No. 18-11479

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHAD BRACKEEN, *et al.*,
***Plaintiffs-Appellees*,**

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, *et al.*,
***Defendants*, and**

CHEROKEE NATION, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas, Case No. 4:17-CV-00868-O

MOTION TO STAY PENDING APPEAL

KEITH M. HARPER
VENUS MCGHEE PRINCE
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street, N.W.
Washington, DC 20005
Telephone: (202) 508-5800
kharper@kilpatricktownsend.com
vprince@kilpatricktownsend.com

KATHRYN E. FORT
MICHIGAN STATE UNIV. COLLEGE OF LAW, INDIAN LAW CLINIC
648 N. Shaw Lane
East Lansing, MI 48823
Telephone: (517) 432-6992
fort@law.msu.edu

ADAM H. CHARNES
KILPATRICK TOWNSEND & STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
Telephone: (214) 922-7106
acharnes@kilpatricktownsend.com

THURSTON H. WEBB
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street NE
Suite 2800
Atlanta, GA 30309
Telephone: (404) 815-6300
twebb@kilpatricktownsend.com

Counsel for Appellants

CERTIFICATE OF INTERESTED PERSONS

Brackeen, et al. v. Zinke, et al., No. 18-11479.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Cherokee Nation (Intervenor-Defendant)
2. Oneida Nation (Intervenor-Defendant)
3. Quinault Indian Nation (Intervenor-Defendant)
4. Morongo Band of Mission Indians (Intervenor-Defendant)
5. Chad Everet and Jennifer Kay Brackeen (Plaintiffs)
6. Frank Nicholas and Heather Lynn Libretti (Plaintiffs)
7. Altagracia Socorro Hernandez (Plaintiff)
8. Jason and Danielle Clifford (Plaintiffs)
9. State of Texas (Plaintiff)
10. State of Louisiana (Plaintiff)
11. State of Indiana (Plaintiff)
12. United States of America (Defendant)

