guidelines involving ICWA, including, regulations addressing tribal reassumption of jurisdiction, notice procedures, and federal grants for child and family programs, 44 Fed. Reg. 45,096 (Jul. 31 1979), which were revised in 1994, 59 Fed. Reg. 2,248-01 (Jan. 13, 1994), and non-binding guidelines for Indian child-custody proceedings in state courts, 44 Fed. Reg. 67,584 (Nov. 26, 1979), which were superseded and replaced, 80 Fed. Reg. 10,146-02 (Feb. 25, 2015).

C.F.R. § 23.130(b); and it requires consideration of the Indian child or parent's preference, *compare* 25 U.S.C. § 1915(c) *with* 25 C.F.R. § 23.130(c). Like ICWA, the Final Rule accommodates deviation from the adoptive placement preferences for good cause. *Compare* 25 U.S.C. § 1915(a) *with* 25 C.F.R. § 23.132. The Final Rule, however, elaborates on the possible bases for a finding of good cause. 25 C.F.R. § 23.132(c) (court's determination should be based on (1) request of the Indian child's parents; (2) request of the child; (3) sibling attachment; (4) extraordinary physical, mental and emotional needs of the child; (5) unavailability of a suitable placement). The Final Rule further interprets ICWA to exclude good-cause findings based on either the socio-economic status of a potential placement or on ordinary bonding that occurs in a placement made in violation of ICWA. *Id.* § 23.132(d)-(e). Thus, the Final Rule interprets "good cause" consistent with ICWA's purposes to ensure uniform implementation of the statute and to ensure that the "good cause" provision does not become the exception that swallows the rule.

4. Related Judicial Proceedings

The Complaint alleges that there are three ongoing state-court child-custody proceedings, occurring in Texas, Minnesota, and Nevada, that concern the Indian children that Individual Plaintiffs seek to adopt. First, at the time of the filing of the Complaint, Chad and Jennifer Brackeen had a petition pending in Texas family court to adopt A.L.M., an Indian child who the Brackeens were then fostering. Compl. ¶¶ 116-120. Although Plaintiffs have not notified this Court and never notified the Cherokee Nation, which was a party to the proceeding, the Cherokee Nation recently learned that the Brackeens' adoption was finalized over a month ago, on January 8, 2018. *See* Crawford Affidavit, attached as Exhibit 1, Appendix at 5. The Texas Department of Family and Protective Services and Navajo Nation also may have been parties or otherwise had an interest in the outcome of that proceeding. *Id*. Second, the Complaint alleges

ongoing abuse and neglect proceedings in Nevada, involving Baby O., an Indian child who Nick and Heather Libretti foster, in which biological parents Altagracia Soccorro Hernandez and Baby O's birth father, the Nevada Division of Child & Family Services, and the Ysleta del Sur Pueblo Tribe may be parties or have interests. *Id.* ¶¶ 141; 147-148. Third, the Complaint includes an ongoing child-custody proceeding in Hennepin County, Minnesota, involving Child P., an Indian child who Jason and Danielle Clifford foster, in which Child P.'s maternal grandmother, Hennepin County Family Services, and the White Earth Band of Ojibwe Tribe may be parties or have interests. *Id.* ¶¶ 7; 152-154. In addition, State Plaintiffs also reference an unspecified number of child-custody proceedings involving Indian children within their States.

5. Summary of Plaintiffs' Claims

On October 25, 2017, the Brackeens and the State of Texas filed an eight-count complaint in this Court. ECF Doc. 1. And on December 15, 2017, Plaintiffs filed an amended complaint adding the Librettis, Hernandez, the Cliffords, and the States of Indiana and Louisiana as plaintiffs. ECF Doc. 22.

Constitutional Claims. All Plaintiffs allege that §§ 1901-1923 and 1951-1952 of ICWA violate the Commerce Clause of Article I of the Constitution (Count Two), *id*. ¶¶ 243-258; that certain provisions of ICWA and the Final Rule violate the Tenth Amendment (Count Three), *id.* ¶¶ 259-299; and that the adoptive preferences and provisions providing for vacatur in the event of fraud and duress violate the Equal Protection Clause of the Fifth Amendment (Count Four), *id.* ¶¶ 300-314. Individual Plaintiffs allege that ICWA's placement preferences violate their substantive due process rights under the Fifth Amendment to an intimate familial relationship with the Indian children they foster (Count Six). *Id.* ¶¶ 326-343. State Plaintiffs allege that certain provisions of ICWA and the Final Rule violate the non-delegation doctrine implicit in

Article I of the Constitution (Count Seven). *Id.* ¶¶ 344-352. State Plaintiffs further allege that ICWA's placement preferences violate the Spending Clause (Count Eight). *Id.* ¶¶ 353-361.

Administrative Procedure Act Claims. The remainder of the Complaint restates these claims as violations of the Administrative Procedure Act ("APA"). Individual Plaintiffs allege that the Final Rule violates their substantive due process rights under the Fifth Amendment (Count Five), *id.* ¶¶ 315-322, as well as the rights of Indian children not party to this case, *id*. ¶¶ 318-319. All Plaintiffs claim that the Final Rule violates the Equal Protection Clause,[5] the Commerce Clause, the Tenth Amendment, and non-delegation principles under Article I of the Constitution. They also claim that the Final Rule is arbitrary and capricious because it departs from the 1979 non-binding guidelines, and because its provisions on good cause to deviate from the placement preferences violate ICWA itself (Count One), *id*. ¶¶ 224-242.

STANDARD OF REVIEW

Defendants seek dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. "Federal courts are courts of limited jurisdiction," and "[i]t is to be presumed that a cause lies outside this limited jurisdiction . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (internal citations omitted). Accordingly, "[s]tanding to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within [their] proper judicial sphere." *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 496-97 (5th Cir. 2007). "Plaintiffs always have the burden to establish standing." *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017).

[5] Individual Plaintiffs again assert the equal-protection rights of non-party Indian children. Compl. ¶¶ 228, 230. State Plaintiffs allege here and in Count Four that ICWA and the Final Rule violate the rights of their state citizens. *Id*. ¶¶ 227-228; 312.

When challenging subject-matter jurisdiction under Rule 12(b)(1), a party can make a "facial attack" or a "factual attack." *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). If the party files a Rule 12(b)(1) motion without submitting evidence such as affidavits or testimony, it is considered a "facial attack," and the court looks only at the sufficiency of the allegations in the pleadings and assumes them to be true. *Id.*; *Davila v. United States*, 713 F.3d 248, 255 (5th Cir. 2013).[6] If a defendant makes a "factual attack" upon the court's subject matter jurisdiction, "the defendant submits affidavits, testimony, or other evidentiary materials." *Paterson v. Weinberger*, 644 F.2d at 523. In such case, "a plaintiff is also required to submit facts through some evidentiary method and has the burden of proving by a preponderance of the evidence that the trial court does have subject matter jurisdiction." *Id*. Nevertheless, the Court need not accept legal conclusions, including those "couched as a factual allegation," as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted).

ARGUMENT

A. Individual Plaintiffs Lack Standing

For Article III standing to sue, a plaintiff must demonstrate that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). As an initial matter, Individual Plaintiffs have alleged injury only from ICWA's §1915(a) (the adoptive preferences), § 1913(d) (vacatur of voluntary adoptions if there is fraud or duress), and Final Rule § 23.132(c)(5) (regarding findings of unavailability of

[6]As argued herein, Plaintiffs' claims can be dismissed for lack of standing on the basis of the insufficient allegations in the Complaint alone. If the Court disagrees, however, Defendants plan to seek discovery relating to jurisdiction.

preferred placement).[7] Plaintiffs, therefore, lack standing to challenge any other provision of ICWA or the Final Rule. *See Crane v. Napolitano*, 920 F. Supp. 2d 724, 741-43 (N.D. Tex. 2013) (O'Connor, J.), *aff'd sub nom. Crane v. Johnson*, 783 F.3d 244, 250 (5th Cir. 2015) (dismissing several counts of complaint that challenged statutory provisions unrelated to the injuries alleged for standing).[8] And even where Individual Plaintiffs assert injury due to ICWA or the Final Rule—§§ 1915(a), 1913(d), and 23.132(c)(5)—they fail to demonstrate an imminent, concrete harm that is fairly traceable to ICWA, or redressable by this Court. All of their claims, therefore, must be dismissed.

