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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. _____

The Supreme Court of Texas

In the Interest of Y.J., a Child

FROM THE SECOND COURT OF APPEALS
AT FORT WORTH, TEXAS
NO. 02-19-00235-CV

Petition for Review of the Navajo Nation

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Statement of the Case

Nature of the Case:	This is an important case of first impression in the Texas appellate courts, involving constitutional issues, the rights of Indian children, and the solemn commitment of the United States government toward Indian tribes, as reflected in federal law as well as treaties between the United States and sovereign tribal entities, including the Navajo Nation. The proceeding below was a suit affecting parent child relationship subject to the Indian Child Welfare Act. When the Department of Family and Protective Services filed the Original Petition, it gave notice as required by ICWA and contacted the Navajo Nation regarding placement possibilities for the Indian child, Y.R.J. (Orig. Pet. — CR.10; CR.35; ICWA Notice — CR.51). But the trial court subsequently declared, prior to the final hearing, that ICWA was inapplicable. (Order at p. 2 — CR.458 — Appendix 1). The placement of Y.R.J. following that determination was in contravention of ICWA and, thus, the Supremacy Clause of the United States Constitution.
Trial Judge:	The Honorable Alex Kim.
Trial Court:	323rd Judicial District Court, Tarrant County.
Trial Court's Disposition:	Order Declaring ICWA Inapplicable, signed on March 1, 2019 (Order — CR.457 — Appendix 1) & Order of Termination, appointing Intervenors C.B. & J.B. and Maternal Great Aunt A.J. as joint managing conservators signed on June 28, 2019. (Order of Termination — CR.665 — Appendix 2).
Parties on Appeal:	Navajo Nation – Appellant. Office of the Attorney General of the State of Texas – Appellee. C.B. and J.B. – Appellees.

Court of Appeals:	Second Court of Appeals, Fort Worth, Texas.
Justices:	Chief Justice Bonnie Sudderth, Justice Lee Gabriel, and Justice J. Wade Birdwell.
Opinion:	by Justice Birdwell: *In the Interest of Y.J.*, No. 02-19-00235-CV, 2019 Tex. App. LEXIS 11068, 2019 WL 6904728 (Tex. App.—Fort Worth, December 19, 2019).
Disposition by Court of Appeals:	The court of appeals reversed the trial court's order appointing joint managing conservators, held that the trial court's purported finding of good cause to depart from the ICWA placement preferences was not supported by factually sufficient evidence, and remanded the case to the trial court for a new trial on conservatorship and adoption issues, as set forth in the court's memorandum opinion. (Opinion — Appendix 4; Judgment — Appendix 5).

Statement of Jurisdiction

The Court has jurisdiction under Government Code section 22.001(a) because this appeal presents a question of law that is important to the jurisprudence of the state. TEX. GOV'T CODE § 22.001(a). This Court should consider the question of law presented on this appeal as important to the jurisprudence of the state because the decision of the court of appeals in this case conflicts with other Texas appellate court decisions that have applied the Indian Child Welfare Act to suits affecting parent-child relationship. *See e.g., In the Interest of S.J.H.*, No. 08-19-00182-CV, 2019 Tex. App. LEXIS 10642 (Tex. App.—El Paso Dec. 9, 2019, no pet. h.) (reversing termination of parental rights as a result of failure to comply with ICWA notice requirement); *In the Interest of A.W.*, No. 06-19-00024-CV, 2019 Tex. App. LEXIS 9316 (Tex. App.—Texarkana, Sept. 30, 2019, pet. filed) (holding that the protections enumerated in ICWA are mandatory) (citing *In re J.J.C.*, 302 S.W.3d 896, 899 (Tex. App.—Waco 2009, no pet.) (citing 25 U.S.C. § 1914); *N. M. v. Tex. Dep't of Family & Protective Servs.*, NO. 03-19-00240-CV, 2019 Tex. App. LEXIS 8631 (Tex. App.—Austin, Sept. 26, 2019) (holding that ICWA preempts state law in the area of child custody proceedings); *In the Interest of A.M.*, 570 S.W.3d 860, 863 (Tex. App.—El Paso 2018, no pet.) (holding that ICWA applies to the case notwithstanding the federal district court's opinion in *Brackeen v. Zinke*, 338 F. Supp.3d 514 (N.D. Tex. 2018)).

Issues Presented

Issue No. 1: Whether Article VI of the United States Constitution requires state judges to apply the Indian Child Welfare Act of 1978 ("ICWA") as the supreme Law of the Land.

> Implicit within this issue is a challenge to the trial court's finding "that the Indian Child Welfare Act does not preempt Texas state law." (Order of Termination at p. 22 — CR.686 — Appendix 2). On the contrary, ICWA does not commandeer the state legislative process or state officials or agencies.

Issue No. 2: Whether the trial court's errors in failing to comply with the adoptive placement and pre-adoptive placement preference requirements of 25 U.S.C. § 1915(a) and (b), or the provisions of 25 U.S.C. § 1916(b), require reversal beyond the judgment of the court of appeals. (*Unbriefed issue*).

> This issue contemplates a multi-level review. First, did the court of appeals err in failing to conclude that the evidence was *legally insufficient* to support a finding that good cause existed to depart from the ICWA placement preferences, thus requiring rendition of judgment consistent with the Navajo Nation's preferred placement under ICWA? Second, in light of the court of appeals' conclusion that the evidence was *factually insufficient* to support a finding that good cause existed to depart from the placement preferences under ICWA, should a remand for further proceedings have been accompanied by instructions to comply with ICWA in a new trial on conservatorship?

Issue No. 3: Whether the trial court's error in ordering foster care placement of an Indian child, as defined by 25 U.S.C. § 1903(4), without complying with the evidentiary and qualifying expert witness requirements of 25 U.S.C. § 1912(e) and without following the placement requirements of 25 U.S.C. § 1915(b), requires reversal. (*Unbriefed issue*).

Issue No. 4: Whether Intervenors C.B. and J.B had standing to petition the trial court for termination, adoption, and placement of the Child or for their appointment as managing conservators of the Child. (*Unbriefed issue*).

Petition for Review

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Navajo Nation asks this Court to grant this Petition, reverse the trial court's order declaring the Indian Child Welfare Act of 1978 ("ICWA") inapplicable as unconstitutional, affirm that part of the court of appeals' judgment setting aside the trial court's joint conservatorship order, and render judgment ordering a preferred placement under ICWA. Because the trial court abused its discretion in departing from the preferred placement required by ICWA, and the evidence was legally insufficient to support a good cause finding to depart from ICWA placement preferences, judgment should be rendered directing the Navajo Nation's preferred placement with the Child's maternal great aunt. Alternatively, because—as the court of appeals has already determined—the evidence at trial was factually insufficient to support a good cause finding to depart from ICWA placement preferences (Opinion at 40), this Court should remand the case to the trial court for further proceedings, with instructions to comply with the placement preferences of ICWA as a constitutional enactment by Congress that preempts state law when Texas law is in conflict.

Reasons to Grant Review

The court of appeals held, "If constitutional, ICWA applies to certain aspects of this case because the child at issue is Navajo through her biological mother (Mother)." (Opinion at 2). And the court of appeals determined that the evidence at trial was factually insufficient to support a good cause finding

to depart from ICWA placement preferences. (Opinion at 40). Yet the court concluded: "we need not decide at this time whether ICWA is constitutional," because a new trial was required on conservatorship. (Opinion at 3).

Why?

When—as the court of appeals acknowledged—"the majority of the parties' arguments have centered on the constitutionality" of ICWA, and a principal concern about conservatorship is the promotion of stability and permanence, why is it appropriate to have a new trial on conservatorship while treating the constitutionality of the controlling law as an open question? (Opinion at 2, 39). That question should be decided now.

The court of appeals' opinion cannot be read as an exercise of constitutional avoidance. Constitutional avoidance is a canon of statutory construction that begins with the presumption that the statute is constitutional. *See In re Inquiry Concerning Honorable Carl Ginsberg*, Docket No. 18-0001, 2018 WL 2994940 (Tex. Sp. Ct. Rev. 2018). In this case, the trial court has already held that ICWA is unconstitutional under the United States Constitution (by determining that ICWA does not preempt Texas state law because it violates the anti-commandeering doctrine). (Opinion at 18). This Court should exercise its jurisdiction, consider the issues presented in this Petition, and reverse the court of appeals' decision to remand the case to the trial court without resolving the constitutional issue.

Statement of Facts

The court of appeals correctly states the nature of the case and fairly recites the facts developed in the trial court, with one significant exception. *See* TEX. R. APP. P. 53.2(g). The opinion states: "At the heart of the dispute is whether ICWA's post-termination placement preferences—which favor placement of an Indian child *with Indian families*—control, or whether the trial court should apply solely Texas law regarding the child's best interest." (Opinion at 2) (emphasis added). This is not quite correct. The very first placement priority under ICWA is with a member of the child's "extended family." 25 U.S.C. § 1915(a) and (b). Section 1915 does not, as the court of appeals stated, mandate "that Indian children be placed in a preadoptive or adoptive placement *with Indian relatives*" as the first priority. (Opinion at 2) (emphasis added). On the contrary, there is no indication in the statutory text (including the definitions in section 1903), or the record below, that a non-Indian aunt, for example, would have been ineligible for consideration as an "extended family member" on equal footing with the Child's maternal great aunt—who is in fact a member of the Navajo Nation but was the only extended family member under consideration at trial.

Procedural Background

The Department of Family and Protective Services ("Department") initiated this proceeding on June 13, 2018, and promptly acknowledged the Indian status of the child, Y.R.J. ("Child") (Orig. Pet. — CR.10; ICWA Notice

— CR.51–56). Nevertheless, the Child was initially placed in foster care without consideration of ICWA placement preferences. (3.RR.97, 106).

On July 10, the Department reported to the court that the Navajo Nation had identified an ICWA compliant home as a possible placement, but the Department recommended continuation of the current placement. (CR.122–26). Following an adversary hearing on July 13, the court maintained custody of the Child with the Department. (CR.110–20).

On July 17, the Department filed a motion for expedited placement under the Interstate Compact for Placement of Children ("ICPC"), recommending placement of the Child with members of the Navajo tribe in Colorado, who were identified as the preferred placement of the Navajo Nation: T.R.B. and J.A.B. (CR.149–50). On July 26, the court ordered the Department to complete all responsibilities under ICPC and to expedite the placement. (CR.166–67). The Child, however, was never placed with the Navajo preferred placement. (3.RR.39–43). Instead, as Department caseworker Karen Soto testified, the ICPC application was not timely submitted because of a finding by the U.S. District Court for the Northern District of Texas that ICWA was unconstitutional. (3.RR.43).

On November 27, the Navajo Nation notified the Department that it objected to a newly proposed placement of the Child with C.B. and J.B. (CR.250). On November 30, the Navajo Nation intervened (CR.224–26). On

December 6, C.B. and J.B. (the Bs)[1] also intervened, joining in the Department's request for termination of parental rights, seeking appointment as permanent managing conservators of the Child, and requesting adoption. (CR.229–34). The Bs claimed standing under section 102.005(4) of the Texas Family Code because the Child is a sibling of a child the Bs have adopted. (CR.229).

On December 21, the Navajo Nation filed a Motion for Placement of the Child in a foster home specified by the Child's tribe pursuant to 25 U.S.C. § 1915; specifically, with T.R.B. and J.A.B. (CR.271–72). In response, the Bs filed an objection, asserting that ICWA is unconstitutional, citing the federal district court's order in the Northern District case—where the Bs, along with the State of Texas and others, were named plaintiffs. (CR.300). The Texas Office of Attorney General (OAG) appeared as amicus curiae (CR.375) and thereafter filed a brief in support of the constitutional challenge. (CR.379).

After a stay of the federal district court's order was issued by the Fifth Circuit, the ICPC application for T.R.B. and J.A.B. was ultimately approved; but because the Department became aware of a prospective familial placement with the Child's maternal great aunt ("Aunt"), the familial placement was deemed to take precedence over the original preferred placement with T.R.B. and J.A.B. (3.RR.43–47). Thus, on January 24, 2019, the Navajo Nation filed a first amended motion for placement of the Child, identifying the Aunt as the preferred placement under 25 U.S.C. § 1915. (CR.398–400).

[1] Note: For simplicity, the Petitioner will follow the court of appeals' practice of referring to Intervenors C.B. and J.B. as the Bs.

On March 1, the court granted the motion to declare ICWA inapplicable and declared that Family Code section 152.104 violated the Texas Constitution. (CR.458–59). Subsequently, the OAG filed a Plea in Intervention, arguing that the court did not go far enough, and seeking a declaration that ICWA violates the United States Constitution. (CR.644).

On March 29, the Aunt, as a tribal member and proposed familial placement for the Child, filed a petition in intervention, requesting that she be appointed sole managing conservator. (CR.497–500). The Bs moved to strike her pleadings (CR.507), which the court subsequently granted. (CR.512).

At the time of the final hearing on May 3, the Child was a member of the Navajo Nation. (4.RR.121 — Nation Ex. 1). Department caseworker Soto testified that placement with the Aunt was in the best interest of the Child and was the Department's request. (3.RR.53–54, 87–88). Celeste Smith, the Navajo Nation case worker and designated ICWA expert, recommended the Aunt for placement of the Child. (3.RR.141). The Aunt's own testimony mirrored that of Smith and Soto. The Aunt is an enrolled Navajo who lives on the reservation in Arizona near other family members including the Child's four older siblings, participates in Navajo culture, and would incorporate that culture into the Child's life. (3.RR.279–84). Additional evidence relevant to the conservatorship issue is set out in the court of appeals' opinion. (Opinion at 23–44).

Order of the Court

The trial court's order terminated the parental rights of the Mother and the named and unnamed fathers. (CR.667–68). The court named the Bs and the Aunt joint non-parent managing conservators, giving the Bs the exclusive right to designate the primary residence, and awarding the Aunt access and possession periods. (CR.668–82).

The Navajo Nation's motion for placement was denied based on a finding that ICWA violates the Texas Constitution "and the best interest of the Child." (CR.683). The Navajo Nation, the Bs, and the OAG all appealed. (Notices—Supp.CR.5, 8, 19).

Introduction

The Navajo Nation is a federally recognized Indian tribe. *See* Indian Entities Recognized, 81 Fed. Reg. 5019, 5022 (Jan. 29, 2016). Like other Indian tribes, the Navajo Nation exercises "inherent sovereign authority." *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (Indian tribes remain "separate sovereigns pre-existing the Constitution"). *See also* Treaty with the Navajo, June 1, 1868, 15 Stat. 667; Treaty with the Navajo, art. X, XI, Sept. 9, 1849, 9 Stat. 974 ("For and in consideration of the faithful performance of all the stipulations herein contained, by the said Navajo Indians, the government of the United States will … adopt such other liberal and humane measures, as said government may deem meet and proper"; and "the government of the United

States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians").

Summary of the Argument

Contrary to the trial court's findings and judgment, ICWA preempts state law. Accordingly, the placement preferences of ICWA apply to this child custody proceeding. Contrary to the additional complaints asserted by the Bs and the OAG, ICWA was lawfully enacted by Congress, does not discriminate on the basis of race, and does not violate the anti-commandeering doctrine.

ICWA protects the rights of Indian children and families by allocating jurisdiction over child custody proceedings among Indian tribes and the states, providing procedures and evidentiary requirements for custody proceedings in state courts, and identifying preferences for the placement of Indian children. 25 U.S.C. § 1911, 1912, 1915. With regard to both adoptive and foster preferences, the statute specifies "good cause" as a basis for state courts to deviate from the enumerated preferences. *Id.* § 1915(a), (b). In this case, however, the trial court did not conduct a meaningful "good cause" inquiry because it rejected ICWA and its placement preferences as inapplicable. Because the trial court failed to apply the governing provisions of ICWA, this cause must be reversed and rendered, or in the alternative, remanded for further proceedings.

Argument

I. The Indian Child Welfare Act Is the Supreme Law of the Land

A. ICWA Was Lawfully Enacted by Congress

The Bs and the OAG argue that ICWA violates the United States Constitution. They are wrong. ICWA was lawfully enacted by Congress and is, thus, the supreme Law of the Land under Article VI of the United States Constitution. U.S. CONST. art. VI, cl. 2.

ICWA provides minimum federal standards to protect the best interests of Indian children in child custody proceedings in state court. 25 U.S.C. § 1902. Congress enacted these federal standards in response to evidence of widespread bias in state and private child welfare agencies and violations of due process in state courts, which together had led to the "wholesale removal of Indian children from their homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–33 (1989). Another concern was "the impact on the tribes themselves," whose continued existence as discrete political bodies depends on the continued participation of younger generations in tribal life. *Holyfield*, 490 U.S. at 33–34.

ICWA was expressly enacted pursuant to the Indian Commerce Clause and other constitutional authority, including treaties made with Indian tribes. 25 U.S.C. § 1901. And ICWA is entitled to a "presumption of constitutionality," so long as Congress enacted the statute "based on one or more of its powers enumerated in the Constitution." *See Brackeen v. Bernhardt*, 937 F.3d 406, slip op.

at 27 (5th Cir. 2019, reh'g granted)[2] (quoting *United States v. Morrison*, 529 U.S. 598, 607 (2000)).

The Bs complain that Congress' authority to enact ICWA cannot be founded in the Commerce Clause. While giving lip service to the argument *du jour*—the ostensible overbreadth of the Supreme Court's historic application of the Commerce Clause—the Bs articulate no persuasive basis for finding that ICWA is not supported by Congress' authority under the Indian Commerce Clause. Indeed, contrary to the Bs argument in the court below—that ICWA does not involve Indian tribes—a stated purpose of ICWA is the "protection and preservation of Indian tribes and their resources." 25 U.S.C. § 1901(2). Congress also found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children…." *Id.* § 1901(3).

Significantly, the Supreme Court has never held that the Indian Commerce Clause does not support Congress' plenary power over Indian affairs. Indeed,

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[2]The Fifth Circuit's November 7, 2019, order granting rehearing *en banc* (Order — Appendix 10) has the effect of vacating the panel decision. *See* FIFTH CIR. R. 41.3. But opinions from federal district and intermediate appellate courts—even on federal constitutional issues—are never controlling authority in Texas courts anyway. *See Pidgeon v. Turner*, 538 S.W.3d 73, 81 (Tex. 2017) (noting that Fifth Circuit opinions are not binding on Texas courts). To the extent a Texas court views a Fifth Circuit opinion as persuasive authority, it does so in reliance on the strength of its legal reasoning and analysis. Unless the United States Supreme Court subsequently rules to the contrary, the panel opinion in *Bernhardt* may still be consulted for its legal reasoning and analysis, notwithstanding the fact that it has been vacated. *See Burke v. Regalado*, 935 F.3d 960, 1045 n.72 (10th Cir. 2019) (citing a vacated Fifth Circuit panel opinion, not as precedent, but for its persuasive value; and noting that the Fifth Circuit itself had twice cited the same opinion after it was vacated). The Fifth Circuit heard oral argument *en banc* on January 22, 2020.

the Supreme Court has said that the "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (recognizing that the Interstate Commerce and Indian Commerce Clauses have very different applications and that the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs). In any event, the Indian Commerce Clause is not the sole source of Congress' authority. *See e.g., Morton v. Mancari*, 417 U.S. 535, 551–52 (1974) (drawing on both war and treaty powers and the power to regulate commerce with Indian tribes).

Congress' legislative authority rests in part, not upon "affirmative grants of the Constitution," but upon the Constitution's adoption of pre-constitutional powers necessarily inherent in any Federal Government, namely powers that the Supreme Court has described as "necessary concomitants of nationality." *United States v. Lara*, 541 U.S. 193, 200, 201 (2004).

Moreover, Indian tribes hold a unique status that is enshrined in the structure of the United States Constitution itself. Even beyond the Indian Commerce Clause (art. I, sec. 8, cl. 3), the Treaty Clause (art. II, sec. 2, cl. 2), and the Property Clause (art. IV, sec. 3, cl. 2), the nascent concept of federalism was the foundation upon which the authority over Indian affairs was recognized—from the beginning of our constitutional republic—as decidedly a federal, rather than state, function. *See Worcester v. Georgia*, 31 U.S. 515, 561 (1832). In *Worcester*, Chief Justice Marshall explained that the inherent power of

Congress to govern Indian affairs derived not merely from the text of the Constitution, but from its structure and from the doctrine of the law of nations by which a weaker power places itself under the protection of a stronger power. *Id.* at 560–61.

Indeed, the first treaty between the United States and the Navajo Nation recognizes that, by virtue of the Treaty of Guadalupe Hidalgo, the Navajo Nation "was lawfully placed under the exclusive jurisdiction and protection of the government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection." *See* 1849 Treaty with the Navajo, art. I, 9 Stat. 974. Thus, the jurisdiction of the United States over the Navajo Nation was accompanied by a commensurate obligation of protection under the law of nations. Moreover, Article I, section 8, clause 10, of the Constitution empowers Congress to enforce the law of nations. U.S. CONST. art. I, sec. 8, cl. 10.

As the Founders understood the law of nations—the Roman principles of *jus gentium*—to apply to intercourse among nations and foreign nationals, it would naturally protect the rights of members of the Navajo Nation sojourning outside Indian territory. Furthermore, Justice Thomas's concurring opinion in *Bond v. United States*, 572 U.S. 844, 885–86 (2014), recognizes that the Treaty Power encompasses legal rights within United States territory when those rights are related to *foreign* subjects. (citing as an example the Treaty with the Cherokee). *See also Bernhardt*, slip op. at 22 (citing *United States v. McGowan*, 302 U.S. 535, 539

(1938) ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States.")

For well over a century, the federal government has used these constitutional powers to enact a wide array of policies targeting the welfare of tribes and their members in general, and tribal children in particular. As the Supreme Court has recognized, these "first treaties between the United States and the Navajo Tribe" also reflected the United States' special "concern with the education of Indian children." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 839 (1982) (citing 1868 Treaty with the Navajo, art. VI, 15 Stat. 669, which provides that "to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted."). And, from early on, Congress has "enacted numerous statutes" vindicating this federal interest in the welfare of Indian children, "both on and off the reservation." *Id.* at 839–840.

B. ICWA Does Not Discriminate on the Basis of Race

The Bs and the OAG contend that ICWA violates equal protection guarantees, arguing that it makes an impermissible classification based upon race. Their argument that the preference provisions of ICWA amount to racial discrimination ignores the special relationship Indian tribes such as the Navajo Nation have with the United States. The Supreme Court has held that federal statutes providing special treatment based on membership in a federally recognized Indian tribe do not impose suspect racial classifications. *See e.g., Mancari*, 417 U.S. 535. A preference, such as the employment preference at issue

in *Mancari*, or the placement preferences provided by ICWA, are "granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities…." 417 U.S. at 554. The Supreme Court further noted, "[a]s 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." *Id.* at 555.

The Bs contend—erroneously—that ICWA's definition of an Indian child creates an inherently racial classification. "Indian child" is defined as a minor who 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). Contrary to the Bs' argument, this statutory definition does not create a racial classification. It references a familial connection, not unlike the Texas Family Code provision that is subject of an unbriefed issue presented in this Petition. *See* TEX. FAM. CODE § 102.005(4) (providing standing to "an adult who has adopted … *a sibling of the child*.") (emphasis added).

As in *Mancari*, the placement preferences ICWA creates in favor of Indian children are "political rather than racial in nature." *See Mancari*, 417 U.S. at 553 n.24. Because ICWA applies a political classification, strict scrutiny does not apply. But even if strict scrutiny applied, the preferences provided by ICWA would survive because of the government's compelling interest in preventing Indian children from being removed from Indian families or in preserving Indian culture by placing such removed children with other Indian families.

Before enacting ICWA, Congress collected extensive evidence regarding "the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 642 (2013) (quoting *Holyfield*, 490 U.S. at 32). Congress enacted ICWA because of the compelling need to protect Indian children and families, and the tribes themselves, which cannot thrive without their children. *Id.* at 32–34.

Finally, as previously noted, the federal government has a compelling interest in fulfilling its treaty obligations. The Supreme Court has recognized that the Treaty Clause of the U.S. Constitution, art. II, § 2, cl. 2, is an independent source of Congress' power to deal with Indian affairs. *Mancari*, 417 U.S. at 552; *Lara*, 541 U.S. at 201.

C. ICWA Does Not Commandeer State Legislatures or Agencies

The trial court's conclusion—that statutorily applying ICWA "commandeers state courts and agencies"—was wrong. (Conclusion 61 — Supp.CR.78 — Appendix 3). The court of appeals agreed only that the trial court's order amounted to a ruling that ICWA was unconstitutional—it did not address the propriety of that ruling. (Opinion at 18).

1. Tenth Amendment

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The

anticommandeering doctrine prohibits federal laws commanding the executive or legislative branch of a state government to act or refrain from acting. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018).

While Congress may not command state legislatures to legislate (or to refrain from legislating) or state executives to administer federal law, it may enact preemptive federal law that state courts are obligated to apply. *See Murphy*, 138 S. Ct. at 1481; *Printz v. United States*, 521 U.S. 898, 907 (1997); *New York v. United States*, 505 U.S. 144, 178 (1992). Accordingly, the anticommandeering doctrine's constraint on congressional compulsion of state legislatures and executives does not extend to state courts. As the Supreme Court noted in *Printz*, "the Constitution was originally understood to permit the imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907 (emphasis in original).

Unlike the statutes struck down in *New York*, *Printz*, and *Murphy*, ICWA does not instruct states to promulgate or refrain from promulgating any statutes as a matter of the state's own child welfare law. Instead, ICWA establishes substantive standards for the treatment of Indian children as a matter of federal law—a prerogative that Congress enjoys in light of its plenary authority to regulate in the field of Indian affairs, including in the area of members' domestic relationships. 25 U.S.C. § 1902; *Mancari*, 417 U.S. at 551–52; *Lara*, 541 U.S. at 200; *Santa Clara Pueblo*, 436 U.S. at 55–56.

By enacting a federal statute directly imposing certain minimum federal standards, rather than demanding that state legislatures alter their own statutes to provide certain protections to Indian children, Congress appropriately heeded the Supreme Court's admonition that "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly." *New York*, 505 U.S. at 178. And as the Fifth Circuit panel concluded, the provisions of ICWA do not commandeer state agencies because it evenhandedly regulates an activity in which both States and private actors engage. *Bernhardt*, slip op. at 31 (citing *Murphy*, 138 S. Ct. at 1478).

