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

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; FRANK NICHOLAS LIBRETTI; HEATHER LYNN LIBRETTI; ALTAGRACIA SOCORRO HERNANDEZ; JASON CLIFFORD; and DANIELLE CLIFFORD,

and

STATE OF TEXAS; STATE OF LOUISIANA; and STATE OF INDIANA,

Plaintiffs,

v.

UNITED STATES OF AMERICA; RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; BRYAN RICE, in his official capacity as Director of the Bureau of Indian Affairs; JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary for Indian Affairs; the BUREAU OF INDIAN AFFAIRS; and the UNITED STATES DEPARTMENT OF INTERIOR; ALEX AZAR, in his official capacity as Secretary of the United States Department of Health and Human Services; and the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants,

CHEROKEE NATION, et al.,

Intervenor-Defendants.

Civil Action No. 4:17-cv-00868-O

MOTION OF 123 FEDERALLY RECOGNIZED INDIAN TRIBES, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, AND OTHER INDIAN ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 7(b) of the Federal Rules of Civil Procedure and Local Rule 7.2(b), 123 federally recognized Indian tribes, the Association on American Indian Affairs, the National Congress of American Indians, the National Indian Child Welfare Association, other national and regional American Indian organizations, by and through undersigned counsel, file this motion for leave to file a brief as *amici curiae* in the above-captioned case in opposition to Plaintiffs' motions for summary judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

Amici are individual federally recognized Indian tribes from across Indian country, along with leading national and regional Indian organizations. The vital protections provided by the Indian Child Welfare Act ("ICWA") to Indian children, Indian families, and Indian tribes is of significant importance to *amici* and their members. The challenges to ICWA presented by Plaintiffs seek to diminish ICWA's protections and undermine the unique trust responsibilities the United States owes to Indian children and Indian tribes. In line with the federal trust responsibility to Indian tribes, *amici* are critically interested in ensuring that the ICWA is interpreted to fully protect the best interests of Indian children, families, and tribes. *Amici* also maintain extensive expertise in the area of child welfare law as it relates to Indian children and tribes, and seek to file a brief in support of Defendants to assist the Court in its resolution of this case.

***Amici* federally recognized Indian tribes** are "Indian tribe[s], band[s], nation[s], or other organized group[s] or communit[ies] of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including [] Alaska Native village[s] as defined in section 1602(c) of title 43," 25 U.S.C. § 1903(8), and therefore are "Indian tribes" within the meaning that term is given in ICWA. Each is a separate and distinct

tribal government, possessing the sovereign authority to adjudicate the best interests of its children. Each has a direct and immediate interest in achieving the best outcomes for Indian children, and knows from experience that the procedural and substantive rights secured by Congress in ICWA help achieve those best outcomes. And each knows that a challenge to ICWA threatens both the best interests of Indian children and the very existence of *amici*. A complete list of *amici* federally recognized Indian tribes is attached as Exhibit 1.

***Amicus* Association on American Indian Affairs ("AAIA")** is a 96-year-old Indian advocacy organization that began its active involvement in Indian child welfare issues in 1967. AAIA's studies were a central focus of the Congressional hearings and committee reports underlying ICWA's passage. At Congress's invitation, AAIA was closely involved in the drafting of the Act. Since 1978, AAIA has continued to work with tribes to implement ICWA.

***Amicus* National Congress of American Indians ("NCAI")** is the largest national organization addressing American Indian interests. As part of its efforts, NCAI works closely with state governments and private organizations to develop productive models of state-tribal cooperation, including cooperation relating to Indian child welfare.

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

***Amicus* Alaska Federation of Natives ("AFN")** is the largest and oldest statewide Native organization in Alaska, representing hundreds of thousands of Alaska Natives. AFN's membership includes 186 federally recognized tribes and 12 regional inter-tribal non-profit

consortia. For over 50 years, AFN has been the principal forum in addressing critical public policy issues that affect the cultural and economic well-being of Alaska Native peoples, including child welfare.

***Amicus* Arctic Slope Native Association ("ASNA")** is a non-profit tribal organization serving people living in the northern region of Alaska. ASNA's mission is "to promote the health and well-being of the people of the Arctic Slope." To meet this mission, ASNA administers social service programs on behalf of the Tribes within the region. ASNA provides ICWA services through resolution to five tribes across the North Slope.

***Amicus* Association of Village Council Presidents ("AVCP")** is an inter-tribal non-profit consortium. It is based in Bethel, Alaska, and is controlled by 56 federally-recognized tribes. AVCP provides human, social, and other culturally relevant services to its member tribes, which are located in villages throughout the Yukon-Kuskokwim Delta in an area of approximately 59,000 square miles."

***Amicus* Bristol Bay Native Association ("BBNA")** is an inter-tribal non-profit consortium. It is based in Dillingham, Alaska, and is controlled by 31 federally-recognized tribes. BBNA provides human, social, and other culturally relevant services to its member tribes, which are located in villages throughout the Bristol Bay Region in an area of approximately 46,500 square miles.

***Amicus* California Association of Tribal Governments** is a nonprofit consortium of 34 federally recognized tribal governments in California, chartered to promote mutual cooperation and represent its members' common interests with federal, state, and local governments.

***Amicus* Chugachmiut** is the tribal consortium that provides traditional and culturally appropriate health and social services, education and training, and technical assistance to the

Chugach Native people. Chugachmiut is governed by a seven member Board of Directors made up of one Director from each of the seven Tribes in the Chugach region, which consists of an area approximately 50,000 square miles.

***Amicus* Kawerak, Inc.** is a non-profit tribal consortium comprised of 20 federally recognized tribal governments located in the Bering Strait region of Northwest Alaska. Kawerak provides social, economic, educational, and cultural programs and services to the residents of the Bering Strait region, in an area roughly 23,000 square miles.

***Amicus* Tanana Chiefs Conference ("TCC")** is a tribal consortium that provides a wide range of health and social services in a way that balances traditional Athabascan and Alaska Native values with modern demands, to 42 Alaskan communities, including 37 federally-recognized tribes in Alaska's vast interior region.

***Amicus* United South and Eastern Tribes, Inc. ("USET")** is a non-profit organization representing 27 federally recognized tribal nations in 13 states stretching from Texas to Maine. Established in 1969, USET works at the regional and national level to educate federal, state, and local governments about the unique historic and political status of its member Tribal Nations.

***Amicus* California Tribal Families Coalition** is a membership organization formed to promote and protect the health, safety, and welfare of tribal children and families, which are inherent tribal governmental functions and are at the core of tribal sovereignty and tribal governance.

***Amicus* Nebraska Indian Child Welfare Coalition** is a statewide organization made up of tribal representatives, ICWA specialists, attorneys, and other advocates working for more than a decade to promote the best interests of Indian children by helping to improve ICWA compliance in Nebraska.

This Court maintains liberal discretion to permit amici participation. *See Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735, 739 n.2 (W.D. Tex. 2007). *Amici* need only make a showing that its "participation is useful or otherwise desirable by the court." *United States v. State of La.*, 751 F. Supp. 608, 620 (E.D. La. 1990). *Amici* respectfully request to submit this separate brief to provide the Court with important additional context and information regarding the factual and legal history leading to ICWA's enactment, the settled constitutional authority under which it was passed, and the collaborative progress since made by states and tribes in rectifying the wrongs ICWA was meant to address. As explained in the attached brief, *amici* argue that ICWA implementation at a state level has improved child welfare services for Indian families and tribes and has fostered tribal-state cooperation in child welfare cases involving Indian children. Indeed, State Plaintiffs have enacted laws that clearly reflect the voluntary adoption of ICWA as official state policy, and several of them have entered into tribal-state agreements to better implement ICWA.

For the foregoing reasons, amici respectfully request that this Court grant leave to file the brief of *amici curiae* contained herein.

/ / /

Respectfully submitted,

By: /s/

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* Application for admission *pro hac vice* pending

CERTIFICATE OF CONFERENCE

The undersigned counsel certifies that counsel for *amici* conferred with counsel for Plaintiffs and Defendants on May 21 and 22, 2018, and that counsel for Plaintiffs and Defendants consent to this motion.

/s/
Richard D. Salgado

CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on May 25, 2018.

/s/
Richard D. Salgado

Exhibit 1

Exhibit 1 – *Amici* Federally Recognized Tribes

The following *amici* are federally recognized Indian tribes:

Alaska
Central Council of the Tlingit & Haida Indian Tribes of Alaska
Chickaloon Native Village
Hoonah Indian Association
Kenaitze Indian Tribe
Native Village of Buckland
Native Village of Eyak
Native Village of Port Graham
Native Village of Ruby
Nome Eskimo Community
Organized Village of Saxman
Pribilof Islands Aleut Community of St. Paul Island Tribal Government
Yakutat Tlingit Tribe

Arizona
Colorado River Indian Tribes
Salt River Pima-Maricopa Indian Community
San Carlos Apache Tribe
Yavapai-Apache Nation

California
Agua Caliente Band of Cahuilla Indians
Bear River Band of Rohnerville Rancheria
Big Lagoon Rancheria
Big Pine Paiute Tribe of the Owens Valley
Big Sandy Rancheria of Western Mono Indians
Cher-Ae Heights Indian Community of the Trinidad Rancheria
Cortina Rancheria Kletsel Dehe Band of Wintun Indians
Coyote Valley Band of Pomo Indians
Dry Creek Band of Pomo Indians
Elk Valley Rancheria, California
Enterprise Rancheria Estom Yumeka Maidu Tribe
Ewiiaapaayp Band of Kumeyaay Indians
Federated Indians of Graton Rancheria
Fort Independence Indian Reservation
Habematolel Pomo of Upper Lake Tribe
Hoopa Valley Tribe
Hopland Band of Pomo Indians
Jamul Indian Village of California
Karuk Tribe
Kashia Band of Pomo Indians of the Stewarts Point Rancheria
Lytton Rancheria of California
Manchester-Point Arena Band of Pomo Indians
Mechoopda Indian Tribe of Chico Rancheria
North Fork Rancheria of Mono Indians of California
Pala Band of Mission Indians
Paskenta Band of Nomlaki Indians
Pechanga Band of Luiseno Indians
Pit River Tribe
Redding Rancheria
Redwood Valley Little River Band of Pomo Indians
Rincon Band of Luiseno Indians
Round Valley Indian Tribes
San Pasqual Band of Mission Indians
Santa Rosa Indian Community of the Santa Rosa Rancheria Tachi Tribe
Santa Ynez Band of Chumash Indians
Scotts Valley Band of Pomo Indians
Sherwood Valley Band of Pomo Indians
Shingle Springs Band of Miwok Indians
Soboba Band of Luiseno Indians
Susanville Indian Rancheria
Tejon Indian Tribe
The Yurok Tribe
Timbisha Shoshone Tribe of Death Valley California
Tolowa Dee-ni' Nation
Toulumne Band of Me-Wuk Indians
Tule River Indian Tribe of California
Viejas Band of Kumeyaay Indians
Wilton Rancheria