1. The Brackeens' claims are moot because the Texas court has finalized their adoption of A.L.M.

Even at the time they filed this Complaint, the Brackeens' adoption of A.L.M. was all but inevitable. The lower court's initial unfavorable judgment had been set aside and the case remanded, with no alternative placements suggested by any party, leaving the Brackeens as the only potential placement for A.L.M. Compl. ¶ 133. It comes as no surprise, therefore, to learn that the Brackeens' adoption was finalized not long after the Complaint was filed. *See* Exhibit 1, Appendix at 5 (stating that the adoption was finalized on January 8, 2018).[9] A.L.M.'s adoption

[7] The Librettis do not assert injury from the adoptive preferences, but rather from the Final Rule. Compl. ¶ 149. Specifically, they challenge the provision recommending that courts, prior to finding good cause not to apply the preferences because no suitable home is available, should first find that a "diligent search" was conducted. *See* 25 C.F.R. § 23.132(c)(5). Thus, the Librettis only have standing to support the challenge to this provision in Count Two. *See* Compl. ¶ 284.

[8] Individual Plaintiffs thus lack standing to pursue certain claims alleged in Count One, *see* Compl. ¶ 232, and Count Three, *see id*. ¶¶ 273-75; 277-278; 281-283; 285; 289-290. Claims made generally or that encompass multiple provisions similarly must be narrowed to a challenge to one of these three provisions. *See, e.g.*, Compl. ¶¶ 229; 233 (Count One); 251; 284 (Count Three); 307 (Count Four).

[9] Plaintiffs have not notified the Court (or even the other parties to the underlying state-court proceeding) of this change in circumstances even though it occurred over a month ago.

by the Brackeens renders their claims moot. Dismissal for mootness is required if "intervening circumstances deprive the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point in the litigation." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (internal quotations omitted). Because A.L.M. has been adopted by the Brackeens, neither A.L.M. nor the Brackeens continue to be party to a child-custody proceeding such that the adoptive preferences could apply.

2. The Brackeens have not alleged imminent injury that is fairly traceable to, or redressable by eliminating § 1915(a) or § 1913(d)

Injury in Fact. Even if their claims were not moot, the Brackeens have not established standing. The Brackeens claim that the § 1915(a) adoptive preferences caused them delay and costs associated with supporting their petition for adoption. Compl. ¶ 135. The Brackeens have alleged no facts to support their claims of delay nor alleged that they were prejudiced by any purported delay. *See* Compl. ¶¶ 114-38 (noting that the Brackeens petitioned for adoption only after the Navajo Nation identified a permanent home for A.L.M.).

More speculative still is the Brackeens' allegation that § 1913(d), ICWA's provision allowing for vacatur in the event of fraud and duress, threatened an adoption that had not yet occurred. Compl. ¶ 133. Plaintiffs "cannot manufacture standing . . . based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 415 (2013). Nor would any possible vacatur be "imminent." For the Brackeens to suffer the injury upon which their claims are based, the following would have to occur: (1) The Brackeens would have to adopt A.L.M. in a voluntary adoption (i.e., from biological parents whose rights were not under threat of termination by the state); (2) A.L.M.'s birth parents would subsequently need to conclude that the consent to adopt was obtained by fraud or duress; and (3) the birth parents would need to petition to vacate the adoption decree after six months have

passed, but not more than two years (six months is the standard statute of limitations under Texas law), *see* Compl. ¶ 133.

But the Complaint does not even allege that the adoption of A.L.M. is voluntary such that § 1913(d) could apply. *See* 25 C.F.R. § 23.136(a) (allowing invalidation of a "*voluntary adoption*"). Moreover, the Brackeens have not made any allegation that A.L.M.'s adoption is likely to be challenged based on fraud or duress, nor have they alleged any reason that the birth parents would take so long to act if it were. The Brackeens have not alleged injury in fact from § 1915(a) or § 1913(d), and do not have standing to challenge these provisions.[10]

Causation. The delay and costs that the Brackeens allegedly suffered also are not attributable to ICWA's adoptive preferences or the elaboration of those preferences in the Final Rule. The Final Rule advises that state courts can deviate from the placement preferences based on the views of an Indian child's biological parents. *See* 25 C.F.R. § 23.132(c)(1) (noting that a determination of good cause to deviate "should" be based on considerations, including "[t]he request of one . . .of the Indian child's parents"). Here, the Complaint alleges that "A.L.M.'s biological parents . . . each testified that they . . . preferred A.L.M.'s adoption by the Brackeens." Compl. ¶ 123. And nothing in ICWA or the Final Rule prevented the state court from determining that there was good cause to deviate from the adoptive preferences under the circumstances, or would prevent the court from doing so on remand on the basis of the existing

[10] Setting aside the issue of mootness, to the extent that the Brackeens imply that they will be injured by the continued participation of the Navajo Nation in the adoption proceedings, *see* Compl. ¶ 133, they have not alleged a concrete and particularized injury that is actual or imminent, as opposed to conjectural. *Spokeo*, 136 S. Ct. at 1548. The Nation did not oppose the Brackeens' motion to set aside the lower court judgment, Compl. ¶132, and the Brackeens have not alleged any facts to support the notion that the Nation would otherwise "contest the adoption," *id*. ¶ 133, much less that the state court would decide against the Brackeens. *See Clapper*, 568 U.S. at 413-14 ("It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in this case.").

evidence. *Cf. Hotze v. Burwell*, 784 F.3d 984, 991 (5th Cir. 2015) (dismissing for lack of standing a challenge to the Affordable Care Act's individual mandate because it did not apply to plaintiff).

The Brackeens have also failed to allege why any threat of vacatur in the event of fraud or duress is caused by § 1913(d) of ICWA when the proximate cause would be the purported fraud or duress, not the statute. In any event, existing Texas law, like ICWA, also would allow collateral attack on an adoption obtained by fraud or duress. *See In re E.R.*, 385 S.W.3d 552, 562 n.21 (Tex. 2012) (concluding that there was no statute of limitations to unwind an adoption for due process violations and citing cases with claims of fraud or duress). Under the circumstances, any threat of vacatur for fraud or duress is not fairly traceable to § 1913(d).

Redressability. The crux of the Brackeens' complaint appears to be that the State of Texas supported A.L.M.'s placement with a Navajo family, and that the state court adjudicating the Brackeens' adoption petition agreed with Texas' position that the Brackeens had failed to demonstrate good cause to deviate from the adoptive preferences. *Id*. ¶¶ 124-25. This alleged past injury is not redressable by the injunctive and declaratory relief the Brackeens seek. *See In re Stewart*, 647 F.3d 553, 557 (5th Cir. 2011) ("Absent [] a showing [of real and immediate threat that injury will occur again in the future], there is no case or controversy regarding prospective relief, and thus no basis in Article III for the court's power to issue an injunction").

And as noted above, the Brackeens are subject to a threat of vacatur in the event of fraud or duress pursuant to Texas law anyway, such that enjoining A.L.M.'s biological parents from moving to vacate pursuant to § 1913(d) or declaring § 1913(d) unconstitutional will not prevent the biological parents from seeking relief in the event of fraud or duress. As a result, the

Brackeens fail to establish that they have suffered an imminent harm that results from §§ 1913(d) and 1915(a) or that the relief the Brackeens seek would have any impact on them.

3. The Librettis have not alleged an injury in fact that is fairly traceable to, or redressable by eliminating 25 C.F.R. § 23.132(c)(5)

The Librettis claim that the Final Rule's requirement for a diligent search for placements that satisfy the adoptive preferences, 25 C.F.R. § 23.132(c)(5), delays their possible future adoption of Baby O. Compl. ¶ 149. Putting aside the question of whether and precisely to what extent frustration of one's efforts to adopt a child constitutes an injury for Article III standing purposes, the Complaint fails to allege that the Librettis have been denied the ability to adopt Baby O. or that Baby O. has been removed from their care. Instead, the Librettis allege nothing more than a speculative harm from the purported delay, but they make no showing that they have served as foster parents for Baby O. for an unusually long time. Based on the facts alleged in the Complaint, the Librettis have lived with Baby O. for at most nine months. Publicly available data, however, suggests that most adoptions in Nevada take longer.[11]

Moreover, under the circumstances, any injury to the Librettis from delay would not be fairly traceable to ICWA. As discussed above, the State court may find that good cause to deviate from ICWA's adoptive preferences exists based on the consent of Baby O.'s biological mother, Hernandez.[12] *See* Compl. ¶145; 25 C.F.R. § 23.132(c)(1). Even if the state court declines to find that Hernandez's consent constitutes good cause, the court controls the manner

[11] In 2014, only 1.4% of adoptive children in Nevada had been in care for less than 12 months; nearly a third (30.2%) were in care for up to 2 years. *See* U.S. Dept. of Health and Human Services, Child Welfare Outcomes 2010-2014: Report to Congress at 48-49 (July 2015), *available at* https://www.acf.hhs.gov/sites/default/files/cb/cwo10_14.pdf.