2. Preemption

For the reasons stated by the panel opinion in *Bernhardt*, and contrary to the trial court's conclusion in this case, ICWA preempts state law. (Order at p. 22 — CR.686 — Appendix 2; Conclusions 61, 75 — Appendix 3).

As the Fifth Circuit panel noted in *Bernhardt*:

> Conflict preemption occurs when "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Murphy*, 138 S. Ct. at 1480.

Bernhardt, slip op. at 33.

As discussed above, Congress' authority to regulate the adoption of Indian children arises under the Indian Commerce Clause as well as "other constitutional authority." 25 U.S.C. § 1901(1). As the Fifth Circuit panel noted in *Bernhardt*, Congress has plenary power over Indian affairs. *Id.*, slip op. at 33–34.

See also United States v. Jicarilla Apache Nation, 564 U.S. 162, 175 (2011) (surveying historic cases discussing Congress' plenary authority over Indians and Indian relations). Moreover, ICWA clearly regulates private individuals. *Bernhardt*, slip op. at 34 (citing *Murphy*, 138 S. Ct. at 1479–80). In enacting the statute, Congress declared that it was the dual policy of the United States to protect the best interests of Indian children and promote the stability and security of Indian families and tribes. 25 U.S.C. § 1902. Accordingly, the Fifth Circuit panel held that, to the extent ICWA's minimum federal standards conflict with state law, "federal law takes precedence and the state law is preempted." *Id.*, slip op. at 35 (citing *Murphy*, 138 S. Ct. at 1480).

Prayer for Relief

The Navajo Nation respectfully asks this Court to grant this Petition for Review, hold that ICWA is constitutional, and reverse the judgments of the court of appeals and of the trial court. The Navajo Nation further requests that this Court render judgment that the Child be placed in accordance with the preferences set out in ICWA, or in the alternative, remand this cause to the trial court for further proceedings, with instructions that the trial court apply the provisions of ICWA.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

Certificate of Compliance

This petition complies with the type-volume limitations of Rule 9.4 of the Texas Rules of Appellate Procedure because it contains 4500 words, excluding the parts of the petition exempted by Rule 9.4(i)(1).

/s/ C. Alfred Mackenzie
C. Alfred Mackenzie

Certificate of Service

On January 30, 2020, in compliance with Texas Rule of Appellate Procedure 9.5, I am serving a copy of this Petition for Review upon all parties to the court of appeals' judgment by electronic service through the electronic file manager and/or by email as follows:

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Appendix 1

NO. 323-107644-18

IN THE INTEREST OF	§	**IN THE 323rd JUDICIAL**
	§	
Y[redacted] R[redacted] J[redacted],	§	**DISTRICT COURT of**
	§	
A CHILD	§	**TARRANT COUNTY, TEXAS**

ORDER GRANTION MOTION TO DECLARE ICWA INAPPLICABLE AS UNCONSTITUTIONAL

On March 1, 2019, came on to be considered Intervenors Motion to Declare ICWA Inapplicable as Unconstitutional.

1.) Appearances

Intervenors C[redacted] E[redacted] B[redacted] AND J[redacted] K[redacted] B[redacted] appeared in person and through their attorneys of record, KELLYE HUGHES and MATT MCGILL.

Respondent TEXAS DEPARTMENT OF FAMILY & PROTECTIVE SERVICES (TDFPS) appeared through their attorney of record, KRISTINE SOULE, ASSISTANT CRIMINAL DISTRICT ATTORNEY FOR TARRANT COUNTY, TEXAS.

Respondent, J[redacted] J[redacted] appeared through her attorney of record, JUSTIN MURRAY.

Respondent, M[redacted] M[redacted] appeared through his attorney of record, KATHLYNN K. PACK.

The NAVAJO NATION, appeared through their attorney of record, CINDY V. TISDALE.

The Attorney Ad Litem for the child, JOHN ECK, appeared.

2.) Jurisdiction

This Court is the court of continuing and exclusive jurisdiction of the child and has jurisdiction to hear this matter.

3.) Record

A record was made by the official court reporter for the 323rd Judicial District.

4.) Child Before the Court

The child before the Court is Y[redacted] R[redacted] J[redacted], a [redacted] child born on [redacted], [redacted]

5.) Findings

The Court acknowledges multiple claims under the United States Constitution, but is providing deference to the United States Court of Appeals for the Fifth Circuit Stay Pending Appeal dated December 3, 2018, and conscientiously refraining from ruling on those matters in this order of the court.

The Court finds that Texas Family Code §152.104(a) to be in violation of Article I, Section 1 of the Texas Constitution and inapplicable to the proceedings in this matter.

The Court finds that Texas Family Code §152.104(a) to be in violation of Article I, Section 3 of the Texas Constitution and inapplicable to the proceedings in this matter.

The Court finds that Texas Family Code §152.104(a) to be in violation of Article I, Section 3a of the Texas Constitution and inapplicable to the proceedings in this matter.

The Court finds that Texas Family Code §152.104(a) to be in violation of Article I, Section 19 of the Texas Constitution and inapplicable to the proceedings in this matter.

The Court finds that Texas Family Code §152.104(a) to be in violation of Article I, Section 29 of the Texas Constitution and inapplicable to the proceedings in this matter.

6.) Order

The Court, having reviewed the Motion to Declare ICWA Inapplicable as Unconstitutional, any responses and reply thereto, the evidence presented, the pleadings on file, the arguments of the parties, and the applicable law, is of the opinion that the Motion to Declare ICWA Inapplicable as Unconstitutional should be **GRANTED**.

IT IS HEREBY ORDERED that Texas Family Code 152.104, is unconstitutional and inapplicable to these proceedings.

IT IS SO ORDERED

SIGNED this 1st day of March, 2019.

JUDGE PRESIDING
323rd DISTRICT COURT of
TARRANT COUNTY, TEXAS

Appendix 2

CAUSE NO. 323-107644-18

IN THE INTEREST OF	§	IN THE DISTRICT COURT OF
	§	
Y[redacted] R[redacted] J[redacted],	§	TARRANT COUNTY, TEXAS
	§	
A CHILD	§	323rd JUDICIAL DISTRICT

ORDER OF TERMINATION OF THE PARENT-CHILD RELATIONSHIP AND ORDER IN SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP AND ORDER ON MOTION FOR PLACEMENT

On May 3, 2019 the Court heard this case.

Appearances

Petitioner, TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, ("the Department") appeared through their representative, KAREN SOTO, and through their attorney of record, ASHLEY BASNETT, Assistant District Attorney, Tarrant County, Texas.

Respondent, J[redacted] R[redacted] JA[redacted] AKA [redacted] R[redacted] J[redacted], executed an affidavit of relinquishment of parental rights which included a waiver of appearance. However, J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted]'S attorney, JUSTIN MURRAY appeared in person and announced ready. JUSTIN MURRAY was then excused by the court because J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted] executed the affidavit of relinquishment of parental rights.

Respondent, M[redacted] M[redacted], who was cited by publication, did not appear. Respondent, M[redacted] M[redacted], was represented by the "Diligent Search" attorney, KATHLYNN PACK.

Respondent, UNKNOWN FATHER, did not appear. The UNKNOWN FATHER was represented by the "Diligent Search" attorney, KATHLYNN PACK.

Intervenor, the NAVAJO NATION appeared in person through their representative, CELESTE SMITH, and their attorney of record, CINDY TISDALE.

Intervenor, C[redacted] B[redacted] and J[redacted] B[redacted], appeared in person and through their attorney of record, KELLYE HUGHES.

The child the subject of the suit, Y[redacted] R[redacted] J[redacted], was represented by her guardian and Attorney Ad Litem, JOHN T. ECK.

A[redacted] J[redacted], the child's maternal great aunt, who was not a party to this proceeding appeared in person.

The OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS, who intervened on June 24, 2019, appeared through Charles K. Eldred, Assistant Attorney General.

Jurisdiction

The Court, having examined the record and heard the evidence and argument of counsel, finds the following:

a. a request for identification of a court of continuing, exclusive jurisdiction has been made as required by Section 155.101 of the Texas Family Code.

b. this Court has jurisdiction of this case and of all the parties and that no other court has continuing, exclusive jurisdiction of this case.

The Court, having examined the record and heard the evidence and argument of counsel, finds that the State of Texas has jurisdiction to render final orders regarding the child the subject of this suit pursuant to Subchapter C, Chapter 152, Texas Family Code, by virtue of the fact that Texas is the home state of the child.

The Court finds that all persons entitled to citation were properly cited.

The Court further finds that the Department served *Notice of Pending Custody Proceeding Involving Indian Child* on each parent or Indian custodian, each tribe identified, the Bureau of Indian Affairs (BIA) and the Secretary of the Interior pursuant to 25 U.S.C. Section 1912(a) on the following:

[redacted] AKA [redacted]

NAVAJO NATION
C/O Celeste Smith
P.O. Box 769
St. Michael, Arizona 86511

The Court further finds that the Department has properly served *Notice to Bureau of Indian Affairs (BIA); Parent, Custodian or Tribe of Child Cannot Be Located or Determined* on the Bureau of Indian Affairs, as necessary pursuant to 25 U.S.C. Section 1912(a).

Jury

A jury was waived, and all questions of fact and of law were submitted to the Court.

Record

The making of a record of testimony was made by the official court reporter for the 323rd Judicial District Court.

Child

The Court finds that the following child is the subject of this suit:

Name: [redacted]
Sex: [redacted]
Birth date: [redacted]
Home state: [redacted]

Termination of Mother's Parental Rights

The Court finds by evidence beyond a reasonable doubt that [redacted] AKA [redacted] has –

1. executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided for by chapter 161 of the Texas Family Code, pursuant to Section 161.001(b)(1)(K); and

2. constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months and: 1) the Department has made reasonable efforts to return the child to the mother; 2) the mother has not regularly visited or maintained significant contact with the child; and 3) the mother has demonstrated an inability to provide the child with a safe environment, pursuant to Section 161.001(b)(1)(N) of the Texas Family Code.

The Court also finds beyond reasonable doubt that termination of the parent-child relationship between [redacted] AKA [redacted] and the child the subject of this suit is in the best interest of the child.

The Court further finds by evidence beyond a reasonable doubt that:

1. The Department made active efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family and that these efforts proved unsuccessful; and

2. The evidence, including testimony of a qualified expert witness, demonstrates that the continued custody of the child by JACQUELENE ROSE JAMES AKA [redacted], parent or Indian Custodian, is likely to result in serious emotional or physical damage to this child.

IT IS THEREFORE ORDERED that the parent-child relationship between [redacted] AKA [redacted] and the child the subject of this suit is terminated.

In accordance with Section 161.001(c) of the Texas Family Code, the Court finds that the order of termination of the parent child relationship as to [redacted] AKA [redacted] is not based on evidence that [redacted] AKA [redacted]:

1. homeschooled the child;

2. is economically disadvantaged;

3. has been charged with a nonviolent misdemeanor other than:

   a. an offense under Title 5 of the Texas Penal Code;

   b. an offense under Title 6 of the Texas Penal Code; or

   c. an offense that involves family violence, as defined by Section 71.004 of the Texas Family Code;

4. provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under Chapter 169 of the Texas Occupations Code; or

5. declined immunization for the child for reasons of conscience, including a religious belief.

Termination of Father's Parental Rights-[redacted]

The Court finds by clear and convincing evidence that M[redacted] M[redacted] has not registered with the paternity registry under Chapter 160 of the Texas Family Code. The Court finds by clear and convincing evidence that Petitioner has filed in this case a certificate of paternity registry search that indicates that no man has registered as the father of this child.

The Court also finds by clear and convincing evidence that termination of the parent-child relationship, if any exists or could exist, between any alleged father and the child the subject of this suit is in the best interest of the child.

IT IS THEREFORE ORDERED that the parent-child relationship, if any exists or could exist, between M[redacted] M[redacted] or any alleged father and the child the subject of this suit is terminated.

Termination of Alleged Father's Parental Rights—UNKNOWN FATHER

The Court finds by clear and convincing evidence that no man has registered with the paternity registry under chapter 160 of the Texas Family Code. The Court finds by clear and convincing evidence that Petitioner has filed in this case a certificate of paternity registry search that indicates that no man has registered as the father of this child.

The Court also finds by clear and convincing evidence that termination of the parent-child relationship, if any exists or could exist, between any UNKNOWN FATHER or alleged father and the child the subject of this suit is in the best interest of the child.

IT IS THEREFORE ORDERED that the parent-child relationship, if any exists or could exist, between any UNKNOWN FATHER or any alleged father and the child the subject of this suit is terminated.

Conservatorship

The Court finds that the following orders are in the best interest of the child.

IT IS ORDERED that C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] and A[redacted] J[redacted] are appointed Joint Non-Parent Managing Conservators of the following child: Y[redacted] R[redacted] J[redacted]

IT IS ORDERED that, at all times, C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] as a non-parent joint managing conservator, shall have the following rights:

1. the right to receive information from any other conservator of the child concerning the health, education, and welfare of the child;

2. the right to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the child;

3. the right of access to medical, dental, psychological, and educational records of the child;

4. the right to consult with a physician, dentist, or psychologist of the child;

5. the right to consult with school officials concerning the child's welfare and educational status, including school activities;

6. the right to attend school activities;

7. the right to be designated on the child's records as a person to be notified in case of an emergency;

8. the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and

9. the right to manage the estate of the child to the extent the estate has been created by the parent or the parent's family.

IT IS ORDERED that, at all times, A[redacted] J[redacted], as a non-parent joint managing conservator, shall have the following rights:

1. the right to receive information from any other conservator of the child concerning the health, education, and welfare of the child;

2. the right to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the child;

3. the right of access to medical, dental, psychological, and educational records of the child;

4. the right to consult with a physician, dentist, or psychologist of the child;

5. the right to consult with school officials concerning the child's welfare and educational status, including school activities;

6. the right to attend school activities;

7. the right to be designated on the child's records as a person to be notified in case of an emergency;

8. the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and

9. the right to manage the estate of the child to the extent the estate has been created by the parent or the parent's family.

IT IS ORDERED that, at all times, C[redacted] and [redacted] and A[redacted], as non-parent joint managing conservator, shall each have the following duties:

1. the duty to inform the other conservator of the child in a timely manner of significant information concerning the health, education, and welfare of the child;

2. the duty to inform the other conservator of the child if the conservator resides with for at least thirty days, marries, or intends to marry a person who the conservator knows is registered as a sex offender under chapter 62 of the Texas Code of Criminal Procedure or is currently charged with an offense for which on conviction the person would be required to register under that chapter. IT IS ORDERED that notice of this information shall be provided to the other conservator of the child as soon as practicable, but not later than the fortieth day after the date the conservator of the child begins to reside with the person or on the tenth day after the date the marriage occurs, as appropriate. IT IS ORDERED that the notice must include a description of the offense that is the basis of the person's requirement to register as a sex offender or of the offense with which the person is charged. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE;

3. the duty to inform the other conservator of the child if the conservator establishes a residence with a person who the conservator knows is the subject of a final protective order sought by an individual other than the conservator that is in effect on the date the residence with the person is established. IT IS ORDERED that notice of this information shall be provided to the other conservator of the child as soon as practicable, but not later than the thirtieth day after the date the conservator establishes residence with the person who is the subject of the final protective order. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE;

4. the duty to inform the other conservator of the child if the conservator resides with, or allows unsupervised access to a child by, a person who is the subject of a final protective order sought by the conservator after the expiration of sixty-day period following the date the final protective order is issued. IT IS ORDERED

that notice of this information shall be provided to the other conservator of the child as soon as practicable, but not later than the ninetieth day after the date the final protective order was issued. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE; and

5. the duty to inform the other conservator of the child if the conservator is the subject of a final protective order issued after the date of the order establishing conservatorship. IT IS ORDERED that notice of this information shall be provided to the other conservator of the child as soon as practicable, but not later than the thirtieth day after the date the final protective order was issued. WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE.

IT IS ORDERED that, during his periods of possession, C[redacted] B[redacted] AND J[redacted] K[redacted] B[redacted], as non-parent joint managing conservator, shall have the following rights and duties:

1. the duty of care, control, protection, and reasonable discipline of the child;

2. the duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure;

3. the right to consent for the child to medical and dental care not involving an invasive procedure; and

4. the right to direct the moral and religious training of the child.

IT IS ORDERED that, during her periods of possession, A[redacted] J[redacted], as non-parent joint managing conservator, shall have the following rights and duties:

1. the duty of care, control, protection, and reasonable discipline of the child;

2. the duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure;

3. the right to consent for the child to medical and dental care not involving an invasive procedure; and

4. the right to direct the moral and religious training of the child.

IT IS ORDERED that C[redacted] B[redacted] and J[redacted] B[redacted], as non-parent joint managing conservators, shall have the following rights and duty:

1. the exclusive right to designate the primary residence of the child within the State of Arizona and within two states contiguous to the State of Arizona (which includes Texas);

2. the independent right to consent to medical, dental, and surgical treatment involving invasive procedures;

3. the independent right to consent to psychiatric and psychological treatment of the child;

4. the independent right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

5. the independent right to consent to marriage and to enlistment in the armed forces of the United States;

6. the exclusive right to make decisions concerning the child's primary, intermediate and secondary education;

8. except as provided by Section 264.0111 of the Texas Family Code, the independent right to the services and earnings of the child;

9. except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the independent right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;

10. the independent duty to manage the estate of the child to the extent the estate has been created by community property or the joint property of the parent; and

11. the independent right to enroll the child in classes during their periods of possession.

IT IS ORDERED that A[redacted] J[redacted], as a non-parent joint managing conservator, shall have the following rights and duty:

1. the independent right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

2. the independent right to consent to marriage and to enlistment in the armed forces of the United States;

3. except as provided by Section 264.0111 of the Texas Family Code, the independent right to the services and earnings of the child;

4. except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the independent right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;

5. the independent duty to manage the estate of the child to the extent the estate has been created by community property or the joint property of the parents;

6. the independent right to enroll the child in any non-primary, intermediate or secondary classes during her periods of possession.

7. the independent right to consent to medical, dental, and surgical treatment involving invasive procedures; and

8. the independent right to consent to psychiatric and psychological treatment of the child.

Primary Residence and Geographical Restriction

IT IS ORDERED that the primary residence of the child shall be within the State of Arizona and within two states contiguous to the State of Arizona, and the parties shall not remove the child from the State of Arizona and within two states contiguous to the State of Arizona for the purpose of changing the primary residence of the child until this geographic restriction is modified by further order of the court of continuing jurisdiction or by a written agreement that is signed by the parties and filed with that court.

IT IS FURTHER ORDERED that C[redacted] B[redacted] and J[redacted] B[redacted] shall have the exclusive right to designate the child's primary residence within the State of Arizona and within two states contiguous to the State of Arizona.

Each conservator, during that conservator's period of possession, is ORDERED to ensure the child's attendance in the schools in which C[redacted] B[redacted] and J[redacted] B[redacted] have enrolled the child.

If C[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] apply for a passport for the child, Y[redacted] R[redacted] J[redacted] C[redacted] B[redacted] and J[redacted] B[redacted] are ORDERED to notify A[redacted] J[redacted] of that fact no later than 10 days after the application.

Possession and Access

IT IS ORDERED that each conservator shall comply with all terms and conditions of this Possession Order. IT IS ORDERED that this Possession Order is effective immediately and applies to all periods of possession occurring on and after the date the Court signs this Possession Order. IT IS, THEREFORE, ORDERED:

1. Mutual Agreement or Specified Terms for Possession

   IT IS ORDERED that the conservators shall have possession of the child at times mutually agreed to in advance by the parties, and, in the absence of mutual agreement, it is ORDERED that the conservators shall have possession of the child under the specified terms set out in this Possession Order.

2. Summer Possession by A[redacted] J[redacted]-2019

   A[redacted] J[redacted] shall have possession of the child for a period of one week beginning July 20, 2019, at 6:00 p.m. and ending on July 27, 2019, at 6:00 p.m.

Travel expenses shall be paid by C E B and J B. C E and/or J B are ORDERED to deliver the child to the residence of A J at the beginning of her period of possession. A J is ORDERED to surrender the child to C E B and/or J K B at the residence of A J at the end of her period of possession.

3. Summer Possession by A J –2020

A J shall have possession of the child for a period of two continuous weeks during the summer of 2020. Travel expenses shall be paid by C E B and J K B. By January 1, 2020, A J must designate in writing to C E B and J K B, which two weeks she desires to exercise. These periods of possession shall begin and end at 6:00 p.m. on each day. The period of possession to be exercised will begin no earlier than the day after school is dismissed for the summer vacation and will end no later than the seventh day before school resumes. C E B and/or J K B are ORDERED to deliver the child to the residence of A J at the beginning of her period of possession. A J is ORDERED to surrender the child to C E B and/or J B at the residence of J at the end of her period of possession.

4. Summer Possession by A J –2021

A J shall have possession of the child for a period of three continuous weeks during the summer of 2021. Travel expenses shall be paid by C E B and J B. By January 1, 2021, A J must designate in writing to C E B and J K B, which three weeks she desires to exercise. These periods of possession shall begin and end at 6:00 p.m. on each day. The period of possession to be exercised will begin no earlier than the day after school is dismissed for the summer vacation and will end no later than the seventh day before school resumes. C E B and/or J K B are ORDERED to deliver the child to the residence of J at the beginning of her period of possession. A J is ORDERED to surrender the child to C E B and/or J K B at the residence of A J at the end of her period of possession.

5. Summer Possession by A J –2022

A J shall have possession of the child for a period of four continuous weeks during the summer of 2022. Travel expenses shall be paid by C E B and J K B. By January 1, 2022, A J must designate in writing to C E B and J B, which four weeks

she desires to exercise. These periods of possession shall begin and end at 6:00 p.m. on each day. The period of possession to be exercised will begin no earlier than the day after school is dismissed for the summer vacation and will end no later than the seventh day before school resumes. C[redacted] E[redacted] B[redacted] and/or J[redacted] K[redacted] B[redacted] are ORDERED to deliver the child to the residence of A[redacted] J[redacted] at the beginning of her period of possession. A[redacted] J[redacted] is ORDERED to surrender the child to C[redacted] E[redacted] B[redacted] and/or J[redacted] K[redacted] B[redacted] at the residence of A[redacted] J[redacted] at the end of her period of possession.

6. Possession Order for A[redacted] J[redacted] Beginning 2023

Except as otherwise expressly provided in this Possession Order, A[redacted] J[redacted] shall have the right to possession of the child as follows:

a. Weekends–A[redacted] J[redacted] shall have the right to possession of the child not more than one weekend per month of A[redacted] J[redacted]'S choice beginning at 6:00 p.m. on the day school recesses for the weekend and ending at 6:00 p.m. on the day before school resumes after the weekend. A[redacted] J[redacted] shall give C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] fourteen days' written notice preceding a designated weekend. The weekends chosen shall not conflict with the provisions regarding Christmas, Thanksgiving, and the child's birthday below.

b. Weekend Possession Extended by a Holiday–

Except as otherwise expressly provided in this Possession Order, if a weekend period of possession by A[redacted] JA[redacted] begins on a student holiday or a teacher in-service day that falls on a Friday during the regular school term, as determined by the school in which the child is enrolled, or a federal, state, or local holiday during the summer months when school is not in session, that weekend period of possession shall begin at the time the child's school is regularly dismissed on the Thursday immediately preceding the student holiday or teacher in-service day and 6:00 p.m. on the Thursday immediately preceding the federal, state, or local holiday during the summer months.

Except as otherwise expressly provided in this Possession Order, if a weekend period of possession by A[redacted] J[redacted] ends on or is immediately followed by a student holiday or a teacher in-service day that falls on a Monday during the regular school term, as determined by the school in which the child is enrolled, or a federal, state, or local holiday that falls on a Monday during the summer months when school is not in session, that weekend period of possession shall end at 6:00 p.m. on that Monday.

c. Spring Vacation in All Years - Every year, beginning at 6:00 p.m. on the day the child is dismissed from school for the school's spring

vacation and ending at 6:00 p.m. on the day before school resumes after that vacation.

d. Extended Summer Possession by A[redacted] J[redacted]–

With Written Notice by January 1–If A[redacted] J[redacted] gives C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] E[redacted] written notice by January 1 of a year specifying an extended period or periods of summer possession for that year, A[redacted] J[redacted] shall have possession of the child for forty-two days beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than seven days before school resumes at the end of the summer vacation in that year, to be exercised in no more than two separate periods of at least seven consecutive days each, as specified in the written notice. These periods of possession shall begin and end at 6:00 p.m. on each applicable day.

Without Written Notice by January 1–If A[redacted] J[redacted] does not give C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] written notice by January 1 of a year specifying an extended period or periods of summer possession for that year, A[redacted] J[redacted] shall have possession of the child for forty-two consecutive days beginning at 6:00 p.m. on June 15 and ending at 6:00 p.m. on July 27 of that year.

Notwithstanding the weekend periods of possession ORDERED for A[redacted] J[redacted], it is expressly ORDERED that C[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] shall have a superior right of possession of the child as follows:

a. Summer Weekend Possession by C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted]–If C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] gives A[redacted] J[redacted] written notice by January 15 of a year, C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] shall have possession of the child on any one weekend beginning at 6:00 p.m. on Friday and ending at 6:00 p.m. on the following Sunday during any one period of possession by A[redacted] J[redacted] during A[redacted] J[redacted] extended summer possession in that year, provided that if a period of possession by [redacted] J[redacted] in that year exceeds thirty days, C[redacted] E[redacted] B[redacted] and J[redacted] B[redacted] may have possession of the child under the terms of this provision on any two nonconsecutive weekends during that period and provided that C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] picks up the child from A[redacted] J[redacted] and returns the child to that same place.

b. Extended Summer Possession by C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted]–If C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] gives A[redacted] J[redacted] written

notice by January 15 of a year, C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] may designate twenty-one days beginning no earlier than the day after the child's school is dismissed for the summer vacation and ending no later than seven days before school resumes at the end of the summer vacation in that year, to be exercised in no more than two separate periods of at least seven consecutive days each, during which A[redacted] J[redacted] shall not have possession of the child, provided that the period or periods so designated do not interfere with A[redacted] J[redacted] period or periods of extended summer possession. These periods of possession shall begin and end at 6:00 p.m. on each applicable day.