Connecticut
Mohegan Tribe of Indians of Connecticut

Idaho
Nez Perce Tribe

Indiana and Michigan
Pokagon Band of Potawatomi Indians, Michigan and Indiana

Kansas
Prairie Band Potawatomi Nation

Louisiana
Jena Band of Choctaw Indians

Massachusetts
Wampanoag Tribe of Gay Head (Aquinnah)

Michigan
Little River Band of Ottawa Indians
Nottawaseppi Huron Band of the Potawatomi
Sault Ste. Marie Tribe of Chippewa Indians

Minnesota
Minnesota Chippewa Tribe and its six component reservations: Bois Forte Band (Nett Lake), Fond du Lac Band of Lake Superior Chippewa, Grand Portage Band of Lake Superior Chippewa, Leech Lake Band of Ojibwe, Mille Lacs Band of Ojibwe, and White Earth Band of the Minnesota Chippewa Tribe.
Red Lake Band of Chippewa Indians
Shakopee Mdewakanton Sioux Community

Mississippi
Mississippi Band of Choctaw Indians

Montana
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation
Chippewa Cree Tribe
Confederated Salish and Kootenai Tribes

Nebraska
Santee Sioux Nation

Nevada
Lovelock Paiute Tribe
Paiute-Shoshone Tribe of the Fallon Reservation and Colony
Pyramid Lake Paiute Tribe
Walker River Paiute Tribe

Nevada and California
Washoe Tribe of Nevada and California

New Mexico
Pueblo of Acoma
Pueblo of Zia

New York
Seneca Nation

North Dakota
Turtle Mountain Band of Chippewa Indians

Oklahoma
Choctaw Nation of Oklahoma
Muscogee (Creek) Nation
Osage Nation
Sac and Fox Nation

Oregon
Confederated Tribes of Siletz Indians of Oregon
Coquille Indian Tribe
Cow Creek Band of Umpqua Tribe of Indians

Rhode Island
Narragansett Indian Tribe

South Dakota
Oglala Sioux Tribe

Texas
Alabama-Coushatta Tribe of Texas
Ysleta del Sur Pueblo

Utah
Paiute Indian Tribe of Utah

Virginia
Pamunkey Indian Tribe
Rappahannock Tribe

Washington
Jamestown S'Klallam Tribe
Lower Elwha Klallam Tribe
Nooksack Indian Tribe
Puyallup Tribe of Indians
Samish Indian Tribe
Sauk-Suiattle Indian Tribe
Shoalwater Bay Indian Tribe
Squaxin Island Tribe
The Suquamish Tribe
Tulalip Tribes

Wisconsin
Bad River Band of the Lake Superior Chippewa
Ho-Chunk Nation
Lac Courte Oreilles Band of Lake Superior Chippewa
St. Croix Chippewa Indians of Wisconsin
Stockbridge-Munsee Community

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UNITED STATES OF AMERICA; RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; BRYAN RICE, in his official capacity as Director of the Bureau of Indian Affairs; JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary for Indian Affairs; the BUREAU OF INDIAN AFFAIRS; and the UNITED STATES DEPARTMENT OF INTERIOR; ALEX AZAR, in his official capacity as Secretary of the United States Department of Health and Human Services; and the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

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BRIEF OF *AMICUS CURIAE* 123 FEDERALLY RECOGNIZED INDIAN TRIBES, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, AND OTHER INDIAN ORGANIZATIONS IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Congress enacted the Indian Child Welfare Act of 1978 ("ICWA" or "the Act"), 25 U.S.C. § 1901 *et seq.*, in response to a nationwide crisis—namely, the widespread and wholesale displacement of Indian children from their families by state child welfare agencies at rates far higher than those of non-Indian families. Studies and Congressional testimony revealed the devastating impact of this displacement on Indian tribes and families, and pointed to significant and pervasive abuses in child welfare and adoption practices as contributing to these harms.[1] As a result, Congress carefully crafted ICWA to promote the best interests of Indian children, and to protect the rights of Indian children, families, and tribes, by establishing uniform federal standards governing state child welfare proceedings involving Indian children.

Plaintiffs ask this Court to undo decades of progress in child welfare made possible by ICWA. The Court should decline Plaintiffs' invitation and deny their motions for summary judgment. *Amici* write separately to address the factual and legal history leading to ICWA's enactment, the settled constitutional authority under which it was passed, and the collaborative progress since made by states and tribes in rectifying these wrongs.

INTEREST OF THE *AMICI CURIAE*

Amici are 123 federally recognized Indian tribes, along with national and regional organizations and tribal consortia dedicated to the interests of American Indians and tribes. Collectively, *amici* share a commitment to the well-being of Indian children and an understanding that ICWA is essential to achieving the best interests of Indian children while preserving Indian families and their tribes. *Amici* share a substantial interest in promoting and securing national conformity with ICWA's procedural and substantive mandates in state child welfare and adoption proceedings involving Indian children. A complete list of *amici's* statements of interest is attached as Appendix 1.

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

ARGUMENT

I. Congress Enacted ICWA in Response to Abuses by States, State Courts and Child Welfare Agencies that Led to the Widespread Displacement of Native Children from their Families.

A. Congress Enacted ICWA Against the Historical Backdrop of Disproportionate Removal of Native Children Compared to Non-Native Children.

Congress did not enact ICWA in a vacuum. During the years prior to the Act's passage, congressionally commissioned reports and wide-ranging testimony taken from interested Indians and non-Indians, and from governmental and nongovernmental agencies, wove together a chilling narrative—state and private child welfare agencies, with the backing of state courts, had engaged in the systematic removal of Indian children from their families without evidence of harm, and without due process of law. *See* H.R. REP. NO. 95-1386, at 27-28 (1978), as reprinted in 1978 U.S.C.C.A.N. 7530.[2]

Studies by the Association on American Indian Affairs ("AAIA") documented that Indian children were placed in foster care at much higher rights than non-Indian children. Indian placement rates by state ranged from double to more than twenty times the non-Indian rate, with the percentage of Indian children placed in non-Indian foster homes ranging from 53% to 97%.[3] Nationwide, "[t]he adoption rate of Indian children was eight times that of non-Indian children [and] [a]pproximately 90% of the . . . Indian placements were in non-Indian homes."[4] Among

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[2] These practices were in many ways successors to the federal boarding school era—a period when federal government-sponsored programs removed Indian children from their communities and placed them without parental consent in military-style boarding schools. *See* MARGARET JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 6 (2014); *see also* H.R. REP. NO. 95-1386, at 9.

[3] *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs,* 95th Cong. 1, 539 (1977) ("1977 Senate Hearing").

[4] *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 33 (1989) (citing *Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected*

Indian children removed from their homes, studies showed that an overwhelming majority were removed for vague reasons such as "neglect" or "social deprivation," or upon the assertion that the children might be subject to emotional damage by continuing to live with their Indian families. H.R. REP. NO. 95-1386, at 10.

Among American Indian and Alaska Native children placed for adoption, as many as 97% in Minnesota—home to Child P. in the matter before this Court—were placed in non-Indian homes. 1977 Senate Hearing at 537-603. Indeed, in 1971 and 1972, nearly one-quarter of all Indian children in Minnesota under one year of age were adopted. H.R. REP. NO. 95-1386, at 9. In Arizona—home to A.L.M.—Indian children were 3.5 times more likely than non-Indian children to be removed from their homes and placed in adoptive or foster care. 1977 Senate Hearing at 544; *see id.* at 546 (noting that in one county, 45 times as many Indian children as non-Indian children were in state-administered foster care). In Nevada—home to Baby O.—Indian children were 7 times more likely than non-Indian children to be removed and placed in foster care. 1977 Senate Hearing at 574; *see also* 1974 Senate Hearings at 40-44 (detailing harassment and abuse of an Indian woman and her children by Nevada authorities under the guise of foster care placement) (statement of Margaret Townsend, Fallon, Nev.). Overall, the evidence presented to Congress revealed that "25-35% of . . . Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Holyfield*, 490 U.S. at 32.

These abuses were not limited to rural states or those with high tribal populations. Testimony established that "in urban areas, Indian people in [states where there are no

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by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs, S. Comm. on Interior and Insular Affairs, 93rd Cong. 1, 3, 75-83 (1974) ("1974 Senate Hearings") (statement of William Byler)).

reservation communities] face the same problems that other minority group people face in this area with family court, and that is that there is a very high rate of placement in urban communities." 1974 Senate Hearing at 38 (statement of Bertram Hirsch, Staff Attorney, AAIA).

B. Congress Found that the Removal of Indian Children to Out-of-Home, Non-Indian Placements Was Not in the Best Interests of Indian Children, Families and Tribes.

"Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture." *Holyfield*, 490 U.S. at 49-50. Prior to ICWA, Indian children often were removed simply because their homes were different from Anglo-American homes, and pre-ICWA state policies generally reflected a complete disregard for tribal interests.[5] The effect of these removals was devastating. Testimony at congressional hearings was replete with examples of Indian children placed in non-Indian homes and later suffering from identity crises when they reached adolescence and adulthood. *See, e.g.*, 1974 Senate Hearing at 113-114; S. REP. NO. 95-597, at 50 (1977); *Holyfield*, 490 U.S. at 50. This phenomenon occurred even among children who had few memories of living as part of an Indian community. *See, e.g.*, 1978 House Hearings at 79 (Statement of Faye La Pointe) (describing the trauma and identity struggle experienced by a Puyallup tribal member who had very little memory of living within the Puyallup community). Such testimony led Congress to conclude that "[r]emoval of Indians from Indian society has serious long- and short-term effects . . . for the individual child . . . who may suffer untold social and psychological consequences." S. REP. NO. 95-597, at 43. A psychiatrist studying Indian children placed in off-reservation foster homes in Minnesota testified that in

[5] *See, e.g.*, 1977 Senate Hearing at 77-78,166, 316; *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 1, 115 ("1978 House Hearings"); H.R. REP. NO. 95-1386, at 19.

adolescence "runaway problems, suicide attempts, drug usage, and truancy are extremely common among them." 1974 Senate Hearing at 46.