[12] Hernandez, who put Baby O. up for adoption at birth, Compl. ¶ 139, would not have standing for the same reason: Nothing in ICWA or the Final Rule prevents the state court from finding "good cause" to deviate from the adoptive preferences.

and extent of the search for a preferred placement: ICWA does not require that Nevada investigate every proposed alternative.[13] Finally, nothing in ICWA or Nevada state statutes prevents the Librettis from petitioning to adopt as long as they have fulfilled State requirements. *See, e.g.*, Nev. Rev. Stat. § 127.110. Final Rule § 23.132(c)(5), therefore, has no effect on the Librettis.

4. The Cliffords have not alleged any specific injury from ICWA, and Child P.'s adoption by her grandmother is supported by state law

The Cliffords' allegations of injury are even vaguer and farther removed from ICWA than those of the Brackeens or Librettis. The Cliffords allege injury from unspecified "heightened legal barriers" to their adoption, caused by ICWA, Compl. ¶ 157, even though they have not yet petitioned to adopt Child P. This allegation of possible future adverse events does not satisfy the injury-in-fact requirement. *See Hotze*, 784 F.3d at 995 (finding no standing where injury is a "generalized grievance" not shown to be "fairly traceable" to challenged provision); *Jebaco, Inc. v. Harrah's Operating Co., Inc.*, 587 F.3d 314, 318 (5th Cir. 2009) ("[T]he complaint must allege 'more than labels and conclusions.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In any event, ICWA's adoptive preferences are not the cause of any injury to the Cliffords. Minnesota law establishes an independent preference for placements with relatives, like Child P.'s maternal grandmother, *see* Minn. Stat. § 259.57(2)(c), and

[13] The Final Rule does not mandate criteria to support a deviation from the placement preferences, but rather indicates that the court's determination "*should* be based on one or more of the following considerations." 25 C.F.R. § 23.132(c) (emphasis added). Further, in the absence of other grounds to deviate, the regulations require only that a diligent search be conducted. *Id.* § 23.132(c)(5). The state court determines what constitutes a "diligent search" and it is not bound in that determination by the views of the tribe. The Complaint acknowledges that Nevada would conduct its own "normal" review of alternative placements before making an adoption recommendation to the court. Compl. ¶ 148.

independently defines what constitutes "good cause" to deviate from ICWA's placement preferences. *See id*. § 260.771(7)(a). The Cliffords have not sought to join the State of Minnesota or otherwise alleged sufficient facts to demonstrate that § 1915(a) has any effect on them.

5. Individual Plaintiffs lack standing to assert the rights of Indian Children A.L.M., Baby O., or Child P.

Individual Plaintiffs lack standing to bring claims on behalf of A.L.M., Baby O., or Child P., as they purport to do in Counts One and Five. *See* Compl. ¶¶ 228, 230; 318-319. In general, "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (internal quotations omitted). As foster parents, the Individual Plaintiffs do not speak for the Indian children in this case.[14] And the interests of foster parents are "not in parallel and, indeed, are potentially in conflict" with the interests of the foster children. *See Elk Grove Unif. Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (holding that non-custodial parent could not pursue claim on behalf of daughter where she disagreed that she was injured). The Indian children's interest in having a permanent placement based on their best interests conflicts with Individual Plaintiffs' intense wish to be that placement, irrespective of what is best for the children.

B. State Plaintiffs Lack Standing to Bring Their Claims

State Plaintiffs lack standing based on parens patriae to assert the interests of their citizens against the federal government. State Plaintiffs allege that they "represent the interests

[14] This is not to say that no one could speak for the children. All three children were or could have been separately represented in the state courts by guardians ad litem. Compl. ¶¶ 132 (A.L.M.), 157 (Child P.); s*ee* Nev. Rev. Stat. § 159.0455 (state court may appoint guardian ad litem by petition). In addition, there are a number of other parties who could potentially assert the rights of children, including biological parents, if their rights have not been terminated and adoptive parents once an adoption has been finalized.

of many children within their custody and care" and "represent the interests of their resident parents who are thinking about fostering and/or adopting a child." Compl. ¶ 26. "A State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923) and *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)).[15] The Supreme Court has made clear that "it is no part of [a state's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Mellon*, 262 U.S. at 485-86. In this regard, the Court emphasized, "it is the United States, and not the state, which represents [its citizens] as *parens patriae*."[16] *Id.* at 486. Thus, State Plaintiffs' efforts to represent the interests of their citizens as a basis for standing in this case must be rejected.

State Plaintiffs have failed to allege fiscal injury. Although State Plaintiffs allege in a conclusory manner that their States' compliance with ICWA and the Final Rule imposes costs on the States, Compl. ¶¶ 23-25; 50; 256, the purported costs are "purely speculative, and at most only remote and indirect." *See Florida v. Mellon*, 273 U.S. 12, 18 (1927). The Complaint provides no specificity of the fiscal burden, if any, that is directly caused by the challenged

[15] Some federal courts have recognized a state's ability to maintain a *parens patriae* suit against the federal government in order to *enforce* rights guaranteed by a federal statute, *see Wash. Util. and Transp. Comm'n v. F.C.C.*, 513 F.2d 1142 (9th Cir. 1975); *Texas v. United States*, 86 F. Supp. 3d 591, 626 (S.D. Tex. 2015), *aff'd on other grounds*, 809 F.3d 134 (5th Cir. 2015), *as revise*d (Nov. 25, 2015). But *Mellon* makes clear that suits brought by a state to protect its citizens from the *application* of a federal statute are barred, 262 U.S. at 486 (*parens patriae* suit against Secretary of Treasury challenging the constitutionality of the Maternity Act barred).

[16] This is particularly true in the context of Indian affairs, where the Constitution expressly provides for congressional authority. Here, Congress spent four years assessing and investigating the issue and opted to exercise its authority to protect Indian children, as well as the continued existence of Indian tribes, from what it deemed unwarranted and improper removal of Indian children from their extended family. *See* H.R. REP. NO. 95-1386, at 27.

provisions of ICWA or the Final Rule.[17] While it is true that "expenditure of state funds may qualify as an invasion of a legally protected interest sufficient to establish standing under the proper circumstances," *Crane v. Napolitano*, 920 F. Supp. 2d at 743, State Plaintiffs must provide concrete allegations of costs. *See id*. (finding "that Mississippi's asserted fiscal injury is purely speculative because there is no concrete evidence that the costs [to the State] . . . increased or will increase as a result of" the federal action).

C. All Plaintiffs Lack Standing to Challenge ICWA Because Defendants Are Not the Cause of Any Alleged Injuries and Relief Targeting Defendants Will Not Provide Redress

1. Defendants are not the cause of Plaintiffs' alleged injuries from ICWA

All Plaintiffs lack standing to bring this suit because named Defendants are not the cause of any injury from ICWA's application to Plaintiffs. Plaintiffs' claimed injuries of delay and expense, if valid, flow from the implementation of ICWA by state courts, not from any actions by Defendants. ICWA specifies no enforcement role for Defendants, and neither the Department nor the Bureau of Indian Affairs ("BIA") or their officers have enforced or are threatening to enforce ICWA against any Plaintiff, State or individual. Instead, ICWA is typically enforced by state courts, which apply their standards as governing law in child-custody proceedings involving Indian children. The parties to such proceedings, who are best positioned to contest violations of the statute, also argue for enforcement of ICWA. Thus, even if Plaintiffs could establish injury due to ICWA, this suit fails to meet the causation and redressability prongs of the standing inquiry. *See Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (plaintiffs

[17] In Count Eight, which alleges a Spending Clause violation, *id*. ¶¶ 353-361, State Plaintiffs do not claim that the federal government has withheld, or even threatened to withhold, funding from State Plaintiffs. As such, their allegation that "State Plaintiffs stand to lose substantial funding for child welfare programs," *id*. ¶357, is speculative, at best, and cannot support standing.

lack standing to bring suit against government defendant "who is without any power to enforce the complained-of statute").