Notwithstanding the weekend periods of possession of A[redacted] J[redacted] C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] and A[redacted] J[redacted] shall have the right to possession of the child as follows:

a. Christmas Holidays in Even-Numbered Years–In even-numbered years, A[redacted] J[redacted] shall have the right to possession of the child beginning at the time the child's school is dismissed for the Christmas school vacation and ending at noon on December 28, and C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] shall have the right to possession of the child beginning at noon on December 28 and ending at 6:00 p.m. on the day before school resumes after that Christmas school vacation.

b. Christmas Holidays in Odd-Numbered Years–In odd-numbered years, C[redacted] E[redacted] B[redacted] and J[redacted] [redacted] E[redacted] shall have the right to possession of the child beginning at the time the child's school is dismissed for the Christmas school vacation and ending at noon on December 28, and A[redacted] J[redacted] shall have the right to possession of the child beginning at noon on December 28 and ending at 6:00 p.m. on the day before school resumes after that Christmas school vacation.

c. Thanksgiving in Odd-Numbered Years–In odd-numbered years, A[redacted] J[redacted] shall have the right to possession of the child beginning at the time the child's school is dismissed for the Thanksgiving holiday and ending at 6:00 p.m. on the Sunday following Thanksgiving.

d. Thanksgiving in Even-Numbered Years–In even-numbered years, C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] shall have the right to possession of the child beginning at the time the child's school is dismissed for the Thanksgiving holiday and ending at 6:00 p.m. on the Sunday following Thanksgiving.

e. Child's Birthday–If a conservator is not otherwise entitled under this Possession Order to present possession of the child on the child's birthday, that conservator shall have possession of the child beginning

at 6:00 p.m. and ending at 8:00 p.m. on that day, provided that that conservator picks up the child from the other conservator's residence and returns the child to that same place.

7. Undesignated Periods of Possession

C E B and J K B shall have the right of possession of the child at all other times not specifically designated in this Possession Order for A J.

8. General Terms and Conditions

Except as otherwise expressly provided in this Possession Order, the terms and conditions of possession of the child that apply regardless of the distance between the residence of a parent and the child are as follows:

a. Surrender of Child by C E B and J K B through August of 2022–C E B and J K B are ORDERED to surrender the child to A J at the beginning of each period of A J possession at the residence of A J beginning immediately and through August 2022.

Beginning September 1, 2022, C E B and J K B are ORDERED to surrender the child to A J at the beginning of each period of A J possession at the residence of C E B and J K B

b. Surrender of Child by A J through August of 2022–A J is ORDERED to surrender the child to C E B and J K B at the end of each period of A J possession at the residence of A J beginning immediately and through August of 2022.

Beginning September 1, 2022, A J is ORDERED to return the child to the residence of C E B and J B at the end of each period of possession.

c. Surrender of Child by A J –AI A JA is ORDERED to surrender the child to C E B and J B if the child is in A J possession or subject to A J control, at the beginning of each period of C E B and J K B 'S exclusive periods of possession, at the place designated in this Possession Order.

d. Return of Child by C E B and J K B –C E B and J

K[redacted] B[redacted] is ORDERED to return the child to A[redacted] J[redacted], if [redacted] J[redacted] is entitled to possession of the child, at the end of each of C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted]'S exclusive periods of possession, at the place designated in this Possession Order.

e. Personal Effects–Each conservator is ORDERED to return with the child the personal effects that the child brought at the beginning of the period of possession.

f. Designation of Competent Adult–Each conservator may designate any competent adult to pick up and return the child, as applicable. IT IS ORDERED that a conservator or a designated competent adult be present when the child is picked up or returned.

g. Inability to Exercise Possession–Each conservator is ORDERED to give notice to the person in possession of the child on each occasion that the conservator will be unable to exercise that conservator's right of possession for any specified period.

h. Written Notice–Written notice, including notice provided by electronic mail or facsimile, shall be deemed to have been timely made if received or, if applicable, postmarked before or at the time that notice is due. Each conservator is ORDERED to notify the other conservator of any change in the conservator's electronic mail address or facsimile number within twenty-four hours after the change.

9. Noninterference with Possession

Except as expressly provided herein, IT IS ORDERED that none of the conservators shall take possession of the child during another conservator's period of possession unless there is a prior written agreement signed by all conservators or in case of an emergency.

10. Long-Distance Access and Visitation

IT IS ORDERED that after the summer 2021 visitation, the following arrangements for the travel of that child shall control:

a. Adult to Accompany Child–IT IS ORDERED that A[redacted] J[redacted] shall travel with the child between the residence of C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] and that of A[redacted] J[redacted] at the beginning and end of each period of possession. In place of this requirement, A[redacted] J[redacted] is authorized to designate a responsible adult known to the child to travel with the child between the airport nearest to the residence of C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] and the residence of A[redacted] J[redacted] IT IS FURTHER ORDERED that the child shall not travel alone between the airport

nearest the residence of C E B and J K B and the residence of A J until the child reaches the age of five years.

b. Expenses Paid by A J–IT IS ORDERED that A J shall pay all travel expenses, charges, escort fees, and air fares incurred for the child from the time A J takes possession of the child from C E B and J K B at the beginning of a period of possession until the time A J returns the child to the possession of C E B and J K B at the end of the period of possession.

IT IS ORDERED that the following provisions shall govern the arrangements for the travel of the child to and from A J after the child reaches the age of five years.

a. Notice of Place and Time of Possession–IT IS ORDERED that, if A J desires to take possession of the child at an airport near A J 'S residence, A J shall state these facts in a notice letter to C E B and J K B:

i. the airport where C E B and J K B is to surrender the child;

ii. the date and time of the flight on which the child is scheduled to leave;

iii. the airline and flight number of the airplane on which the child is scheduled to leave;

iv. the airport where the child will return to C E B and J K B at the end of the period of possession;

v. the date and time of the flight on which the child is scheduled to return to that airport; and

vi. the airline and flight number of the airplane on which the child is scheduled to return to C E B and J K B at the end of the period of possession.

b. Flight Arrangements–IT IS ORDERED that A J shall make airline reservations for the child only on major commercial passenger airlines on flights having no change of airplanes between the airport of departure and the airport of final arrival (a "nonequipment change flight"). IT IS FURTHER ORDERED that

A[redacted] J[redacted] shall make airline reservations for the child on flights that depart from a commercial airport near the residence of C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] that offers regularly scheduled passenger flights to various cities throughout the United States on major commercial passenger airlines.

IT IS FURTHER ORDERED that A[redacted] J[redacted] shall make airline reservations for the child on flights that depart the airport of departure nearest the time A[redacted] J[redacted] period of possession is to begin under the possession order and that arrive at the airport of final arrival nearest the time A[redacted] J[redacted] period of possession is to end under the possession order. IT IS FURTHER ORDERED, that A[redacted] J[redacted] shall not make airline reservations that would require the child to depart the airport of departure sooner than 8:00 a.m. or to arrive at the airport of final arrival later than 8:00 p.m. IT IS FURTHER ORDERED that A[redacted] J[redacted] shall not make flight arrangements that cause the child to be removed before the child's school is regularly dismissed on the date the period of possession is to begin or that cause the child to be returned to the child's school later than the time the child's school resumes on the date the period of possession is to end.

c. Delivery and Pickup by C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted]–IT IS ORDERED that C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] shall deliver the child to the airport from which the child is scheduled to leave at the beginning of each period of possession at least 2 hours before the scheduled departure time. IT IS FURTHER ORDERED that C[redacted] E[redacted] BR[redacted] and J[redacted] K[redacted] B[redacted] shall surrender the child to a flight attendant who is employed by the airline and who will be flying on the same flight on which the child is scheduled.

IT IS FURTHER ORDERED that C[redacted] E[redacted] B[redacted] and J[redacted] K[redacted] B[redacted] shall take possession of the child at the end of A[redacted] J[redacted] period of possession at the airport where the child is scheduled to return and at the security checkpoint, if applicable, or at the specific airport gate where the passengers from the child's scheduled flight disembark.

d. Pickup and Return by A[redacted] J[redacted]–IT IS ORDERED that A[redacted] J[redacted] shall take possession of the child at the beginning of each period of possession at the airport where the child is scheduled to arrive and at the security checkpoint, if applicable, or at the specific airport gate where the passengers from the child's scheduled flight disembark.

IT IS FURTHER ORDERED that A[redacted] J[redacted], at the end of each period of possession, shall deliver the child to the airport where

the child is scheduled to depart at least 2 hours before the scheduled departure time and surrender the child to a flight attendant who is employed by the airline and who will be flying on the same flight on which the child is scheduled to return.

e. Missed Flights–IT IS ORDERED that any conservator who has possession of the child at the time shall notify the other conservator immediately if the child is not placed on a scheduled flight at the beginning or end of a period of possession. IT IS FURTHER ORDERED that, if the child should miss a scheduled flight, the conservator having possession of the child when the flight is missed shall schedule another nonequipment change flight for the child as soon as is possible after the originally scheduled flight and shall pay any additional expense associated with the changed flight and give the other conservator notice of the date and time of that flight.

f. Expenses Paid by A J –IT IS ORDERED that A J shall purchase, in advance, the round-trip airline tickets (including escort fees) to be used by the child for the child's flight. IT IS FURTHER ORDERED that A J shall make necessary arrangements with the airlines and with C E B and J K B in order that the airline tickets are available to the child before a scheduled flight. IT IS FURTHER ORDERED that A J shall pay any other traveling expenses and charges incurred for the child from the time C E B and J K E surrender possession of the child by placing the child on the scheduled nonequipment change flight at the beginning of a period of possession until the time C E B and J K B take possession of the child at the termination of the scheduled nonequipment change flight at the end of the period of possession. IT IS FURTHER ORDERED that A J shall reimburse C E B and J K B for travel expenses of the child if, because of circumstances beyond C E B and J K B S control, C E E and J K B are required to pay travel expenses of the child on a nonequipment change flight to or from the possession of A J

g. Miscellaneous Expenses–IT IS ORDERED that the expenses of a conservator incurred in traveling to and from an airport, as well as related parking and baggage-handling expenses, are the sole responsibility of the conservator delivering or receiving the child.

This concludes the Possession Order.

Dismissal of Parties

IT IS ORDERED that JUSTIN MURRAY earlier appointed by the Court to represent [redacted], is relieved of all duties based on a finding of good cause.

IT IS ORDERED that KATHLYNN PACK earlier appointed by the Court to represent [redacted] and UNKNOWN FATHER, is relieved of all duties based on a finding of good cause.

IT IS ORDERED that JOHN T. ECK earlier appointed by the Court as Guardian and Attorney Ad Litem for the child [redacted], is relieved of all duties based on a finding of good cause.

IT IS ORDERED that the DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, earlier appointed by the Court as the Temporary Managing Conservator of the child [redacted], is dismissed.

Language Program for Child

IT IS ORDERED that as soon as a Navajo language program will accept the child for enrollment, [redacted] shall enroll the child [redacted] in a Navajo Language Program at their sole cost and expense. IT IS FURTHER ORDERED that [redacted] shall keep the child continuously enrolled in the Navajo Language Program until the child's fourteenth birthday.

IT IS ORDERED that if a Navajo Language Program is not available within 30 miles of the residence of [redacted], they shall enroll the child in an equivalent on-line program.

Intervenor Navajo Nation's Motion for Placement

IT IS ORDERED that the Intervenor, NAVAJO NATION'S Motion for Placement is hereby DENIED based on the finding that the Indian Child Welfare Act is inapplicable because Texas Family Code Section 152.104 violates the Texas Constitution as set forth in the order of this Court dated March 1, 2019. AND THE BEST INTERESTS OF THE CHILD. (AK)

Required Information

The information required for each party by section 105.006(a) of the Texas Family Code is as follows:

Name:	[redacted]
Social Security number:	[redacted]
Driver's license number:	[redacted]
Current residence address:	[redacted]
Mailing address:	[redacted]
Home telephone number:	[redacted]
Email Address:	[redacted]
Name of employer:	

Address of employment: _____
Work telephone number: _____

Name: [redacted]
Social Security number: [redacted]
Driver's license number: [redacted]
Current residence address: [redacted]
Mailing address: [redacted]
Home telephone number: [redacted]
Email Address: [redacted]
Name of employer: _____
Address of employment: _____
Work telephone number: _____

Name: [redacted]
Social Security number: [redacted]
Driver's license number: [redacted]
Current residence address: [redacted]

Mailing address: [redacted]
Home telephone number: [redacted]
Email Address: _____
Name of employer: _____
Address of employment: _____
Work telephone number: _____

Required Notices

EACH PERSON WHO IS A PARTY TO THIS ORDER IS ORDERED TO NOTIFY EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY OF ANY CHANGE IN THE PARTY'S CURRENT RESIDENCE ADDRESS, MAILING ADDRESS, HOME TELEPHONE NUMBER, NAME OF EMPLOYER, ADDRESS OF EMPLOYMENT, DRIVER'S LICENSE NUMBER, AND WORK TELEPHONE NUMBER. THE PARTY IS ORDERED TO GIVE NOTICE OF AN INTENDED CHANGE IN ANY OF THE REQUIRED INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY ON OR BEFORE THE 60TH DAY BEFORE THE INTENDED CHANGE. IF THE PARTY DOES NOT KNOW OR COULD NOT HAVE KNOWN OF THE CHANGE IN SUFFICIENT TIME TO PROVIDE 60-DAY NOTICE, THE PARTY IS ORDERED TO GIVE NOTICE OF THE CHANGE ON OR BEFORE THE FIFTH DAY AFTER THE DATE THAT THE PARTY KNOWS OF THE CHANGE.

THE DUTY TO FURNISH THIS INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY CONTINUES AS LONG AS ANY PERSON, BY VIRTUE OF THIS ORDER, IS UNDER AN OBLIGATION TO PAY CHILD SUPPORT OR ENTITLED TO POSSESSION OF OR ACCESS TO A CHILD.

FAILURE BY A PARTY TO OBEY THE ORDER OF THIS COURT TO PROVIDE EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY WITH THE CHANGE IN THE REQUIRED INFORMATION MAY RESULT IN FURTHER

LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

Notice shall be given to the other party by delivering a copy of the notice to the party by registered or certified mail, return receipt requested. Notice shall be given to the Court by delivering a copy of the notice either in person to the clerk of this Court or by registered or certified mail addressed to the clerk at 2700 Kimbo Rd., Fort Worth, TX 76111. Notice shall be given to the state case registry by mailing a copy of the notice to State Case Registry, Contract Services Section, MC046S, P.O. Box 12017, Austin, Texas 78711-2017.

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE TERMS OF CHILD CUSTODY SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CLAIM, CIVIL OR OTHERWISE, REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THE ORDER THAT RELATE TO CHILD CUSTODY. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.

THE COURT MAY MODIFY THIS ORDER THAT PROVIDES FOR THE SUPPORT OF A CHILD, IF:

(1) THE CIRCUMSTANCES OF THE CHILD OR A PERSON AFFECTED BY THE ORDER HAVE MATERIALLY AND SUBSTANTIALLY CHANGED; OR

(2) IT HAS BEEN THREE YEARS SINCE THE ORDER WAS RENDERED OR LAST MODIFIED AND THE MONTHLY AMOUNT OF THE CHILD SUPPORT AWARD UNDER THE ORDER DIFFERS BY EITHER 20 PERCENT OR $100 FROM THE AMOUNT THAT WOULD BE AWARDED IN ACCORDANCE WITH THE CHILD SUPPORT GUIDELINES.

Warnings

WARNINGS TO PARTIES: FAILURE TO OBEY A COURT ORDER FOR CHILD SUPPORT OR FOR POSSESSION OF OR ACCESS TO A CHILD MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

FAILURE OF A PARTY TO MAKE A CHILD SUPPORT PAYMENT TO THE PLACE AND IN THE MANNER REQUIRED BY A COURT ORDER MAY RESULT IN THE PARTY'S NOT RECEIVING CREDIT FOR MAKING THE PAYMENT.

FAILURE OF A PARTY TO PAY CHILD SUPPORT DOES NOT JUSTIFY DENYING THAT PARTY COURT-ORDERED POSSESSION OF OR ACCESS TO A CHILD. REFUSAL BY A PARTY TO ALLOW POSSESSION OF OR ACCESS TO A CHILD DOES NOT JUSTIFY FAILURE TO PAY COURT-ORDERED CHILD SUPPORT TO THAT PARTY.

Additional Findings

The Court finds and declares that the Indian Child Welfare Act does not preempt Texas state law.

The Court finds and declares that Section 152.104 of the Texas Family Code is unconstitutional under the Texas Constitution.

Attorney's Fees

IT IS ORDERED that attorney's fees are to be borne by the party who incurred them.

Costs

IT IS ORDERED that costs of court are to be borne by the party who incurred them.

Discharge from Discovery Retention Requirement

IT IS ORDERED that the parties and their respective attorneys are discharged from the requirement of keeping and storing the documents produced in this case in accordance with rule 191.4(d) of the Texas Rules of Civil Procedure.

Relief Not Granted

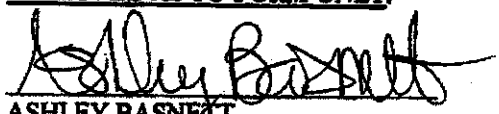
IT IS ORDERED that all relief requested in this case and not expressly granted is denied.

Date of Order

This order judicially PRONOUNCED in court at Fort Worth, Tarrant County, Texas, on May 3, 2019, but signed on June 28th 2019.

JUDGE PRESIDING

APPROVED AS TO FORM ONLY:



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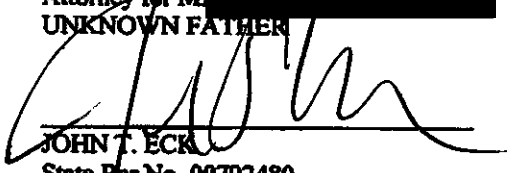
UNKNOWN FATHER

AGREES THE WORDING OF THIS ORDER CORRECTLY REFLECTS THE COURT'S RULING, BUT OBJECTS AND DISAGREES TO THE SUBSTANCE OF THE ORDER:



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Appendix 3

Cause No. 323-107644-18

IN THE INTEREST OF	§	IN THE DISTRICT COURT OF
Y[redacted] R[redacted] J[redacted]	§	
	§	
	§	TARRANT COUNTY, TEXAS
A CHILD	§	
	§	
	§	323rd JUDICIAL DISTRICT

FIRST AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 3, 2019, the Court heard this case. In response to the first amended request of the Navajo Nation on July 8, 2019, the Court makes and files the following as original Findings of Fact and Conclusions of Law in accordance with rules 296 and 297 of the Texas Rules of Civil Procedure.

FINDINGS OF FACT

A. The Parties

1. Petitioner, TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES ("the Department"), appeared through its representative, KAREN SOTO, and through its attorney of record, ASHLEY BASNETT, Assistant District Attorney, Tarrant County, Texas.

2. Respondent J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted] executed an affidavit of relinquishment of parental rights which included a waiver of appearance. However, J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted] attorney, JUSTIN MURRAY, appeared in person and announced ready. JUSTIN MURRAY was then excused by the court because J[redacted] R[redacted] J[redacted] A[redacted] J[redacted] R[redacted] J[redacted] executed the affidavit of relinquishment of parental rights.

3. Respondent M[redacted] M[redacted] who was cited by publication, did not appear. Respondent M[redacted] M[redacted] was represented by the "Diligent Search" attorney, KATHLYNN PACK.

4. Respondent UNKNOWN FATHER did not appear. The UNKNOWN FATHER was represented by the "Diligent Search" attorney, KATHLYNN PACK.

5. Intervenor NAVAJO NATION appeared in person through its representative, CELESTE SMITH, and its attorney of record, CINDY TISDALE.

6. Intervenors C[redacted] B[redacted] and J[redacted] B[redacted] (hereinafter, the "[redacted]") appeared in person and through their attorney of record, KELLYE HUGHES.

7. The Attorney Ad Litem for the child, JOHN T. ECK, appeared.

8. A[redacted] J[redacted], the child's maternal great-aunt, who was not a party to this proceeding, appeared in person.

9. The OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS, who appeared as *amici* on January 28, 2019 and who intervened on June 24, 2019, appeared through David J. Hacker, Special Counsel for Civil Litigation, and Charles K. Eldred, Assistant Attorney General.

B. Jurisdiction

10. The Court, having examined the record and heard the evidence and argument of counsel, finds the following:

a. A request for identification of a court of continuing, exclusive jurisdiction has been made as required by Section 155.101 of the Texas Family Code.

b. This Court has jurisdiction of this case and of all the parties, and no other court has continuing, exclusive jurisdiction of this case.

11. The Court, having examined the record and heard the evidence and argument of counsel, finds that the State of Texas has jurisdiction to render final orders regarding the child the subject of this suit pursuant to Subchapter C, Chapter 152, Texas Family Code, by virtue of the fact that Texas is the home state of the child.

12. The Court finds that all persons entitled to citation were properly cited.

13. The Court finds that the Department served Notice of Pending Custody Proceeding Involving Indian Child on each parent or Indian custodian, each tribe identified, the Bureau of

Indian Affairs (BIA), and the Secretary of the Interior pursuant to 25 U.S.C. Section 1912(a) on the following:

a. J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted], [redacted]

b. NAVAJO NATION, C/O Celeste Smith, P.O. Box 769, St. Michael, Arizona 86511.

c. M[redacted] M[redacted], [redacted].

14. The Court further finds that the Department has properly served Notice to Bureau of Indian Affairs (BIA): Parent, Custodian or Tribe of Child Cannot Be Located or Determined on the Bureau of Indian Affairs, as necessary pursuant to 25 U.S.C. Section 1912(a).

C. Child

15. The Court finds that the following child is the subject of this suit:

a. Name: Y[redacted] R[redacted] J[redacted]

b. Sex: [redacted]

c. Birth date: [redacted]

d. Home state: [redacted]

D. Termination of Mother's Parental Rights

16. The Court finds by evidence beyond a reasonable doubt that J[redacted] R[redacted] J[redacted] A[redacted] J[redacted] R[redacted] J[redacted] ("Mother") has –

a. Executed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided for by chapter 161 of the Texas Family Code, pursuant to Section 161.001(b)(1)(K); and

b. Constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months and: 1) the Department has made reasonable efforts to return the child to the mother; 2) the mother has not regularly visited or maintained significant contact with the child; and 3) the mother has demonstrated an inability

to provide the child with a safe environment, pursuant to Section 161.001(b)(1)(N) of the Texas Family Code.

17. The Court also finds beyond a reasonable doubt that termination of the parent-child relationship between J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted] and the child the subject of this suit is in the best interest of the child.

18. The Court further finds by evidence beyond a reasonable doubt that:

a. The Department made active efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family and that these efforts proved unsuccessful; and

b. The evidence, including testimony of a qualified expert witness, demonstrates that the continued custody of the child by J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted], parent or Indian Custodian, is likely to result in serious emotional or physical injury to this child.

19. In accordance with Section 161.001(c) of the Texas Family Code, the Court finds that the order of termination of the parent-child relationship as to J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted] is not based on evidence that J[redacted] R[redacted] J[redacted] AKA J[redacted] R[redacted] J[redacted]:

a. Homeschooled the child;

b. Is economically disadvantaged;

c. Has been charged with a nonviolent misdemeanor other than:

i. An offense under Title 5 of the Texas Penal Code;

ii. An offense under Title 6 of the Texas Penal Code; or

iii. An offense that involves family violence, as defined by Section 71.004 of the Texas Family Code;

d. Provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under Chapter 169 of the Texas Occupations Code; or

e. Declined immunization for the child for reasons of conscience, including a religious belief.

E. Termination of Father's Parental Rights – M[redacted] M[redacted]

20. The Court finds by clear and convincing evidence that M[redacted] M[redacted] has not registered with the paternity registry under Chapter 160 of the Texas Family Code. The Court finds by clear and convincing evidence that Petitioner has filed in this case a certificate of paternity registry search that indicates that no man has registered as the father of this child.

21. The Court also finds by clear and convincing evidence that termination of the parent-child relationship, if any exists or could exist, between any alleged father and the child the subject of this suit is in the best interest of the child.

F. Termination of Alleged Father's Parental Rights – Unknown Father

22. The Court finds by clear and convincing evidence that no man has registered with the paternity registry under chapter 160 of the Texas Family Code. The Court finds by clear and convincing evidence that Petitioner has filed in this case a certificate of paternity registry search that indicates that no man has registered as the father of this child.

23. The Court also finds by clear and convincing evidence that termination of the parent-child relationship, if any exists or could exist, between any UNKNOWN FATHER or alleged father and the child the subject of this suit is in the best interest of the child.

G. Findings Regarding Potential Placements

24. The Court finds that the [redacted] are the adoptive parents to the child's sibling, L[redacted] B[redacted]. L[redacted] B[redacted], born [redacted], has lived with the [redacted] since June 22, 2016. L[redacted] has integrated fully into the [redacted] family and has bonded with each family member. The [redacted] have two biological children, H.B. (10 years old) and B.B. (7 years old). The [redacted] have provided all three children a stable and nurturing home. Dr. J[redacted] B[redacted] is an anesthesiologist who works 7:00 AM to 2:00 PM at a day-surgery center. C[redacted] E[redacted] B[redacted] is a full-time stay-at-home parent, and a professional portrait photographer. The [redacted]

live in a 4,000-square-foot, 4-bedroom household that is a licensed foster home in [redacted] of [redacted]. The [redacted] are willing to cultivate the child's Navajo culture.

25. This Court finds that the [redacted] petitioned the Court to terminate the parent-child relationships, to be appointed managing conservators of the Child, to adopt the Child, and for temporary orders placing the child in the [redacted] home as foster placement and appointing them temporary possessory conservators.

26. The Court finds that non-party A[redacted] J[redacted] is the child's maternal great-aunt. A[redacted] J[redacted] lives in a two-bedroom house on the Navajo reservation in a remote part of Arizona. A[redacted] J[redacted] is 55 years of age and divorced. She is not employed outside the home. A[redacted] J[redacted] has five adult children. One of her adult sons lives with her and helps her pay bills through his occupation as a weaver and officiant at Navajo ceremonies. A[redacted] J[redacted] also receives food stamps.

27. This Court finds that A[redacted] J[redacted] cares for her ailing brother and mother, as well as numerous animals. Four of J[redacted] J[redacted]' other children, the youngest of which is at least 10 years older than the child, live 40 minutes away from A[redacted] J[redacted]. A[redacted] J[redacted] follows Navajo traditions and desires to raise the child in the Navajo culture.

28. This Court finds that A[redacted] J[redacted], who was not a party, did not file a petition with this Court seeking relief. A[redacted] J[redacted] did not file a motion for placement of the child with her. A[redacted] J[redacted] did not file a petition seeking to be appointed conservator of the child. No party filed a petition seeking to appoint A[redacted] J[redacted] a managing conservator.