Finally, the legislative record reflects "considerable emphasis on the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34. "Child rearing and the maintenance of tribal identity" were recognized to be "essential tribal relations." TASK FORCE FOUR: FEDERAL, STATE, AND TRIBAL JURISDICTION, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 86 (Comm. Print July 1976), *available at* https://www.narf.org/nill/documents/icwa/federal/lh/76rep/76rep.pdf (citation and quotation omitted). The large number of Indian children placed with families outside their tribes "paralyz[ed] the ability of the tribe to perpetuate itself." *Id.* at 86; *see also*, 124 Cong. Rec. 38103 (1978) (statement of Rep. Lagomarsino) ("[f]or Indians generally and tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as ongoing, self-governing communities"); *id*. at 38102 (statement of sponsor Rep. Udall) ("Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy.").

C. Congress Recognized that States Frequently Disregarded Due Process, Tribal Family Practices and Tribal Sovereignty in Removing Indian Children.

Congress found that "the 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." 25 U.S.C. § 1901(5); *see also Holyfield*, 490 U.S. at 45 ("Congress perceived the States and their courts as partly responsible for the problem it intended to correct"). The House Committee noted that states had failed "to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in

preserving and protecting the Indian family as the wellspring of its own future." H.R. REP. NO. 95-1386, at 19, *see also Holyfield*, 490 U.S. at 45, n. 18, *quoting* 124 Cong. Rec. 38103 (1978) (letter from Rep. Udall to Assistant Attorney General Wald) ("'[S]tate courts and agencies and their procedures share a large part of the responsibility' for the crisis threatening 'the future and integrity of Indian tribes and Indian families.'").

State courts allowed these abuses to occur in virtually an unfettered fashion. Child welfare decisions were "in most cases, carried out without due process of law." H.R. REP. NO. 95-1386, at 10-12; *see also* 1974 Senate Hearings at 67 (statement of Bertram Hirsch) ("It was never proven in court that she was unfit. We had a hearing in the district county court . . . . [T]he burden of proof was very clearly shifted on [an Indian parent] to prove that she was fit, rather than the State proving she was unfit."). Tribes, too, frequently were kept in the dark about removal of Indian children from their families. 124 Cong. Rec. 38102 (1978) (statement of Rep. Robert Lagomarsino) (noting that "[g]enerally there … [were] no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agents.").

One of the most frequent complaints was the tendency of social workers to apply standards that ignored the realities of Indian societies and cultures. As the House Committee Report explained:

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

H.R. REP. NO. 95-1386, at 10, 20. Senator Abourezk summarized the 1974 Senate Hearing testimony as establishing "that in Indian communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or friend will take that child in." 1974 Senate Hearing at 473. The failure to account for these cultural practices led "many social workers . . . [to] make decisions that are wholly inappropriate in the context of Indian family life . . . [T]hey frequently discover neglect or abandonment where none exists." H.R. REP. NO. 95-1386, at 10. Children often were removed or threatened with removal because they were placed in the care of relatives or their homes lacked the amenities that could be found in non-Indian society. *See, e.g.*, 1977 Senate Hearing at 77-78, 166, 316; 1978 House Hearings at 115.

Nor were these abuses limited to involuntary removals; state and private adoption agencies sometimes coerced parents into signing "voluntary" consents to adoption. *See, e.g.*, H.R. REP. NO. 95-1386, at 10-12 (noting that "the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children," and that "because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments."); 1974 Senate Hearing at 463 (statement of Senator Abourezk) ("[i]n many cases [parents] were lied to, they were given documents to sign and they were deceived about the contents of the documents.").

D. Congress Enacted ICWA in Response to this Nationwide Crisis in Order to Establish Minimum Federal Standards for the Protection of Indian Children, Families and Tribes.

Following years of hearings and deliberation, Congress enacted ICWA to remedy the widespread harms that states had helped to enable. At its core, ICWA establishes "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's substantive and

procedural mandates were carefully tailored to address the harms identified during Congressional hearings, thereby reflecting "a Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37 (*quoting* H.R. REP. NO. 95-1386, at 23). These mandates include, for example, provisions for notification of and participation by Indian tribes in child welfare proceedings involving Indian children, 25 U.S.C. §§ 1911(c), 1912(a), (c), and standards to ensure due process for Indian children, families, and tribes throughout child welfare proceedings. *Id.* at §§ 1912(d)-(f), 1913, 1914, 1916, 1920, 1921, 1922. The "most important substantive requirement imposed on state courts" in the Act are the adoptive placement preferences codified at 25 U.S.C. § 1915. *Holyfield*, 490 U.S. at 36-37. These preferences, which Congress determined to be presumptively in the best interests of Indian children, are in part meant to ensure that Indian child welfare decisions are not made according to "white, middle-class standard[s] which, in many cases, foreclose[] placement with [an] Indian family." *Id*. at 37 (quoting H.R. REP. NO. 95-1386, at 24; internal quotation marks omitted).

II. ICWA Implementation at a State Level Has Improved Child Welfare Services for Indian Families and Has Fostered Tribal-State Cooperation in Child Welfare Cases.

A. ICWA Establishes the "Gold Standard" for Child Welfare Proceedings and Is Supported by Child Welfare Organizations and State Court Judges Alike.

ICWA's protections for Indian children and families are now widely considered the "gold standard" among national child welfare organizations. *See* Brief of Casey Family Programs, *et al.*, as *Amici Curiae* in Support of Respondent Birth Father, *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 2013 WL 1279468 at *2 (March 28, 2013) ("[I]n the Indian Child Welfare Act, Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children . . . [I]t would work serious harm to child welfare programs nationwide

. . . to curtail the Act's protections and standards.").[6] Although ICWA's procedural mandates have significantly improved Indian child welfare systems, this progress is not universal. For example, states such as Minnesota and Alaska still have vastly disproportionate rates of Indian children in out-of-home placements compared to the general child population.[7] In addition, serious due process violations in child custody proceedings involving Indian children were uncovered recently in South Dakota, where a state judge conducted cursory removal hearings lasting no more than a few minutes and at which parents were not allowed even to view documents outlining the case against them, leading a federal court to enjoin the practice. *See Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 770 (D.S.D. 2015), *on reconsideration in part sub nom. Oglala Sioux Tribe v. Hunnik*, No. CV 13-5020-JLV (D.S.D. Feb. 19, 2016), *appeal docketed*, No. 17-1135 (8th Cir. January 19, 2017).

The Department of the Interior's Final Rule for Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778-01 (June 14, 2016), also furthers ICWA's laudable goals by synthesizing nearly forty years of case law, legislative changes, and evolution in social work practice to provide state courts with additional clarity in implementing the law. *Amici* were not alone in supporting these

[6] Others joining Casey Family Programs in this view include such national organizations as the Child Welfare League of America, the Children's Defense Fund, the North American Council on Adoptable Children, the Children and Family Justice Center, Foster Care Alumni of America, National Association of Public Child Welfare Administrators, National Association of Social Workers, and the National Court Appointed Special Advocate Association. *Id.* at n.1a.

[7] In Minnesota, Indian children have been placed in out-of-home care at a rate more than twice that of any other group and were 12 times more likely than white children to spend time in placement. CENTER FOR ADVANCED STUDIES IN CHILD WELFARE, POLICY BRIEF, CHILD WELL-BEING IN MINNESOTA 2 (2013) (citing Minnesota Department of Human Services statistics), *available at* http://cascw.umn.edu/wp-content/uploads/2013/11/policyreport3_web-versionFINAL.pdf. In Alaska, Alaska Native children only make up 18.9% of the overall population of Alaskan children, but represent 55% percent of the children removed by the state and placed in out of home care. U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILDREN'S BUREAU, CHILD AND FAMILY SERVICES REVIEW: 2017 STATEWIDE ASSESSMENT 2 (2017), *available at* http://dhss.alaska.gov/ocs/Documents/CFSR.pdf.

efforts. As Defendants have noted, Texas's Department of Family Protective Services (DFPS) filed (albeit untimely) comments on the proposed regulations noting that it "fully supports the Indian Child Welfare Act." Doc. 57 and Ex. 2 App'x at 8.

What is more, Interior's efforts have been embraced by many of the same state court judges and court personnel that Plaintiffs claim suffer under their yoke. Noting that "[d]iffering interpretations [of ICWA] have resulted in inconsistent, and sometimes conflicting, practices by various State courts and agencies and different minimum standards are being applied across the United States, contrary to Congress' intent," the National Council of Juvenile and Family Court Judges ("NCJFCJ") filed comments in favor of the Department's proposed regulations. *NCJFCJ Filed Comments Supporting Proposed ICWA Regulations* (May 18, 2015), *available at* http://www.ncjfcj.org/ICWA-Statement. These comments came on the heels of an earlier NCJFCJ resolution supporting full implementation of the Indian Child Welfare Act, noting *inter alia* that such implementation "should be a priority for all state courts" and that "NCJFCJ encourages states to adopt ICWA in its entirety in state law." *Resolution in Support of Full Implementation of the Indian Child Welfare Act*, National Council of Juvenile Court Judges (July 13, 2013), *available at* http://www.ncjfcj.org/sites/default/files/FNL_ICWA_Resolution_07132013.pdf.