ICWA's only enforcement-related provision is § 1914, which provides that "[a]ny Indian child," his or her "parent or Indian custodian," or the "Indian child's tribe" may "petition any court of competent jurisdiction" to challenge the termination of parental rights or foster care placements made in violation of the statute. 25 U.S.C. § 1914. Section 1914 challenges are typically brought in state court. *See In Interest of J.J.T.*, No. 08-17-00162-CV, 2017 WL 6506405, at *2 (Tex. App. Dec. 20, 2017) (Navajo Nation has standing to bring § 1914 claim).[18] And the existence of § 1914, along with the ability of parties to appeal adverse state-court child-welfare proceedings pursuant to state law, spurs state courts to ensure ICWA's requirements are met. *See e.g., In Interest of C.C.*, No. 12-17-00114-CV, 2017 WL 2822518 at *2 (Tex. App. June 30, 2017); *Matter of Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994) (reversing adoptive placement decision for failure to demonstrate good cause); *Matter of Adoption of T.R.M.*, 525 N.E.2d at 311-12 (reviewing and affirming good cause departure from § 1915 preferences).

These "enforcement" mechanisms are in accord with the statutory scheme crafted by Congress, which does not "oust the States of their traditional jurisdiction over Indian children falling within their geographic limits." H.R. REP. NO. 95-1386, 19. State courts apply ICWA, when relevant, in state proceedings otherwise governed by state law. *In re J.J.C.*, 302 S.W.3d 896, 899 (Tex. App. 2009). And, as a practical matter, state courts regularly interpret ICWA and determine how it best applies case-by-case in state court proceedings. *See e.g. Matter of*

[18] Although § 1914 grants any "court of competent jurisdiction," including a federal court, authority to consider a challenge, § 1914 has not been construed to authorize "federal court supervision into ongoing state adoption proceedings." *Morrow v. Winslow*, 94 F.3d 1386, 1396 (10th Cir. 1996).

Adoption of T.R.M., 525 N.E.2d at 311 ("Primary responsibility for interpreting the language of [ICWA] rests with the courts deciding the custody proceedings of Indian children"). In doing so, state courts should follow the relevant Department guidelines and regulations, but in the end the state courts both apply ICWA and determine whether its requirements have been properly met without direct federal involvement in child-welfare proceedings.[19] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (injury resulting from the "independent action of [a] third party not before the court" does not meet the causation requirement for standing) (internal quotations omitted).

There are no allegations that Defendants are either currently enforcing, threatening imminent enforcement, or have ever enforced ICWA's requirements against Plaintiffs. *See Younger*, 401 U.S. at 42 ("Persons having no fears of state prosecution except those that are imaginary or speculative . . . lack standing."); *Crane v. Johnson*, 783 F.3d at 254-55 (no standing where there was "no evidence" of any threat of employment sanctions and an apparent "unlikelihood of an agency sanction"); *Okpalobi*, 244 F.3d at 426. Plaintiffs' only allegation of harm traceable to federal officials derives from a potential denial of federally funded "child welfare grants" under the Social Security Act. State Plaintiffs allege coercion because State recipients of such grants must "develop jointly" a plan with the Secretary of Health and Human Services which comports with applicable federal child welfare laws, including ICWA. 42 U.S.C. § 622 (a), (b); Compl. ¶¶ 65; 357. No named Defendant, however, either approves such plans or

[19] Section 1915(e) requires States to maintain a record for each Indian child placement "evidencing the efforts to comply with the order of preferences specified" by ICWA and also requires that such records be available to the Secretary or the Indian child's tribe. This enables the Department to monitor State compliance with ICWA generally. The Complaint does not allege that the Department has raised concerns with any State's compliance with § 1915 or threatened any enforcement action.

has authority to deny funding provided under the Social Security Act and thus, again, there is no causation.[20]

2. This Court cannot redress Plaintiffs' alleged harms from ICWA through injunctive or declaratory relief targeting Defendants

Injunctive or declaratory relief from this Court against Defendants cannot redress Plaintiffs' alleged injuries. A court's remedial power is limited to the parties before it, those under the parties' control, and those in concert with them. Fed. R. Civ. P 65(d)(2); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 108-12 (1969). A judgment by this Court would bind Defendants but would leave third parties free to invoke their rights under ICWA. *See Okpalobi*, 244 F.3d at 427 ("these defendants cannot prevent purely private litigants from filing and prosecuting a cause of action under [the statute]").

And a declaratory judgment addressing the constitutionality of ICWA would not bind state courts that are applying ICWA in the cases before them. *See Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); *Omniphone, Inc. v. Sw. Bell Telephone Co.*, 742 S.W.2d 523, 526 n.3 (Tex. App. Austin 1987) ("While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, *since the state court owes obedience to only one federal court, namely, the Supreme Court*.") (emphasis in original); *Ind. Dept. of Public Welfare v. Payne*, 622 N.E.2d 461, 468

[20] Even had Plaintiffs sued the proper party, a claim alleging harm from 42 U.S.C. § 622 would not be ripe. Plaintiffs have not even alleged a failure to jointly develop a plan with the Secretary of Health and Human Services. *See Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 716-18 (5th Cir. 2012). And even if this Court enjoined enforcement of 42 U.S.C. § 622, there would not be redress because State Plaintiffs' courts would continue to apply governing law in child welfare proceedings, which includes ICWA.

(Ind.1993) (same); *Kornman v. Blue Cross/Blue Shield of La*, 662 So.2d 498, 94-306 (La. App. 5 Cir. 9/26/95) (same). This means that because State Plaintiffs have opted to challenge ICWA in Texas federal court rather than in their own state courts, their own courts may well continue to treat ICWA as constitutional, regardless of the outcome of this case. And for Individual Plaintiffs involved in proceedings in Nevada and Minnesota, the possibility of relief is even more remote, since those States and state courts are not a party to this suit. That lack of redressability is fatal for the standing of all Plaintiffs.

None of this suggests Plaintiffs lack recourse for their alleged grievances. Nothing prevents Individual Plaintiffs from challenging the constitutionality of ICWA in the context of state-court proceedings in which they seek to adopt children.[21] And State Plaintiffs can raise their grievances in any relevant proceeding in their own state courts.[22] In contrast, this Court would be offering an advisory opinion, and whether that will provide redress is purely speculative.

3. Plaintiffs cannot challenge the Final Rule as an indirect attack on ICWA because they do not have standing to challenge ICWA directly

Plaintiffs also seek to invalidate the Final Rule as unconstitutional on comparable grounds under the APA. The APA does not relieve them of the obligation to show standing,

[21] State courts have routinely considered questions related to the constitutionality of ICWA's provisions. *See e.g., Matter of Appeal in Pima Cnty. Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981) (equal protection challenge to ICWA); *In Interest of Armell*, 550 N.E.2d 1060, 1067-68 (Ill. App. Ct. 1990) (equal protection and due process challenge); *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278, 280-81 (S.D. 1980) (equal protection and Tenth Amendment challenge); *In re A.B.*, 2003 ND ¶ 37, 663 N.W.2d 625, 636-37 (N.D. 2003) (Tenth Amendment challenge).