29. This Court finds that on January 24, 2019, the Navajo Nation filed a motion for placement of the child with A[redacted] J[redacted]. The basis of its motion was that A[redacted] J[redacted] is the maternal great-aunt of the child. The Navajo Nation argues that she is therefore a preferred placement option compared to the [redacted] under the ICWA. The Court finds that on March 1, 2019, it denied the Navajo Nation's motion for placement.

H. Joint Managing Conservatorship

30. Consistent with the specific rights described in this Court's June 28, 2019 Order, the Court finds that it is in the best interest of the child to appoint the [redacted]s, who sought appointment as managing conservators, and A[redacted] J[redacted], who did not ask the court to be appointed as a managing conservator, as Joint Non-Parent Managing Conservators of Y[redacted]R[redacted] J[redacted].

31. The Court finds that it is in the best interest of the child to treat the [redacted]s and non-party A[redacted] J[redacted] as if they were divorced parents living more than 100 miles apart. The Court finds that it is in the child's best interest to enter into this joint managing conservatorship arrangement to place her in a loving home with her sibling who is closest to her in age by several years, while still ensuring the child's continued connection to Navajo culture and family.

32. The Court finds that it is in the best interest of the child to require each conservator, during that conservator's period of possession, to ensure the child's attendance in school.

I. Primary Residence and Geographical Restriction

33. The Court finds that it is in the best interest of the child to give the [redacted]s the exclusive right to designate the child's primary residence. The [redacted]s must designate a primary residence that is either within the State of Arizona, within a state that is contiguous to the State of Arizona, or within a state that is contiguous to a state that is contiguous to the State of Arizona (including the State of Texas).

34. The Court finds that in the residence of the [redacted]s, the child will be well-cared for, have her needs met, and bond with the [redacted]s. *See In the Interest of M.D.M.*, No. 01-18-01142-CV, 2019 WL 2459058, at *17 (Tex. App. June 13, 2019). The Court further finds that the [redacted]s can and will provide the child with a stable and loving home environment that gives her the care, nurturance, guidance, and supervision necessary for the child's safety and development. *See* Tex. Fam. Code Ann. § 263.307.

35. The court finds that it is in the best interest of the child for the child to have her primary residence in the same home with her sibling, L[redacted], who lives with the [redacted] as their adopted son.

J. Possession and Access

36. The Court finds that it is in the best interest of the child to give the [redacted] a right of possession of the child at all times not specifically designated in the June 28, 2019 Possession Order for A[redacted] J[redacted]. The Court finds that it is in the best interest of the child to give A[redacted] J[redacted], a non-party, the right of possession of the child for designated summer, weekend, and holiday periods, as prescribed in the June 28, 2019 Possession Order.

K. Language Program for Child

37. The Court finds that it is in the best interest of the child to require the continuous enrollment of the child in a Navajo Language Program from as soon as a Navajo Language Program will accept the child for enrollment until the child's fourteenth birthday. If a Navajo Language Program is not available within 30 miles of the residence of the [redacted], the [redacted] shall enroll the child in an equivalent on-line program.

CONCLUSIONS OF LAW

A. Termination of Parental Rights

38. The Court may order termination of the parent-child relationship if the Court finds by clear and convincing evidence that the parent has executed an unrevoked or irrevocable affidavit of relinquishment of parental rights. Tex. Family Code § 161.001(b)(1)(K).

39. The Court may order termination of the parent-child relationship if the Court finds by clear and convincing evidence that the parent has constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than six months, and (i) the department has made reasonable efforts to return the child to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child; and (iii) the parent has demonstrated an inability to provide the child with a safe environment. Tex. Family Code § 161.001(b)(1)(N).

40. The Court may not order termination of the parent-child relationship based on evidence that the parent (1) homeschooled the child; (2) is economically disadvantaged; (3) has been charged with a nonviolent misdemeanor offense other than: (A) an offense under title 5, Penal Code; (B) an offense under Title 6, Penal Code; or (C) an offense that involves family violence, as defined by Section 71.004 of this code; (4) provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed under Chapter 169, Occupations Code; or (5) declined immunization for the child for reasons of conscience, including a religious belief. Tex. Family Code § 161.001(c).

41. The Court concludes, beyond a reasonable doubt, that the conditions set forth in Tex. Family Code § 161.001(b)(1)(K) and (b)(1)(N) are met as to the child's mother. The Court further concludes, beyond a reasonable doubt, that termination of the child's mother's parental rights is in the best interest of the child. Accordingly, the Court concludes that the child's mother's parental rights should be and are terminated. The Court does not base this conclusion in any part on the prohibited considerations recited in Tex. Family Code § 161.001(c).

42. The Court may order termination of the parental rights of a man alleged to be the father of a child without notice if the man did not timely register with the vital statistics unit and is not entitled to notice under Texas. Family Code § 160.402 or § 161.002. Tex. Family Code § 160.404.

43. The Court concludes, beyond a reasonable doubt, that the conditions set forth in Texas Family Code § 160.404 are met as to M[redacted] M[redacted]. The Court further concludes, beyond a reasonable doubt, that termination of M[redacted] M[redacted]'s parental rights is in the best interest of the child. Accordingly, the Court concludes that M[redacted] M[redacted]'s parental rights should be and are terminated.

44. The Court concludes, beyond a reasonable doubt, that the conditions set forth in Texas Family Code § 160.404 are met as to Unknown Father. The Court further concludes, beyond a reasonable doubt, that termination of Unknown Father's parental rights is in the best interest of

the child. Accordingly, the Court concludes that Unknown Father's parental rights should be and are terminated.

B. The Brackeens Have Standing To Intervene.

45. On January 22, 2019, the Navajo Nation filed a motion to dismiss the [redacted]' intervention on the basis that the [redacted] did not have standing to intervene. On January 28, 2019, the Parties appeared before this Court and were heard on this motion and the [redacted]' opposition thereto. After considering the Navajo Nation's motion, as well as evidence and argument of counsel, and for the reasons given in the Court's previous orders and statements, the Court concludes that the [redacted] have standing to proceed in this cause number and that the [redacted]' original petition in Cause No. 323-108748-19 should be consolidated into the above cause number.

46. Where a party has standing to file an original suit, it may petition to intervene. *See Whitworth v. Whitworth*, 222 S.W.3d 616, 621 (Tex. App.—Houston [1st Dist.] 2007, no pet.). In keeping with that general rule, courts have permitted parties to intervene in a suit affecting the parent-child relationship on the basis that they could have filed an original suit pursuant to Section 102.005. *See In re A.C.*, No. 10-15-00192-CV, 2015 WL 6437843, at *9 (Tex. App.—Waco Oct. 22, 2015, no pet. h.).

47. Texas Family Code § 102.005 permits an original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption to be filed by, *inter alia*, an adult who has adopted, or is the foster parent of and has petition to adopt, a sibling of the child.

48. The Court has found that L[redacted] B[redacted] is the sibling of the child and is the adoptive child of the[redacted]. Accordingly, the Court concludes that the [redacted] have standing to file an original petition under Section 102.005(4).

49. Because the [redacted] have standing to file an original petition, which they properly invoked in their petition in intervention, the Court concludes that the [redacted] properly petitioned to intervene. *See* First Amended Petition in Intervention (Jan. 15, 2019).

50. Moreover, standing to intervene in an existing proceeding is subject to a more relaxed standard than is standing to file an original suit. *See In re N.L.G.*, 238 S.W.3d 828, 830 (Tex. App.—Fort Worth 2007, no pet.) (per curiam) ("Sound policy supports the relaxed [intervention] standing requirements.") (citing *In re K.T.*, 21 S.W.3d 925, 927 (Tex. App.—Beaumont 2000, no pet.)).

51. The [redacted], as prospective adoptive parents, have standing to intervene in this proceeding because it advances the Court's efforts to determine the placement most in keeping with the best interests of the child. *See In re N.L.G.*, 238 S.W.3d at 830; *In re A.L.W.*, No. 02-11-00480-CV, 2012 WL 5439008, at *5 (Tex. App.—Fort Worth Nov. 8, 2012, *rev. denied* (Mar. 22, 2013), *reh'g of pet. rev. denied* (Apr. 19, 2013)) ("allowing the intervention of parties who wish to adopt the child may enhance the trial court's ability to adjudicate that issue.").

C. Texas Law Applying the Indian Child Welfare Act to Texas Placement Proceedings Violates the Texas Constitution.

52. On January 18, 2019, the [redacted] filed a motion to declare the Indian Child Welfare Act inapplicable to these proceedings on the basis that the ICWA violates the United States Constitution. Specifically, the [redacted] argued that (a) the ICWA placement preferences discriminate on the basis of race in violation of the Constitution's guarantee of equal protection, (b) the ICWA and the Final Rule unconstitutionally commandeer state courts and agencies; and (c) the ICWA and the Final Rule violate the United States Constitution because the adoption of "Indian Children" is not a permissible subject of federal regulation. The Navajo Nation opposed the [redacted]' motion to declare the ICWA inapplicable as unconstitutional.

53. On January 28, 2019, the Parties appeared before this Court. All Parties were heard on the merits of the [redacted]' motion to declare the ICWA inapplicable as unconstitutional. The Court concluded that the United States Court of Appeals for the Fifth Circuit in No. 18-11479 stayed the order of the Northern District of Texas in *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018). The Court concluded that the Fifth Circuit stay prevented the Court from ruling on the constitutionality of the ICWA under the United States Constitution.

54. The [redacted]s filed a supplemental brief on February 1, 2019, arguing that the Court had an independent obligation to decide the issue before it and that state courts are bound only by decisions of the United States Supreme Court and higher state courts, not federal courts of appeals. The Court concludes that stay in *Brackeen v. Zinke* prevents the Court from ruling on the constitutionality of ICWA. Accordingly, the Court does not here decide that issue.

55. The Court concludes that the ICWA does not apply to Texas state-court custody proceedings of its own force because it is not a valid form of preemption. Federal law preempts state law only if the federal law is "best read as one that regulates private actors." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018). Because ICWA regulates state courts and agencies rather than individuals, the Court concludes that ICWA does not validly preempt state law.

56. Texas Family Code § 152.104(a) provides that "[a] child custody proceeding that pertains to an Indian child as defined in [ICWA] is not subject to this chapter to the extent that it is governed by the Indian Child Welfare Act."

57. Since ICWA does not apply in Texas state-court proceedings of its own preemptive force, it could be applied only by means of Texas Family Code § 152.104(a).

58. On March 1, 2019 the Court concluded that Texas Family Code § 152.104 is unconstitutional under the Texas Constitution, specifically Tex. Const. art. I, §§ 1, 3, 3a, 19, and 29.

59. The Court concludes that Texas Family Code § 152.104(a) violates the Texas Constitution's guarantee of equal protection. ICWA's definition of "Indian child" is explicitly based on lineal descent. It sweeps in not only children who are enrolled members of an Indian tribe, but any "biological child of a member of an Indian tribe" who is eligible for tribal membership. 25 U.S.C. § 1903(4)(b). The Texas Constitution "guarantees that all persons similarly situated should be treated alike." *Sanders v. Palunsky*, 36 S.W.3d 222, 224–25 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The ICWA treats individuals differently based on their ancestry, and discrimination on the basis of "ancestry [is] equivalent to racial discrimination." *Richards v. League of United*

Latin Am. Citizens (LULAC), 868 S.W.2d 306, 312 n.6 (Tex. 1993); *see also, e.g.*, *Rice v. Cayetano*, 528 U.S. 495, 514 (2000). For these reasons, Texas Family Code § 152.104(a) violates the Texas Constitution.

60. The Court concludes that Texas Family Code § 152.104(a) violates the Texas guarantee of the "right of local self-government." Tex. Const. art. I, § 1. "[T]he Constitution divides authority between federal and state governments for the protection of individuals." *Murphy*, 138 S. Ct. at 1477 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). But ICWA requires state agencies and courts to carry out its federal policy of placing Indian children with Indian families. Indeed, ICWA repeatedly dictates what state agencies and courts "shall" do. *See, e.g.*, 25 U.S.C. § 1915 ("shall be given"; "shall be placed"; "shall follow"; "shall be maintained"). ICWA thus commands state actors to implement federal policy in contravention of "local self-government, unimpaired to all the States." Tex. Const. art. I, § 1. Applying ICWA, as Texas Family Code § 152.104(a) mandates, accordingly violates Tex. Const. art. I, § 1.

61. The Court concludes that because statutorily applying ICWA both deprives Texas citizens of equal protection and commandeers state courts and agencies, the state legislature did not have the power to enact Texas Family Code § 152.104(a) under Tex. Const. art. I, § 29, and Texas Family Code § 152.104(a) could not be considered the "law of the land" for due process under Tex. Const. art. I, § 19.

62. The Court concludes that the Navajo Nation's motion for placement should be denied because the Indian Child Welfare Act is inapplicable because Texas Family Code § 152.104(a) violates the Texas Constitution and because denial of the Navajo Nation's motion for placement is in the best interest of the child.

D. The Best Interest of the Child Requires Placement with the Brackeens

63. The Court concludes that it is in the best interest of the child to appoint the [redacted] and A[redacted] J[redacted], a non-party, as joint managing conservators as if they were divorced parents living more than 100 miles apart. Trial courts have wide latitude in determining a child's best interest. *Gillespie v. Gillespie,* 644 S.W.2d 449, 451 (Tex. 1982). Section 153 of the Texas Family

Code gives this Court the authority to appoint nonparents as joint managing conservators where it is in the best interest of the child. *See* Tex. Fam. Code §§ 153.002; 153.005; 153.372. The Court applied the *Holley* factors to analyze what is in the child's best interest. *Holley v. Adams,* 544 S.W.2d 367, 371–72 (Tex. 1976); *see* Tex. Fam. Code §§ 153.002. These factors include: (1) the desires of the child; (2) the emotional and physical needs of the child now and in the future; (3) the emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals seeking custody; (5) the programs available to assist these individuals to promote the best interest of the child; (6) the plans for the child by these individuals or the agency seeking custody; (7) the stability of the home or proposed placement; (8) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (9) any excuse for the acts or omissions of the parent. *Id.; In re C.H.,* 89 S.W.3d 17, 27 (Tex. 2002).

64. Applying these factors, the Court concludes that it is in the child's best interest to enter into this joint managing conservatorship arrangement to place her in a loving home with her sibling who is closest to her in age by several years, while still ensuring the child's continued connection to Navajo culture and family. Placing a child with her sibling is routinely considered to be in the child's best interest. *See, e.g., In Interest of M.R.J.M.*, 280 S.W.3d 494, 511 (Tex. App.—Fort Worth 2009, no pet. h.); *In Interest of B.H.R.*, 535 S.W.3d 114, 125 (Tex. App.—Texarkana 2017, no pet. h.). Further, cultural heritage is also considered important in advancing the child's best interest. *In re W.D.H.*, 43 S.W.3d 30, 36 (Tex. App.—Houston [14th Dist.] 2001).

65. The Court concludes the joint managing conservatorship arrangement is best way to advance the child's best interest.

66. The Court concludes that it is in the best interest of the child to give the [redacted] a right of possession of the child at all times not specifically designated in the June 28, 2019 Possession Order for A[redacted] J[redacted]

67. The Court concludes that in the residence of the [redacted], the child will be well-cared for, have her needs met, and bond with the [redacted]. *See In the Interest of M.D.M.*, No. 01-18-01142-CV, 2019 WL 2459058, at *17 (Tex. App.—Houston [1st Dist.] June 13, 2019, no

pet. h.). The Court further concludes that the [redacted] can and will provide the child with a stable and loving home environment that gives her the care, nurturance, guidance, and supervision necessary for the child's safety and development. *See* Tex. Fam. Code Ann. § 263.307.

E. Miscellaneous Conclusions

68. The Court concludes that that the Navajo Nation had standing to intervene in these proceedings.

69. The Court concludes that A[redacted] J[redacted] was allowed to participate as a non-party.

70. The Court concludes that it is in the best interest of the child and it is within its discretion to appoint A[redacted] J[redacted] as a joint non-parent managing conservator, though she has not petitioned the Court to do so.

71. The Court concludes that it is in the best interest of the child and it is within its discretion to treat the [redacted] and A[redacted] J[redacted] as if they are divorced parents who will be given joint managing conservatorship and live more than 100 miles apart, though the [redacted] are the only parties who sought to be appointed managing conservators.

72. The Court concludes that the State of Texas had standing to intervene in these proceedings on June 25, 2019.

F. Application of ICWA (in the Alternative)

73. "Any party seeking . . . termination of parental rights to[] an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d).

74. "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).

75. For the reasons set forth in paragraphs 52-62, the Court concludes that ICWA does not validly preempt Texas law in this case.

76. Nonetheless, and in the alternative to its conclusions of law set forth above, the Court concludes based on evidence beyond a reasonable doubt that the conditions of Section 1912(d) and (f) are met with respect to the termination of parental rights of Mother, M[redacted] M[redacted], and Unknown Father.

77. Moreover, and in the alternative to its conclusions of law set forth above, the Court concludes that the best interest of the child provides good cause to place the child with the[redacted] pursuant to 25 U.S.C. § 1915(b).

Signed August 16, 2019

JUDGE PRESIDING

Appendix 4

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00235-CV

IN THE INTEREST OF Y.J., A CHILD

On Appeal from the 323rd District Court
Tarrant County, Texas
Trial Court No. 323-107644-18

Before Sudderth, C.J.; Gabriel and Birdwell, JJ.
Memorandum Opinion by Justice Birdwell
Chief Justice Sudderth and Justice Gabriel concur without opinion.

MEMORANDUM OPINION

This unusual appeal is from an order terminating parental rights, but neither parent has appealed, the Department of Family and Protective Services (Department) was dismissed and has not appealed, and no appealing party challenges the termination. Instead, three intervenors—the Navajo Nation, the Office of the Attorney General of the State of Texas (AG), and two of the nonparents the trial court named as joint managing conservators for the child, C.B. and J.B. (the Bs)—appeal the part of the trial court's order naming the Bs and the child's Navajo maternal great-aunt A.J. the child's joint managing conservators.

At trial and on appeal, the majority of the parties' arguments have centered on the constitutionality of the federal Indian Child Welfare Act (ICWA) and its applicability to this case. If constitutional, ICWA applies to certain aspects of this case because the child at issue is Navajo through her biological mother (Mother). *See* 25 U.S.C.A. §§ 1901–63. At the heart of the dispute is whether ICWA's post-termination placement preferences—which favor placement of an Indian child with Indian families—control, or whether the trial court should apply solely Texas law regarding the child's best interest. *Id.* § 1915 (mandating that Indian child be placed in a preadoptive or adoptive placement with Indian relatives, the child's tribe, or any other Indian family absent good cause not to do so); Tex. Fam. Code Ann. § 153.002 ("The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.").

The Navajo Nation contends that ICWA is constitutional and mandates placing the child solely with A.J.[1] The AG and the Bs claim that ICWA is unconstitutional under both the United States and Texas Constitutions, that it does not pre-empt Texas law and therefore cannot be applied to these proceedings, and that the trial court abused its discretion under Texas law by naming A.J. as one of the child's joint managing conservators along with the Bs.

The trial judge purported not to determine ICWA's constitutionality under the United States Constitution. Instead, he held that even if ICWA does not violate the United States Constitution, it nevertheless does not apply to this proceeding because (1) ICWA violates the anticommandeering doctrine and therefore cannot validly pre-empt Texas law and (2) Family Code Section 152.104, which the judge concluded attempts to engraft ICWA into Texas law, violates the Texas constitution.

After considering the record and procedural posture of this case—taking into account the ultra-accelerated nature of this appeal—we conclude we need not decide at this time whether ICWA is constitutional; regardless of ICWA's application, the trial court committed reversible error requiring a new trial on conservatorship. We therefore reverse only the part of the trial court's order naming the Bs and A.J. joint managing conservators for the child, and we remand the case for a new trial on that issue.

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[1]Alternatively, the Navajo Nation argues that if ICWA does not apply, the trial court did not abuse its discretion by naming A.J. a joint managing conservator along with the Bs.

Pretrial Factual and Procedural Background

Removal and initial placement efforts

On June 13, 2018, the Department filed a petition seeking conservatorship of Y.J. or termination of her parents' rights because Y.J. had tested positive for marijuana, amphetamines, and methamphetamines at birth. In the attached affidavit, a Department caseworker averred that Mother had told Texas Child Protective Services (CPS) workers that she is a member of the Navajo tribe and that the workers had contacted the tribe to seek Navajo tribal members for foster placement. Mother named more than one man as a possible father; at least one of those men requested DNA testing and was excluded as Y.J.'s biological father. The Department alleged that it had attempted to contact some of Mother's suggested placements, but none were suitable. It also alleged that Mother had an extensive history with New Mexico CPS, that seven of her other children had been removed from her care, and that "the Tribal Council" had placed four of those children with relatives. The caseworker stated further in the affidavit that one of Mother's other children had been removed in Texas when the maternal grandmother—who allegedly had a New Mexico CPS history and with whom Mother had left the child—had tested positive for methamphetamine use. The affidavit also stated that the Navajo Nation was "working to locate a potential Navajo foster home for placement."

An associate judge signed an order naming the Department Y.J.'s temporary sole managing conservator.

Mother waived service of citation. After the statutory temporary adversary hearing, *see* Tex. Fam. Code Ann. § 262.201, the trial court ordered Mother and the child's alleged fathers to submit the Section 261.307[2] Child Placement Resources Form and specifically found, "the Department . . . does not have the option of placing the child with a relative [or] other designated caregiver." The order also noted that the "inquiry regarding the child or family's possible Indian ancestry [was] not complete due to ex parte proceedings or similar circumstances." The Department placed Y.J. in a non-Indian foster home.

Four days after the adversary hearing, the Navajo Nation sent a letter stating that Y.J. was eligible for "ICWA[] service" and that the Navajo Nation would assign an ICWA social worker to the case to coordinate services with the Department.

Identification of first ICWA-compliant home

Although a caseworker noted in the child's June 2018 service plan, "Worker will engage with the Navajo Nation to discuss possible placements," she also stated that the Navajo Nation had not contacted the Department about what it could do to preserve the child's heritage. In a July 2018 status report, a CPS specialist told the trial court that the Navajo Nation had identified an ICWA-compliant home as a possible placement.

[2] *See* Tex. Fam. Code Ann. § 261.307(a)(2) (describing form's contents, including instruction that parent list at least three persons who could be relative caregivers or designated caregivers), § 264.751 (defining types of caregivers).

Around the same time, the Department filed a Motion for Expedited Placement Under the Interstate Compact for the Placement of Children (ICPC),[3] in which it sought an expedited placement of the child with a Colorado family identified by the Navajo Nation. The Navajo Nation had also sent the Department a "favorable Navajo Adoption Home Study" on the family. The nine-page, detailed report discusses the suitability of the couple and the man's Navajo heritage and family ties. It further notes that although the man had a "finding" on an Arizona background check, the offense was over twenty years old (i.e., when he was twenty-one or younger) and his lifestyle had changed for the better.

The trial court approved the placement in late July 2018 and ordered the Department to expedite its compliance with the ICPC to effectuate the placement. But the Department's attempts to comply with the ICPC for this placement were repeatedly rejected for administrative reasons, such as missing records and lack of a social security number for Y.J. After a second failed attempt in October 2018, the Department stopped trying to comply with the trial court's order because, by that time, a Texas federal judge had held ICWA unconstitutional in a case in which the State of Texas is a party. *See Brackeen v. Zinke*, 338 F. Supp. 3d 514, 536–46 (N.D. Tex.

[3] *See id.* §§ 162.101–.107 (adopting the ICPC, by which states cooperate to place children across state lines with the goal of placing children "in a suitable environment and with persons or institutions having appropriate qualifications and facilities" while giving authorities in the state where the child resides and the state where the child is to be placed an adequate opportunity and the necessary information to evaluate the placement's suitability).

2018), *rev'd*, 937 F.3d 406 (5th Cir. 2019), *reh'g en banc granted*, 942 F.3d 287 (5th Cir. 2019). The Department never placed Y.J. with the Colorado family,[4] and she stayed with her Texas, non-ICWA-compliant foster placement.

Interventions related to Y.J.'s placement

In late November 2018, the Navajo Nation intervened in the Department's suit and immediately sought removal of the case to a tribal court under ICWA. The Bs, who by that time had adopted Y.J.'s three-year-old half sibling Alan,[5] also intervened seeking termination of Y.J.'s parents' rights, adoption of Y.J., and appointment as Y.J.'s permanent managing conservators. The Bs, along with Mother,[6] opposed removal of the case to a tribal court. The Navajo Nation opposed placement of Y.J. with the Bs.

After the Bs intervened, Mother signed an affidavit that was filed in the clerk's record; the affidavit contains a certificate of service from Mother's appointed counsel. In the affidavit, Mother asked the trial court to place Y.J. with the Bs "as soon as possible . . . [to] allow her to be placed with her sibling (who is also a Navajo

[4]The Department began reconsidering this family in January 2019, and they were approved in February 2019, but by that time the Navajo Nation had notified the Department about A.J., who as a family member is a preferred placement under ICWA.

[5]Alan is a pseudonym. *See* Tex. Fam. Code Ann. § 109.002(d). Mother has seven other children, but Alan is the closest in age to Y.J. Because Y.J.'s father is unknown, we refer to all of Mother's other children as half siblings.

[6]The Department had lost track of Mother, but the Bs found her in the Tarrant County Jail. Mother's appointed counsel filed the objection to removal to tribal court.

member)." Mother averred that placement with the Bs allowed Y.J. "reasonable proximity to [Mother], her home, [and] extended family and siblings." Mother also signed a Section 261.307 form naming the Bs as "relatives or close family friends" who could take care of Y.J.

On December 3, 2018, the Fifth Circuit Court of Appeals stayed enforcement of the Northern District trial judge's order determining that ICWA is unconstitutional.

Later that month, the Navajo Nation filed a Motion for Placement of the Child, urging the trial court to place Y.J. with the Colorado family that the Navajo Nation had originally identified and complaining that the Department had not complied with the July 2018 order requiring it to do so. The Bs responded by moving to have Y.J. placed with them. They also opposed the Navajo Nation's motion, arguing that if ICWA does not apply, Texas law favors placement with them because they had adopted Alan. *Cf.* 40 Tex. Admin. Code § 700.1309(3) (setting forth factors Department considers in placing children in substitute care and including as a factor that "[s]iblings removed from their home should be placed together unless such placement would be contrary to the safety or well-being of any of the siblings"). They argued alternatively that good cause existed to depart from ICWA's placement preferences.