B. Many States (Including State Plaintiffs) Have Voluntarily Adopted ICWA as Official Policy.

A number of states, such as plaintiff Louisiana, have enacted state companions to ICWA, thereby ensuring a seamless interaction with federal requirements. *See, e.g.*, 2018 La. Sess. Law Serv. Act 296 ("Louisiana ICWA"); Minn. Stat. §§260.751-260.835 (2015); Neb. Rev. Stat. §§43-1501-43-1517 (2015); Iowa Code Ann. §§232B.1-232B.14 (2003). The Louisiana ICWA, passed by both chambers of the state's legislature without a single dissenting vote and signed

into law just two days ago, is a quintessential example.[8] Acknowledging that the purpose of ICWA is "to express a preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children and placing Indian children who must be removed from their homes within their own families or with their own or other Indian tribes," Louisiana ICWA, 2018 Comments to Art. 103.1, the Louisiana ICWA carefully and deliberately incorporates the provisions of the federal ICWA and the Final Rule into state law. *See, e.g., Id.* Art. 103.1 (applicability of Louisiana ICWA to child welfare proceedings), Art. 116 (adopting definitions of "Indian child" and "Indian tribe" from federal ICWA); 2018 Comments to Art. 624.1 (describing Art. 624.1(A) as "in all substantive aspects a verbatim copy of 25 C.F.R. 23.107(c)"); 2018 Comments to Art. 103.1 (describing when a court has reason to know a child is an Indian child).

Other states (including plaintiffs Indiana, Louisiana, and Texas and *amicus* Ohio) have enacted other laws that clearly reflect the voluntary adoption of ICWA as official state policy. For example, Indiana, Louisiana, and Ohio each explicitly require their state child welfare agencies to comply with ICWA in placing children subject to the Interstate Compact on the Placement of Children ("ICPC"), a compact voluntarily entered into state-by-state and not subject to federal oversight or involvement. *See* Ind. Code Ann. § 31-28-6-1 art. VII(h)(2012) (stating "[t]he public child placing agency in the sending state shall oversee compliance with the provisions of the Indian Child Welfare Act"); La. Child. Code Ann. art. 1629 (2010) (same); Ohio Rev. Code Ann. § 5103.20 art. VII(I) (2006) (same). All four states have exempted the

[8] Senate Vote on HB 182, FINAL PASSAGE (#997), *available at* http://www.legis.la.gov/legis/ViewDocument.aspx?d=1095562; House Vote on HB 182, FINAL PASSAGE (#59), *available at* http://www.legis.la.gov/legis/ViewDocument.aspx?d=1077037; NOTICE: Bills Signed by Gov. Edwards, Office of the Governor, State of Louisiana, available at http://gov.louisiana.gov/news/notice-bills-signed-by-gov-edwards-May-24-2018 (announcing signing of HB 182 into law).

applicability of ICWA in their family code versions of the Uniform Child Custody and Judicial Enforcement Act ("UCCJEA"), another uniform, voluntary state law. *See* Tex. Fam. Code Ann. § 152.104 (1999); Ind. Code Ann. § 31-21-1-2, Sec. 2(a) (2007); La. Stat. Ann. § 13:1804 (2007); Ohio Rev. Code Ann. § 3127.03 (2004).

Texas likewise is unambiguously committed to ICWA compliance. In response to reports "suggest[ing] that many judges in Texas who deal with child protective services cases are unaware of the federal Indian Child Welfare Act of 1978," and unprompted by the federal government, the Texas Legislature in 2015 amended the Texas Family Code to mandate inquiry into the tribal status of children and families involved in child welfare cases. H. Rep. 84(R)-16852, Reg. Sess., at 1 (Tex. 2015), *see* Tex. Fam. Code §§ 262.201(a-4), 263.202(f-1), and 263.306 (a)(9). According to its sponsor, the legislation was intended to ensure "proper efforts to identify the heritage of Native American children" so that Texas "help[s] such children remain connected with their families and tribes while going through a child protection suit and assist[s] the judicial and court community *in upholding the important promise made in the Indian Child Welfare Act of 1978*." H. Rep. 84(R)-16852, Reg. Sess., at 1 (Tex. 2015) (emphasis added). The legislation was signed into law by Texas' governor after passing both the Texas House and Senate with near-unanimous support.[9]

Consistent with their official state laws and policies, several of the State Plaintiffs also have entered into tribal-state agreements to better implement ICWA and other child welfare

[9] H. JOURNAL, 84th Leg., Reg. Sess., 2164-2165 (2015), *available at* http://www.journals.house.state.tx.us/hjrnl/84r/pdf/84RDAY60FINAL.PDF#page=20 (stating that the legislation (House Bill 825) passed the Texas House of Representatives by a vote of 125 to 15.); S. JOURNAL, 84th Leg., Reg. Sess., 2321 (2015), *available at* http://www.journals.senate.state.tx.us/sjrnl/84r/pdf/84RSJ05-26-F1.PDF#page=155 (stating HB 825 passed the Texas Senate by a vote of 29 to 2).

issues affecting each sovereign.[10] For example, DFPS noted in its comments on the Final Rule that it

> 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.

Doc. 57 Ex. 2 App'x at 8. Texas DFPS's agreement with the Ysleta Del Sur Pueblo/Tigua Tribe of Texas calls for "mutual protocols for open communication, cooperation and training in the vital areas of child protection and family preservation." Appendix 2. These protocols include membership, *see id.*, Preamble ("all questions of membership in the Tribe or eligibility for membership in the Tribe shall be decided by the Tribe and such decisions shall be final"), and notice. *See, e.g., id.* at § IV.12 ("All notifications pursuant to the ICWA of 1978 (25 USC 1912) shall be sent to the Tribe"), and at § III.4 ("[w]hen possible, notification should be made to the [Tribe's Social Services Department] prior to a child's removal from his or her home environment"). The agreement also requires the Tribe to participate in state court hearings concerning the child, *id.* at § IV.11, and to "make reasonable efforts to assist the Department to eliminate the need for removing the child from his/her home and to make a timely reunification when possible." *Id.* at § IV.10.

Nothing in ICWA or the Final Rule "'impos[ed] substantial pressure'" on these states to "change their laws," States' Opp. Mot. Dismiss and Mot. Summ. J. 14 (*quoting Texas v. United*

[10] *See, e.g.*, Interagency Agreement/Jena Band of Choctaw Indians of LA and the Rapides, Grant and LaSalle Office of Cmty. Serv./Children Youth and Fam. Servs. (Nov. 10, 2009) (agreeing that "[i]nvestigation of reports involving Native American children will revert back to the Indian Child Welfare Act procedure"); Mem. of Understanding between Ysleta Del Sur Pueblo/Tigua Tribe and the Texas Dep't of Fam. and Prot. Servs., Child Prot. Servs. Div. (July 27, 2009); attached as Appendix 2.

States, 809 F.3d 134, 153 (5th Cir. 2015)), to adopt the provisions of ICWA as official state policy, or to require its implementation through formal government-to-government agreements with Indian tribes within their respective borders. Nor are any of these state actions dependent upon Social Security Act Title IV-B funding. These states took it upon themselves to recognize ICWA as official state policy—whether to carefully incorporate ICWA into state law, as Louisiana did this past week, or out of a desire to "uphold the important promise" of ICWA, which motivated Texas to amend its laws in 2015, or a recognition that state court compliance with ICWA was necessary to properly implement the (voluntary and state-coordinated) ICPC and UCCJEA, as Louisiana, Indiana, and Ohio did by enacting those laws.

III. ICWA and the Final Rule Are Constitutional

Plaintiffs claim that ICWA suffers from a variety of constitutional infirmities. None of these arguments have merit. Rather, Congress carefully worked within the bounds of its constitutional authority over Indian affairs, crafting a statute that makes tribes and states partners in Indian child welfare—an arena where both sovereigns share authority.

A. ICWA Does Not Exceed Congress's Constitutional Authority

Congress's broad authority to legislate concerning Indian affairs is well established. "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes." *United States v. Lara*, 541 U.S. 193, 200 (2004). Sources of Federal authority in Indian affairs include the Indian Commerce Clause,[11] and the Treaty Clause.[12] *See Lara*, 541 U.S. at 200 (citing *Morton v. Mancari*, 417 U.S. 535, 552 (1974)); *McClanahan v. Ariz. Tax. Comm'n*, 411 U.S. 164, 172 n.7 (1973). Congress drew from and recognized both of these authorities,

[11] U.S. CONST. art. I, § 8, cl. 3 (The Congress shall have the power…"To regulate commerce with foreign Nations, and among the several States, *and with the Indian tribes*." (emphasis added)).

[12] *Id.* art. II, § 2, cl. 2 (The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").

among others, in enacting ICWA. *See* 25 U.S.C. § 1901(1) (*citing* Indian Commerce Clause); § 1901(2) (noting "that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources."); *see also Mancari*, 417 U.S. at 551-52 (finding Congress' Indian affairs authority "is drawn both explicitly and implicitly from the Constitution itself").

The Indian Commerce Clause clearly provides adequate authority for ICWA. The U.S. Supreme Court has recognized that the Clause grants "broad power [to] Congress to regulate tribal affairs." *Ramah Navajo Sch. Bd., Inc. v. Bur. of Revenue of N.M.*, 458 U.S. 832, 837 (1982) (*citing White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980)). Indeed, in *Cotton Petroleum Corp. v. New Mexico*, the Court noted that Interstate Commerce Clause case law "is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." 490 U.S. 163, 192 (1989). While Plaintiffs seek to conflate the two clauses, *see* Doc. 74 at 49-52 (*citing Adoptive Couple vs. Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas, J., concurring)), this view appears to have mustered no support on the Supreme Court beyond Justice Thomas. Rather, the Court continues to recognize that "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause" and that states "have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996); *see also Cotton Petroleum*, 490 U.S. at 192 ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian

affairs.") (*citing Mancari*, 417 U.S. at 551-52).[13] Indeed, "trade with Indians was an expansive category that encompassed more than the narrowly economic transactions Justice Thomas envisions," and included the adoption of children, "as Natives and Anglo-Americans adopted children they had captured or purchased." Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1028, 1031 and n.101 (2015).[14]

Congress further correctly observed that "statutes, treaties, and the general course of dealing with Indian tribes," as well as the United States' "direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe," provided adequate authority to enact ICWA. *See* 25 U.S.C. § 1901(2)-(3). In fact, multiple treaties between the United States and Indian tribes provided Federal funds for Indian child welfare, in particular for the support and education of orphans. *See, e.g.*, Treaty with the Yancton [*sic*] Sioux, 11 Stat. 743, 744-45 (1858); Treaty with the Cherokee, 7 Stat. 478, 482-83 (1835); Supplement to the Treaty with the Chickasaws, 7 Stat. 388, 388-89 (1832); Treaty with the Choctaw, 7 Stat. 333, 335-37 (1830). The Federal government managed Indian orphanages to supplement the work of tribal and charitable institutions. *See generally* Matthew L.M. Fletcher

[13] The Court's decision in *Mancari* highlighted this historical relationship and constitutional authority, stating the analysis "turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status." 417 U.S. at 551. Where the courts refer to the "plenary power" of Congress over Indians, the phrase is used as a summary of the congressional powers relating to Indian affairs. *Id.* at 552.