[22] To the best of Defendants' knowledge, State Plaintiffs have applied ICWA in their respective state courts for multiple decades without asserting that the statute suffers from constitutional infirmities.

however. *See e.g. Bennett v. Spear*, 520 U.S. 154, 162-63 (1997). The Final Rule does two things: It incorporates standards found in ICWA itself and in places "clarifies" those standards by elaborating procedural and substantive requirements that constitute best practices in implementing ICWA. 81 Fed. Reg. at 38,779-80. Where Plaintiffs challenge requirements that merely repeat statutory requirements, there is no redress because even in the absence of the regulatory requirement, ICWA's requirements still apply.[23]

Plaintiffs' constitutional challenges to regulatory provisions that elaborate on the statutory requirements also fail for lack of standing. For example, Plaintiffs' equal protection challenge to 25 C.F.R. § 23.132(b) (addressing "good cause" under the adoptive placement preferences) appears to turn not on the particular requirements of that provision of the Final Rule but on the fact that the provision applies, like ICWA, to cases involving children who meet the definition of "Indian child" in the statute itself. Thus, invalidation of § 23.132(b) would not provide redress because Plaintiffs' alleged harm actually flows from ICWA itself, not the Final Rule's elaboration of good cause requirements. The same is true for Plaintiffs' equal protection challenge to 25 C.F.R. § 23.136, Compl. ¶ 230, because that provision just reiterates ICWA's establishment of a two-year period to bring a collateral attack on voluntary adoptions where parental consent was obtained by duress or fraud. *Compare* 25 C.F.R. § 23.136(a) *with* 25 U.S.C. § 1913(d). It is also true for Plaintiffs' Tenth Amendment, non-delegation, and

[23] This is true, for example, of Plaintiffs' challenge to the Final Rule's restatement of the adoptive preferences, *compare* 25 C.F.R. § 23.129 *with* 25 U.S.C. § 1915(a); their challenge to the definition of "Indian child," *compare* 25 C.F.R. § 23.2 *with* 25 U.S.C. § 1903(4).; and their challenge to the two year statute of limitations for vacatur in the event of fraud or duress, *compare* 25 C.F.R. § 23.136(a) *with* 25 U.S.C. § 1913(d). *See* Compl. ¶¶ 227; 231-232; 318-319 (challenge to adoptive preferences in Final Rule); *id*. ¶ 227 (challenge to "Indian child" definition in Final Rule); *id*. ¶¶ 230; 320 (challenge to vacatur for fraud and duress in Final Rule).

substantive due process claims challenging the Regulation's reiteration of ICWA's placement preferences. Compl. ¶¶ 231-32; 275; 318; 348.[24]

D. The Court Should Abstain from Review of Plaintiffs' Claims under *Younger*

Even if the Court determines that it has subject-matter jurisdiction to hear Plaintiffs' claims, it should abstain from exercising such jurisdiction under *Younger*, 401 U.S. 37, and its progeny. Plaintiffs here seek declaratory and injunctive relief to preclude application of ICWA and the Final Rule in ongoing state-court child-custody proceedings. As Plaintiffs acknowledge, these state-court child-custody proceedings involve important state interests. *See e.g.*, Compl. ¶¶ 34-40 (highlighting State Plaintiffs' interests in domestic relations and child-welfare matters).

The *Younger* abstention doctrine provides that federal courts should abstain whenever a state's interests in an ongoing judicial proceeding "are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987). "[T]he basic doctrine of equity jurisprudence [is] that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger*, 401 U.S. at 43-44. While *Younger* initially addressed abstention in the context of ongoing state criminal proceedings, the Supreme Court has recognized the applicability of *Younger* in two categories of state civil proceedings: enforcement proceedings akin to criminal prosecutions and pending proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013).

[24] Defendants acknowledge that this rationale does not extend to instances in which Plaintiffs allege that the Final Rule violates ICWA itself by going beyond ICWA's requirements or that aspects of the Final Rule are arbitrary and capricious. For example, it does not apply to Plaintiffs' APA claim that the Final Rule constitutes an unexplained departure from the Department's prior policy. Compl. ¶ 233.

State abuse and neglect proceedings qualify as a civil enforcement actions under *Younger*. *See Moore v. Sims*, 442 U.S. 415, 423 (1979) (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975)); *see also DeSpain v. Johnston*, 731 F.2d 1171, 1178 (5th Cir. 1984) (*Younger* abstention applies to a challenge to a state abuse and neglect investigation). This Court has also applied *Younger* in the context of constitutional challenges to pending state-court proceedings involving child custody and child support matters. *Stewart v. Nevarez*, No. 4:17-CV-00501-O-BP, 2018 WL 507153, at *2 (N.D. Tex. Jan. 23, 2018). And the Tenth Circuit has applied it to preclude federal interference with state court ICWA proceedings. *Morrow*, 94 F.3d at 1386. Here, Plaintiffs' alleged injuries are based on the application of ICWA to state-court child-custody proceedings, which are the kind of civil enforcement actions in which *Younger* applies.

As such, *Younger* instructs a federal court to abstain from interfering in the state proceedings involved in this case, if three factors are present:

(1) there are ongoing state judicial proceedings;
(2) the proceedings implicate important state interests; and
(3) there is an adequate opportunity to raise federal claims in the state proceedings

Google, Inc. v. Hood, 822 F.3d 212, 222–23 (5th Cir. 2016); *see also Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). All three of these factors, termed "*Middlesex*" factors, are met here and favor a dismissal of the Complaint in its entirety, which would appropriately allow the State courts implicated in the Complaint the opportunity to adequately hear any constitutional challenges to the child-custody proceedings referenced.

Ongoing state judicial proceedings. With regard to the first condition, Plaintiffs allege harm from application of ICWA and the Final Rule to ongoing state-court child custody proceedings. The Brackeens challenge the application of ICWA and the Final Rule to the adoption petition they filed in the 323rd District Court, Tarrant County, Texas. Compl. ¶¶ 116-

133. The Librettis and Hernandez challenge the application of ICWA and the Final Rule to ongoing Nevada child-custody proceedings involving Baby O. *Id*. ¶¶ 147-151. And the Cliffords challenge ICWA and the Final Rule's application to ongoing child-custody proceedings in Minnesota involving Child P. *Id*. ¶¶ 157.

Additionally, State Plaintiffs' allegations rest on the existence of both ongoing and future state-court child-custody proceedings in their respective States in which state agencies are a party and ICWA applies. "In deciding whether to abstain pursuant to *Younger,* [courts] must be practical in assessing the most likely result of granting plaintiff's requested relief." *Bice v. La. Pub. Def. Bd.*, 677 F.3d 712, 718 (5th Cir. 2012). *Younger* abstention applies with equal vigor when the relief sought by a plaintiff "would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent." *O'Shea v. Littleton,* 414 U.S. 488, 500 (1974) (internal citation omitted). As in *O'Shea*, State Plaintiffs seek relief "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state . . . trials." *Id*. The Court in that case determined that *Younger* applied "because an injunction against acts which might occur in the course of future criminal proceedings would necessarily impose continuing obligations of compliance"; thus, "the question arises of how compliance might be enforced if the beneficiaries of the injunction were to charge that it had been disobeyed." *Id.* at 501; *see also Williams v. Rubiera,* 539 F.2d 470, 473 (5th Cir. 1976) (finding abstention was required because "[i]f relief were granted in this case it would have the effect of a federal court telling a state court how to run an ongoing criminal prosecution, i.e., whether it could constitutionally try the defendant without appointed counsel.").

Younger has been applied by numerous federal courts to abstain from review of aspects of state child-welfare and foster-care proceedings. *31 Foster Children v. Bush*, 329 F.3d 1255,

1278 (11th Cir. 2003) (finding that the first factor of *Middlesex* is satisfied where plaintiffs' requested relief would "interfere with ongoing dependency proceedings by placing decisions that are now in the hands of the state courts under the direction of the federal district court."); *Morrow*, 94 F.3d at 1386 (state private-adoption proceedings); *Moore v. Sims*, 442 U.S. at 423 (child abuse and neglect proceedings). Like in *Williams*, the relief sought by State Plaintiffs here would have the effect of the federal court telling the state courts how to run ongoing state child-custody proceedings, running afoul of *Younger*. Thus, the requirement of ongoing state-court proceedings is met as to all Plaintiffs.

The proceedings implicate important state interests. With respect to the second condition, Plaintiffs' Complaint rests on the premise that the state proceedings that are the subject of the Complaint involve important state interests, given the central role that states maintain in regulation of domestic relations within their borders. "It cannot be gainsaid that adoption and child custody proceedings are an especially delicate subject of state policy, the [Supreme] Court stating that '[f]amily relations are a traditional area of state concern.'" *Morrow*, 94 F.3d at 1393 (citing *Moore*, 442 U.S. at 435); *see also DeSpain*, 731 F.2d at 1179 ("Child welfare has long been a recognized area of state concern."). In addition to states' interest in the development of child welfare law (including the overlay of ICWA on their own state child-welfare law), state courts have an equally important interest in "continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies." *Huffman*, 420 U.S. at 604.