Thus began a course of briefing in the trial court on ICWA's constitutionality, with the Bs challenging its constitutionality and the Navajo Nation advocating its

constitutionality. The AG filed an amicus curiae brief in support of the Bs, challenging the constitutionality of ICWA on the same grounds and also urging placement of Y.J. with the Bs.

In January 2019, the Navajo Nation amended its placement request and instead moved to have Y.J. placed with Mother's great-aunt A.J.—a Navajo who lives on the reservation in Arizona near Y.J.'s four oldest half siblings,[7] who live with another great-aunt—and, alternatively, with the Colorado couple. The Navajo Nation also moved to dismiss the Bs' intervention for lack of standing. The trial court denied that motion.

In March 2019, the trial court issued a ruling on ICWA's applicability, making the following findings:

> The Court acknowledges multiple claims under the United States Constitution, but is providing deference to the United States Court of Appeals for the Fifth Circuit Stay Pending Appeal dated December 3, 2018, and conscientiously refraining from ruling on those matters in this order of the court.
>
> The Court finds . . . Texas Family Code §152.104(a) to be in violation of Article I, Section 1 of the Texas Constitution and inapplicable to the proceedings in this matter.
>
> The Court finds . . . Texas Family Code § 152.104(a) to be in violation of Article I, Section 3 of the Texas Constitution and inapplicable to the proceedings in this matter.

[7]Although Mother's rights to these half siblings have not been terminated, she does not see them.

> The Court finds . . . Texas Family Code § 152.104(a) to be in violation of Article I, Section 3a of the Texas Constitution and inapplicable to the proceedings in this matter.
>
> The Court finds . . . Texas Family Code § 152.104(a) to be in violation of Article I, Section 19 of the Texas Constitution and inapplicable to the proceedings in this matter.
>
> The Court finds . . . Texas Family Code § 152.104(a) to be in violation of Article I, Section 29 of the Texas Constitution and inapplicable to the proceedings in this matter.

The court also held,

> The Court, having reviewed the Motion to Declare ICWA Inapplicable as Unconstitutional, any responses and reply thereto, the evidence presented, the pleadings on file, the arguments of the parties, and the applicable law, is of the opinion that the Motion to Declare ICWA Inapplicable as Unconstitutional should be **GRANTED**.
>
> **IT IS HEREBY ORDERED** that Texas Family Code 152.104, is unconstitutional and inapplicable to these proceedings.

Despite this ruling, neither the Bs nor the Department moved to strike the Navajo Nation's intervention.

Final trial was set for May 3, 2019. Although A.J. intervened before final trial, the trial court dismissed her intervention petition for lack of standing.[8]

A little less than a month before trial, Mother signed a voluntary affidavit of relinquishment of her parental rights; in it, she designated the Department as Y.J.'s

[8]A.J.'s petition in intervention stated "that placement with her would provide the child access to the four siblings and *the child's maternal grandmother*." [Emphasis added.] Because the evidence showed that in Navajo society older maternal relatives are referred to as grandmothers, it is unclear whether she was referring to herself or to Y.J.'s actual maternal grandmother.

managing conservator and stated that she preferred that Y.J. be placed with the Bs for adoption.

At trial, the Department, the Navajo Nation, and the Bs all supported termination of Y.J.'s parents' rights and appointment of the Department as Y.J.'s permanent managing conservator. The Department and the Navajo Nation recommended that Y.J. be placed with A.J.,[9] but the Bs advocated placing Y.J. with them and asked to be named possessory conservators so that the Department would not place Y.J. with A.J. after being named permanent managing conservator. The trial court ordered on the record that Mother's and all alleged fathers' rights be terminated, but instead of naming the Department Y.J.'s permanent managing conservator, the trial court named the Bs and A.J. joint managing conservators and designated the Bs as the primary persons to designate Y.J.'s residence, so long as Y.J. was living within

[9]The Department's recommendation was different than the AG's amicus recommendation. The record does not indicate why these two State agencies disagreed on the proper placement for Y.J., but the record does show that the Department had dealt with the Bs in connection with Alan's adoption and that Department workers were aware of the Bs when Y.J. came into care because of the federal court litigation. Y.J.'s caseworker could not explain why the Department never considered the Bs even for a temporary placement because other Department workers made that decision; she admitted the Department did not follow its own policy about placing removed children in care with siblings. Additionally, C.B. testified that he had asked Y.J.'s caseworker—also Alan's caseworker—on the date the Department removed Y.J. from Mother's care whether she knew anything about Y.J.'s being in care, and she told them she did not know and said, "[I]f there was a baby in care, I think I would know about it." The caseworker at first did not admit that she had talked to C.B., but when given the date of the phone call, she explained, "I believe at that time I didn't feel comfortable with giving him any information of that case" because she could not disclose a child's personal information to a nonparty.

two states of Arizona (including Texas). The trial court stated its intention to treat the Bs and A.J. as if they were divorced parents residing more than 100 miles apart, but with a stair-step schedule for A.J.'s possession, beginning with one week in summer 2019, two weeks in summer 2020, and so on until Y.J. turned five, when A.J. would have extended summer possession. The trial court dismissed the Department from the suit.[10]

After trial, the AG also intervened in the suit and filed a motion for new trial. The AG continued to support placement of Y.J. with the Bs.

The trial judge did not sign an order of termination until almost two months after trial. The order is consistent with the trial judge's ruling on the record and provides a detailed possession schedule, which until 2023 gives A.J. exclusive possession of Y.J. only during the stair-stepped weeks in the summer. Beginning in 2023, when Y.J. turns five, the order provides for possession by A.J. one weekend each month, one week every spring, and extended summer possession. The order provides that the Bs have the right of possession of Y.J. "at all other times not specifically designated" for A.J.

The only parties that appealed the trial court's judgment are the Bs, the AG, and the Navajo Nation. Because the Department did not file a notice of appeal, and no party has argued that just cause exists for rendering a judgment that the Department be named managing conservator, we do not consider that as a choice for

[10]The Department did not file a notice of appeal from the trial court's ruling.

our disposition. *See* Tex. R. App. P. 25.1(c); *see also* Tex. Fam. Code Ann. § 161.207(a) (requiring trial court to appoint "suitable, competent adult" as managing conservator after termination if not appointing the Department). Thus, the only dispute before this court is whether the trial court's awarding joint managing conservatorship to the Bs and A.J. should stand. The Navajo Nation asks us to reverse and render a judgment that Y.J. be placed in accordance with ICWA preferences (or in the alternative, to remand for ICWA-compliant proceedings); the Bs and the AG ask us to hold ICWA unconstitutional, reverse the trial court's order, and render judgment that the Bs be named Y.J.'s sole managing conservators so that they may adopt her. Because we determine that the trial court abused its discretion in making its joint-managing-conservatorship ruling, necessitating a remand for a new trial, regardless of whether ICWA applies, we do not reach the constitutionality of ICWA. But we do not foreclose the trial court's reconsidering the issue and ruling on it in the remanded proceedings.

The Bs Have Standing In This Suit

In its fifth issue,[11] the Navajo Nation argues that the Bs lacked standing to seek placement of Y.J. with them or appointment as managing conservators. According to the Navajo Nation, Family Code Section 102.005(4), on which the Bs relied to intervene in the suit, allows a party to seek only adoption or termination and adoption, not placement or appointment as a managing conservator. The Navajo

[11]We address the issues out of order for ease of discussion.

Nation also argues that Section 102.005 allows a party to file only an original suit, not an intervention, because the statute does not specifically say that it allows intervention.

Section 102.005 provides that "[a]n original suit requesting only an adoption or for termination of the parent–child relationship joined with a petition for adoption may be filed by . . . an adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child." Tex. Fam. Code Ann. § 102.005(4). The Navajo Nation does not dispute that the Bs have adopted Alan.

As a general rule, an individual's standing to intervene is commensurate with that individual's standing to file an original lawsuit. *In re A.C.*, Nos. 10-15-00192-CV, 10-15-00193-CV, 2015 WL 6437843, at *9 (Tex. App.—Waco Oct. 22, 2015, no pet.) (mem. op.); *Whitworth v. Whitworth*, 222 S.W.3d 616, 621 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (op. on reh'g) ("Generally, an intervenor must show standing to maintain an original suit in order to intervene."). A party's standing to file an original suit affecting the parent–child relationship is typically governed by Family Code Sections 102.003, 102.004, and 102.005. Tex. Fam. Code Ann. §§ 102.003–.005; *A.C.*, 2015 WL 6437843, at *9; *see In re Smith*, 262 S.W.3d 463, 467 (Tex. App.—Beaumont 2008, orig. proceeding [mand. denied]). A party who has standing to file an original suit under Section 102.005 may also file an intervention under that same statute. *A.C.*, 2015 WL 6437843, at *8–9.

The Navajo Nation acknowledges the holdings of *A.C.* and *Whitworth* but argues that by not specifically mentioning intervention, the plain language of Section 102.005 allows only the filing of an original suit, not an intervention. The Navajo Nation cites no authority supporting this proposition, and we have not found any. It discusses the holding in *Whitworth*—in which the court discussed Family Code Section 102.004(b), which specifies which parties can intervene in a suit affecting the parent–child relationship—but *Whitworth* does not support the Navajo Nation's argument. 222 S.W.3d at 621–22. Section 102.004(b) provides standing to intervene to certain parties who do not have standing under another Family Code provision to file an original suit. *See* Tex. Fam. Code Ann. § 102.004(b); *In re N.L.G.*, 238 S.W.3d 828, 830 (Tex. App.—Fort Worth 2007, no pet.); *In re A.M.*, 60 S.W.3d 166, 169 (Tex. App.—Houston [1st Dist.] 2001, no pet.). But the Bs do have standing to file an original suit under Section 102.005(4), and that section does not expressly prohibit a party with original standing from intervening in a suit. Nor does any other Family Code provision. *But cf.* Tex. Fam. Code Ann. § 102.006 (limiting standing of certain parties who would otherwise have standing to file an original suit affecting the parent–child relationship). Therefore, we conclude that the plain language of Section 102.005(4) permits the Bs to intervene rather than bars them from intervening.

The Navajo Nation argues, alternatively, that the Bs' standing was limited to seeking adoption only, or termination and adoption, and that the Bs have no standing to seek placement of Y.J. or managing conservatorship because Section 102.005 limits

the relief they can ask for. The Bs' focus in their pleadings and at trial was for the parents' rights to be terminated so that the Bs could adopt Y.J., which is what Section 102.005 gives them standing to seek. *See Turner v. Robinson*, 534 S.W.3d 115, 123 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("Standing is determined at the time suit is filed in the trial court."). Their requests for conservatorship were in response to the Department's apparent unwillingness to consider them as a placement and potential adoption choice. Additionally, because Y.J. had not been placed with them, she had not lived with them for at least six months—a prerequisite to adoption unless the trial court waives that requirement when it is in the child's best interest. *See* Tex. Fam. Code Ann. § 162.009. Absent the trial court's waiver, the only way the Bs could fulfill the residency prerequisite was by obtaining conservatorship and possession of Y.J.

Here, the trial court ordered termination but not adoption in a suit in which the Bs had standing to seek them jointly. Nothing in Section 102.005 limits their standing to seek post-termination conservatorship as against the Department or any other nonparent in this instance. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (noting that because standing—in terms of a party's right to initiate a lawsuit and the trial court's power to hear it—is determined when suit is filed, subsequent events do not deprive the court of subject matter jurisdiction).

We therefore overrule the Navajo Nation's fifth issue.

Constitutionality of ICWA and Family Code Section 152.104(a)

In its first and second issues, the Navajo Nation contends that the trial judge erred by not holding ICWA constitutional and by holding that Section 152.104(a) of the Family Code violates the Texas constitution. The AG's first and second issues, and the Bs' first through third issues, urge the opposite contention: they argue that ICWA is unconstitutional, that Family Code Section 152.104(a) engrafts all of ICWA into Texas law, and that Section 152.104(a) violates the Texas constitution. Although we hold that the trial court made two errors in its legal reasoning, we do not sustain any of the parties' issues related to the constitutionality question because we need not decide their merits.

First, although the trial judge stated that he declined to decide ICWA's constitutionality under the United States Constitution, he determined that ICWA could not validly pre-empt Texas law because it violates the anticommandeering doctrine, as explained in *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018): "The anticommandeering doctrine . . . is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States." In describing the doctrine, the Supreme Court explained that a statute that violates the anticommandeering doctrine *is unconstitutional* because no provision in the Constitution gives Congress the power to pass such a law. *Id.* at 1479. Although *Murphy* discussed whether a statute that violates the anticommandeering doctrine could validly pre-empt state law, the

Court determined that such a statute could not because pre-emption flows from the Supremacy Clause, which is not an independent grant of congressional power. *Id.* In other words, pre-emption under the Supremacy Clause will not save a statute that violates the anticommandeering doctrine because such a law still exceeds Congress's power under the United States Constitution, and otherwise unconstitutional statutes cannot pre-empt state law. *See id.* Thus, by determining that ICWA violates the anticommandeering doctrine under *Murphy* and cannot pre-empt Texas state law, the trial court actually determined that ICWA is unconstitutional under the United States Constitution, even though it purported not to do so.

Second, the trial court then held that Texas Family Code Section 152.104(a) purports to independently apply all provisions of ICWA to all aspects of a Texas child custody proceeding involving an Indian child. *See* 25 U.S.C.A. § 1903(4) (defining "Indian child"). Section 152.104(a) provides that "[a] child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act of 1978 (25 U.S.C. Section 1901 et seq.) is not subject *to this chapter* to the extent that it is governed by the Indian Child Welfare Act." Tex. Fam. Code Ann. § 152.104(a) (emphasis added). "[T]his chapter" is Chapter 152, which adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *Id.* § 152.101. Chapter 152 deals generally with the proper court in which custody disputes regarding a child are to be heard and the authority to be given to child custody determinations of other courts. *See id.* §§ 152.001–.317.

By its plain language, Section 152.104(a) does not purport to apply all ICWA provisions to all facets of Texas child custody proceedings. By limiting its scope to "this chapter," it defers to ICWA only in jurisdictional issues arising under the UCCJEA.[12] No such issues occurred in this proceeding. Except for the Navajo Nation's attempt to remove the case to a tribal court—the denial of which the Navajo Nation has not appealed[13]—all parties have agreed that the trial court is the court of continuing, exclusive jurisdiction for this case. *See id.* § 152.202. Thus, the trial court erred by holding that Section 152.104(a) of the Family Code purported to make all of ICWA applicable to all facets of Texas child custody proceedings, independent of federal law. The placement preferences of ICWA at the heart of this case are not affected by whether Section 152.104(a) violates the Texas constitution; thus, that ruling of law was unnecessary to the disposition of this case.[14]

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[12]By comparison, other states have specifically incorporated ICWA into state proceedings. *See, e.g.*, Cal. Welf. & Inst. §§ 224–224.6 (incorporating specific provisions of ICWA into California law); Okla. Stat. tit. 10, § 40.1 (stating that the Oklahoma Indian Child Welfare Act was intended to clarify "state policies and procedures regarding the implementation by the State of Oklahoma of the federal Indian Child Welfare Act"), § 40.6 ("The placement preferences specified in 25 U.S.C. Section 1915, shall apply to all . . . preadoptive, adoptive and foster care placements.").

[13]ICWA allows such a removal only if no parent objects. 25 U.S.C.A. § 1911(b).

[14]We therefore agree with the Navajo Nation that Section 152.104(a)'s constitutionality has no bearing on this case. Accordingly, we also decline to address whether Section 152.104(a) violates the Texas constitution. *See In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003).

To summarize, the trial court purported not to decide whether ICWA violates the federal Constitution, but its ruling that ICWA violates the anticommandeering doctrine is actually a determination that ICWA is unconstitutional. Although the trial court purported not to apply ICWA to the proceedings, it allowed the Navajo Nation to participate in the trial[15] and made A.J.—a nonparty whose interest is being represented only by the Navajo Nation—a joint managing conservator. And, as an alternative ruling, the trial court found that even if ICWA is constitutional and applied to the proceedings, good cause existed to deviate from its preferred placement scheme. *See* 25 U.S.C.A. § 1915(a)–(b) (providing placement preferences "in the absence of good cause to the contrary"). Thus, the trial court applied ICWA while purporting not to apply ICWA.

The trial judge understandably attempted to avoid squarely addressing whether ICWA violates the United States Constitution. A federal district judge has held that it does, a Fifth Circuit panel—with one judge dissenting—has held that it does not, and the Fifth Circuit court has vacated the panel opinion and judgment and will be rehearing the case en banc. Therefore, this exact issue has been—and will be—extensively briefed and argued in the federal system in a case in which both the State of Texas and the Bs are parties. But in his attempt to fashion a remedy that

[15] *See* 25 U.S.C.A. § 1911(c) (giving Indian child's tribe the right to intervene at any point in a state proceeding for the foster care placement of, or termination of parental rights to, an Indian child).

incorporates the important concerns of ICWA[16] and Texas law regarding the best interest of the child,[17] the trial judge made conflicting rulings in this case that are difficult to harmonize. In attempting to address the interests of all parties and provide alternative relief in the event the Fifth Circuit (or perhaps ultimately the United States Supreme Court) decides ICWA is constitutional,[18] the trial judge reversibly erred. Because, as we explain below, the trial judge's sua sponte conservatorship ruling necessitates a new trial regardless of the federal system's conclusion regarding ICWA's constitutionality, we need not reach the federal constitutional issue[19] and therefore do not grant any of the parties relief under their related issues.

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[16]*See id.* § 1901–02.

[17]The Navajo Nation contends "that ICWA does not abandon—nor compel trial courts to abandon—the best interests of children. Instead, ICWA supplements the traditional best interest standards with a modified best interest standard and stated placement preferences, which are not absolute."

[18]Practically speaking, we do not quarrel with this approach. Failing to comply with certain provisions of ICWA can result in a challengeable, infirm judgment well after the trial court has made a ruling and the child has bonded with a caregiver, *see id.* § 1913(d) (allowing an Indian child's parent who voluntarily consented to adoption to petition to vacate it on duress or fraud grounds), §1914 (allowing Indian child's parent or tribe to petition to invalidate foster care placement or termination for violation of Sections 1911, 1912, 1913), a result which goes against bedrock principles underpinning Texas family law that are focused on promoting stability and permanence for children. Following the procedural requirements of ICWA for the termination—while recognizing the tension that can seemingly result in some cases between its stated goals and a child's best interest—is an understandable approach until the federal constitutional question is settled.

[19]Likewise, we need not address the Navajo Nation's subargument that the AG and the Bs are bound by issue preclusion, an argument which the Navajo Nation

Evidence Does Not Support Ruling Under Either Texas Law or ICWA

The Navajo Nation's fourth issue, and the Bs' fourth and fifth issues,[20] advocate that the trial court's joint managing conservatorship decision should be reversed: the Navajo Nation because it contends ICWA requires placement with A.J. only, in that the evidence is legally and factually insufficient to show that good cause exists to deviate from ICWA's Indian-centered placement preferences; and the Bs because (1) they contend that the trial court's decision is not in Y.J.'s best interest under Texas law[21] and (2) even if ICWA applies, the evidence shows that good cause exists to deviate from ICWA's placement preferences. Because both sides' complaints require an examination of the trial evidence, we review their issues together.

Standard of review

The parties agree that we review the trial court's conservatorship decision for an abuse of discretion. *See In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007); *In re A.K.M.*,

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concedes has been rendered moot by the Fifth Circuit's subsequent actions in the case pending in that court, except to the extent that the complaint must be raised for preservation purposes.

[20]We do not reach the Navajo Nation's third issue, which argues about alleged error in pre-termination placement of Y.J. Because both parents' rights have been terminated and no party challenges the termination, even if error occurred in the pre-termination placements, the Navajo Nation would not be entitled to relief. *See In re A.M.*, 570 S.W.3d 860, 866–67 (Tex. App.—El Paso 2018, no pet.) (citing, and agreeing with reasoning of, Montana and Iowa cases holding similarly); *see also* Tex. R. App. P. 47.1.

[21]*See generally Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976) (setting forth nonexhaustive factors courts generally use in analyzing child's best interest).

No. 02-12-00469-CV, 2013 WL 6564267, at *2 (Tex. App.—Fort Worth Dec. 12, 2013, no pet.) (mem. op.). A trial court abuses its discretion if it makes an erroneous legal ruling even in an unsettled area of law. *See In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (orig. proceeding); *In re United Scaffolding, Inc.*, 301 S.W.3d 661, 663 (Tex. 2010) (orig. proceeding). Thus, whether the evidence supporting the decision is legally and factually sufficient is relevant in deciding whether the trial court abused its discretion. *See In re T.D.C.*, 91 S.W.3d 865, 872 (Tex. App.—Fort Worth 2002, pet. denied) (op. on reh'g).

Evidentiary review

Termination of parental rights was not the focus of the trial because Mother relinquished her rights and a father could not be found; instead, the primary consideration before the trial court was where to place Y.J. after termination. The Bs' primary focus was on adoption, whether by immediate placement with them and eventual adoption after a conservatorship or by waiver of the six-month requirement and immediate adoption.

The Department's caseworker

As stated before, the Department advocated placement of Y.J. solely with A.J. The caseworker testified that although delays in the Department's IT system had prevented the completion of an ICPC home study for A.J.,[22] she had no concerns

[22]The Department had sent the request to Arizona, who then had to send the request to the Navajo Nation. Once the Navajo Nation had completed its home study

about placement with A.J. after speaking with her on the phone. According to a representative from the Navajo Nation, the ICPC home study for A.J. would have been fully completed less than a week after trial. A.J. lives close to Y.J.'s four oldest half siblings and sees them at least once a week. A.J. had not visited Y.J. while the case was pending. When asked why, the caseworker responded, "Just financially and she's out of state. It's hard to come to Texas."

Y.J. was very bonded to the foster family she was living with at the time of trial, and the Department had no concerns about that home. The Department planned for Y.J. to stay there pending completion of A.J.'s home study. According to the caseworker, the Department would have recommended A.J. for placement even if ICWA did not apply because A.J. is a family member. According to the caseworker, Y.J.'s best interest was to be placed with A.J. instead of the Bs because of "family ties," which includes extended family. A.J. and Y.J.'s oldest half sibling had visited with Y.J. the day before trial.

The caseworker stated that the Bs had offered Mother an open adoption,[23] in which Mother would continue to have contact with Y.J. The Department did not think an open adoption was in Y.J.'s best interest. But the caseworker testified that it

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and other requirements, it would send the materials back to Arizona, which would then send the final approval to Texas. At the time of trial, Texas had sent the original request to Arizona, but Arizona had not yet forwarded it to the Navajo Nation.

[23]The caseworker was never asked to explain how she knew the Bs had offered an open adoption, but she said that she had become concerned because she had heard about a "possible" open adoption.

was in Y.J.'s best interest to stay in her then-current foster placement "for up to . . . two weeks" until the ICPC approval was finished, "knowing it can be finished with[in] less than a week." The Department intended to place Y.J. with A.J. upon Arizona's ICPC approval.

According to the caseworker, from September 2018 to the time of trial, the Bs had possession of and access to Y.J. for at least one visit per month, anywhere from overnight to a full day. Y.J.'s foster mother set up these visits. When asked whether the sibling contact between Y.J. and Alan would be maintained if Y.J. were to be placed with A.J., the caseworker responded, "I believe [Y.J.] will know where to contact her brother and how that initial -- initial bond that she created when she met him here."

Although the foster parent was adoption motivated, the foster family was not ICWA compliant.

CASA representative

Stacey Main, the CASA representative for Y.J., had also been Alan's advocate. Main recommended placing Y.J. with the Bs because of the relationship they already had with her and to minimize "trauma."[24] She also acknowledged that naming the Department as Y.J.'s managing conservator would facilitate financial subsidies for Y.J.

[24]Main said that CASA had trained her in trauma, utilizing a continuing series of two-hour lectures from a doctor who specializes in childhood trauma.

According to Main, Y.J. already had an attachment to her foster mother and to the Bs. But Main agreed it was important for Y.J. to bond with her oldest half siblings and extended family in Arizona. As to placement with A.J., Main opined, "I look at it as a win-win either way. If she goes with the [Bs], she wins. If she goes with [A.J.], she wins. If she stays with the foster home, she wins. I like them all." According to Main, keeping Y.J. "with family" was the main goal, and Y.J. would have contact with her family with any of those placements.

Y.J. had normal, sibling-type interactions with the Bs' children. Her then-current foster parents "adore[d]" her and were bonded to her.

Navajo Nation expert

Celeste Smith, a senior social worker with Navajo Children and Family Services Indian Child Welfare Act, testified as an expert on the Navajo Nation. Smith is an enrolled member of the tribe who lives on the reservation. Although Smith agreed that termination of the parents' rights was in Y.J.'s best interest, she recommended placement of Y.J. with A.J.

Smith had initiated a home study for A.J., but she had not received it by the time of trial because the ICPC request with Arizona had not been completed. Nevertheless, she had no concerns about A.J. based on background checks.[25] Smith estimated that when she received the ICPC request from Arizona, she could finish the

[25]State and federal background checks, and Navajo Department of Family Services background checks, for A.J. and her adult son living with her showed "no findings."

home study within a week. The only remaining items were for A.J. to obtain a Navajo Nation foster care license and for Smith to check two additional references. A.J. had already completed the foster care "trainings," and Y.J. could be fully placed with A.J. before A.J. was officially licensed as a foster parent.

Additionally, according to Smith, A.J.'s home was clean, safe, and appropriate for Y.J. A.J. lived with her adult son in a two-bedroom home with an addition in back for which a doorway needed to be cut. Y.J. would sleep in A.J.'s bedroom with her, which is not uncommon for Navajo. A.J. is a homemaker, which is a traditional Navajo role, and her children help support her and take care of her bills, which is also Navajo custom. A.J. receives food stamps and her monthly income varies. Her thirty-three-year-old son and other family members would provide Y.J.'s care when she could not, such as when she was helping care for her chronically ill mother and brother. According to A.J., Y.J. will take the bus to school when she gets older.