13. Bureau of Indian Affairs and its Director, Bryan Rice (Defendants)

14. John Tahsuda III, Bureau of Indian Affairs Principal Assistant Secretary for Indian Affairs (Defendant)

15. United States Department of the Interior and its Secretary, Ryan Zinke (Defendants)

16. United States Department of Health and Human Services and its Secretary, Alex Azar (Defendants)

17. Adam H. Charnes, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

18. Christin J. Jones, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

19. Keith M. Harper, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

20. Venus McGhee Prince, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

21. Thurston H. Webb, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

22. Kathryn E. Fort, Michigan State University College of Law, counsel for Intervenor-Defendants

23. David J. Hacker, Office of the Attorney General, counsel for State Plaintiffs

24. Jeff Landry, Attorney General of Louisiana

25. Curtis Hill, Attorney General of Indiana

26. Ken Paxton, Attorney General of Texas

27. Jeffrey C. Mateer, First Assistant Attorney General of Texas

28. Brantley D. Starr, Deputy First Assistant Attorney General of Texas

29. James E. Davis, Deputy Attorney General of Texas for Civil Litigation

30. Matthew D. McGill, Gibson, Dunn & Crutcher LLP, counsel for Individual Plaintiffs

31. Lochlan F. Shelfer, Gibson, Dunn & Crutcher LLP, counsel for Individual Plaintiffs

32. David W. Casazza, Gibson, Dunn & Crutcher LLP, counsel for Individual Plaintiffs

33. Mark Fiddler, Fiddler Law Office, P.A., counsel for Libretti Plaintiffs and Clifford Plaintiffs

34. JoAnn Kintz, U.S. Department of Justice, counsel for Federal Defendants

35. Steven Miskinis, U.S. Department of Justice, counsel for Federal Defendants

36. Christine Ennis, U.S. Department of Justice, counsel for Federal Defendants

37. Ragu-Jara "Juge" Gregg, U.S. Department of Justice, counsel for Federal Defendants

38. Amber Blaha, U.S. Department of Justice, counsel for Federal Defendants

39. John Turner, U.S. Department of Justice, counsel for Federal Defendants

40. Jeffrey H. Wood, Acting Assistant Attorney General, counsel for Federal Defendants

41. Samuel C. Alexander, Section Chief, Indian Resources Section, counsel for Federal Defendants

42. Sam Ennis, United States Department of the Interior, Solicitor's Office, of-counsel for Federal Defendants.

43. Hon. Reed O'Connor, United States District Judge, Northern District of Texas

s/ Adam H. Charnes
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Forty years ago, Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963,[1] to remedy an unconscionable crisis: the prevalence of abusive child-welfare practices by state agencies and state courts that separated a large percentage of Indian children from their families and tribes. Exercising its plenary power over Indian affairs and fulfilling its trust obligations to Indians and tribes, Congress adopted "minimum Federal standards," applicable in state courts, "for the removal of Indian children from their families." § 1902. ICWA dramatically succeeded in improving the lives of Indian children and maintaining their relationships with their families, tribes, and communities. Indeed, child-welfare organizations now consider ICWA's substantive and procedural requirements to represent the "gold standard" for foster care and adoption.

Plaintiffs filed this action to overturn that success. Their kitchen-sink complaint attacked ICWA on a host of constitutional grounds. Bypassing binding Supreme Court and Fifth Circuit authority, the district court granted Plaintiffs summary judgment on four of their

[1] Unless noted, all statutory citations are to ICWA, 25 U.S.C.

claims. And though Plaintiffs seek to overturn a status quo that has prevailed for 40 years—and that has benefitted thousands of Indian children—and though Plaintiffs can show no injury from a stay, the district court refused to stay its judgment pending appeal. By this motion, four Indian tribes that intervened as defendants below—Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians ("Tribes")—ask this Court to preserve the status quo by staying the judgment pending appeal. The Tribes respectfully request a ruling within 15 days.

BACKGROUND

A. INDIAN CHILD WELFARE ACT

After extensive hearings, Congress enacted ICWA in 1978 in response to "rising concern … over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Specifically, Congress determined that upwards of one-third of Indian children had been removed from their

families, *id.*, and that these removals were "often unwarranted," § 1901(4).

Because "Congress perceived the States and their courts as partly responsible for the problem it intended to correct," *Holyfield*, 490 U.S. at 44–45; *see* § 1901(5), ICWA "establish[ed] … minimum Federal standards for the removal of Indian children from their families," § 1902. Those federal standards apply to four state-court proceedings: (1) foster-care placement; (2) termination of parental rights; (3) preadoptive placement; and (4) adoptive placement. § 1903(1). Moreover, ICWA does not apply to all children who are racially Indian. Instead, ICWA applies only to a child who either (a) is an enrolled member of a federally recognized tribe or (b) is eligible for membership in, *and* is the biological child of a member of, a federally recognized tribe. § 1903(4). ICWA requires notice to parents and tribes; court-appointed counsel for indigent parents; and the testimony of a qualified expert witness, and proof that active efforts have been made to prevent the breakup of the Indian family, before a child is placed in foster care. § 1912(a), (b), (d), (e). ICWA also permits a parent to challenge removal

and placement upon a showing of improper removal or fraud. §§ 1913(d), 1920.

Central to ICWA's protections are its placement preferences, which (except when there is good cause to order otherwise) require courts to place Indian children in adoptive or foster-care homes with a member of the child's extended family, members of the Indian child's tribe, or other Indian families. § 1915(a), (b). Congress enacted these preferences in response to "evidence of the detrimental impact on the children themselves of such placements outside their culture." *Holyfield*, 490 U.S. at 49–50. Congress permitted the Indian child's tribe to establish a different order of preference by resolution. § 1915(c).

After 40 years, the need for ICWA remains. Some courts routinely order the removal of Indian children without complying with ICWA. *See, e.g.*, *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 760–61 (D.S.D. 2015), *vacated,* 904 F.3d 603 (8th Cir. 2018). Because of defiance of the statute, and because of inconsistent interpretations of some provisions, the Bureau of Indian Affairs ("BIA") promulgated regulations in 2016. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,779 (June 14, 2016) ("Final Rule").