[14] Plaintiffs glibly object that "children are not commerce." Doc. 74 at 50-52 (State Plaintiffs); *see also* Doc. 80 at 67 (Individual Plaintiffs). This argument elides the distinction the Supreme Court, with good reason, has drawn between Interstate Commerce and Indian Commerce. In addition, it ignores the historical reality that ICWA was enacted partly in response to the unscrupulous market-based practices in the adoption of Indian children. *See* 1974 Senate Hearing at 70 (testimony of Bertram Hirsch) (describing the "tremendous pressure" felt by child welfare workers to adopt Indian children as a "gray market"); 1977 Senate Hearing at 359 (statement of Don Milligan, State of Washington, Department of Social and Health Services) ("[s]ome people will pay thousands of dollars for a child. It is also well-known that Indian children have always been a prize catch in the field of adoption.").

& Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885 (2017);[15] MARILYN IRVIN HOLT, INDIAN ORPHANAGES 47, 182, 185-86, 200-02, 253 (2001) (describing federal supervision of Indian orphanages).

B. ICWA and the Final Rule Use a Political, Not Racial, Definition of Indian

Plaintiffs contend that, because ancestry frequently is a factor in determining tribal membership, even tribal membership constitutes a racial category. The implications of Plaintiffs' argument cannot be overstated. If Congress cannot, within its Indian affairs authority, legislate with regard to members of federally recognized tribes, then the whole field of Federal Indian law would become suspect and "an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Mancari*, 417 U.S. at 552; *cf.* Ezra Rosser, *Medicaid Waivers and Political Preferences for Indians*, Harv. L. Rev. Blog (May 16, 2018), *available at* https://blog.harvardlawreview.org/medicaid-waivers-and-political-preferences-for-indians/ (arguing that "mischaracterizing Indian political preferences as racial preferences" would effectively undermine the entire field of Indian law). But no such measures are necessary because, where Congress enacts "legislation that singles out Indians for particular and special treatment. . . As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed" by the courts. *Mancari*, 417 U.S. at 554-55. Accordingly, when the United States acts to fulfill its obligations to Indians, pursuant to its constitutional Indian affairs powers, these actions do not create a suspect racial classification. ICWA is just such a statute.

[15] In fact, Professors Fletcher and Singel note that "few state governments assumed a comprehensive role in the regulation of child welfare generally" until, decades after these Treaties were entered, "the Great Depression forced the closure of many" charitable orphanages. Fletcher & Singel at 952.

Two of the Act's definitions, read together, demonstrate how it operates as a politically—and not a racially—based statute. First, ICWA defines "Indian tribe" to include only federally recognized Indian tribes. 25 U.S.C. § 1903(8) ("'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43"). This ensures that ICWA applies only to Indian tribes that have a political relationship with the United States. Second, ICWA defines "Indian child" as "any unmarried person who is under age eighteen 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). This ensures that ICWA applies only to children who have a political relationship—either directly by virtue of their own tribal membership, or indirectly through the membership of their biological parents who are tribal members—with a federally recognized tribe.[16] By these definitions, Congress carefully crafted ICWA to ensure that it would apply only to children who have political status as Indians. This is why, even though dozens of cases concerning ICWA have reached state courts of last resort, not

[16] The inclusion within ICWA's ambit of some children who are not (yet) tribal members does not transform ICWA into a racially discriminatory statute. Congress explained that it included those nonmember children who are both eligible for tribal membership and the biological child of a tribal member to ensure that parents had the opportunity to obtain tribal membership, and ICWA's protection, for their children. H.R. REP. NO. 95-1386, at 17. *Cf. Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989) (holding that under ICWA and "generally accepted doctrine in this country" a child assumed the reservation domicile of her parents even though the child had never lived on a reservation). Even if strict scrutiny was wrongly applied, this narrowly tailored statute—for which Congress expressed a compelling interest, and which is consistent with United States citizenship practices, *see, e.g.*, 8 U.S.C. §§ 1401, 1431 (children born outside U.S. qualify for citizenship if one or both parents are U.S. citizens and other conditions are met)—surely would survive strict scrutiny.

one such court has held that ICWA constitutes an unconstitutional racially-based statute.[17] The Louisiana Legislature apparently agrees. A comment to the state's just-passed ICWA companion statute quotes directly from the Department's 2016 *Guidelines for Implementing the Indian Child Welfare Act*:

> [The definition of "Indian child"] is based on the child's political ties to a federally recognized Indian Tribe, either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship. ICWA does not apply simply based on a child or parent's Indian ancestry. Instead, there must be a political relationship to the Tribe.

2018 La. Sess. Law Serv. Act 296, 2018 Comments to Art. 116 (quoting Bureau of Indian Affairs, *Guidelines for Implementing the Indian Child Welfare Act* 10 (Dec. 2016), *available at* https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf).

Congress considered, but ultimately rejected a broader definition of "Indian child" that would have included all children eligible for tribal membership, regardless of whether either parent is a tribal member. *Nielson v. Ketchum*, 640 F.3d 1117, 1124 (10th Cir. 2011) (citing 123 Cong. Rec. S37223 (1977)). Instead, Congress in ICWA defined "Indian child" such that it, like the employment preference in *Mancari*, "operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." 417 U.S. at 553 n.24.

[17] To the contrary, several state courts of last resort have explicitly upheld ICWA's constitutionality. *See, e.g.*, *In the Matter of Baby Boy L.*, 103 P.3d 1099, 1107 (Okla. 2004) (rejecting equal protection challenges to federal and state companion ICWA statutes); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003) ("The different treatment of Indians and non-Indians under ICWA is based on the political status of the parents and children and the quasi-sovereign nature of the tribe"); *In the Matter of Guardianship of DLL & CLL*, 291 N.W.2d 278, 281 (S.D. 1980) ("The denial of access to state court was based solely upon the political status of the parents and children and the quasi-sovereign nature of the tribe. This is a discriminatory classification which is not prohibited by the United States Constitution.").

C. ICWA Does Not Unconstitutionally Commandeer State Resources

The anti-commandeering doctrine holds that Congress may not direct the legislative bodies of the states to legislate in accordance with Federal policy, *New York v. United States*, 505 U.S. 144 (1992), nor may it command the executive apparatus of the states to implement Federal policy. *Printz v. United States*, 521 U.S. 898 (1997). ICWA and the Final Rule do neither. Rather, they set the ground rules for state courts in an arena where tribes and states share jurisdiction: adjudicating the welfare of Indian children. This is well within Congress' authority, as "the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Id.* at 907 (emphasis original).[18]

Indeed, Congress has passed, and the Court repeatedly has upheld, other directives to state courts to address matters specific to Indian affairs. For example, pursuant to the Act of May 27, 1908, 35 Stat. 312, Congress provided that conveyance of an interest in allotted lands of certain members of the Five Civilized Tribes of Oklahoma would not be valid unless approved by a state court, and specifically made determinations of such courts subject to certain provisions of the Act. In examining this process and its relation to Congress' authority concerning Indians and Indian affairs, the Court explained:

[18] Plaintiffs argue, Doc. 54 at 37-39, that ICWA is outside of Congress's purview because the Constitution implicitly vests in the states "exclusive power over domestic relations," citing *Sosna v. Iowa*, 419 U.S. 393 (1975), and *In re Burrus*, 136 U.S. 586 (1890). This general description, however, overlooks both the Constitution's express grant to the federal government of exclusive authority in Indian affairs, and the federal government's consistent activity in Indian child welfare since colonial times. *See generally* Fletcher & Singel (detailing centuries of federal activity in Indian child welfare). Regardless, neither *Sosna* nor *Burras* concerned Indian children, and neither opinion says anything that would limit Congress's authority to legislate in the arena of Indian child welfare. Moreover, Plaintiffs fail to identify a single federal Indian statute that the Court has struck down on the grounds that the statute concerned "domestic relations" such as child welfare.

> That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control.

Parker v. Richard, 250 U.S. 235, 239 (1919). And pursuant to Sections 1 and 2 of the Act of June 14, 1918, 40 Stat. 606, "Congress vested in the Oklahoma state courts jurisdiction to determine heirship in [certain] restricted lands . . . and jurisdiction to partition them," an authority that the Court described as "clear." *United States v. Hellard*, 322 U.S. 363, 365 (1944) (*citing Parker*, 250 U.S 235). The Court further confirmed that "[s]ince the power of Congress over Indian affairs is plenary, it may waive or withdraw these duties of guardianship or entrust them to such agency—*state or federal*—as it chooses." *Id.* at 367 (emphasis added).

ICWA establishes substantive and procedural rights for Indian children who are the subjects of certain child welfare proceedings. Such rights cannot be denied merely because they are at odds with a state's "rules of practice and procedure." *Brown v. Western Ry. Co. of Ala.*, 338 U.S. 294, 296 (1949). Unlike the statute at issue in *New York*, ICWA does not require that any state enact legislation enshrining these rights in state law (although, as demonstrated in Part II, *supra*, many states—including State Plaintiffs—have done so of their own volition). Unlike the statute at issue in *Printz*, ICWA does not require that any state executive or administrative agency implement or enforce its provisions.[19]

Finally, ICWA does not force the states to abandon their commitment to the best interests of Indian children—one of the most persistent, and pernicious, myths concerning ICWA. In fact, "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that

[19] Contrary to Plaintiffs' assertions, the ministerial tasks that ICWA requires of state courts, such as providing the Secretary of the Interior with a copy of an adoption decree, 25 U.S.C. § 1951(b), does not convert those courts into commandeered executive agencies any more than the reporting requirements in the Civil Justice Reform Act, 28 U.S.C. § 476, convert the federal courts into executive agencies.

its relationship to the tribe be protected." *Holyfield*, 490 U.S. at 50 n. 24 (quoting *In the Matter of the Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 204, 635 P.2d 187, 189 (App. 1981)); 25 U.S.C. § 1902 ("Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children"); H.R. REP. NO. 95-1386, at 19 ("the underlying principle of the bill is in the best interest of the Indian child"); Final Rule, 81 Fed. Reg. 38778-01, at 38797 ("While ICWA and this rule provide objective standards, however, judges may appropriately consider the particular circumstances of individual children and protect the best interests of those children as envisioned by Congress."). Texas's own judiciary concurs, noting that while

> ICWA is clearly concerned with the best interests of Indian children, the phrase "best interests of Indian children" in the context of the ICWA is different than the general Anglo-American "best interest of the child" standard used in cases involving non-Indian children . . . Under the ICWA, what is best for an Indian child is to maintain ties with the Indian Tribe, culture, and family.