There is adequate opportunity to raise federal claims in the state proceedings. Given the ongoing state-court proceedings and important state interests, the final inquiry is whether there is an adequate opportunity to raise federal claims in state-court proceedings. The Supreme Court

has made clear that so long as "constitutional claims [] can be determined in the state proceedings and so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain." *Middlesex*, 457 U.S. at 435. Thus, federal courts "should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil*, 481 U.S at 15. Here, Plaintiffs have alleged no barrier to their ability to raise constitutional challenges to ICWA and the Final Rule in state-court proceedings; indeed, constitutional challenges to ICWA have been considered by many state courts.[25] *See supra* n.21. In fact, Plaintiffs allege that constitutional challenges were made in the context of Brackeens' petition to adopt A.L.M.[26] *See* Compl. ¶ 128.

Further, the state courts are in a better position to evaluate the particular circumstances of a concrete case, and if Plaintiffs are dissatisfied with the outcome, they have the opportunity to

[25] State Plaintiffs cannot rely on their inability to challenge the Final Rule under the APA in the state-court proceedings as a basis to circumvent *Younger* abstention because they have waived their ability to challenge the Final Rule in federal court by failing to comment during the notice and comment period. *See* infra Section III.F. So all that remain are their constitutional challenges to ICWA and the Final Rule, which can be raised in the context of the state-court proceedings referenced in the Complaint.

[26] Additionally, the Supreme Court has had the opportunity to review the Texas Family Code and determined that "Texas law is apparently as accommodating as the federal forum . . . . [A]bstention is appropriate unless state law clearly bars the interposition of the constitutional claims." *Moore*, 442 U.S. at 425–26. *See also Rangel v. Reynolds*, No. 4:07-CV-20 AS, 2007 WL 1189356, at *2 (N.D. Ind. Apr. 18, 2007) (applying *Younger* abstention to a federal court constitutional challenge to Indiana child custody proceedings); *Henry A. v. Willden*, No. 2:10-CV-00528-RCJ, 2010 WL 4362809, at *17 (D. Nev. Oct. 26, 2010), *aff'd in part, rev'd in part on other grounds*, 678 F.3d 991 (9th Cir. 2012) (determining Nevada state courts adequately provide opportunity for a putative class of children in foster care to challenge constitutionality of Nevada's appointment of guardians ad litem in child welfare cases and also determining that "[t]he injunctive relief sought by Plaintiffs would require this Court to monitor the state court system and would take the responsibility away from that court and put it under control of the federal court"); *P.G. v. Ramsey Cty.*, 141 F.Supp.2d 1220, 1229 (D. Minn. 2001) ("[J]uvenile courts in Minnesota may decide issues of federal constitutional law.").

appeal that decision in state court. "[T]ypically a judicial system's appellate courts [] are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions. . . . we do not believe that a State's judicial system would be fairly accorded the opportunity to resolve federal issues arising in its courts if a federal district court were permitted to substitute itself for the State's appellate courts." *Huffman*, 420 U.S. at 609. The Court should refrain, based on abstention, from providing any declaratory or injunctive relief.

E. Claims by the Cliffords and Librettis Should Be Dismissed Under Rule 19 for Failure to Join a Necessary and Indispensable Party

Plaintiffs Hernandez and the Librettis are involved in child-custody proceedings in Nevada and desire a favorable decision to prevent Nevada state courts from applying either ICWA or the Final Rule to those proceedings. The Cliffords are foster parents in Minnesota and seek a favorable decision to prevent Minnesota state courts from applying ICWA or the Final Rule to child-custody proceedings. For these Plaintiffs to secure the relief they desire, a favorable decision would have to bind Nevada and Minnesota state courts and their executive agencies. Accordingly, at a minimum, Nevada and Minnesota are necessary parties.[27] Pursuant to Fed R. Civ. P. 19, they must either be joined or the Librettis and Cliffords should be dismissed.

Rule 19 requires joinder of an absent "person" where "in that person's absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(1)(A). If that party is a state possessing sovereign immunity and cannot be joined, then "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Id.* at 19(b). The Court must consider four factors:

[27] Even if the States of Nevada and Minnesota were parties, it is not clear that Nevada or Minnesota courts would be bound by a judgment of this Court.

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties; and (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures; (3) whether a judgment rendered in the person's absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Id.

All four factors support dismissal. First, a judgment regarding the applicability of ICWA in Nevada and Minnesota prejudices those States' sovereign interest in the welfare of children. As Plaintiffs themselves assert, States have "sovereign authority over domestic relations in every child custody proceeding," and a judgment that dictates how that authority will be exercised in their absence would "intrude" upon their sovereign interest. Compl. ¶ 17. Minnesota has enacted its own statute to further prevent the breakup of Indian families: the Minnesota Indian Family Preservation Act ("MIFPA"), Minn. Stat. §§ 260.751-260.835. As one court has noted, "MIFPA is broader than its federal counterpart – the Indian Child Welfare Act of 1978" both in how it applies and how it defines "Indian child." *Doe v. Piper*, No. CV 15-2639 (JRT/DTS), 2017 WL 3381820, at *1 (D. Minn. Aug. 4, 2017). Any decision by this Court determining the applicability of ICWA in absent States "would be enormously prejudicial to [that State's] sovereign interest." *Hood ex rel. Miss. v. City of Memphis, Tenn.*, 570 F.3d 625, 633 (5th Cir. 2009). That is particularly true of Minnesota, since a decision on the constitutionality of ICWA could have ramifications for the MIFPA as well.

Second, no protective measures or shaping of the relief can mitigate prejudice here. Third, a judgment rendered in the absence of Nevada and Minnesota would not be adequate because if neither Nevada and Minnesota courts nor their executive agencies are bound, then no relief is available to the Librettis or Cliffords. Fourth, Plaintiffs have an adequate remedy if this case is dismissed for nonjoinder. Plaintiffs are three States and a set of individual Plaintiffs with

an interest in child-welfare proceedings in two more States. Each of these five States has their own capable state-court systems that routinely handle child-welfare proceedings and apply the relevant laws, including ICWA. Plaintiffs can raise their constitutional challenges to both ICWA and the Final Rule when and if the provisions of the statute and regulation are applied to them.[28]

F. State Plaintiffs Waived Their Arguments Challenging the Final Rule By Failing to Raise the Issue to the Agency During the Notice and Comment Period

State Plaintiffs waived their APA arguments challenging the Final Rule in Count One by not presenting their objections to the BIA during the notice and comment period, which extended from March 20, 2015 through May 19, 2015. *See* 80 Fed. Reg. 14,880 (Mar. 20, 2015). "It is black-letter administrative law that absent special circumstances, a party must ordinarily present its comments to the agency during the rulemaking in order for the court to consider the issue." *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001); *BCCA Appeal Grp. v. E.P.A.*, 355 F.3d 817, 828 (5th Cir. 2003) (courts "will not consider questions of law which were neither presented to nor passed on by the agency"); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004). This rule ensures that courts do not "usurp the agency's function" and "deprive the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *BCCA Appeal Grp.*, 355 F.3d at 828 (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35-37 (1952)). This rule applies to questions of law, including constitutional objections to agency action. *See Chamber of Commerce of the United States of Am. v. Hugler*, 231 F. Supp. 3d 152, 202 (N.D. Tex. 2017) (finding constitutional challenges waived when the objection was not made to the agency (citing *Nebraska v. E.P.A.*, 331 F.3d 995,

[28] The only claim that might not be raised in state court forum is Plaintiffs' claim that the Final Rule constitutes an unexplained departure from the 1979 Guidelines, Compl. ¶ 233, a claim that is disposed of by a cursory review of the extensive preamble to the Final Rule. *Indian Child Welfare Act Proceedings*, 81 Fed. Reg. at 38,782–84 (explaining the need for regulations).

997–98 (D.C. Cir. 2003)). Generalized objections to agency action or objections raised at the wrong time will not suffice; rather, "an objection must be made with sufficient specificity reasonably to alert the agency." *Appalachian Power Co.*, 251 F.3d at 1036 (citing *Tex Tin Corp. v. EPA*, 935 F.2d 1321, 1323 (D.C. Cir. 1991)).