B. THIS LITIGATION.

1. On October 25, 2017—almost 40 years after Congress enacted ICWA—Texas, Louisiana, and Indiana ("State Plaintiffs") and seven Individual Plaintiffs filed an action seeking to declare key sections unconstitutional and to invalidate the Final Rule. (ECF No. 1.) The Tribes intervened as defendants.

Plaintiffs did not move for a preliminary injunction, nor did they litigate this case with urgency. Almost two months after filing the complaint, Plaintiffs filed an amended complaint. (ECF No. 22.) The Federal Defendants moved to dismiss (ECF No. 27), so Plaintiffs amended yet again and filed their Second Amended Complaint on March 22, 2018 (App. 1–138)—five months after their initial complaint. Defendants again moved to dismiss. (ECF No. 56.) The district court denied the renewed motions to dismiss, and the Individual Plaintiffs and State Plaintiffs each moved for summary judgment. (App. 139–47.)

2. The district court granted summary judgment to Plaintiffs on October 4, 2018 (App. 519–65) ("Order") and entered judgment (App. 566).

In its Order, the district court held that ICWA was unconstitutional on three different grounds and it also invalidated the Final Rule. First, the court held that ICWA and the Final Rule violated equal protection. The court stated that because a child is an "Indian child" under ICWA if he or she is enrolled *or* eligible for enrollment in a tribe (when a parent is enrolled), the definition of Indian child "uses ancestry as a proxy for race." Thus, the court held that strict scrutiny applies, and ICWA cannot survive strict scrutiny. (App. 540–44.)

Second, the court held that § 1915(c) of ICWA and § 23.230 of the Final Rule, which allows tribes to change the order of the placement preferences, are unconstitutional delegations of federal legislative authority to non-federal actors. (App. 549–51.)

Third, the court held that ICWA unconstitutionally commandeers the states "by directly regulat[ing] the State Plaintiffs." (App. 554–56.) The court also found, on this same basis, that ICWA violated the Indian Commerce Clause. (App. 564–65.)

Fourth, the court held that the Final Rule exceeded the scope of BIA's authority. (App. 559–64.)

3. On October 10, 2018, the Tribes moved to stay the judgment pending appeal. (App. 567–71, 572–95.) The district court denied the motion on October 30, 2018. (App. 758–64.) The district court held, *inter alia*, that the Tribes "have shown no more than 'some possibility' of irreparable injury because Defendants have not pointed to any actual injury they will suffer." (App. 762.)

When the Tribes filed their stay motion, it did not appear that any of the State Plaintiffs had yet implemented the judgment. On November 15, 2018, however, the Tribes learned that the Texas Attorney General's office sent a memorandum, dated October 25, 2018, directing the Texas Department of Family and Protective Services ("Texas DFPS") not to comply with ICWA: "ICWA and the Final Rule are no longer good law and should not be applied to any pending or future child custody proceeding in Texas. Now DFPS should handle these ICWA cases as it would any child welfare or custody proceeding according to Texas law."

(Exhibit A.[2]) Texas DFPS has incorporated this memorandum in its Texas Practice Guide for Child Protective Services Attorneys.[3]

ARGUMENT

Four factors govern a motion to stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantively injure the other parties interested in the proceeding; and (4) [whether] public interest [favors a stay]." *Weingarten Reality Invs. v. Miller*, 66 F.3d 904, 910 (5th Cir. 2011) (brackets in original). These factors are not applied "'in a rigid … [or] mechanical fashion.'" *Campaign for Southern Equality v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014) (brackets in original).

Further, a party need not always satisfy these traditional stay factors. "[A] movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of

---

[2] This memorandum is available at http://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/documents/Section_4_OAG_ICWA_Ruling_Letter.pdf.

[3] *See* http://www.dfps.state.tx.us/Child_Protection/Attorneys_Guide/default.asp.

equities weighs heavily in favor of granting a stay." *Id.* "[T]he authority to 'hold an order in abeyance pending review allows an appellate court to act responsibly' when faced with serious legal questions that merit careful scrutiny and judicious review." *Id.* Moreover, as then-Justice Rehnquist stated: "where the decision of the District Court has invalidated a part of an Act of Congress, I think that the Act of Congress, presumptively constitutional as are all such Acts, should remain in effect pending a final decision on the merits by this Court." *Marshall v. Barlow's, Inc.*, 429 U.S. 1347, 1348 (1977) (Rehnquist, J., in chambers).