Yavapai-Apache Tribe v. Mejia, 906 S.W.2d 152, 169 (Tex. App. 1995) (internal citations omitted). Indeed, given the embrace of ICWA by the Texas Legislature, *supra* Part II.B, the Texas DFPS, *id.*, and the Texas Judiciary, one wonders how Plaintiff State of Texas could feel "commandeered" some forty years after ICWA's enactment.

D. ICWA Does Not Impermissibly "Delegate" Authority to Tribes

In establishing placement preferences for adoptive and foster placement, 25 U.S.C. § 1915(a)-(b), ICWA also provides that "if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." *Id.* at § 1915(c). Contrary to Plaintiffs' assertions, this provision does not violate the

nondelegation doctrine because it is not a delegation of authority. *See Loving v. United States*, 517 U.S. 748, 758 (1996).

The Supreme Court has acknowledged that tribes retain inherent sovereign authority over domestic relations, including child welfare, of their members. *See, e.g.*, *Holyfield*, 490 U.S. at 42 ("Tribal jurisdiction over Indian child custody proceedings is not a novelty of ICWA."); *Fisher v. District Court*, 424 U.S. 382, 389 (1976) (recognizing, before ICWA was enacted, tribe's exclusive jurisdiction over adoption proceeding involving tribal members residing on the reservation). ICWA did not and could not *delegate* to tribes authority they already possess; rather, ICWA *confirms* tribes' authority to enact placement preferences for their member children, and as an exercise of Congress' established authority over Indian affairs, requires that state courts, when exercising their concurrent jurisdiction over those children, give effect to those legislated preferences.

CONCLUSION

For the foregoing reasons, the Plaintiffs' motions for summary judgment should be denied.

Respectfully submitted,

By: /s/

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Attorneys for amici Association on American Indian Affairs, National Congress of American Indians, National Indian Child Welfare Association, other national and regulation American Indian organizations, and federally recognized Indian tribes.

* Application for admission *pro hac vice* pending

Appendix 1

Appendix 1 – Statements Of Interest of *Amici Curiae* 123 Federally Recognized Indian Tribes, Association On American Indian Affairs, National Congress Of American Indians, National Indian Child Welfare Association, and Other Indian Organizations

***Amici* federally recognized Indian tribes** are "Indian tribe[s], band[s], nation[s], or other organized group[s] or communit[ies] of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including [] Alaska Native village[s] as defined in section 1602(c) of Title 43," 25 U.S.C. § 1903(8), and therefore are "Indian tribes" within the meaning that term is given in ICWA. Each is a separate and distinct tribal government, possessing the sovereign authority to adjudicate the best interests of its children. Each has a direct and immediate interest in achieving the best outcomes for Indian children, and knows from experience that the procedural and substantive rights secured by Congress in ICWA help achieve those best outcomes. And each knows that a challenge to ICWA threatens both the best interests of Indian children and the very existence of *amici*. A complete list of *amici* federally recognized Indian tribes follows at the end of this Appendix.

***Amicus* Association on American Indian Affairs ("AAIA")** is a 96-year-old Indian advocacy organization that began its active involvement in Indian child welfare issues in 1967. AAIA's studies were a central focus of the Congressional hearings and committee reports underlying ICWA's passage. At Congress's invitation, AAIA was closely involved in the drafting of the Act. Since 1978, AAIA has continued to work with tribes to implement ICWA.

***Amicus* National Congress of American Indians ("NCAI")** is the largest national organization addressing American Indian interests. As part of its efforts, NCAI works closely with state governments and private organizations to develop productive models of state-tribal cooperation, including cooperation relating to Indian child welfare.

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

***Amicus* Alaska Federation of Natives ("AFN")** is the largest and oldest statewide Native organization in Alaska, representing hundreds of thousands of Alaska Natives. AFN's membership includes 186 federally recognized tribes and 12 regional inter-tribal non-profit consortia. For over 50 years, AFN has been the principal forum in addressing critical public policy issues that affect the cultural and economic well-being of Alaska Native peoples, including child welfare.

***Amicus* Arctic Slope Native Association ("ASNA")** is a non-profit tribal organization serving people living in the northern region of Alaska. ASNA's mission is "to promote the health and well-being of the people of the Arctic Slope." To meet this mission, ASNA administers social service programs on behalf of the Tribes within the region. ASNA provides ICWA services through resolution to five tribes across the North Slope.

***Amicus* Association of Village Council Presidents ("AVCP")** is an inter-tribal non-profit consortium. It is based in Bethel, Alaska, and is controlled by 56 federally recognized tribes. AVCP provides human, social, and other culturally relevant services to its member tribes, which are located in villages throughout the Yukon-Kuskokwim Delta in an area of approximately 59,000 square miles."

***Amicus* Bristol Bay Native Association ("BBNA")** is an inter-tribal non-profit consortium. It is based in Dillingham, Alaska, and is controlled by 31 federally recognized

tribes. BBNA provides human, social, and other culturally relevant services to its member tribes, which are located in villages throughout the Bristol Bay Region in an area of approximately 46,500 square miles.

***Amicus* California Association of Tribal Governments** is a non-profit consortium of 34 federally recognized tribal governments in California, chartered to promote mutual cooperation and represent its members' common interests with federal, state, and local governments.

***Amicus* Chugachmiut** is the tribal consortium that provides traditional and culturally appropriate health and social services, education and training, and technical assistance to the Chugach Native people. Chugachmiut is governed by a seven member Board of Directors made up of one Director from each of the seven Tribes in the Chugach region, which consists of an area approximately 50,000 square miles.

***Amicus* Kawerak, Inc.** is a non-profit tribal consortium comprised of 20 federally recognized tribal governments located in the Bering Strait region of Northwest Alaska. Kawerak provides social, economic, educational, and cultural programs and services to the residents of the Bering Strait region, in an area roughly 23,000 square miles.

***Amicus* Tanana Chiefs Conference ("TCC")** is a tribal consortium that provides a wide range of health and social services in a way that balances traditional Athabascan and Alaska Native values with modern demands, to 42 Alaskan communities, including 37 federally recognized tribes in Alaska's vast interior region.

***Amicus* United South and Eastern Tribes, Inc. ("USET")** is a non-profit organization representing 27 federally recognized tribal nations in 13 states stretching from Texas to Maine. Established in 1969, USET works at the regional and national level to educate federal, state, and local governments about the unique historic and political status of its member Tribal Nations.

***Amicus* California Tribal Families Coalition** is a membership organization formed to promote and protect the health, safety, and welfare of tribal children and families, which are inherent tribal governmental functions and are at the core of tribal sovereignty and tribal governance.

***Amicus* Nebraska Indian Child Welfare Coalition** is a statewide organization made up of tribal representatives, ICWA specialists, attorneys, and other advocates working for more than a decade to promote the best interests of Indian children by helping to improve ICWA compliance in Nebraska.

***Amici* Federally Recognized Indian Tribes (by State)**

Alaska
Central Council of the Tlingit & Haida Indian Tribes of Alaska
Chickaloon Native Village
Hoonah Indian Association
Kenaitze Indian Tribe
Native Village of Buckland
Native Village of Eyak
Native Village of Port Graham
Native Village of Ruby
Nome Eskimo Community
Organized Village of Saxman
Pribilof Islands Aleut Community of St. Paul Island Tribal Government
Yakutat Tlingit Tribe

Arizona
Colorado River Indian Tribes
Salt River Pima-Maricopa Indian Community
San Carlos Apache Tribe
Yavapai-Apache Nation

California
Agua Caliente Band of Cahuilla Indians
Bear River Band of Rohnerville Rancheria
Big Lagoon Rancheria
Big Pine Paiute Tribe of the Owens Valley
Big Sandy Rancheria of Western Mono Indians
Cher-Ae Heights Indian Community of the Trinidad Rancheria
Cortina Rancheria Kletsel Dehe Band of Wintun Indians
Coyote Valley Band of Pomo Indians
Dry Creek Band of Pomo Indians
Elk Valley Rancheria, California
Enterprise Rancheria Estom Yumeka Maidu Tribe
Ewiiaapaayp Band of Kumeyaay Indians
Federated Indians of Graton Rancheria
Fort Independence Indian Reservation
Habematolel Pomo of Upper Lake Tribe
Hoopa Valley Tribe
Hopland Band of Pomo Indians
Jamul Indian Village of California
Karuk Tribe
Kashia Band of Pomo Indians of the Stewarts Point Rancheria
Lytton Rancheria of California

Manchester-Point Arena Band of Pomo Indians
Mechoopda Indian Tribe of Chico Rancheria
North Fork Rancheria of Mono Indians of California
Pala Band of Mission Indians
Paskenta Band of Nomlaki Indians
Pechanga Band of Luiseno Indians
Pit River Tribe
Redding Rancheria
Redwood Valley Little River Band of Pomo Indians
Rincon Band of Luiseno Indians
Round Valley Indian Tribes
San Pasqual Band of Mission Indians
Santa Rosa Indian Community of the Santa Rosa Rancheria Tachi Tribe
Santa Ynez Band of Chumash Indians
Scotts Valley Band of Pomo Indians
Sherwood Valley Band of Pomo Indians
Shingle Springs Band of Miwok Indians
Soboba Band of Luiseno Indians
Susanville Indian Rancheria
Tejon Indian Tribe
The Yurok Tribe
Timbisha Shoshone Tribe of Death Valley California
Tolowa Dee-ni' Nation
Toulumne Band of Me-Wuk Indians
Tule River Indian Tribe of California
Viejas Band of Kumeyaay Indians
Wilton Rancheria