None of the State Plaintiffs submitted comments to the BIA during the comment period. Texas DFPS submitted an untimely comment, but did not raise any of the concerns that Texas raises in this complaint. Texas DFPS Comment to Proposed Rule, attached as Exhibit 2, Appendix at 8. To the contrary, Texas DFPS stated that it "fully supports the Indian Child Welfare Act," noting that it worked collaboratively with tribes and community stakeholders to "develop best practices that will inure to the benefit of tribal children and families." *Id*. Texas DFPS also stated that "our commitment to both the letter and spirit of the ICWA is clear." *Id*. In the Complaint, Texas completely and inexplicably reverses its views on both the statute and Final Rule, but it should not be permitted to sandbag the agency with complaints that it did not raise in the rulemaking proceeding.

Nor did any other commenter adequately raise most of the objections in Count One of the Complaint.[29] For example, Plaintiffs' Complaint does not identify, and the Department has not located, any comment on the Rule concerning the allegation that the Rule's preference for "Indian families" as an adoptive placement is based on race and violates the guarantee of equal protection. Compl. ¶ 227. Nor have Plaintiffs (or the Department) identified any comment that argues that the Rule's provisions regarding foster-care and adoptive placements is not authorized

[29] Comments are available online. Indian Child Welfare Act (ICWA) Proceedings Regulation Comments, *available at* https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=BIA-2015-0001

by the Indian Commerce Clause. *Id.* ¶ 229. Similarly, the Department has not located any comment that raises an equal protection objection to the Rule's reiteration of ICWA's two-year period to invalidate a voluntary adoption, *id.* ¶ 230, nor any comment opining that the Rule violates the non-delegation doctrine, i*d.* ¶ 232. Because neither State Plaintiffs nor any other commenter clearly presented the concerns raised in Count One to the BIA during the rulemaking process, the Court should not consider these arguments for the first time in this case.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), or alternatively, abstain from hearing this case in favor of resolution of these challenges in the applicable state-court proceedings.

Dated: February 13, 2018

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division

/s/ *JoAnn Kintz*
JoAnn Kintz (CO Bar No. 47870)
Steve Miskinis
Christine Ennis
U.S. Department of Justice
Environment & Natural Resources Division
Indian Resources Section
P.O. Box 7611
Washington, DC 20044
Telephone: (202) 305-0424
Facsimile: (202) 305-0275
joann.kintz@usdoj.gov
Counsel for Defendants

Of Counsel:

Sarah Walters
Sam Ennis
Solicitor's Office, Division of Indian Affairs
United States Department of the Interior

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2018, a true and correct copy of the foregoing was submitted to the Clerk of the Court for the U.S. District Court, Northern District of Texas, along with Plaintiffs' counsel, using the ECF system of the court.

/s/ JoAnn Kintz
JoAnn Kintz
Trial Attorney
U.S. Department of Justice

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al. Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior, et al., Defendants.	Civil Action No: 4:17-cv-868-O **DECLARATION OF JOANN KINTZ IN SUPPORT OF MOTION TO DIMISS**

JoAnn Kintz declares and states as follows:

1. I am a trial attorney at the U.S. Department of Justice, Environment and Natural Resources Division. I have personal knowledge of the facts contained in this Declaration and am competent to testify thereto.

2. Attached as Exhibit 1 is a true and correct copy of the Affidavit of Kristi Crawford, Child Welfare Specialist II for the Cherokee Nation of Oklahoma (dated January 8, 2018).

3. Attached as Exhibit 2 is a true and correct copy of the Comment Letter Regarding the Notice of Proposed Rulemaking on Regulations for State Courts and Agencies in Indian Child Custody Proceedings, Texas Department of Family and Protective Services (dated May 19, 2015, postmarked May 20, 2015).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 13, 2018.

/s/ JoAnn Kintz

JOANN KINTZ
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Indian Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
TEL: (202) 305-0424
FAX: (202) 305-0275
e-mail: joann.kintz@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2018, a true and correct copy of the foregoing was submitted to the Clerk of the Court for the U.S. District Court, Northern District of Texas, along with Plaintiffs' counsel, using the ECF system of the court.

/s/ JoAnn Kintz
JoAnn Kintz
Trial Attorney
U.S. Department of Justice

EXHIBIT 1

AFFIDAVIT

I, Kristi Crawford, Child Welfare Specialist II for Cherokee Nation, affirm and attest to the following:

1. That Cherokee Nation Indian Child Welfare received notice of child custody proceedings regarding A.M. and determined that the child A.M. was an "Indian child" as defined under 25 U.S.C. §1903(4). A letter informing of such eligibility was sent to Tarrant County and subsequently filed on January 30, 2017 in cause number 323-103401-16.

2. That on or about February 7, 2017, Cherokee Nation mailed a Notice of Intervention in case number 323-103401-16 to the District Court of Tarrant County, 323rd Judicial District, 2701 Kimbo Road, Fort Worth, TX 76111.

3. That a filed stamped copy of said Notice of Intervention was mailed back to Cherokee Nation Indian Child Welfare with a file stamp date of February 15, 2017.

4. The Notice of Intervention expressly states that the Cherokee Nation appears in the case and requests that each party to the proceeding, and their counsel of record, provide Cherokee Nation with copies of all documents filed with the court pursuant to 25 U.S.C. § 1911(d). Additionally, the Notice of Intervention states the tribe intends to become an interested party to the case and will be involved with all case activity.

5. That on or about October 31, 2017, Cherokee Nation Indian Child Welfare mailed a letter to the Tarrant County Juvenile Justice Center, Attn: Court Clerk, 2701 Kimbo Road, Fort Worth, TX 76111 regarding case number 323-103401-16. The letter agreed with good cause to deviate from placement preferences for A.M. and consent to the adoption of A.M. with Chad and Jennifer Brackeen.

6. That a filed stamped copy of the letter agreeing to good cause to deviate from placement preferences and consent to the adoption of A.M. with Chad and Jennifer Brackeen was file stamped on November 6, 2017.

7. That Cherokee Nation requested from Texas Department of Family and Protective Services ("TX DFPS") the status of the adoption on or about January 29, 2018.

8. That a TX DFPS social worker informed Cherokee Nation that the adoption was finalized on January 8, 2018 and sent a copy of the adoption order to Cherokee Nation on or about January 30, 2018.

9. That the adoption of A.M. with Chad and Jennifer Brackeen was finalized on January 8, 2018 by an "Order Granting Adoption" in the District Court of Tarrant County.

Kristi Crawford
AFFIANT

Subscribed before and sworn to me this 8th day of February, 2018.

NAYELI ARBALLO NOTARY PUBLIC #17005616 Exp. 06-15-2021 STATE OF OKLAHOMA GARVIN COUNTY

Nayeli Arballo
NOTARY PUBLIC

My Commission Expires: June 15th, 2021

EXHIBIT 2

1ATE-52

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

COMMISSIONER
John J. Specia, Jr.

May 19, 2015

Ms. Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action—Indian Affairs
U. S. Department of the Interior
1849 C Street NW, MS 3642
Washington, DC 20240

Via Email: comment@bia.gov
Via Certified Mail: 7010 2780 0001 6953 8924

RE: Notice of Proposed Rulemaking (NPRM)
Regulations for State Courts and Agencies in Indian Child Custody Proceedings
25 CFR Part 23

Dear Ms. Appel:

The Texas Department of Family and Protective Services ("DFPS") respectfully submits this comment letter regarding the Notice of Proposed Rulemaking ("NPRM") with Comment Period on the Regulations for State Courts and Agencies in Indian Child Custody Proceedings, published in the Federal Register on March 20, 2015, for the U. S. Department of the Interior.

DFPS fully supports the Indian Child Welfare Act ("ICWA") and has worked collaboratively with the three federally recognized tribes in Texas and many other tribes throughout the country, as well as community stakeholders throughout Texas to develop best practices that will inure to the benefit of tribal children and families. This agency maintains an ongoing dialogue with Texas tribes to address both case specific and systemic issues. While there is always room for improvement, our commitment to both the letter and spirit of the ICWA is clear.

The concerns expressed in these comments relate to what we perceive as unintended but harmful consequences for Indian children and to agencies seeking essential child protection orders. We appreciate the opportunity to provide you with the following comments regarding the proposed rules.