A stay is warranted here.

I. THE FOUR FACTORS SUPPORT A STAY.

A. The Tribes are likely to succeed on appeal.

The court granted summary judgment to Plaintiff for four reasons, each reviewed *de novo*. *United States v. Brown*, 250 F.3d 907, 912 (5th Cir. 2001). This Court is likely to uphold ICWA on all grounds.

1. Equal protection.—The district court held that ICWA violates equal protection because it is based on a racial classification that cannot survive strict scrutiny. (App. 544.) This is error. The Supreme Court has consistently held that legislation passed by Congress that gives special

treatment to "Indians" is a permissible political classification subject to rational-basis review. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 553–55 (1974) (holding that hiring preferences for members of federally recognized tribes are political, not racial); *United States v. Antelope*, 430 U.S. 641, 645 (1977) ("The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."). This point is demonstrated by ICWA itself: on one hand, a child who is racially 100 percent Indian is not an "Indian child" if he or she is neither a member nor a child of a member of a federally recognized tribe; on the other hand, a child who is 100 percent white or African-American can be an "Indian child," *see*, *e.g.*, *In re Dependency & Neglect of A.L.*, 442 N.W.2d 233, 235 (S.D. 1989) (holding that a white child adopted by tribal member is an "Indian child"); App. 219–20 (explaining that descendants of slaves and "adopted whites" are eligible for membership in the Cherokee Nation).

The district court rejected the argument that this precedent applied here. It stated that "the preference in *Mancari* applied 'only to *members* of "federally recognized" tribes,'" while ICWA's definition of

"Indian child" extends to "children simply eligible for membership who have a biological Indian parent." (App. 542–43.) Relying on *Rice v. Cayetano*, 528 U.S. 495 (2000), the court concluded: "By deferring to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, the ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race," and therefore is subject to strict scrutiny. (App. 544.)

The district court erred. The Supreme Court found ancestry to be a proxy for race in *Rice* because the law did not require *any* political relationship with a separate sovereign. ICWA, by contrast, requires just such a political tie—the child must either be a member of a federally recognized tribe or be eligible for membership *and* a biological child of a member. § 1903(4). In this way, ICWA applies only if an Indian child has a direct tie to a political body, which makes ICWA political rather than racial under *Mancari*.

Moreover, in criticizing the application of ICWA to children who are eligible for membership, the Order overlooked the *context* of ICWA's application. *Mancari* involved hiring preferences for adults. By contrast, ICWA applies to children, including those only days old. *See, e.g.*,

§ 1913(a) (consent to termination of parental rights invalid if within 10 days after birth). No tribe grants automatic membership to eligible newborns or children, *cf. Nielson v. Ketchum*, 640 F.3d 1117 (10th Cir. 2011); those eligible for membership must apply, which can be a lengthy and detailed process. To apply for membership in appellant Cherokee Nation, for example, the applicant must complete a detailed application and submit (*inter alia*) copies of a birth certificate and citizenship documents for an immediate relative who is a member or, if none, certified state birth and death records documenting lineage back to the Dawes Rolls. *See* http://www.cherokee.org/Services/Tribal-Citizenship/Citizenship. It is impossible for this paperwork to be completed and approved for a newborn. Application of ICWA's requirements to a child who is eligible for tribal membership, and whose parent is a member, therefore furthers ICWA's goals; otherwise thousands of parents could lose their parental rights before ICWA even applies—undermining Congress's purpose. Indeed Congress contemplated this very issue when it passed ICWA: "The constitutional and plenary power of Congress over Indians, and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a

mechanical process established under tribal law." H.R. Rep. No. 95-1386, at 17 (1978).

2. Non-delegation.—The district court held that § 1915(c), which permits tribes to change the order of placement preferences, impermissibly delegates legislative power and that Congress cannot delegate even regulatory power to Indian tribes.