Connecticut
Mohegan Tribe of Indians of Connecticut

Idaho
Nez Perce Tribe

Indiana and Michigan
Pokagon Band of Potawatomi Indians, Michigan and Indiana

Kansas
Prairie Band Potawatomi Nation

Louisiana
Jena Band of Choctaw Indians

Massachusetts
Wampanoag Tribe of Gay Head (Aquinnah)

Michigan
Little River Band of Ottawa Indians
Nottawaseppi Huron Band of the Potawatomi
Sault Ste. Marie Tribe of Chippewa Indians

Minnesota
Minnesota Chippewa Tribe and its six component reservations: Bois Forte Band (Nett Lake), Fond du Lac Band of Lake Superior Chippewa, Grand Portage Band of Lake Superior Chippewa, Leech Lake Band of Ojibwe, Mille Lacs Band of Ojibwe, and White Earth Band of the Minnesota Chippewa Tribe.
Red Lake Band of Chippewa Indians
Shakopee Mdewakanton Sioux Community

Mississippi
Mississippi Band of Choctaw Indians

Montana
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation
Chippewa Cree Tribe
Confederated Salish and Kootenai Tribes

Nebraska
Santee Sioux Nation

Nevada
Lovelock Paiute Tribe
Paiute-Shoshone Tribe of the Fallon Reservation and Colony
Pyramid Lake Paiute Tribe
Walker River Paiute Tribe

Nevada and California
Washoe Tribe of Nevada and California

New Mexico
Pueblo of Acoma
Pueblo of Zia

New York
Seneca Nation

North Dakota
Turtle Mountain Band of Chippewa Indians

Oklahoma
Choctaw Nation of Oklahoma
Muscogee (Creek) Nation
Osage Nation
Sac and Fox Nation

Oregon
Confederated Tribes of Siletz Indians of Oregon
Coquille Indian Tribe
Cow Creek Band of Umpqua Tribe of Indians

Rhode Island
Narragansett Indian Tribe

South Dakota
Oglala Sioux Tribe

Texas
Alabama-Coushatta Tribe of Texas
Ysleta del Sur Pueblo

Utah
Paiute Indian Tribe of Utah

Virginia
Pamunkey Indian Tribe
Rappahannock Tribe

Washington
Jamestown S'Klallam Tribe
Lower Elwha Klallam Tribe
Nooksack Indian Tribe
Puyallup Tribe of Indians
Samish Indian Tribe
Sauk-Suiattle Indian Tribe
Shoalwater Bay Indian Tribe
Squaxin Island Tribe
The Suquamish Tribe
Tulalip Tribes

Wisconsin
Bad River Band of the Lake Superior Chippewa
Ho-Chunk Nation
Lac Courte Oreilles Band of Lake Superior Chippewa
St. Croix Chippewa Indians of Wisconsin
Stockbridge-Munsee Community

Appendix 2

Memorandum Of Understanding

Between

Ysleta Del Sur Pueblo/Tigua Tribe

And

The Texas Department Of Family And Protective Services, Child Protective Services

AGREEMENT BETWEEN YSLETA DEL SUR PUEBLO SOCIAL SERVICES DEPARTMENT AND THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, CHILD PROTECTIVE SERVICES DIVISION

PREAMBLE

This Memorandum of Understanding (Agreement) is entered into by and between The Texas Department Of Family And Protective Services, Child Protective Services Division (Department) and Ysleta Del Sur Pueblo (Tribe), each acting in their respective capacities.

This Agreement is based on the fundamental principles of government-to-government relationships and recognizes the sovereignty of the Tribe and the State of Texas and each respective sovereign's interests.

As a party to this Agreement the Department has the authority to bind regional and local offices of the Department of Family and Protective Services as its agents to the provisions set forth.

As a party to this Agreement the Tribe has the authority to bind its members and Social Services Department workers as its agents to the provisions set forth.

For the purpose of this Agreement, all definitions in the Indian Child Welfare Act, 25 U.S.C 21 ("ICWA") are applicable to this Agreement and shall be referenced and utilized in the performance of each party's responsibilities under this Agreement.

To the extent consistent with the ICWA all questions of membership in the Tribe or eligibility for membership in the Tribe shall be decided by the Tribe and such decisions shall be final. If the Department has questions concerning the Tribal membership of a particular individual, it shall communicate with the Tribe's Social Services Department for resolution.

I. PURPOSE AND OBJECTIVES

This Agreement furthers the interests of the Tribe and the Department by establishing mutual protocols for open communication, cooperation and training in the vital areas of child protection and family preservation. The responsibilities and duties of each party are detailed in this Agreement.

II.
CONFIDENTIALITY

For the purpose of this Agreement, the confidentiality restrictions applicable to the Department in performing its children's protective services responsibilities in this state are applicable to Ysleta Del Sur Pueblo Social Services Department (SSD) identified in Section VII.1 of this Agreement. The Tribe agrees, for the purpose of this Agreement, that SSD will keep confidential all information concerning child protective services cases covered by this Agreement and will not reveal information regarding child protective service cases involving the Tribe.

III.
NOTICE

1. The Department will provide the names and contact information for Child Protection Service Specialist(s) and Supervisor(s) (CPS) to handle the Tribe's cases throughout the Department's child services programs from initial investigation to conclusion. The Department will update the Tribe quarterly on staff changes.

2. The first visit of any investigation shall be conducted jointly to the extent this effort does not impede the Department's duties, with staff from the Department to include: Child Protection Services Specialists and Supervisors and the SSD personnel identified in Section VII.1 of this Agreement. Notification of all first visits of any investigation shall come from the CPS to the SSD, regardless of the source of the referral of the case to CPS.

3. The Department shall notify the SSD should an initial contact need to be made. If the contact is to be made after hours, CPS will notify the SSD by telephone. The SSD will provide to the Department a phone number or pager number at which the SSD may be notified after hours. Should CPS be unable to reach the SSD, he/she will notify the Tribal Police of CPS presence on the reservation to conduct an investigation. The SSD and/or the Tribal Police shall not, under any circumstances, forewarn anyone of CPS contact plans.

4. When possible, notification should be made to the SSD prior to a child's removal from his or her home environment. If this is not possible due to emergency circumstances then he/she will notify the Tribal Police of their presence on the reservation to conduct a removal. If neither the SSD nor a Tribal Police Officer can be reached prior to removal, the Department will notify the SSD the first working day after removal.

5. The Tribe agrees to report to the Child Abuse Hotline, pursuant to the Texas Family Code sections 261.101 through 261.109, any incidents identified in working with families, which may constitute possible child abuse or neglect as defined by the Texas Family Code, section 261.001.

IV.
SERVICE PROVISIONS

1. The SSD staff is available to assist in the delivery of child protection services along with CPS, which includes efforts to prevent the breakdown of the family and to assist in the transition of the family case from the first visit of any investigation through legal services to conclusion. This includes updating the Department about significant developments concerning the Tribe that might impact the delivery of services.

2. The SSD will assist in the recruitment of foster parents from within the Tribe.

3. The Tribe requires that a statistical report be completed and provided to the SSD on a quarterly basis. This report will contain statistical information to include:

a) The case name;
b) The outcome of investigations;
c) Whether substance abuse was involved;
d) The type of abuse and/or neglect involved;
d) Current case status; and,
e) Contact information for CPS.

The Department agrees to create and provide the SSD with a blank copy of the type of report to be completed, and the Department agrees to submit this report to the Tribe by the fifth working day of each new quarter. The SSD agrees to coordinate with the Department concerning alterations of the report's format or content as needed.

4. The Department agrees to provide the SSD with copies of any disposition letters to the parents or caretakers of the child or children involved of the outcome of all investigations. These letters shall be sent to the attention of the Director, Ysleta Del Sur Pueblo Department of Human Services, at 9314 Juanchido, El Paso, Texas, 79907.

5. The Department and SSD shall stay in open communication with each other. This includes, but is not limited to, CPS notification to the SSD in advance of visits to the Tribe. CPS and SSD will notify each other by phone of all changes in appointments or cancellations thereof. The Department and SSD should be aware that all changes to scheduled visits may adversely effect the positive working relationship with the clients and make it more difficult to gain the trust and engage the clients. The SSD shall not, under any circumstances, release any information regarding any unscheduled home visit.

6. Family preservation and/or reunification services shall be coordinated with the SSD. Information shall be provided about the status of the transition of the case from the first visit of an investigation to family preservation or reunification, including the delivery of services and case assignment to different CPS staff.

7. Service Plans as developed by CPS with the family shall also be coordinated and developed with the SSD. The SSD will also sign and date the Service Plan with CPS and the family. Copies of the Service Plan shall be provided to the SSD to allow for the continuation of services.

8. Service Plans, or any similar plans, as developed by the SSD with the family shall also be coordinated and developed with CPS. CPS will also sign and date the Service Plan with the SSD and the family. Copies of the Service Plan shall be provided to CPS to allow for the continuation of services.

9. The SSD shall, upon request by CPS, provide a native-speaking translator who will be present and/or available from the time of, if possible given time restraints, the first visit of an investigation and as needed throughout the period services are provided. The translator will be particularly necessary when a written Service Plan is developed with the family to ensure the family understands the content of the written Service Plan.

10. The Tribe through the SSD will make reasonable efforts to assist the Department to eliminate the need for removing the child from his/her home and to make a timely reunification when possible.

11. The Tribe through the SSD shall attend any court hearings plus any Permanency Conferences as scheduled by the Department. The Department agrees to notify the SSD in advance of all Permanency Conferences and court hearings as scheduled, during which the Department shall inform those present that the Tribe is represented by the SSD.

12. All notifications pursuant to the ICWA of 1978 (25 USC 1912) shall be sent to the Tribe. All other copies and notices shall be sent to the address as presented in Section IV.4, by certified mail.

13. Subpoenas shall be served on the individuals of the Tribe if necessary for the purpose of providing testimony in Court. The tribe shall cooperate and assist in the delivery and service of any such subpoena served on tribal property.