Smith testified that the references she contacted for A.J. acknowledge that she is a good candidate for placement. A.J.'s family, including the family living on the reservation, are "very close" and were supportive of A.J.'s decision to seek placement of Y.J. with her. Y.J.'s maternal grandmother, A.J.'s sister-in-law, communicates with A.J. and has contact with Mother. According to Smith, Y.J.'s maternal grandmother returns to the reservation "on and off."[26]

[26]This evidence renders somewhat curious the Department caseworker's concern that the Bs would seek an open adoption. Although the trial court could not

Smith further testified about the importance of the Navajo culture to Y.J.: "[I]t's her whole identity. It's going to help . . . to know where she comes from, what her clans are, what . . . Navajo culture traditions there are for her. From . . . birth . . . to [her] elderly age, she could have the ceremonies, the teachings, in order to . . . [have] a balance[d] life for her." Smith explained that children are sacred to the Navajo and that the tribe is always looking to its children's future. Smith explained that contact with Y.J.'s oldest half siblings, especially the oldest who understands the Navajo language and traditional Navajo foods and customs, would help Y.J.'s cultural understanding of what it means to be a Navajo girl and woman. It is especially important to hand down the Navajo language. The Navajo Nation's concerns about non-Navajo placement were the loss of cultural and institutional knowledge of the Navajo Nation and the difficulty for children living outside the reservation to participate in Navajo ceremonies because they generally are not open to the public. But Navajo children who do not live on the reservation may participate in traditional ceremonies with their family. Smith acknowledged that Y.J. would not receive benefits for being a tribal member but would receive free medical care.

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have judicially noticed for its truth the Department's statement in the affidavit attached to its removal petition that Y.J.'s maternal grandmother had a CPS history in New Mexico, *see In re R.A.*, No. 02-18-00185-CV, 2018 WL 5832148, at *8 (Tex. App.—Fort Worth Nov. 8, 2018, no pet.) (mem. op.), it could have judicially noticed that the Department had made such an allegation. Nevertheless, it is undisputed that A.J. does not have contact with Mother.

According to Smith, in January 2019, when Mother found out that A.J. was also interested in placement, Mother told her that she would be satisfied with placement of Y.J. with either the Bs or A.J. But Smith did not find out about Mother's affidavit of relinquishment, in which she again expressed a preference for the Bs, until the day before trial.

C.B.

C.B. testified that the Bs had found out about Y.J.'s birth through Alan's biological paternal grandmother, who is a Cherokee. The Bs keep in touch with her and the adoptive mother of Mother's fifth and sixth children, who also have a Cherokee birth father.

C.B. testified that the Bs had not promised Mother an open adoption but had not closed the door to possible supervised visitation between Y.J. and Mother if Mother were to stay sober and was consistent with her promises. In other words, they were "open to being open." But C.B. also said that the Bs would comply with any court order that Mother have no contact with Y.J. Additionally, Mother had never requested visitation nor had any contact with Alan.

According to C.B., Alan "understands that [Y.J.'s] his sister" and is excited to see her. She "lights up" around him. All of the Bs' children are "very playful" with Y.J., and she likes the attention and interaction. The Bs "feel very strongly that [Y.J. and Alan] should grow up together and support and love each other" because of their important sibling bond. The Bs were concerned that if Y.J. were placed with A.J., she

might never see Alan again. Their plan was for Y.J. to sleep in a room with Alan until "it was age appropriate necessary" for her to have her own room.

Although the Bs met with Mother after they found her in the county jail, they did not ask her to request them for placement, nor did they discuss an open adoption. C.B. was not present when Mother signed the affidavit of relinquishment, and he did not ask her to sign it. He did not know where it was signed or created because "[a]ll of that was handled through her attorney."

The Bs were trying to learn Navajo culture. They had used age-appropriate books for that purpose, but because Alan was only three and a half at the time of trial, the books were more "lifestyle" books. To involve Alan in the Cherokee culture, they maintained a relationship with his biological family, particularly his biological paternal grandmother. They had "sought recommendations from her . . . [and] directions [they] could point him in." They had attended two public powwows in the Dallas/Fort Worth area and were educating themselves, as C.B. put it, to "better educate our child and our children, . . . as a family, what it means to be native, the history, the culture. . . . [A]s an outsider looking in, as best as we can, that is difficult[,] and we have always welcomed any resources that are there to help us in that process." C.B. acknowledged that because the Cherokee tribe has been more involved in Alan's life, he has a stronger connection to that tribe, but the Bs do not prefer one tribe over another. Alan's Navajo family had not attempted to contact him, but C.B. said the Bs

"would welcome any contact from [that] family to help" raise him. C.B. did not think that Alan's Navajo family's lack of contact with him would change, though.

When asked, "You understand the conundrum here, that we have more than just one sibling in this picture?" C.B. answered, "Yes." He acknowledged that "the problem of trying to prioritize which sibling is most important to have a relationship with moving forward" was "very complicated."

J.B.

J.B. acknowledged that the Bs did not know much about Navajo culture. J.B. had tried to contact Y.J.'s maternal grandmother and had texted her pictures of Alan at Mother's request. J.B. testified that Y.J. had visited with the B family one day each month between September 2018 and January 2019 and once each month for a forty-eight-hour period between January 2019 and trial.

Summary of the Bs' adoption report for Alan

The trial court admitted into evidence a favorable 2017 adoption report for the Bs that CK Family Services had completed for Alan's foster placement and adoption. The Department placed Alan with the Bs the day he was removed from Mother's care. At the time of the report, the Bs were in their late thirties; they have two biological children, who were both under the age of ten. C.B. was a college-educated stay-at-home father, and J.B. was an employed in the medical field with a substantial monthly income. The interviewer described their marriage as "stable and loving," their family as "loving and affectionate," and their characters as "compassionate." The

home environment was safe; they lived in a four-bedroom, three-bath home with their children and a dog. Both Bs had passed criminal and child abuse background checks.

Regarding Alan's biological family, the report stated that the Bs had maintained phone contact with his paternal grandmother and that they were "open to . . . have contact, as long as it is appropriate," with biological family members to ensure he has a "familial and cultural connection." Additionally, it stated the Bs "want[ed] to ensure they learn and implement [Alan's] culture into their home and lives due to [his] being Navajo and Cherokee Indian." At the time, Alan had never met any of his oldest half siblings.

CK Family Services updated the report in October 2018 after the Bs became interested in adopting Y.J. The addendum was not as detailed as the original report but showed no significant changes.

A.J.

A.J. testified that she lives on the Navajo reservation close to many family members. Y.J.'s four oldest half siblings live with A.J.'s older sister about twenty-seven miles from her. A.J. sees Y.J.'s oldest half siblings twice a week, but Y.J. would see them probably every other day. A.J. has a lot of extended family members who would help with Y.J.'s care and take care of anything she could not.

A.J. said she would follow any order that Y.J. have no contact with Mother; A.J. had not heard from Mother for many years.

A.J. supplements her income by making and selling crafts, and her four sons and her daughter help her financially, which is normal for Navajo families on the reservation. A.J. testified that she would be able to support Y.J. financially.

A.J. did not know much about Alan, but Y.J.'s maternal grandmother had told her "a little bit." She did not know about Y.J.'s other children in the DFW area. When asked, "When you were asked about coming out here to visit [Y.J.], has cost been a consideration -- has cost been a problem for you to be able to come out here to visit *up until now*?," she answered "No." [Emphasis added.]

Findings

The trial judge made extensive findings on the record and in written findings of fact and conclusions of law.

On the record, the trial judge stated that he had applied the *Holley* factors in deciding who should be Y.J.'s managing conservator. He ordered that Y.J. be enrolled in a Navajo language class, which the Navajo Nation had a duty to identify, beginning as soon as possible and continuing until she turned fourteen. The judge acknowledged that "[w]hen a person leaves a [n]ation, there is an expectation that you will lose some of your culture. . . . [A]nd there's expectation your [descendants] will also slowly lose some of their culture but that's part of the decision that we make to immigrate to other cultures and other countries." He recognized that Y.J.'s Navajo culture is part of her identity and that preserving culture and heritage can be a struggle. He stated that "[t]he goals of ICWA are noble and most often what is best for the children." As for

the dual joint managing conservatorship, he explained, "I'm trying to find that mix to ensure that we give this child every chance possible to maintain ties with . . . her rich Navajo history and culture, in the meantime, doing what I feel like is best for the child at this point." The judge indicated that "a large factor in this [ruling] was the relationship that she would have with her biological brother who is the closest sibling in age to her."

Acknowledging the evidence about the importance of tribal rituals that occur when a child reaches certain milestones, the trial court said that there is no way to plan those and he "certainly wish[ed] there was a way for the Court to plan other things out to make sure she's in touch with her heritage and not lose sight of that." But the judge went on to say that—without regard to any of the parties' financial resources—he thought it was in Y.J.'s best interest to live with her half sibling who was closest to her in age while maintaining her cultural ties to the Navajo Nation. He stated, "[T]here was no bad situation for [Y.J]."

The trial court signed findings of fact and conclusions of law consistent with its verbal findings. Specifically, the trial court found and concluded that "it is in the child's best interest to enter into this joint managing conservatorship arrangement to place her in a loving home with her half sibling who is closest to her in age by several years, while still ensuring the child's continued connection to Navajo culture and family." The trial court also found and concluded that the Bs would provide Y.J. "with a stable and loving home environment that gives her the care, nurturance,

guidance, and supervision necessary for [her] safety and development" and that it was in Y.J.'s best interest "to have her primary residence in the same home with her sibling, [Alan], who lives with [them] as their adopted son." The trial court further found that it was in Y.J.'s best interest for A.J. to have "the right of possession . . . for designated summer, weekend, and holiday periods." Finally, the trial court concluded that "the best interest of [Y.J.] provides good cause to place [her] with the [Bs] pursuant to 25 U.S.C. § 1915(b)."

Best-interest determination without consideration of ICWA

The Bs contend that the trial court abused its discretion under Texas law, without regard to ICWA's placement preferences, by naming A.J. a joint managing conservator and mandating a possession and access schedule akin to parents living more than one hundred miles apart. Their argument discusses the *Holley* factors and places great emphasis on Y.J.'s sibling relationship with Alan.

The nonexhaustive *Holley* factors include

(A) the [child's] desires . . . ;

(B) the [child's] emotional and physical needs[,] . . . now and in the future;

(C) the emotional and physical danger to the child now and in the future;

(D) the parental abilities of the individuals seeking custody;

(E) the programs available to assist these individuals to promote the [child's] best interest . . . ;

(F) the plans for the child by these individuals or[, if applicable,] by the agency seeking custody;

(G) the stability of the home or proposed placement;

(H) the [parent's] acts or omissions . . . indicat[ing] that the existing parent–child relationship is not a proper one; and

(I) any excuse for the [parent's] acts or omissions . . . .

544 S.W.2d at 371–72 (citations omitted).[27] We need not consider (H) and (I) because whether Y.J. should be returned to her parents is not an issue.

Y.J. was too young to articulate her desires, and the evidence showed that she had a normal, healthy infant's response to caregivers and other children. We need not compare the degree of bonding with Y.J.[28] as between the Bs and A.J. because the evidence showed that Y.J.'s primary bond at the time of trial was with her foster mother, who had the primary care of and access to Y.J. by virtue of the foster care placement. There was no evidence that she had any special emotional or physical

[27]We employ the *Holley* factors in reviewing conservatorship orders, in addition to termination orders. *See In re R.M.*, No. 02-18-00004-CV, 2018 WL 2293285, at *5 (Tex. App.—Fort Worth May 21, 2018, no pet.) (mem. op.).

[28]If ICWA applies, federal rules implementing it provide that "[a] placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." 25 C.F.R. § 23.132(e) (2016).

needs that could not be met by either the Bs or A.J. separately, nor was there any evidence of a particular emotional or physical danger to her other than theoretical contact with Mother. Both the Bs and A.J. expressed a willingness to protect Y.J. from harmful contact with Mother.

The evidence showed that both the Bs were excellent parents. There was not much evidence specific to A.J.'s parenting abilities, but the evidence showed that she had her own adult children who helped support her and that she maintained close ties to her family and extended family. There was not much evidence about any programs available to assist the Bs and A.J. other than that Y.J. would be entitled to health care on the reservation and would have access to Arizona Medicaid. She would also have access to an early intervention program and Head Start. The evidence showed that Navajo culture includes assisting older tribal members with their needs, and A.J.'s family would help her with child care. There was also evidence that naming the Department as managing conservator would have facilitated "financial subsidies" for Y.J.

The Bs wanted to adopt Y.J. She would be raised in a home with continual daily access to the half sibling that is closest to her in age, in a loving home with two other children. The Bs intended to facilitate contact with her two half siblings in the DFW area and expressed a willingness to provide contact with her other half siblings and family on the reservation and to educate her in Navajo culture. The Navajo Nation asked only for placement of Y.J. with A.J.; there was no evidence that A.J. had

any plans to adopt Y.J. if the child were to be placed with her. But Y.J. would be immersed in her Navajo culture and heritage, have weekly visits with four of her oldest half siblings, and have close contact with her extended Navajo family.

The evidence showed that both homes, individually, would be stable choices for Y.J., and each would fulfill a different primary need: with the Bs, a home with daily contact with her half sibling closest in age, the opportunity to see other half siblings living close by (and possibly her half siblings living on the reservation), and occasional interaction with the Navajo tribe directed by non-Indian parents; and with A.J., a home without daily sibling interaction but with frequent contact with her four oldest siblings and extended family and with immersion in Y.J.'s Navajo culture and heritage (but with possibly little to no contact with her half siblings in Texas).

Considering the *Holley* factors separately, then, without considering the sibling-attachment and contact evidence, the evidence is favorable for either the Bs or A.J. to provide a home for Y.J. But we are reviewing the trial court's decision to name all three nonparent joint managing conservators. No evidence supports the trial court's decision that Y.J.'s stability and permanence would be best served by the arrangement ordered. As the Bs note, the standard possession and access provisions generally exist for when parents—with whom the child already has an existing relationship—divorce or are not married and the trial court must order custody in a way that maintains an already existing bond between the child and those two parents. That is not the case here. And the arrangement seriously undermines the possibility that Y.J. could ever be

adopted. *See* Tex. Fam. Code Ann. § 162.009 (six-month residency requirement),[29] § 162.010 (requiring written consent to adoption by "a managing conservator" unless "the managing conservator" is a petitioner, but not specifically addressing consent required when a child has more than one—nonaligned—joint managing conservator), § 263.3026 (including as only permanency goal after termination by Department, "adoption of the child by a relative or other suitable individual"). Thus, here, the joint managing conservator arrangement does little to promote a stable and permanent solution for Y.J.

Based on the trial judge's comments, it is clear that he was trying to place Y.J. where she would develop and enjoy a daily sibling attachment, have the most access to all of her half siblings, and still maintain her relationship with and access to her Navajo culture and extended family.[30] But in doing so, the trial judge fashioned a remedy that seriously undermines Y.J.'s stability and permanence, particularly in her younger years.[31] Not only is establishing a stable, permanent home for a child a compelling state interest, the need for permanence is a paramount consideration for a

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[29]A.J. could not meet this requirement under the current order.

[30]We also have no quarrel with the trial judge's suggestion that this could be a proper best-interest consideration under Texas law, regardless of ICWA's application, especially considering that the record includes expert testimony about the benefit to Y.J. of being a part of her heritage and culture.

[31]For example, without stating why it would be in her best interest, the order provides that when Y.J. turns five, she may fly alone between the airport nearest the Bs' residence and the airport nearest A.J.'s residence.

child's present and future physical and emotional needs. *In re J.W.*, No. 10-18-00344-CV, 2019 WL 5078678, at *8 (Tex. App.—Waco Oct. 9, 2019, no pet. h.) (mem. op. on reh'g); *see* Tex. Fam. Code Ann. § 153.001(a)(2); *In re A.B.*, 412 S.W.3d 588, 609 n.15 (Tex. App.—Fort Worth 2013) (en banc op. on reh'g), *aff'd*, 437 S.W.3d 498 (Tex. 2014). Accordingly, we hold—without reference to ICWA—that the trial court abused its discretion by naming the Bs and A.J. the child's joint managing conservators with a possession and access schedule akin to parents living more than 100 miles apart.

We sustain the Bs' fifth issue.

Good cause under ICWA

The trial court likewise abused its discretion in making its alternative good cause finding under ICWA because the evidence is factually insufficient to support it.

A party seeking to establish good cause for not following ICWA's placement preferences for adoptive or preadoptive placement—here, with a member of the Indian child's extended family—must bring forth clear and convincing evidence of good cause. *See* 25 C.F.R. § 23.132(b) (2016).[32] That good cause must be based on at

[32]This standard is set forth in the Bureau of Indian Affairs' Final Rule, which clarifies the "minimum Federal standards governing implementation of . . . ICWA to ensure that ICWA is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families." *Id.* § 23.101 (2016). The Bs do not raise independent constitutional challenges to ICWA and the current version of the Final Rule. Thus, in assuming ICWA's application for purposes of this part of our analysis, we also presume—without deciding—the constitutionality of the Final Rule.

least one of several considerations; here, the two possible considerations are "[t]he request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference" and "[t]he presence of a sibling attachment that can be maintained only through a particular placement." *Id.* § 23.132(c)(1), (3).

To determine if evidence is legally sufficient under the clear-and-convincing standard, we look at all the evidence in the light most favorable to the challenged finding to determine whether a reasonable factfinder could form a firm belief or conviction that the finding is true. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). Evidence is factually insufficient under the clear-and-convincing standard if, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction that the finding is true. *Id.*

Mother's placement preference

In Mother's first affidavit stating her preference that Y.J. be placed with the Bs, she averred that she had reviewed the potential placement with the Colorado couple and preferred the Bs so that Y.J. would be "placed with[] her brother and his adoptive family rather than with strangers who live several hundred miles away." A.J. had not been identified as a potential placement at that time. Although this evidence is legally sufficient to meet the clear-and-convincing standard, Mother's affidavit of voluntary relinquishment—which also stated her preference for Y.J.'s placement with the Bs but

which she signed after A.J. had been identified as a potential placement—did not state that Mother had reviewed A.J. as a potential placement. And Smith testified that Mother had indicated at one time that she preferred placement with either the Bs or A.J. Thus, the evidence is factually insufficient under the clear-and-convincing standard to support the trial court's finding of good cause based on a parent's preference.

Sibling attachment maintainable only with a particular placement

Y.J. has seven half siblings: Alan who lives with the Bs, the four oldest who live in Arizona on the reservation, and two who live close to the Bs in the DFW area. The trial court was clearly concerned with how best to foster all of those sibling attachments and was faced with an incredibly difficult decision as to how to prioritize the importance of each of those attachments to Y.J.

The evidence showed that Y.J. was the closest in age to Alan, that she had visited with him, and that Alan had formed an attachment to her. Although Y.J. was by all accounts a happy infant with no discernable attachment problems—and therefore could be expected to "light[] up" when around other small children such as Alan—the evidence of Alan's attachment to her shows a benefit of that relationship *to Y.J.*[33] as she ages. She would also be living in a home with, and have daily interaction

[33]The Navajo Nation attempts to minimize this evidence, arguing that preservation of sibling attachments should be a guiding concern only when two siblings had been living together before being removed from a home. We do not

with, two nonbiological older siblings. The evidence also shows that the Bs have cultivated contact with Y.J.'s other two half siblings that do not live in Arizona and desire to continue that contact. C.B. testified that the Navajo family had not attempted to contact Alan and that he did not think Y.J. would have much contact with Alan if she were to be placed with A.J. Although A.J. testified that it had been no problem to come to Texas up until the time of trial, she had only attended trial and visited with Y.J. once. There was no evidence she or the family could afford to maintain cross-country visits with Alan or her other two DFW-area siblings. And Y.J. would not be living in a home with any of her half siblings in Arizona.

But the evidence also showed that A.J. and Y.J.'s oldest half sibling had visited with her once before trial and that her close Navajo family was excited at the prospect of having Y.J. live with A.J. Although the trial court found that the Bs could best maintain the sibling relationships, it ordered A.J. to pay the cost of Y.J.'s travel to Arizona after the age of five and to accompany her on all flights during summer 2022.[34] The evidence also showed that even though the oldest half siblings lived about half an hour from A.J., she saw them frequently and anticipated that Y.J. would see them every other day. This is in keeping with Smith's testimony about the importance

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agree that the trial court's consideration of the importance of sibling relationships to a child when making a best-interest determination is so limited.

[34]This provision appears to conflict with another provision in the order requiring the Bs to deliver Y.J. to A.J.'s residence, and for A.J. to surrender Y.J. at her residence, for the "four continuous week[]" summer 2022 possession.

of family in Navajo culture. Finally, the evidence showed that the Bs wanted to maintain a relationship between Alan and Y.J. and likely have the financial means to travel to facilitate visits. Thus, there is conflicting evidence of a sibling attachment that could be maintained only through a particular placement.

We hold that the evidence regarding sibling attachment conflicts such that the trial court's finding that good cause existed to deviate from Section 1915's placement preferences is factually insufficient.[35] Because the evidence is factually insufficient to support the trial court's good cause finding under either of the possible considerations set forth in the Final Rule, we conclude that the trial court abused its discretion in making that finding. We thus sustain the Navajo Nation's fourth issue and overrule the Bs' fourth issue.

Conclusion

Having sustained the Navajo Nation's fourth issue and the Bs' fifth issue, we reverse only the part of the trial court's June 28, 2019 order appointing the Bs and A.J. joint managing conservators of Y.J., and we remand the case for a new decision on conservatorship, or adoption, as the case may be. Although we limit remand to the conservatorship/adoption decision, we do not limit the trial court's reconsideration of previously raised legal issues that we have not ruled on, such as ICWA's

[35]Because we determined that the evidence supporting parental consent is legally sufficient, we need not address the legal sufficiency of the sibling-attachment factor.

constitutionality, or the trial court's consideration of new issues or evidence raised regarding conservatorship.

/s/ Wade Birdwell

Wade Birdwell
Justice

Delivered: December 19, 2019

Appendix 5

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00235-CV

IN THE INTEREST OF Y.J., A CHILD	§	On Appeal from the 323rd District Court
	§	of Tarrant County (323-107644-18)
	§	December 19, 2019
	§	Opinion by Justice Birdwell

JUDGMENT

This court has considered the record on appeal in this case and holds that the trial court reversibly erred in the part of its order awarding joint managing conservatorship. We reverse the part of the trial court's order appointing joint managing conservators, and we remand the case to the trial court for a new trial on the conservatorship and adoption issues, as set forth in this court's memorandum opinion. The trial court must commence a new trial no later than 180 days after the date this court issues the mandate in this appeal. *See* Tex. Fam. Code Ann. § 263.401(b-1).

It is further ordered that each party shall bear their own costs of this appeal, for which let execution issue.

SECOND DISTRICT COURT OF APPEALS

By /s/ Wade Birdwell
Justice Wade Birdwell

Appendix 6

25 USCS § 1901

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963)

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution [USCS Constitution, Art. I, § 8, cl 3] provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes [Tribes]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) 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;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) 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.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, § 2, 92 Stat. 3069.

25 USCS § 1902

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963)

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, § 3, 92 Stat. 3069.

End of Document

25 USCS § 1903

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963)

§ 1903. Definitions

For the purposes of this Act [25 USCS §§ 1901 et seq.], except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689) [43 USCS § 1606];

(4) "Indian child" means 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;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(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 3(c) of the Alaska Native Claims Settlement Act (85 Stat. 688, 689), as amended [43 USCS § 1602(c)];

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18, United States Code and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

History

HISTORY: Act Nov. 8, 1978, P. L. 95-608, § 4, 92 Stat. 3069.

25 USCS § 1911

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963) > CHILD CUSTODY PROCEEDINGS (§§ 1911 — 1923)

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction. An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided* , that such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes. The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 101, 92 Stat. 3071.

25 USCS § 1912

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963) > CHILD CUSTODY PROCEEDINGS (§§ 1911 — 1923)

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation. In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided* , That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel. In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13).

(c) Examination of reports or other documents. Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures. Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide

remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child. No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child. No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 102, 92 Stat. 3071.

25 USCS § 1913

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963) > CHILD CUSTODY PROCEEDINGS (§§ 1911 — 1923)

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents. Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent. Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody. In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations. After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

History

25 USCS § 1914

Current through Public Law 116-39, approved August 6, 2019.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 101, 102, and 103 of this Act [25 USCS §§ 1911, 1912, and 1913].

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 104, 92 Stat. 3072.

25 USCS § 1915

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963) > CHILD CUSTODY PROCEEDINGS (§§ 1911 — 1923)

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences. In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

(1) a member of the child's extended family;

(2) other members of the Indian child's tribe; or

(3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences. Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences. In the case of a placement under subsection (a) or (b) of this section, 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, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided* , That

where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable. The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability. A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 105, 92 Stat. 3073.

25 USCS § 1916

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963) > CHILD CUSTODY PROCEEDINGS (§§ 1911 — 1923)

§ 1916. Return of custody

(a) Petition; best interests of child. Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 102 of this Act [25 USCS § 1912], that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure. Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this Act [25 USCS §§ 1901 et seq.], except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 106, 92 Stat. 3073.

End of Document

25 USCS § 1917

Current through Public Law 116-39, approved August 6, 2019.

§ 1917. Tribal affiliation information and other information of protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 107, 92 Stat. 3073.

25 USCS § 1918

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963) > CHILD CUSTODY PROCEEDINGS (§§ 1911 — 1923)

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary. Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession.

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 101(a) of this Act [25 USCS § 1911(a)] are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 101(b) of this Act [25 USCS § 1911(b)], or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 101(a) [25 USCS § 1911(a)] over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval. If the Secretary approves any petition

under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected. Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 109 of this Act [25 USCS § 1919].

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 108, 92 Stat. 3074.

25 USCS § 1919

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963) > CHILD CUSTODY PROCEEDINGS (§§ 1911 — 1923)

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage. States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected. Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 109, 92 Stat. 3074.

End of Document

25 USCS § 1920

Current through Public Law 116-39, approved August 6, 2019.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 110, 92 Stat. 3075.

25 USCS § 1921

Current through Public Law 116-39, approved August 6, 2019.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this title [25 USCS §§ 1911–1923], the State or Federal court shall apply the State or Federal standard.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 111, 92 Stat. 3075.

25 USCS § 1922

Current through Public Law 116-39, approved August 6, 2019.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this title [25 USCS §§ 1911–1923] shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this title [25 USCS §§ 1911–1923], transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 112, 92 Stat. 3075.

25 USCS § 1923

Current through Public Law 116-39, approved August 6, 2019.

§ 1923. Effective date

None of the provisions of this title [25 USCS §§ 1911–1923], except sections 101(a), 108, and 109 [25 USCS §§ 1911(a), 1918, and 1919], shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after the enactment of this Act [enacted Nov. 8, 1978], but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title I, § 113, 92 Stat. 3075.