This holding is erroneous. "[T]he limits on delegation are frequently stated, but rarely invoked: the Supreme Court has not struck down a statute on nondelegation grounds since 1935." *United States v. Whaley*, 577 F.3d 254, 263 (5th Cir. 2009). The district court erred in claiming that ICWA delegated legislative power, as Congress determined the relevant placement preferences and simply allowed tribes, through resolution, to "establish a different order of preference." § 1915(c).

Moreover, the district court erred in contending that *any* delegation to an Indian tribe is impermissible because a tribe is not a "federal actor." The Supreme Court has held precisely the opposite. *See United States v. Mazurie*, 419 U.S. 544, 556–57 (1975). Indeed, the Court has recognized that Congress's authority to delegate to tribes

extends beyond their members and reservations. *See Montana v. United States*, 450 U.S. 544, 564 (1981) (noting that, with "express congressional delegation," tribes can "exercise ... tribal power beyond what is necessary to protect tribal self-government or to control internal relations"). And Congress has repeatedly delegated authority to tribes. *See* Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 Harv. Envtl. L. Rev. 475, 478 n.18 (2007).

3. Tenth Amendment Anti-Commandeering.—The court's holding that ICWA impermissibly commandeers the states also is likely to be reversed. In finding that ICWA represents "a direct command from Congress to the states" (App. 554), the court relied on cases where Congress impermissibly commandeered the state legislative process (*New York v. United States*, 505 U.S. 144 (1992); *Murphy v. NCAA*, 138 S. Ct. 1470 (2018)) and the state executive branch (*Printz v. United States*, 521 U.S. 898 (1997)). But these cases do not apply to congressional direction to state *courts*. *Printz* expressly held that "the Constitution was originally understood to permit imposition of an

obligation on state judges to enforce federal prescriptions." *Id.* at 907. "Federal statutes enforceable in state courts, do, in a sense, direct state judges to enforce them," the Court explained, "but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York*, 505 U.S. at 178–79. Because all challenged provisions of ICWA and the Final Rule either impose obligations directly on state courts or, in light of the constitutional-doubt canon, should be read that way, the statute and regulations do not impermissibly commandeer the states.[4]

Moreover, ICWA does not commandeer the states for an additional reason: It is a constitutional condition on federal funding of states' foster-care and adoption programs. *See Nat'l Fed'n of Indep. Business v. Sebelius*, 567 U.S. 519, 575–79 (2012). The State Plaintiffs never argued that ICWA coerced the states to comply with the statute, so it is a permissible measure to "'encourage a State to regulate in a particular way.'" *Id.* at 575.

[4] The court's Indian Commerce Clause holding is based solely on this rationale.

Finally, the district court's holding threatens Congress's comprehensive regulation of state foster care and adoption. Numerous federal statutes impose substantive and procedural rules on state courts in foster care and adoption cases, many directly comparable to ICWA's requirements. *See, e.g.*, 42 U.S.C. § 671(a)(15) (requiring that the "child's health and safety shall be the paramount concern" with respect to placement of children); *id.* § 671(a)(19) (overriding state foster-care placement preferences to require placement with an adult relative over a non-relative); *id.* § 675(5)(E) (requiring states to file a petition to terminate parental rights if the child has been in foster care for 15 of the most recent 22 months). If ICWA violates the Tenth Amendment, so do these statutes.

4. APA claims.—The district court also erred in its APA holding. Contrary to the Order, the APA does not permit the courts to second-guess expert administrative agencies on the "necessity" of a federal regulation. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007). BIA explained the inconsistent application of certain provisions of ICWA by state courts, undermining Congress's purpose in enacting the statute and necessitating federal regulation to