V.
ACCESS TO RECORDS

1. The Department shall provide access to Department case records involving a Tribal child or family to the SSD personnel identified in Section VII.1 of this Agreement. These records shall be presented in a form consistent with Chapter 261, Section 261.201 of the Texas Family Code as well as the relevant provisions of the Texas Administrative Code, Section 40.

2. The Tribe shall provide access to Tribe case records, specifically including but not limited to any and all police reports, involving a Tribal child or family to the CPS personnel identified in Section VII.2 of this Agreement.

3. The Department and the Tribe each shall give permission to the other upon oral or written request, to review compliance with and performance under the terms and conditions of this Agreement and to review any compliance or performance records as necessary.

VI.
TRAINING

1. The Department will provide reasonable technical assistance to aid the Tribe in complying with Federal and State Child Welfare laws, policies and regulations. This will include the Department providing an overview of program operations, reporting procedures and compliance with the terms and conditions of this Agreement on an annual basis.

2. The Department agrees to offer overview training for the SSD, including:

a) Roles and responsibilities;
b) Stages of service;
c) Available child protective services; and,
c) Available legal services and resources.

3. The Department also agrees to notify the Tribe Social Service Director, Department of Human Services, of trainings on sexual abuse dynamics, Department trainings, resource availability trainings and other relevant trainings available in the community of which the Department is aware. Attendance or participation by the tribe at the above trainings shall be at the expense of the tribe.

4. The Tribe agrees to notify the Department's Regional Director of all Indian Child Welfare specific training. The Regional Director will designate which staff will attend the training.

5. The Tribe and the Department agree to provide joint trainings each year. These joint presentations will include two (2) sessions on abuse/neglect overview and two (2) sessions on foster home recruitment, to be scheduled with the SSD and limited to one (1) hour in length.

VII.
PLAN OF OPERATION

1. In order to facilitate the successful operation of this Agreement, the Tribe agrees to provide the Department with the names, addresses and phone numbers of all persons working within the Tribe's Social Services Department ("SSD" personnel), including one or more persons to be responsible for resolving any questions concerning this Agreement, or the Federal Indian Child Welfare Act, and to notify the Department as to any changes in the SSD personnel within ten (10) working days of such change.

2. In order to facilitate the successful operation of this Agreement, the Department agrees to provide the Tribe with the names, addresses and phone numbers of persons working in the County, Regional and State offices; to follow Regional procedures to answer any questions of the Department's local operations, to designate one or more persons at the Regional level to be responsible for resolving any questions or conflicts occurring at the local office level involving the provisions of this Agreement, or the Federal Indian Child Welfare Act; and, to notify the Tribe as to any changes in the Department personnel assigned to these functions under this Agreement within ten (10) working days of such change.

3. The Tribe and the Department agree to meet on an as needed basis to review and discuss the outcomes of this Agreement.

VIII.
DURATION AND REVIEW

This Agreement shall become effective the ____ day of _____ 2009, either party may terminate this agreement by providing the other party with thirty (30) days written notice.

The Tribe and the Department may review, revise, amend and renew this Agreement on an annual basis or as otherwise found necessary.

WE, THE UNDERSIGNED, HEREBY AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT BETWEEN THE YSLETA DEL SUR PUEBLO INDIAN TRIBE AND THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES.

7.27.09

Diana Barajas **DATE**
Regional Director, Department of Family and Protective Services, Child Protective Services

7/14/09

Frank Paiz **DATE**
Ysleta Del Sur Pueblo/Tigua Tribal Governor

State Director/Administrator **DATE**
Department of Family and Protective Services, Child Protective Services

7/14/09

Carlos Hisa **DATE**
Ysleta Del Sur Pueblo/Tigua Tribal Lieutenant Governor

BOBBY JINDAL
GOVERNOR

KRISTY H. NICHOLS
SECRETARY

State of Louisiana

Department of Social Services

Christine Norris, Tribal Chairman
Jena Band Choctaw Tribe
PO Box 14
Jena, LA 71342

November 10, 2009

RE: INTERAGENCY AGREEMENT/
Jena Band of Choctaw Indians
of LA and the Rapides, Grant and
LaSalle Office of Community
Service/Children Youth and
Family Services

Dear Chief Norris:

This is to confirm our interagency working agreement to establish an maintain and effective cooperative relationship between the Jena Band of Choctaw Indians and the Louisiana Department of Social Services/Office of Community Services of Rapides, Grant and LaSalle parishes in order to share responsibilities in regard to the protection of children of the Jena Band of Choctaw Tribal children and the investigation of reports of child abuse and/or neglect in the three parish services area of the Jena Band of Choctaw Indians, as per Louisiana Law R.S. 14:403. Investigation of reports involving Native American children will revert back to the Indian Child Welfare Act procedure.

We are submitting the following agreements for approval:

I. The prompt communication of all reports of suspected child physical abuse, sexual abuse and/or neglect, including incidents occurring with members of the Jena Band of Choctaw Indians to the Rapides (318) 487.5054, Grant (318) 627.3000 and LaSalle (318) 339.6030 Office of Community Services. These reports shall include suspicious child deaths. This would also include forwarding a copy of reports to Rapides, Grant and LaSalle OCS on all child abuse/neglect investigations.

II. Rapides, Grant and LaSalle Child Protection workers shall request assistance and/or accompaniment from the Jena Band Choctaw Tribe Social Worker for investigations.

III. When the Jena Band of Choctaw Tribe receives a report that young children are alone or without adequate supervision, the Rapides, Grant and/or LaSalle Child Protection will be notified and a decision on how to respond will be agreed upon at that time.

IV. Sexual abuse allegations involving children of Jena Band of Choctaw Indians will be investigated by the Rapides, Grant or LaSalle Parish Sheriff's Office, and when possible and feasible. At that time the procedure for the investigations are discussed and decided.

V. Jena Band of Choctaw Indians will be invited and encouraged to attend staffings held on cases in which OCS and the Tribe is involved. Rapides, Grant and LaSalle OCS shall provide adequate notification of Jena Band of Choctaw Indians' Social Worker of upcoming staffings, court dates, Family Team Conference and Adoption Safe Families Act other issues involving tribal members.

VI. Information obtained in child abuse/neglect investigations conducted on any Jena Band of Choctaw member is subject to regulations of confidentiality but will be shared by Jena Band of Choctaw Indians and Child Protection.

VII. In accordance with LA R.S. 46:56, requests for the release of information by Jena Band of Choctaw Indians from the Rapides, Grant and LaSalle Child Protection Agency will be honored. This will be regarding cases that we are jointly involved in and the information that is needed in the completion of their investigation and/or prosecution. This section precludes the need for individual requests for information on a case to case basis.

VIII. In Child Protection Investigation (CPI), Family Services (FS), Foster Care (FC), or any other OCS cases involving suspected methamphetamine abuse and /or manufacturing, OCS and the Jena Band of Choctaw Indians, referred to as law enforcement, will collaborate as follows:

1. CPI Investigations will be initiated with the assistance of law enforcement, if there is suspicion of methamphetamine involvement at the time of intake.

2. If there is no suspicion involving methamphetamine at the time of CPI intake, but suspicion develops later, OCS may request the assistance of law enforcement at that time.

3. If a CPI, FS, FC or any other OCS worker becomes suspicious of a methamphetamine lab during a home visit, he/she will leave the area and call the Rapides, Grant or LaSalle Sheriff's Office. The worker shall not return to the area without law enforcement and shall not reenter the home without clearance from law enforcement. If it is determined the home is not safe to reenter and children are present, the worker shall request that the children be taken out of the home by law enforcement.

4. Any contaminated clothing obtained by OCS personnel will be given to law enforcement for proper disposal.

During working, 8:00 am to 4:30 p.m. Monday through Friday please contact 318-339-6030. After working hours and on holidays, please notify the after hours on call number which is 1-866-429-8871 or 1.866.699.9614. Contact for the Jena Band of Choctaw Indians working hours are 7:30 am to 5:30 pm Monday through Thursday please call 318.992.0136 and after working hours and holidays call 318.481.0136.

I concur with the above agreement.

_____
Christine Norris, Tribal Chief
Jena Band of Choctaw Indians

_____
Mona Maxwell
Tribal Social Services Director

_____
Marybeth Boothe
Catahoula/LaSalle Office of Community Services/
Children, Youth and Family Services

_____
Rita Jackson, GSW/DM/Parish Manager
Rapides Parish Office of Community Services

_____
Kim McCain, GSW/DM/Parish Manager
DSS/Office of Community Services

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

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; FRANK NICHOLAS LIBRETTI; HEATHER LYNN LIBRETTI; ALTAGRACIA SOCORRO HERNANDEZ; JASON CLIFFORD; and DANIELLE CLIFFORD,

and

STATE OF TEXAS; STATE OF LOUISIANA; and STATE OF INDIANA,

Plaintiffs,

v.

UNITED STATES OF AMERICA; RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; BRYAN RICE, in his official capacity as Director of the Bureau of Indian Affairs; JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary for Indian Affairs; the BUREAU OF INDIAN AFFAIRS; and the UNITED STATES DEPARTMENT OF INTERIOR; ALEX AZAR, in his official capacity as Secretary of the United States Department of Health and Human Services; and the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants,

CHEROKEE NATION, et al.,

Intervenor-Defendants.

Civil Action No. 4:17-cv-00868-O

[PROPOSED] ORDER GRANTING MOTION OF 123 FEDERALLY RECOGNIZED INDIAN TRIBES, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, AND OTHER INDIAN ORGANIZATIONS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Upon consideration of the Motion for Leave to File Brief as *Amicus Curiae* in Opposition to Plaintiffs' Motion to Dismiss by 123 Federally Recognized Tribes, Association on American Indian Affairs, National Congress of American Indians, National Indian Child Welfare Association and Other Indian Organizations, the Court finds that the Motion is hereby **GRANTED**. Accordingly, it is **ORDERED** that *amicus curiae* brief of 123 Federally Recognized Tribes, Association on American Indian Affairs, National Congress of American Indians, National Indian Child Welfare Association and Other Indian Organizations is hereby filed.

SIGNED on this ___ day of _____, 2018.

THE HONORABLE REED O'CONNOR
UNITED STATES DISTRICT JUDGE