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs. The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to—

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted

program. Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under titles IV-B and XX of the Social Security Act [42 USCS §§ 620 et seq. and 1397 et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this Act [25 USCS §§ 1901 et seq.]. The provision or possibility of assistance under this Act [25 USCS §§ 1901 et seq.] shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV-B and XX of the Social Security Act [42 USCS §§ 620 et seq. and 1397 et seq.] or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title II, § 201, 92 Stat. 3075.

25 USCS § 1932

Current through Public Law 116-39, approved August 6, 2019.

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to—

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title II, § 202, 92 Stat. 3076.

25 USCS § 1933

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963) > INDIAN CHILD AND FAMILY PROGRAMS (§§ 1931 — 1934)

§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments. In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health, Education, and Welfare [Secretary of Health and Human Services], and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health, Education, and Welfare [Department of Health and Human Services]: *Provided* , That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under 25 USCS § 13. Funds for the purposes of this Act [25 USCS §§ 1901 et seq.] may be appropriated pursuant to the provisions of the Act of November 2, 1921 (42 Stat. 208), as amended [25 USCS § 13].

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title II, § 203, 92 Stat. 3076.

End of Document

25 USCS § 1934

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963) > INDIAN CHILD AND FAMILY PROGRAMS (§§ 1931 — 1934)

§ 1934. "Indian" defined for certain purposes

For the purposes of sections 202 and 203 of this title [25 USCS §§ 1932 and 1933], the term "Indian" shall include persons defined in section 4(c) of the Indian Health Care Improvement Act of 1976 (90 Stat. 1400, 1401) [25 USCS § 1603(c)].

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title II, § 204, 92 Stat. 3077.

End of Document

25 USCS § 1951

Current through Public Law 116-39, approved August 6, 2019.

United States Code Service > TITLE 25. INDIANS (Chs. 1 — 48) > CHAPTER 21. INDIAN CHILD WELFARE (§§ 1901 — 1963) > RECORDKEEPING, INFORMATION AVAILABILITY, AND TIMETABLES (§§ 1951 — 1952)

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act [5 USCS § 552]. Any State court entering a final decree or order in any Indian child adoptive placement after the date of enactment of this Act [enacted Nov. 8, 1978] shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show—

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment. Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

History

25 USCS § 1952

Current through Public Law 116-39, approved August 6, 2019.

§ 1952. Rules and regulations

Within one hundred and eighty days after the enactment of this Act [enacted Nov. 8, 1978], the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this Act [25 USCS §§ 1901 et seq.].

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title III, § 302, 92 Stat. 3077.

25 USCS § 1961

Current through Public Law 116-39, approved August 6, 2019.

§ 1961. Locally convenient day schools

(a) Sense of Congress. It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc. The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health, Education, and Welfare [Department of Health and Human Services], a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate [Committee on Indian Affairs of the Senate] and the Committee on Interior and Insular Affairs of the United States House of Representatives [Committee on Natural Resources of the House of Representatives] within two years from the date of this Act [enacted Nov. 8, 1978]. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title IV, § 401, 92 Stat. 3078.

25 USCS § 1963

Current through Public Law 116-39, approved August 6, 2019.

§ 1963. Severability of provisions

If any provision of this Act [25 USCS §§ 1901 et seq.] or the applicability thereof is held invalid, the remaining provisions of this Act [25 USCS §§ 1901 et seq.] shall not be affected thereby.

History

HISTORY:

Act Nov. 8, 1978, P. L. 95-608, Title IV, § 403, 92 Stat. 3078.

Appendix 7

Sept. 9, 1849.

Consent of Senate Sept. 9, 1850.
Proclamation made Sept. 24, 1850.

TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE NAVAJO TRIBE OF INDIANS.

Contracting parties.

THE following acknowledgements, declarations, and stipulations, have been duly considered, and are now solemnly adopted and proclaimed by the undersigned: that is to say, John M. Washington, Governor of New Mexico, and Lieutenant-Colonel commanding the troops of the United States in New Mexico, and James S. Calhoun, Indian agent, residing at Santa Fé, in New Mexico, representing the United States of America, and Mariano Martinez, Head Chief, and Chapitone, second Chief, on the part of the Navajo tribe of Indians.

Navajo tribe placed under the jurisdiction of the U. S. by the treaty of Guadalupe Hidalgo.

I. The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of Guadalupe Hidalgo, by N. P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl Atristain, of the second part, the said tribe was lawfully placed under the exclusive jurisdiction and protection of the government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.

Perpetual peace to exist between the contracting parties.

II. That from and after the signing of this treaty, hostilities between the contracing parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by other persons or powers in amity with the said States, shall be referred to the government of said States for adjustment and settlement.

Laws now in force for regulating trade and preserving peace with the Indian tribes to be binding upon the Navajoes.

III. The government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection; and to this end, and for all other useful purposes, the government of New Mexico, as now organized, or as it may be by the government of the United States, or by the legally constituted authorities of the people of New Mexico, is recognized and acknowledged by the said Navajoes; and for the due enforcement of the aforesaid laws, until the government of the United States shall otherwise order, the territory of the Navajoes is hereby annexed to New Mexico.

The Navajoes to deliver to the military authorities of the U. S. the murderer or murderers of M. Garcia.

IV. The Navajo Indians hereby bind themselves to deliver to the military authority of the United States in New Mexico, at Santa Fe, New Mexico, as soon as he or they can be apprehended, the murderer or murderers of Micente Garcia, that said fugitive or fugitives from justice may be dealt with as justice may decree.

All American and Mexican captives to be delivered to the

V. All American and Mexican captives, and all stolen property taken from Americans or Mexicans, or other persons or powers in amity with the United States, shall be delivered by the Navajo Indians to the afore-

said military authority at Jemez, New Mexico, on or before the 9th day of October next ensuing, that justice may be meted out to all whom it may concern; and also all Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes.

Military authority of the United States by the 9th October, 1850; also all Indian captives and stolen property of friendly tribes to be given up.

VI. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo Indian or Indians, he or they shall be arrested and tried, and, upon conviction, shall be subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States.

Citizens of the U. S. committing outrages upon the Navajoes to be subjected to the penalties of the law, if convicted upon trial.

VII. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

Free passage through their territory.

VIII. In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said government may designate.

Military posts and agencies to be established.

IX. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

The government of the U. S. to adjust territorial boundaries, and pass such laws as will promote the happiness of the Navajoes.

X. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Navajo Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures, as said government may deem meet and proper.

Donations, presents, and implements to be given.

XI. This treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

To be binding after being signed, and to receive a liberal construction.

In faith whereof, we, the undersigned, have signed this treaty, and affixed thereunto our seals, in the valley of Cheille, this the ninth day of September, in the year of our Lord one thousand eight hundred and forty-nine.

Signed, September 9, 1849.

J. M. WASHINGTON, [L. S.]
Brevet Lieutenant-Colonel Commanding.

JAMES S. CALHOUN, [L. S.]
Indian Agent, residing at Santa Fe.

Mariano Martinez, his x mark, [L. S.]
Head Chief.

Chapitone, his x mark, [L. S.]
Second Chief.

J. L. Collins.
James Conklin.
Lorenzo Force.

Antonio Sandoval, his x mark.
Francisco Josto, his x mark.
Governor of Jemez.

Witnesses —
H. L. Kendrick, *Brevet Major U. S. A.*
J. N. Ward, *Brevet 1st Lieut. 3d Inf'ry.*
John Peck, *Brevet Major U. S. A.*
J. F. Hammond, *Assistant Surg'n U. S. A.*
H. L. Dodge, *Capt. comd'g Eut. Rg's.*
Richard H. Kern.
J. H. Nones, *Second Lieut. 2d Artillery.*
Cyrus Choice.
John H. Dickerson, *Second Lieut. 1st Art.*
W. E. Love.
John G. Jones.
J. H. Simpson, *First Lieut. Corps Top. Engrs.*

Appendix 8

Treaty between the United States of America and the Navajo Tribe of Indians; Concluded June 1, 1868; *Ratification advised July* 25, 1868; *Proclaimed August* 12, 1868.

ANDREW JOHNSON,

June 1, 1868.

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Preamble.

WHEREAS a treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States, and Barboncito, Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit: —

Contracting parties.

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness: —

Peace and friendship.

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

Offenders among the whites to be arrested and punished;

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

among the Indians, to be given up to the United States, or, &c.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner

Rules for ascertaining damage.

of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

Reservation boundaries.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly, which cañon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Who not to reside thereon.

Buildings to be erected by the United States.

ARTICLE III. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and blacksmith shop, not to cost exceeding one thousand dollars each; and a school-house and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

Agent to make his home and reside where.

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

His duties.

Heads of families desiring to commence farming may select lands, &c.

ARTICLE V. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Effect of such selection.

Persons not heads of families.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

Certificate of selection to be delivered, &c.;

to be record-

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land Book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each. Survey.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper. Alienation and descent of property.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. Children between six and sixteen to attend school. Duty of agent. School-houses and teachers.

The provisions of this article to continue for not less than ten years.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars. Seeds and agricultural implements.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit: Delivery of articles in lieu of money and annuities.

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian — each Indian being encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based. Clothing, &c. Indians to be furnished with no articles they can make. Census.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery. Annual appropriations in money for ten years; may be changed. Army officer to attend delivery of goods, &c.

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United Stipulations by the Indians

as to outside territory; States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

railroads; 1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

residents, travellers, wagon trains; 3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

women and children; 4th. That they will never capture or carry off from the settlements women or children.

scalping; 5th. They will never kill or scalp white men, nor attempt to do them harm.

roads or stations; 6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

damages;

military posts and roads. 7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

Cession of reservation not to be valid, unless, &c. ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article —— of this treaty.

Indians to go to reservation when required. ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

Appropriations how to be disbursed. ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

Removal. 1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

Sheep and goats. 2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

Cattle and corn. 3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

Remainder. 4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

Removal, how made. 5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mex-

ico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

Reservation to be permanent home of Indians.

Penalty for leaving reservation.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

Execution.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.
S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, Chief.	his x mark.
ARMIJO.	his x mark.
DELGADO.	
MANUELITO.	his x mark.
LARGO.	his x mark.
HERRERO.	his x mark.
CHIQUETO.	his x mark.
MUERTO DE HOMBRE.	his x mark.
HOMBRO.	his x mark.
NARBONO.	his x mark.
NARBONO SEGUNDO.	his x mark.
GAÑADO MUCHO.	his x mark.

Council.

RIQUO.	his x mark.
JUAN MARTIN.	his x mark.
SERGINTO.	his x mark.
GRANDE.	his x mark.
INOETENITO.	his x mark.
MUCHACHOS MUCHO.	his x mark.
CHIQUETO SEGUNDO:	his x mark.
CABELLO AMARILLO.	his x mark.
FRANCISCO.	his x mark.
TORIVIO.	his x mark.
DESDENDADO.	his x mark.
JUAN.	his x mark.
GUERO.	his x mark.
GUGADORE.	his x mark.
CABASON.	his x mark.
BARBON SEGUNDO.	his x mark.
CABARES COLORADOS.	his x mark.

Attest:

GEO. W. G. GETTY,
Col. 37th Inf'y, Bt. Maj. Gen'l U. S. A.
B. S. ROBERTS,
Bt. Brg. Gen'l U. S. A., Lt. Col. 3d Cav'y.
J. COOPER MCKEE,
Bt. Lt. Col. Surgeon U. S. A.
THEO. H. DODD,
U. S. Indian Ag't for Navajos.
CHAS. MCCLURE,
Bt. Maj. and C. S. U. S. A.
JAMES F. WEEDS,
Bt. Maj. and Asst. Surg. U. S. A.
J. C. SUTHERLAND,
Interpreter.
WILLIAM VAUX,
Chaplain U. S. A.

Ratification. And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:—

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, July 25, 1868.

Resolved, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Navajo Indians, concluded at Fort Sumner, New Mexico, on the first day of June, 1868.

Attest:

GEO. C. GORHAM,
Secretary,
By W. J. MCDONALD,
Chief Clerk.

Proclamation. Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the City of Washington, this twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

[SEAL.]

ANDREW JOHNSON.

By the President:
W. HUNTER,
Acting Secretary of State.

Appendix 9

MODIFIED August 16, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
August 9, 2019

Lyle W. Cayce
Clerk

No. 18-11479

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,

Plaintiffs - Appellees

v.

DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants - Appellants

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants - Appellants

Appeals from the United States District Court
for the Northern District of Texas

Before WIENER, DENNIS, and OWEN, Circuit Judges.

JAMES L. DENNIS, Circuit Judge:

This case presents facial constitutional challenges to the Indian Child Welfare Act of 1978 (ICWA) and statutory and constitutional challenges to the 2016 administrative rule (the Final Rule) that was promulgated by the Department of the Interior to clarify provisions of ICWA. Plaintiffs are the states of Texas, Indiana, and Louisiana, and seven individuals seeking to adopt Indian children. Defendants are the United States of America, several federal agencies and officials in their official capacities, and five intervening Indian tribes. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction, but the district court denied the motion, concluding, as relevant to this appeal, that Plaintiffs had Article III standing. The district court then granted summary judgment in favor of Plaintiffs, ruling that provisions of ICWA and the Final Rule violated equal protection, the Tenth Amendment, the nondelegation doctrine, and the Administrative Procedure Act. Defendants appealed. Although we AFFIRM the district court's ruling that Plaintiffs had standing, we REVERSE the district court's grant of summary judgment to Plaintiffs and RENDER judgment in favor of Defendants.

BACKGROUND

I. The Indian Child Welfare Act (ICWA)

Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 *et seq.*, to address rising concerns over "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 Choctaw Indians v. Holyfield*, 490

U.S. 30, 32 (1989). Recognizing that a "special relationship" exists between the United States and Indian tribes, Congress made the following findings:

Congress has plenary power over Indian affairs. 25 U.S.C. § 1901(1) (citing U.S. CONST. art. I, section 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.")).

"[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ." *Id.* at § 1901(3).

"[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." *Id.* at § 1901(4).

"States exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* at § 1901(5).

In light of these findings, Congress declared that it was the policy of the United States "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." *Id.* at § 1902.

ICWA applies in state court child custody proceedings involving an "Indian child," defined 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." *Id.* at § 1903(4). In proceedings for the foster care placement or termination of parental rights, ICWA provides "the Indian custodian of the child and the Indian child's tribe [] a right to intervene at any point in the proceeding." *Id.* at § 1911(c). Where such proceedings are involuntary, ICWA requires that the parent, the Indian custodian, the child's tribe, or the Secretary of the United States Department of the Interior (Secretary or Secretary of the Interior) be notified of pending proceedings and of their right to intervene. *Id.* at § 1912. In voluntary proceedings for the termination of parental rights or adoptive placement of an Indian child, the parent can withdraw consent for any reason prior to entry of a final decree of adoption or termination, and the child must be returned to the parent. *Id.* at § 1913(c). If consent was obtained through fraud or duress, a parent may petition to withdraw consent within two years after the final decree of adoption and, upon a showing of fraud or duress, the court must vacate the decree and return the child to the parent. *Id.* at § 1913(d). An Indian child, a parent or Indian custodian from whose custody the child was removed, or the child's tribe may file a petition in any court of competent jurisdiction to invalidate an action in state court for foster care placement or termination of parental rights if the action violated any provision of ICWA §§ 1911–13. *Id.* at § 1914.

ICWA further sets forth placement preferences for foster care, preadoptive, and adoptive proceedings involving Indian children. Section 1915 requires that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *Id.* at § 1915(a). Similar requirements are set for foster care or preadoptive placements. *Id.* at § 1915(b). If a tribe establishes by resolution a different order of preferences,

the state court or agency effecting the placement "shall follow [the tribe's] order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." *Id.* at § 1915(c).

The state in which an Indian child's placement was made shall maintain records of the placement, which shall be made available at any time upon request by the Secretary or the child's tribe. *Id.* at § 1915(e). A state court entering a final decree in an adoptive placement "shall provide the Secretary with a copy of the decree or order" and information as necessary regarding "(1) the name and tribal affiliation of the child; (2) the names and addresses of the biological parents; (3) the names and addresses of the adoptive parents; and (4) the identity of any agency having files or information relating to such adoptive placement." *Id.* at § 1951(a). ICWA's severability clause provides that "[i]f any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby." *Id.* at § 1963.

II. The Final Rule

ICWA provides that "the Secretary [of the Interior] shall promulgate such rules and regulations as may be necessary to carry out [its] provisions." 25 U.S.C. § 1952. In 1979, the Bureau of Indian Affairs (BIA) promulgated guidelines (the "1979 Guidelines") intended to assist state courts in implementing ICWA but without "binding legislative effect." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979). The 1979 Guidelines left the "primary responsibility" of interpreting certain language in ICWA "with the [state] courts that decide Indian child custody cases." *Id.* However, in June 2016, the BIA promulgated the Final Rule to "clarify the minimum Federal standards governing implementation of [ICWA]" and to ensure that it "is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote

the stability and security of Indian tribes and families." 25 C.F.R. § 23.101; Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,868 (June 14, 2016). The Final Rule explained that while the BIA "initially hoped that binding regulations would not be necessary to carry out [ICWA], a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law." 81 Fed. Reg. at 38,782.

The Final Rule provides that states have the responsibility of determining whether a child is an "Indian child" subject to ICWA's requirements. 25 C.F.R. §§ 23.107–22; 81 Fed. Reg. at 38,778, 38,869–73. The Final Rule also sets forth notice and recordkeeping requirements for states, *see* 25 U.S.C. §§ 23.140–41; 81 Fed. Reg. at 38,778, 38,875–76, and requirements for states and individuals regarding voluntary proceedings and parental withdrawal of consent, *see* 25 C.F.R. §§ 23.124–28; 81 Fed. Reg. at 38,778, 38,873–74. The Final Rule also restates ICWA's placement preferences and clarifies when they apply and when states may depart from them. *See* 25 C.F.R. §§ 23.129–32; 81 Fed. Reg. at 38,778, 38,874–75.

III. The Instant Action

A. Parties

1. Plaintiffs

Plaintiffs in this action are the states of Texas, Louisiana, and Indiana,[1] (collectively, the "State Plaintiffs"), and seven individual Plaintiffs—Chad and Jennifer Brackeen (the "Brackeens"), Nick and Heather Libretti (the "Librettis"), Altagracia Socorro Hernandez ("Hernandez"), and Jason and

[1] There are three federally recognized tribes in Texas: the Yselta del Sur Pueblo, the Kickapoo Tribe, and the Alabama-Coushatta Tribe. There are four federally recognized tribes in Louisiana: the Chitimacha Tribe, the Coushatta Tribe, the Tunica-Biloxi Tribe, and the Jena Band of Choctaw Indians. There is one federally recognized tribe in Indiana: the Pokagon Band of Potawatomi Indians.

Danielle Clifford (the "Cliffords") (collectively, "Individual Plaintiffs") (together with State Plaintiffs, "Plaintiffs").

a. The Brackeens & A.L.M.

At the time their initial complaint was filed in the district court, the Brackeens sought to adopt A.L.M., who falls within ICWA's definition of an "Indian Child." His biological mother is an enrolled member of the Navajo Nation and his biological father is an enrolled member of the Cherokee Nation. When A.L.M. was ten months old, Texas's Child Protective Services ("CPS") removed him from his paternal grandmother's custody and placed him in foster care with the Brackeens. Both the Navajo Nation and the Cherokee Nation were notified pursuant to ICWA and the Final Rule. A.L.M. lived with the Brackeens for more than sixteen months before they sought to adopt him with the support of his biological parents and paternal grandmother. In May 2017, a Texas court, in voluntary proceedings, terminated the parental rights of A.L.M.'s biological parents, making him eligible for adoption under Texas law. Shortly thereafter, the Navajo Nation notified the state court that it had located a potential alternative placement for A.L.M. with non-relatives in New Mexico, though this placement ultimately failed to materialize. In July 2017, the Brackeens filed an original petition for adoption, and the Cherokee Nation and Navajo Nation were notified in compliance with ICWA. The Navajo Nation and the Cherokee Nation reached an agreement whereby the Navajo Nation was designated as A.L.M.'s tribe for purposes of ICWA's application in the state proceedings. No one intervened in the Texas adoption proceeding or otherwise formally sought to adopt A.L.M. The Brackeens entered into a settlement with the Texas state agency and A.L.M.'s guardian ad litem specifying that, because no one else sought to adopt A.L.M., ICWA's placement preferences did not apply. In January 2018, the Brackeens successfully petitioned to adopt A.L.M. The Brackeens initially alleged in their complaint that they would like to

continue to provide foster care for and possibly adopt additional children in need, but their experience adopting A.L.M. made them reluctant to provide foster care for other Indian children in the future. Since their complaint was filed, the Brackeens have sought to adopt A.L.M.'s sister, Y.R.J. in Texas state court. Y.R.J., like her brother, is an Indian Child for purposes of ICWA. The Navajo Nation contests the adoption. On February 2, 2019, the Texas court granted the Brackeens' motion to declare ICWA inapplicable as a violation of the Texas constitution, but "conscientiously refrain[ed]" from ruling on the Brackeens' claims under the United States Constitution pending our resolution of the instant appeal.

b. The Librettis & Baby O.

The Librettis live in Nevada and sought to adopt Baby O. when she was born in March 2016. Baby O.'s biological mother, Hernandez, wished to place Baby O. for adoption at her birth, though Hernandez has continued to be a part of Baby O.'s life and she and the Librettis visit each other regularly. Baby O.'s biological father, E.R.G., descends from members of the Ysleta del sur Pueblo Tribe (the "Pueblo Tribe"), located in El Paso, Texas, and was a registered member at the time Baby O. was born. The Pueblo Tribe intervened in the Nevada custody proceedings seeking to remove Baby O. from the Librettis. Once the Librettis joined the challenge to the constitutionality of the ICWA and the Final Rule, the Pueblo Tribe indicated that it was willing settle. The Librettis agreed to a settlement with the tribe that would permit them to petition for adoption of Baby O. The Pueblo Tribe agreed not to contest the Librettis' adoption of Baby O., and on December 19, 2018, the Nevada state court issued a decree of adoption, declaring that the Librettis were Baby O.'s lawful parents. Like the Brackeens, the Librettis alleged that they intend to provide foster care for and possibly adopt additional children in need but are reluctant to foster Indian children after this experience.

c. The Cliffords & Child P.

The Cliffords live in Minnesota and seek to adopt Child P., whose maternal grandmother is a registered member of the White Earth Band of Ojibwe Tribe (the "White Earth Band"). Child P. is a member of the White Earth Band for purposes of ICWA's application in the Minnesota state court proceedings. Pursuant to ICWA section 1915's placement preferences, county officials removed Child P. from the Cliffords' custody and, in January 2018, placed her in the care of her maternal grandmother, whose foster license had been revoked. Child P.'s guardian ad litem supports the Cliffords' efforts to adopt her and agrees that the adoption is in Child P.'s best interest. The Cliffords and Child P. remain separated, and the Cliffords face heightened legal barriers to adopting her. On January 17, 2019, the Minnesota court denied the Cliffords' motion for adoptive placement.

2. Defendants

Defendants are the United States of America; the United States Department of the Interior and its Secretary Ryan Zinke, in his official capacity; the BIA and its Director Bryan Rice, in his official capacity; the BIA Principal Assistant Secretary for Indian Affairs John Tahsuda III, in his official capacity; and the Department of Health and Human Services ("HHS") and its Secretary Alex M. Azar II, in his official capacity (collectively the "Federal Defendants"). Shortly after this case was filed in the district court, the Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians (collectively, the "Tribal Defendants") moved to intervene, and the district court granted the motion. On appeal, we granted

the Navajo Nation's motion to intervene as a defendant[2] (together with Federal and Tribal Defendants, "Defendants").

B. Procedural History

Plaintiffs filed the instant action against the Federal Defendants in October 2017, alleging that the Final Rule and certain provisions of ICWA are unconstitutional and seeking injunctive and declaratory relief. Plaintiffs argued that ICWA and the Final Rule violated equal protection and substantive due process under the Fifth Amendment and the anticommandeering doctrine that arises from the Tenth Amendment. Plaintiffs additionally sought a declaration that provisions of ICWA and the Final Rule violated the nondelegation doctrine and the Administrative Procedure Act (APA). Defendants moved to dismiss, alleging that Plaintiffs lacked standing. The district court denied the motion. All parties filed cross-motions for summary judgment. The district court granted Plaintiffs' motion for summary judgment in part, concluding that ICWA and the Final Rule violated equal protection, the Tenth Amendment, and the nondelegation doctrine, and that the challenged portions of the Final Rule were invalid under the APA.[3] Defendants appealed. A panel of this court subsequently stayed the district court's judgment pending further order of this court. In total, fourteen amicus briefs were filed in this court, including a brief in support of Plaintiffs and affirmance filed by the state of Ohio; and a brief in support of Defendants and reversal filed by the states of California, Alaska, Arizona, Colorado, Idaho,

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[2] The Navajo Nation had previously moved to intervene twice in the district court. The first motion was for the limited purpose of seeking dismissal pursuant to Rule 19, which the district court denied. The Navajo Nation filed a second motion to intervene for purposes of appeal after the district court's summary judgment order. The district court deferred decision on the motion pending further action by this court, at which time the Navajo Nation filed the motion directly with this court.

[3] The district court denied Plaintiffs' substantive Due Process claim, from which Plaintiffs do not appeal.

Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Virginia, Washington, and Wisconsin.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *See Texas v. United States*, 497 F.3d 491, 495 (5th Cir. 2007). Summary judgment is appropriate when the movant has demonstrated "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

DISCUSSION

I. Article III Standing

Defendants first contend that Plaintiffs lack standing to challenge ICWA and the Final Rule. The district court denied Defendants' motion to dismiss on this basis, concluding that Individual Plaintiffs had standing to bring an equal protection claim; State Plaintiffs had standing to challenge provisions of ICWA and the Final Rule on the grounds that they violated the Tenth Amendment and the nondelegation doctrine; and all Plaintiffs had standing to bring an APA claim challenging the validity of the Final Rule.

Article III limits the power of federal courts to "Cases" and "Controversies." *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing U.S. CONST. art. III, § 2). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Id.* To meet the Article III standing requirement, plaintiffs must demonstrate "(1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 590 (1992) (internal quotations omitted). A plaintiff seeking equitable relief

must demonstrate a likelihood of future injury in addition to past harm. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). This injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *See Lujan*, 504 U.S. at 560 (cleaned up). "[S]tanding is not dispensed in gross," and "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006). "This court reviews questions of standing *de novo*." *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 343 (5th Cir. 2013).