establish uniformity. 81 Fed. Reg. at 38,782–87. The district court faulted BIA for failing to "address how, suddenly, it no longer believes that ICWA primarily tasks … state courts and agencies with the authority to apply the statute as they see fit." (App. 559.) But BIA never said that state courts and agencies could apply ICWA in any manner "as they see fit," and 40 years of experience demonstrated to the agency the need for federal guidance. More fundamentally, the district court overlooked the Solicitor of Interior's detailed explanation for why BIA had authority to promulgate the Final Rule. *See* Memorandum 37037 from Solicitor of Interior to Secretary of Interior on Implementation of the Indian Child Welfare Act by Legislative Rule at 16–17 (June 8, 2016), *available at* www.doi.gov/sites/doi.gov/files/uploads/m-37037.pdf. Finally, there is nothing in ICWA that denies BIA authority to establish the "good cause" definition; the agency based the regulation on a detailed review of the inconsistent state-court application of the statute, and the district court erred in reading into the statute a prohibition on a heightened standard that Congress never included.

B. The Tribes will be irreparably injured absent a stay.

Absent a stay, the Tribes—and Indian children and their families—will suffer irreparable injury.

Congress adopted ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." § 1902. ICWA therefore provides significant protections for tribes and Indian children, with the permissible goal of ensuring that Indian children remain in the Indian community, when possible. *Holyfield*, 490 U.S. at 37. These protections are necessary during the pendency of this appeal.

First, absent a stay, the Tribes will lose their statutory rights in state-court proceedings involving Indian children in Texas, and perhaps in Louisiana and Indiana as well. As noted above, Texas has unequivocally indicated that ICWA "should not be applied to any pending or future child welfare or child custody proceeding in Texas." (Exhibit A.) This means, among other things, that the Tribes will no longer receive notice of child-custody and termination-of-parental-rights proceedings involving Indian children; will be denied their statutory right to exclusive jurisdiction over certain Indian children; will be

denied mandatory intervention; and will be denied their statutory right to challenge child-placement and parental-termination decisions. Just as important, Indian children will be denied the protections Congress thought essential to prevent the unjustified breakup of Indian families, including restrictions on the validity of a parent's voluntary consent to termination of parental rights; the right of a child domiciled on a reservation to have custody determined by a tribal court rather than a state court; the requirement that active efforts be made to maintain an Indian family; and the preference for continuing placement of Indian children with their families and communities. In other words, the judgment below, if not stayed pending appeal, will permit Texas, Louisiana, and Indiana to return to the unconscionable practices that Congress found objectionable when it enacted ICWA 40 years ago.

These are not hypothetical concerns. For example, as of October 2018, the Cherokee Nation had received formal notice under ICWA, and intervened in pending child custody cases, with respect to at least *52 children* in Texas who are Indian children as defined in that statute and who are in the custody of Texas child-welfare agencies. (App. 594–95 ¶ 2.) The Court's judgment, if not stayed, will deprive these 52 Indian

children—and Cherokee children who enter the Texas child-welfare system in the future—of ICWA's protections.

Such an outcome would be particularly tragic in view of this Court's recent decision in *M.D. v. Abbott*, 907 F.3d 237 (5th Cir. 2018), which affirmed in part a judgment finding that the Texas FDPS violated the constitutional rights of thousands of children in Texas's foster-care system by "expos[ing] them to a serious risk of abuse, neglect, and harm to their physical and physiological well-being," and being "deliberately indifferent" to these risks. *Id.* at 243, 256-68. For example, as Judge Higginbotham explained, sexual abuse of children in foster care in Texas "is the norm." *Id.* at 291 (concurring in part and dissenting in part). Section 1912(d) and (e) impose heightened standards before an Indian child can be removed from his or her Indian parent or custodian and placed in the state foster-care system. The judgment in this case, if not stayed, will force countless Indian children into Texas's unconstitutional foster care system, subjecting them to severe risk of sexual and other abuse.

Second, the protections ICWA affords to Indian children and Indian communities remain necessary today. For example, Indian

children are placed in foster care at a higher rate than white children despite no significant difference between Indian and non-Indian families receiving child-welfare services.[5] And in 2015, Indian children in the United States remained overrepresented in the foster-care system by a factor of 2.7 as compared to non-Indian children.[6] As bad as these statistics are, they would become worse if the judgment is not stayed pending appeal.