Section 23.113 What is the process for the emergency removal of an Indian child?

Emotional harm Deleting emotional harm from the grounds for an emergency removal of child raises the specter of leaving a sexual abuse victim, a severely emotionally abused child or a child exposed to severe neglect beyond the law's protections. 25 C.F.R. 23.113(d)(10). This is contrary to the controlling statute which refers to "whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," 25 U.S.C. §1912(e) and could have devastating consequences for an Indian child.

The same issue is raised by deleting emotional harm in § 23.121 (a) and (b) in the context of foster care placement or termination of parental rights. While Subsection (c) refers to emotional damage "[c]lear and convincing evidence must show *a causal relationship between the existence of particular conditions in the home that are likely to result in serious emotional or physical damage* to the particular child who is the subject of the proceeding" (Emphasis added), it is not clear when this standard applies if not when foster care placement or termination of parental rights is at issue.

Emergency hearing within 30 days Conducting a hearing on an emergency removal within 30 days is not feasible if compliance with the notice requirements (10 days plus 20 additional days on request) and expert witness requirements also apply. It is not feasible to set and give notice of a hearing the same day a child or sibling set is removed, yet that would be necessary unless every removal is deemed to involve "extraordinary circumstances." The 90 day period permitted by the original BIA Guidelines, B.7 (d), represents a reasonable accommodation between the need for expediting a hearing and the time necessary to meet higher ICWA requirements.

§23.111 What are the notice requirements for a child custody proceeding involving an Indian child?

DFPS fully recognizes that the problem of inconsistent and inadequate tribal notification undermines compliance with the ICWA. In this agency's experience, the primary impediment to proper notice is either a failure to discover possible Indian ancestry or a lack of understanding as to the significance of this information. To address this issue, DFPS has developed new ICWA training for caseworkers, created online materials available to attorneys representing the agency and DFPS provides ICWA training to community stakeholders on an ongoing basis. A pending bill in the Texas Legislature would also mandate greater focus on identifying ICWA cases by changing practices in the courtroom at statutory hearings (H.B. 825).

Repeated formal notice
This rule would require formal notice by registered mail at multiple intervals including: removal, foster care placement, termination of parental rights and adoption. To date DFPS' practice has been to serve formal ICWA notice as soon as a child's Indian status is known or there is reason to know. Subsequent hearing notices are sent by regular mail, without further formal notice unless an amended petition or a new suit is filed. While the added burden on the agency posed by more frequent formal notice is notable, this does not seem likely to change the rates of actual notice in ICWA cases and as a result, the benefit to Indian children, parents or tribes is not clear.

Registered mail ill-suited for this purpose

Although the statute requires notice by registered mail, return receipt requested 25 U.S.C. § 1912, current regulations permit service by certified mail, return receipt requested 25 C.F.R. §23.11 (a). The Bureau of Indian Affair's response to a comment recommending the use of registered mail in 1994 makes clear why registered mail was rejected as impractical:

"Response. No change is made in the manner in which ICWA notices are served due to considerations given for proof of delivery of said notices in a timely manner. Registered mail is delivered only to the addressee. This means ICWA notices may not be delivered should the addressee not be present at the time of mail delivery. Unclaimed registered mail is held by the mail service for a limited number of days and then returned to the sender. On the other hand, mail delivered via certified mail with return receipt requested may be delivered to the office in the address rather than only to a specific person. Because the intent of providing ICWA notices is timely tribal notification of child custody proceedings and proof that such notice was given, certified mail with return receipt requested is the preferred method of serving ICWA notices to assure its timely delivery." FR 94-570 (Jan. 13, 1994).

The problem of locating a specific addressee and delays posed by unclaimed mail make clear that certified mail return receipt requested, with proof of delivery, is more effective for ensuring notice is delivered. The fact that registered mail costs approximately twice as much as certified mail (assuming return receipt requested with both) only underscores why certified mail represents the pragmatic choice and best use of limited resources.

§23.108 Who makes the determination as to whether a child is a member of a tribe? State court alternative

DFPS unequivocally respects the exclusive right of tribes to make membership determinations. In the context of proposed §23.103, the specific exclusion of a State court from making any determination as to the application of ICWA proposed in §23.108 does raise concern. Section 23.103 would require that an agency or a state court treat a child as an Indian child if there is "any reason to believe the child is an Indian child, *unless and until it is determined that the child is not a member or is not eligible for membership in an Indian tribe*," (Emphasis added). If a tribe is the sole arbiter of membership and does not respond to formal notice or informal efforts to communicate, some mechanism is essential to allow a state court to determine, based on the evidence available, whether the case is or is not subject to the ICWA. As proposed, a court would be compelled to apply the ICWA if a tribe did not respond in a child protection proceeding, even if the report of tribal heritage is unsupported by any family history information or other corroboration.

§23.107 What actions must an agency and State court undertake in order to determine whether a child is an Indian child?

If an agency must obtain written verification from all potential tribes as to whether the child is an Indian child, there must be some mechanism to allow the state court to proceed if a tribe fails to respond, as noted above, § 23.108.

§23.117 How is a determination of "good cause" not to transfer made?

Court's good cause limited This rule would eliminate a court's ability to consider whether the case is at an advanced stage or whether transfer would result in a change of placement in determining whether there is good cause not to transfer. This is contrary to basic permanency practices. While the advanced stage of the case or a child's placement may not be relevant in every case, inclusion of these factors discourages delayed requests for transfer and allows for appropriate exercise of judicial discretion.

§ 23.122 Who may serve as a qualified expert witness?

This rule sets out a hierarchy of persons presumed to be qualified to testify as an expert on a tribe's culture and customs. While these options should always be the first choice, identifying additional expert resources will ensure all Indian children have the protections the ICWA affords.

One challenge is that some tribal members are understandably unwilling to testify regarding another tribal member. Especially with smaller tribes, there may be few or no individuals outside the tribe genuinely knowledgeable about tribal culture and customs. One tribe has a policy that their own social work staff cannot testify out of state because they do not have the opportunity to investigate the case first hand. As compelling as these reasons are, if no expert witness is available for an ICWA case, child protection efforts will fail. If one of the listed candidates is not available: Could individual tribes designate other tribes with similar family and child rearing principles that could serve as a resource for an expert witness? If another expert (pediatrician, social worker, therapist, for example) consulted with a tribal expert on a case by case basis to identify potential bias and to incorporate the tribal perspective, would that expert's testimony be adequate? The intent is to generate a discussion that will improve ICWA compliance by expanding the pool of potential experts.

§ 23.131 How is a determination for "good cause" to depart from the placement preferences made?

Good cause to depart from the placement preferences includes the unavailability of a placement if active efforts are used to locate a placement, but "[f]or purposes of this analysis, *a placement may not be considered unavailable if the placement conforms to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides* or with which the Indian child's parent or extended family members maintain social and cultural ties." (Emphasis added) 25 C.F.R. §23.131(c)(4). This is not a problem unique to ICWA cases, but to the extent that federal and state laws impose licensure or verification requirements on children in DFPS conservatorship, the agency has limited options, particularly if a placement requires financial support.

§ 23.109 What is the procedure for determining an Indian child's tribe when the child is a member or eligible for membership in more than one tribe?

DFPS believes the most effective strategy for ensuring compliance with notice requirements is to avoid any added requirement that does not directly serve the tribe or a child. Formal notice with all necessary advisements and information about the pending suit is required for each tribe of which a child may be a member or eligible for membership. If more than one tribe responds to notification, this information is shared with any other tribe that responds in order to initiate the process of identifying the child's tribe for purposes of ICWA.

The goal of the requirement in proposed § 23.109 (a) that each notice specify any and all other tribes of which a child may be a member or eligible for membership is not clear. From DFPS' perspective, the fact that family history information is often shared at different junctures throughout the life of a case, as rapport builds with parents or new family members are located, makes consistent cross notification of tribes difficult. If the goal were clarified, possibly better options could be identified.

In conclusion, we appreciate the vital importance of this process, the value of your work and the opportunity to comment.

Respectfully,

John J. Specia, Jr.

TEXAS
Department of Family
and Protective Services

Agency Mail Code: E-611
P.O. Box 149030 ★ Austin, Texas 78714-9030

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