Third, the failure to stay the judgment during the appeal will cause irreversible harm. If Texas, Louisiana, and Indiana no longer abide by ICWA, it is likely that termination and adoption decisions in these states that are inconsistent with ICWA could not be reversed should the Tribes prevail on appeal.

Fourth, the district court's failure to undertake a severability analysis magnifies the harms to the Tribes. Because ICWA contains a severability clause, *see* § 1963, the district court was required to "take

---

[5] Vernon Brooks Carter, *Factors Predicting Placement of Urban American Indian/Alaska Natives in Out-of-Home Care*, 32 Children & Youth Servs. Rev. 657, 661 (2010).

[6] *See* Nat'l Council of Juv. & Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care (Fiscal Year 2015)* at 1, 6 (2017), *available at* http://www.ncjfcj.org/Disproportionality-TAB-2015.

special care to attempt to honor a legislature's policy choice to leave the statute intact." *Veasey v. Abbott*, 830 F.3d 216, 269 (5th Cir. 2016).

C. A stay will not substantially injure any other parties.

The first two factors—likelihood of success and injury to the stay applicant—"are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Even if Plaintiffs could show harm from a stay, that "is not enough, standing alone, to outweigh the other factors." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013). In any event, a stay will not injure Plaintiffs.

The State Plaintiffs have been subject to ICWA for the last *40 years*. Never once during those many decades did the State Plaintiffs contend that ICWA imposed any injury on them. *See Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (the "failure to act sooner undercuts the sense of urgency … and suggest that there is, in fact, no irreparable injury"). Indeed, just recently Plaintiff Louisiana adopted a law *requiring* the state to comply with ICWA as a matter of state law. *See* 2018 La. Sess. Law Serv. Act 296 (effective Aug. 1, 2018). Seven other states—which have the same obligations under ICWA as the State Plaintiffs—filed an *amicus* brief in this case arguing *for* the

constitutionality of ICWA (App. 366–97), refuting the suggestion that the statute injures the states *qua* states. Nor did the State Plaintiffs litigate this case with dispatch—they amended their complaint twice, over the course of five months, and never moved for a preliminary injunction. It is far too late for them to contend that a stay pending appeal will cause them injury.

Nor will the Individual Plaintiffs suffer any harm. The judgment below will not affect *any* of the Individual Plaintiffs. Chad and Jennifer Brackeen have already adopted A.L.M. (App. 37 ¶ 152.) They have asserted that ICWA allows a collateral attack on that adoption for two years, *see* § 1913(d), which is longer than allowed by state law. Plaintiffs misread the statute. The two-year period applies only to a birth parent's attack on his or her consent to adoption; the birth parents here did not consent to the Brackeen's adoption, but instead voluntarily terminated their parental rights before the adoption occurred. (ECF No. 81 at app. 61.) Therefore, the collateral-attack provision applicable to the Brackeens is § 1914, which incorporates the relevant *state* limitations period. *See In re Adoption of Erin G.*, 140 P.3d 886, 889–93

(Alaska 2006). So a stay of the judgment will have no adverse effect on the Brackeens.

Nick and Heather Libretti live, and sought to adopt Baby O, in Nevada. (App. 38–40.) Altagracia Socorro Hernandez, who is Baby O's biological mother, also lives in Nevada. (App. 38–39.) Nevada was not a party to this lawsuit, so neither Nevada's child-welfare agencies nor its courts are bound by the judgment; the ruling therefore has no effect on the Libretti's ability to adopt Baby O. And Danielle and Jason Clifford, who are the foster parents of Child P and are attempting to adopt her, live in Minnesota. (App. 41–43.) As Minnesota also is not a party to this lawsuit, neither its child-welfare agencies nor its courts are bound by the judgment either.

Therefore, a stay will not affect any Plaintiffs.

D. The public interest supports a stay.

Finally, the public interest supports a stay. As discussed above, the failure to enforce ICWA will harm Indian children and their families, Indian tribes, and Indian communities. Indeed, child-welfare experts consider ICWA's procedural and substantive requirements for Indian children and families to represent the "gold standard." *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 (Mar. 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."). Eliminating this "gold standard" would harm the public interest.

Furthermore, there is a "unique trust relationship between the United States and the Indians." *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). ICWA is a direct product of that relationship. § 1901(2); *Doe v. Mann*, 285 F. Supp. 2d 1229, 1234 (N.D. Cal. 2003). It advances the public interest to allow the United States to protect Indian children and families. And the enforcement of federal laws also advances the public interest. *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014).

II. A STAY IS WARRANTED BECAUSE THE TRIBES HAVE PRESENTED A SUBSTANTIAL CASE INVOLVING A SERIOUS LEGAL QUESTION AND THE EQUITIES FAVOR A STAY.

A stay is also warranted here because the Tribes have presented "a substantial case on the merits when a serious legal question is involved" and "the balance of equities weighs heavily in favor of granting a stay." *Bryant*, 773 F.3d at 57.

In *Bryant*, this Court faced an analogous situation. The district court entered a preliminary injunction barring Mississippi from enforcing its ban on same-sex marriage. *Id.* This Court stayed the injunction, holding that the case presented a serious legal question and the equities favored a stay. The Court also found that, while the plaintiffs might suffer harm "by a continued violation of their constitutional rights," a stay was still warranted. *Id.* at 58.

A stay is likewise required here. *First*, the Tribes have indisputably presented a "substantial case on the merits," and "the legal questions … are serious, both to the litigants and the public at large." *Id.* at 57. Further, the district court's judgment is unprecedented—the Supreme Court has not found a non-delegation violation since the New Deal; that Court has never found federal legislation benefitting tribes or

Indians to violate equal protection; and ICWA has survived numerous constitutional challenges until now. *See* Cohen's Handbook of Federal Indian Law 861–66 (Newton ed., 2012). As in *Bryant*, "'a detailed and in depth examination of this serious legal issue' is warranted before a disruption of a long standing status quo." 773 F.3d at 58.

Second, the balance of the equities greatly favors a stay. Congress enacted ICWA 40 years ago. Texas, Louisiana, and Indiana have been subject to the statute since that time. ICWA *directly* improved the dire situation found by Congress in 1978. ICWA remains a necessary safeguard to keep Indian children with their families and in their communities, when possible. And the Plaintiffs will not suffer harm during a stay.

Finally, the district court's ruling will cause significant inconsistency throughout the country. As this Court noted in *Bryant*, when issuing a stay, "[t]he inevitable disruption that would arise from a lack of continuity and stability in this important area of the law" will harm the parties and "the public interest at large." *Id*.

CONCLUSION

The Court should stay the judgment pending appeal.

Respectfully submitted,

s/ Adam H. Charnes

KEITH M. HARPER
VENUS MCGHEE PRINCE
KILPATRICK TOWNSEND
& STOCKTON LLP
607 14th Street, N.W.
Washington, DC 20005
Telephone: (202) 508-5800
kharper@kilpatricktownsend.com
vprince@kilpatricktownsend.com

KATHRYN E. FORT
MICHIGAN STATE UNIV. COLLEGE
OF LAW, INDIAN LAW CLINIC
648 N. Shaw Lane
East Lansing, MI 48823
Telephone: (517) 432-6992
fort@law.msu.edu

ADAM H. CHARNES
KILPATRICK TOWNSEND
& STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
Telephone: (214) 922-7106
acharnes@kilpatricktownsend.com

THURSTON H. WEBB
KILPATRICK TOWNSEND
& STOCKTON LLP
1100 Peachtree Street NE
Suite 2800
Atlanta, GA 30309
Telephone: (404) 815-6300
twebb@kilpatricktownsend.com

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this response contains 5,113 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Century Schoolbook 14-point font using MS Word 2016.

DATED: November 19, 2018

s/ Adam H. Charnes
ADAM H. CHARNES
KILPATRICK TOWNSEND
& STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, TX 75201
Telephone: (214) 922-7106
acharnes@kilpatricktownsend.com

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2018, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

DATED: November 19, 2018.

s/ Adam H. Charnes
ADAM H. CHARNES
KILPATRICK TOWNSEND
& STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, Texas 75201
(214) 922-7106
acharnes@kilpatricktownsend.com