A. Standing to Bring Equal Protection Claim

Plaintiffs challenged ICWA sections 1915(a)–(b), 1913(d), and 1914 and Final Rule sections 23.129–32 on equal protection grounds, alleging that these provisions impose regulatory burdens on non-Indian families seeking to adopt Indian children that are not similarly imposed on Indian families who seek to adopt Indian children. The district court concluded that Individual Plaintiffs suffered and continued to suffer injuries when their efforts to adopt Indian children were burdened by ICWA and the Final Rule; that their injuries were fairly traceable to ICWA and the Final Rule because these authorities mandated state compliance; and that these injuries were redressable because if ICWA and the Final Rule were invalidated, then state courts would no longer be required to follow them. Defendants disagree, arguing that the Individual Plaintiffs cannot demonstrate an injury in fact or redressability and thus lack standing to bring an equal protection claim. For the reasons below, we conclude that the Brackeens have standing to assert an equal protection claim as to ICWA sections 1915(a)–(b) and Final Rule sections 23.129–32, but as

discussed below, not as to ICWA sections 1913–14. Accordingly, because one Plaintiff has standing, the "case-or-controversy requirement" is satisfied as to this claim, and we do not analyze whether any other Individual Plaintiff has standing to raise it.[4] *See Rumsfeld*, 547 U.S. at 53 n.2.

The district court concluded that ICWA section 1913(d), which allows a parent to petition the court to vacate a final decree of adoption on the grounds that consent was obtained through fraud or duress, left the Brackeens' adoption of A.L.M. vulnerable to collateral attack for two years. Defendants argue that section 1914,[5] and not section 1913(d), applies to the Brackeens' state court proceedings and that, in any event, an injury premised on potential future collateral attack under either provision is too speculative. We need not decide which provision applies here, as neither the Brackeens nor any of the Individual Plaintiffs havesuffered an injury under either provision. Plaintiffs do not assert that A.L.M.'s biological parents, the Navajo Nation, or any other party seeks to invalidate the Brackeens' adoption of A.L.M. under either provision. Plaintiffs' proffered injury under section 1913 or section 1914 is therefore too speculative to support standing. *See Lujan*, 504 U.S. at 560; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("[T]hreatened injury must be *certainly impending* to constitute injury in fact, and [] [a]llegations of *possible* future injury are not sufficient." (cleaned up)). To the extent Plaintiffs argue that an injury arises from their attempts to avoid

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[4] State Plaintiffs argue that they have standing to bring an equal protection challenge in *parens patriae* on behalf of their citizens. We disagree. *See South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("[A] State [does not] have standing as the parent of its citizens to invoke [the Fifth Amendment Due Process Clause] against the Federal Government, the ultimate parens patriae of every American citizen.").

[5] "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title." 25 U.S.C. § 1914.

collateral attack under section 1914 by complying with sections 1911–13, "costs incurred to avoid injury are insufficient to create standing" where the injury is not certainly impending. *See Clapper*, 568 U.S. at 417.

The district court also concluded that ICWA section 1915, and sections 23.129–32 of the Final Rule, which clarify section 1915, gave rise to an injury from an increased regulatory burden. We agree. Prior to the finalization of the Brackeens' adoption of A.L.M., the Navajo Nation notified the state court that it had located a potential alternative placement for A.L.M. in New Mexico. Though that alternative placement ultimately failed to materialize, the regulatory burdens ICWA section 1915 and Final Rule sections 23.129–32 imposed on the Brackeens in A.L.M.'s adoption proceedings, which were ongoing at the time the complaint was filed, are sufficient to demonstrate injury. *See Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015) ("An increased regulatory burden typically satisfies the injury in fact requirement."); *see also Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007) (standing is assessed at the time the complaint was filed)*; Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000) (discussing *Lyons*, 461 U.S. at 108, and finding the injury requirement satisfied where the alleged harmful conduct was occurring when the complaint was filed).

Defendants contend that the Brackeens' challenge to section 1915 and sections 23.129–32 is moot. They argue that, because the Brackeens' adoption of A.L.M. was finalized in January 2018 and the Navajo Nation will not seek to challenge the adoption, section 1915's placement preferences no longer apply in A.L.M.'s adoption proceedings. Plaintiffs argue that section 1915's placement preferences impose on them the ongoing injury of increased regulatory burdens in their proceedings to adopt A.L.M.'s sister, Y.R.J., which the Navajo Nation currently opposes in Texas state court.

"A corollary to this case-or-controversy requirement is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013). "[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969)(internal quotation marks omitted). However, mootness will not render a case non-justiciable where the dispute is one that is "capable of repetition, yet evading review." *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982). "That exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008) (internal citations and quotations omitted). Here, the Brackeens were unable to fully litigate a challenge to section 1915 before successfully adopting A.L.M. Additionally, they have demonstrated a reasonable expectation that they will be subject to section 1915's regulatory burdens in their adoption proceedings involving A.L.M.'s sister, Y.R.J. Thus, the Brackeens' challenge to section 1915 is justiciable on the grounds that it is capable of repetition, yet evading review. *See Hunt*, 455 U.S. at 482.

Having thus found an injury with respect to ICWA section 1915 and Final Rule sections 23.129–32, we consider whether causation and redressability are met here. *See Lujan*, 504 U.S. at 590. The Brackeens' alleged injury is fairly traceable to the actions of at least some of the Federal Defendants, who bear some responsibility for the regulatory burdens imposed by ICWA and the Final Rule. *See Contender Farms, L.L.P.*, 779 F.3d at 266 (noting that causation "flow[ed] naturally from" a regulatory injury). Additionally, the Brackeens have demonstrated a likelihood that their injury will be redressed by a favorable ruling of this court. In the Brackeens' ongoing

proceedings to adopt Y.R.J., the Texas court has indicated that it will refrain from ruling on the Brackeens' federal constitutional claims pending a ruling from this court. Accordingly, Plaintiffs have standing to bring an equal protection claim challenging ICWA section 1915(a)–(b) and Final Rule sections 23.129–32. *See Lujan*, 504 U.S. at 590; *Rumsfeld*, 547 U.S. at 53 n.2.

B. Standing to Bring Administrative Procedure Act Claim

Plaintiffs first argue that ICWA does not authorize the Secretary of the Interior to promulgate binding rules and regulations, and the Final Rule is therefore invalid under the APA. The district court ruled that State Plaintiffs had standing to bring this claim, determining that the Final Rule injured State Plaintiffs by intruding upon their interests as quasi-sovereigns to control the domestic affairs within their states.[6] A state may be entitled to "special solicitude" in our standing analysis if the state is vested by statute with a procedural right to file suit to protect an interest and the state has suffered an injury to its "quasi-sovereign interests." *Massachusetts v. EPA,* 549 U.S. 497, 518–20 (2007) (holding that the Clean Air Act provided Massachusetts a procedural right to challenge the EPA's rulemaking, and Massachusetts suffered an injury in its capacity as a quasi-sovereign landowner due to rising sea levels associated with climate change). Applying *Massachusetts*, this court in *Texas v. United States* held that Texas had standing to challenge the Department of Homeland Security's implementation and expansion of the Deferred Action for Childhood Arrivals program (DACA) under the APA. *See* 809 F.3d 134, 152 (5th Cir. 2015). This court reasoned that Texas was entitled to special solicitude on the grounds that the APA created a procedural right to

[6] The district court also found an injury based on the Social Security Act's conditioning of funding on states' compliance with ICWA. However, because we find that Plaintiffs have standing on other grounds, we decline to decide whether they have demonstrated standing based on an alleged injury caused by the SSA.

challenge the DHS's actions, and DHS's actions affected states' sovereign interest in creating and enforcing a legal code. *See id.* at 153 (internal quotations omitted).

Likewise, here, the APA provides State Plaintiffs a procedural right to challenge the Final Rule. *See id.*; 5 U.S.C. § 702. Moreover, State Plaintiffs allege that the Final Rule affects their sovereign interest in controlling child custody proceedings in state courts. *See Texas*, 809 F.3d at 153 (recognizing that, pursuant to a sovereign interest in creating and enforcing a legal code, states may have standing based on, inter alia, federal preemption of state law). Thus, State Plaintiffs are entitled to special solicitude in our standing inquiry. With this in mind, we find that the elements of standing are satisfied. If, as State Plaintiffs alleged, the Secretary promulgated a rule binding on states without the authority to do so, then State Plaintiffs have suffered a concrete injury to their sovereign interest in controlling child custody proceedings that was caused by the Final Rule. Additionally, though state courts and agencies are not bound by this court's precedent, a favorable ruling from this court would remedy the alleged injury to states by making their compliance with ICWA and the Final Rule optional rather than compulsory. *See Massachusetts*, 549 U.S. at 521 (finding redressability where the requested relief would prompt the agency to "reduce th[e] risk" of harm to the state).

C. Standing to Bring Tenth Amendment Claim

For similar reasons, the district court found, and we agree, that State Plaintiffs have standing to challenge provisions of ICWA and the Final Rule under the Tenth Amendment. The imposition of regulatory burdens on State Plaintiffs is sufficient to demonstrate an injury to their sovereign interest in creating and enforcing a legal code to govern child custody proceedings in state courts. *See Texas*, 809 F.3d at 153. Additionally, the causation and redressability requirements are satisfied here, as a favorable ruling from this

court would likely redress State Plaintiffs' injury by lifting the mandatory burdens ICWA and the Final Rule impose on states. *See Lujan*, 504 U.S. at 590.

D. Standing to Bring Nondelegation Claim

Finally, Plaintiffs contend that ICWA section 1915(c), which allows a tribe to establish a different order of section 1915(a)'s placement preferences, is an impermissible delegation of legislative power that binds State Plaintiffs. Defendants argue that State Plaintiffs cannot demonstrate an injury, given the lack of evidence that a tribe's reordering of section 1915(a)'s placement preferences has affected any children in Texas, Indiana, or Louisiana or that such impact is "certainly impending." State Plaintiffs respond that tribes can change ICWA's placement preferences at any time and that at least one tribe, the Alabama-Coushatta Tribe of Texas, has already done so. We conclude that State Plaintiffs have demonstrated injury and causation with respect to this claim, as State Plaintiffs' injury from the Alabama-Coushatta Tribe's decision to depart from ICWA section 1915's placement preferences is concrete and particularized and not speculative. *See Lujan*, 504 U.S. at 560. Moreover, a favorable ruling from this court would redress State Plaintiffs' injury by making a state's compliance with a tribe's alternative order of preferences under ICWA section 1915(c) optional rather than mandatory. *See id.*

Accordingly, having found that State Plaintiffs have standing on the aforementioned claims, we proceed to the merits of these claims. We note at the outset that ICWA is entitled to a "presumption of constitutionality," so long as Congress enacted the statute "based on one or more of its powers enumerated in the Constitution." *See United States v. Morrison*, 529 U.S. 598, 607 (2000). "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon

a plain showing that Congress has exceeded its constitutional bounds." *Id.* (citing, among others, *United States v. Harris*, 106 U.S. 629, 635 (1883)).

II. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. 14, § 1. This clause is implicitly incorporated into the Fifth Amendment's guarantee of due process. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). We apply the same analysis with respect to equal protection claims under the Fifth and Fourteenth Amendments. *See Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995). In evaluating an equal protection claim, strict scrutiny applies to laws that rely on classifications of persons based on race. *See id.* But where the classification is political, rational basis review applies. *See Morton v. Mancari*, 417 U.S. 535, 555 (1974). The district court granted summary judgment on behalf of Plaintiffs, concluding that section 1903(4)—setting forth ICWA's definition of "Indian Child" for purposes of determining when ICWA applies in state child custody proceedings—was a race-based classification that could not withstand strict scrutiny.[7] On appeal, the parties disagree as to whether section 1903(4)'s definition of "Indian Child" is a political or race-based classification and which level of scrutiny applies. "We review the constitutionality of federal statutes de novo." *Nat'l Rifle Ass'n*

[7] As described above, we conclude that Plaintiffs have standing to challenge ICWA section 1915(a)–(b) and Final Rule sections 23.129–32 on equal protection grounds. The district court's analysis of whether the ICWA classification was political or race-based focused on ICWA section 1903(4), presumably because section 1903(4) provides a threshold definition of "Indian child" that must be met for any provision of ICWA to apply in child custody proceedings in state court. Because we are satisfied that our analysis would produce the same result with respect to section 1903(4) and the specific provisions Plaintiffs have standing to challenge, we similarly confine our discussion of whether ICWA presents a political or race-based classification to section 1903(4).

of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 192 (5th Cir. 2012).

A. Level of Scrutiny

We begin by determining whether ICWA's definition of "Indian child" is a race-based or political classification and, consequently, which level of scrutiny applies. The district court concluded that ICWA's "Indian Child" definition was a race-based classification. We conclude that this was error. Congress has exercised plenary power "over the tribal relations of the Indians . . . from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). The Supreme Court's decisions "leave no doubt that federal legislation with respect to Indian tribes . . . is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645 (1977). "Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations." *Mancari*, 417 U.S. at 552. "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, 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." *Id.*

In *Morton v. Mancari*, the Supreme Court rejected a challenge to a law affording to qualified Indian applicants—those having one-fourth or more degree Indian blood with membership in a federally recognized tribe[8]—a hiring

[8] The United States currently recognizes 573 Tribal entities. *See* 84 Fed. Reg. 1,200 (Feb. 1, 2019). Federal recognition "is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." *See California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quoting COHEN'S HANDBOOK OF

preference over non-Indians within the BIA. *Id.* at 555. The Court recognized that central to the resolution of the issue was "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes." *Id.* at 551. It reasoned that the BIA's hiring preference was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. The preference was thus a non-racial "employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It [was] directed to participation by the governed in the governing agency." *Id.* at 553–54. The disadvantages to non-Indians resulting from the hiring preferences were an intentional and "desirable feature of the entire program for self-government."[9] *Id.* at 544.

FEDERAL INDIAN LAW § 3.02[3], at 138 (2005 ed.) (internal quotation marks omitted)). It "[i]s a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify." 25 C.F.R. § 83.2.

[9] Plaintiffs argue that, unlike the law in *Mancari*, ICWA is not a law promoting tribal self-governance. However, prior to enacting ICWA, Congress considered testimony from the Tribal Chief of the Mississippi Band of Choctaw Indians about the devastating impacts of removing Indian children from tribes and placing them for adoption and foster care in non-Indian homes:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

Holyfield, 490 U.S. at 34. This testimony undoubtedly informed Congress's finding that children are the most vital resource "to the continued existence and integrity of Indian tribes." 25 U.S.C. § 1901(3). Thus, interpreting ICWA as related to tribal self-government and the survival of tribes makes the most sense in light of Congress's explicit intent in enacting the statute. *See id.*

The district court construed *Mancari* narrowly and distinguished it for two primary reasons: First, the district court found that the law in *Mancari* provided special treatment "only to Indians living on or near reservations." Second, the district court concluded that ICWA's membership eligibility standard for an Indian child does not rely on actual tribal membership as did the statute in *Mancari*. The district court reasoned that, whereas the law in *Mancari* "applied 'only to *members* of 'federally recognized' tribes which operated to exclude many individuals who are racially to be classified as Indians,'" ICWA's definition of "Indian child" extended protection to children who were *eligible* for membership in a federally recognized tribe and had a biological parent who was a member of a tribe. The district court, citing the tribal membership laws of several tribes, including the Navajo Nation, concluded that "[t]his means one is an Indian child if the child is related to a tribal ancestor by blood."

We disagree with the district court's reasoning and conclude that *Mancari* controls here. As to the district court's first distinction, *Mancari*'s holding does not rise or fall with the geographical location of the Indians receiving "special treatment." *See Mancari*, 417 U.S. at 552. The Supreme Court has long recognized Congress's broad power to regulate Indians and Indian tribes on and off the reservation. *See e.g., United States v. McGowan*, 302 U.S. 535, 539 (1938) ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States."); *Perrin v. United States*, 232 U.S. 478, 482 (1914) (acknowledging Congress's power to regulate Indians "whether upon or off a reservation and whether within or without the limits of a state").

Second, the district court concluded that, unlike the statute in *Mancari*, ICWA's definition of Indian child extends to children who are merely eligible for tribal membership because of their ancestry. However, ICWA's definition

of "Indian child" is not based solely on tribal ancestry or race. ICWA defines an "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). As Defendants explain, under some tribal membership laws, eligibility extends to children without Indian blood, such as the descendants of former slaves of tribes who became members after they were freed, or the descendants of adopted white persons. Accordingly, a child may fall under ICWA's membership eligibility standard because his or her biological parent became a member of a tribe, despite not being racially Indian. Additionally, many racially Indian children, such as those belonging to non-federally recognized tribes, do not fall within ICWA's definition of "Indian child." Conditioning a child's eligibility for membership, in part, on whether a biological parent is a member of the tribe is therefore not a proxy for race, as the district court concluded, but rather for not-yet-formalized tribal affiliation, particularly where the child is too young to formally apply for membership in a tribe.[10]

Our conclusion that ICWA's definition of Indian child is a political classification is consistent with both the Supreme Court's holding in *Mancari* and this court's holding in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1212 (5th Cir. 1991). In *Mancari*, the hiring preference extended to individuals who were one-fourth or more degree Indian blood and a member of

[10] The Navajo Nation's membership code is instructive on these points, despite the district court's reliance on it to the contrary. The Navajo Nation explains that, under its laws, "blood alone is never determinative of membership." The Navajo Nation will only grant an application for membership "if the individual has some tangible connection to the Tribe," such as the ability to speak the Navajo language or time spent living among the Navajo people. "Having a biological parent who is an enrolled member is per se evidence of such a connection." Additionally, individuals will not be granted membership in the Navajo Nation, regardless of their race or ancestry, if they are members of another tribe.

a federally recognized tribe. *See* 417 U.S. at 554. Similarly, in *Peyote Way*, this court considered whether equal protection was violated by federal and state laws prohibiting the possession of peyote by all persons except members of the Native American Church of North America (NAC), who used peyote for religious purposes. *See* 922 F.2d at 1212. Applying *Mancari*'s reasoning, this court upheld the preference on the basis that membership in NAC "is limited to Native American members of federally recognized tribes who have at least 25% Native American ancestry, and therefore represents a political classification." *Id.* at 1216. ICWA's "Indian child" eligibility provision similarly turns, at least in part, on whether the child is eligible for membership in a federally recognized tribe. *See California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (federal recognition "is a formal political act" that "institutionaliz[es] the government-to-government relationship between the tribe and the federal government."); 25 U.S.C. § 1903(4).

The district court concluded, and Plaintiffs now argue, that ICWA's definition "mirrors the impermissible racial classification in *Rice* [*v. Cayetano*, 528 U.S. 495 (2000)], and is legally and factually distinguishable from the political classification in *Mancari*." The Supreme Court in *Rice* concluded that a provision of the Hawaiian Constitution that permitted only "Hawaiian" people to vote in the statewide election for the trustees of the Office of Hawaiian Affairs (OHA) violated the Fifteenth Amendment. 528 U.S. at 515. "Hawaiian" was defined by statute as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.* The Court noted the state legislature's express purpose in using ancestry as a proxy for race and held that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a

free people whose institutions are founded upon the doctrine of equality." *Id.* at 514–17 (citing *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943)). Distinguishing *Mancari*, the Court noted that its precedent did not afford Hawaiians a protected status like that of Indian tribes; that the OHA elections were an affair of the state and not of a "separate quasi sovereign" like a tribe; and that extending "*Mancari* to this context would [] permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs." *Id.* at 522.

Rice is distinguishable from the present case for several reasons. Unlike *Rice*, which involved voter eligibility in a state-wide election for a state agency, there is no similar concern here that applying *Mancari* would permit "by racial classification, [the fencing] out [of] whole classes of [a state's] citizens from decisionmaking in critical state affairs." *See* 528 U.S. at 518–22. Additionally, as discussed above, ICWA's definition of "Indian child," unlike the challenged law in *Rice*, does not single out children "*solely* because of their ancestry or ethnic characteristics." *See id.* at 515 (emphasis added). Further, unlike the law in *Rice*, ICWA is a federal law enacted by Congress for the protection of Indian children and tribes. *See Rice,* 528 U.S. at 518 (noting that to sustain Hawaii's restriction under *Mancari*, it would have to "accept some beginning premises not yet established in [its] case law," such as that Congress "has determined that native Hawaiians have a status like that of Indians in organized tribes"); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (rejecting an equal protection challenge brought by Native Hawaiians, who were excluded from the U.S. Department of the Interior's regulatory tribal acknowledgement process, and concluding that the recognition of Indian tribes was political). Additionally, whereas the OHA elections in *Rice* were squarely state affairs, state court adoption proceedings involving Indian children are simultaneously affairs of states, tribes, and

Congress. *See* 25 U.S.C. § 1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."). Because we find *Rice* inapplicable, and *Mancari* controlling here, we conclude, contrary to the district court's determination, that ICWA's definition of "Indian child" is a political classification subject to rational basis review. *See Mancari*, 417 U.S. at 555.

B. Rational Basis Review

Having so determined that rational basis review applies, we ask whether "the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. Given Congress's explicit findings and stated objectives in enacting ICWA, we conclude that the special treatment ICWA affords Indian children is rationally tied to Congress's fulfillment of its unique obligation toward Indian nations and its stated purpose of "protect[ing] the best interests of Indian children and [] promot[ing] the stability and security of Indian tribes." *See* 25 U.S.C. §§ 1901–02; *see also Mancari*, 417 U.S. at 555. ICWA section 1903(4)'s definition of an "Indian child" is a political classification that does not violate equal protection.

III. Tenth Amendment

The district court concluded that ICWA sections 1901–23[11] and 1951–52[12] violated the anticommandeering doctrine by requiring state courts and executive agencies to apply federal standards to state-created claims. The

[11] ICWA sections 1901–03 set forth Congress's findings, declaration of policy, and definitions. Sections 1911–23 govern child custody proceedings, including tribal court jurisdiction, notice requirements in involuntary and voluntary state proceedings, termination of parental rights, invalidation of state proceedings, placement preferences, and agreements between states and tribes.

[12] Section 1951 sets forth information-sharing requirements for state courts. Section 1952 authorizes the Secretary of the Interior to promulgate necessary rules and regulations.

district court also considered whether ICWA preempts conflicting state law under the Supremacy Clause and concluded that preemption did not apply because the law "*directly* regulated states." Defendants argue that the anticommandeering doctrine does not prevent Congress from requiring state courts to enforce substantive and procedural standards and precepts, and that ICWA sets minimum procedural standards that preempt conflicting state law. We examine the constitutionality of the challenged provisions of ICWA below and conclude that they preempt conflicting state law and do not violate the anticommandeering doctrine. .

A. Anticommandeering Doctrine

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Congress's legislative powers are limited to those enumerated under the Constitution. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). "[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Id.* The anticommandeering doctrine, an expression of this limitation on Congress, prohibits federal laws commanding the executive or legislative branch of a state government to act or refrain from acting.[13] *Id.* at 1478 (holding that a federal law prohibiting state authorization of sports gambling violated the anticommandeering rule by "unequivocally dictat[ing] what a state legislature

[13] Though Congress is prohibited from commandeering states, it can "encourage a State to regulate in a particular way, or . . . hold out incentives to the States as a method of influencing a State's policy choices." *New York*, 505 U.S. at 166. For example, Congress may also condition the receipt of federal funds under its spending power. *See id.* at 167. Defendants also contend that ICWA is authorized under Congress's Spending Clause powers because Congress conditioned federal funding in Title IV-B and E of the Social Security Act on states' compliance with ICWA. However, because we conclude that ICWA is constitutionally permissible on other bases, we need not reach this argument.

may and may not do"); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that a federal law requiring state chief law enforcement officers to conduct background checks on handgun purchasers "conscript[ed] the State's officers directly" and was invalid); *New York v. United States*, 505 U.S. 144, 175–76 (1992) (holding that a federal law impermissibly commandeered states to implement federal legislation when it gave states "[a] choice between two unconstitutionally coercive" alternatives: to either dispose of radioactive waste within their boundaries according to Congress's instructions or "take title" to and assume liabilities for the waste).

1. State Courts

Defendants argue that because the Supremacy Clause requires the enforcement of ICWA and the Final Rule by state courts, these provisions do not run afoul of the anticommandeering doctrine. We agree. The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. In setting forth the anticommandeering doctrine, the Supreme Court drew a distinction between a state's courts and its political branches. The Court acknowledged that "[f]ederal statutes enforceable in state court do, in a sense, direct state judges to enforce them, 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 (internal quotation marks omitted). Early laws passed by the first Congresses requiring state court action "establish, at most, that 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." *Printz*, 521 U.S. at 907. State courts were viewed as distinctive because, "unlike [state] legislatures and executives, they

applied the law of other sovereigns all the time," including as mandated by the Supremacy Clause. *Id.* Thus, to the extent provisions of ICWA and the Final Rule require state courts to enforce federal law, the anticommandeering doctrine does not apply. *See id.* at 928–29 (citing *Testa v. Katt*, 330 U.S. 386 (1947), "for the proposition that state courts cannot refuse to apply federal lawa conclusion mandated by the terms of the Supremacy Clause").

2. State Agencies

Plaintiffs next challenge several provisions of ICWA that they contend commandeer state executive agencies, including sections 1912(a) (imposing notice requirements on "the party seeking the foster care placement of, or termination of parental rights to, an Indian child"), 1912(d) (requiring that "any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."), 1915(c) (requiring "the agency or court effecting [a] placement" adhere to the order of placement preferences established by the tribe), and 1915(e) (requiring that "the State" in which the placement was made keep a record of each placement, evidencing the efforts to comply with the order of preference, to be made available upon request of the Secretary or the child's tribe). *See* 25 U.S.C. §§ 1912, 1915. Plaintiffs argue that ICWA's requirements on state agencies go further than the federal regulatory scheme invalidated in *Printz* and impermissibly impose costs that states must bear. Defendants contend that the challenged provisions of ICWA apply to private parties and state agencies alike and therefore do not violate the anticommandeering doctrine.

In *Printz*, the Supreme Court affirmed its prior holding that "[t]he Federal Government may not compel the States to enact or administer a

federal regulatory program," and "Congress cannot circumvent that prohibition by conscripting the State's officers directly." 521 U.S. at 925, 935 (quoting *New York,* 505 U.S. at 188). The *Printz* Court, rejecting as irrelevant the Government's argument that the federal law imposed a minimal burden on state executive officers, explained that it was not "evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments," but rather a law whose "whole *object* . . . [was] to direct the functioning of the state executive." *Id.* at 931–32. Expanding upon this distinction, the Court in *Murphy* discussed *Reno v. Condon*, 528 U.S. 141 (2000), and *South Carolina v. Baker*, 485 U.S. 505 (1988), and held that "[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." 138 S. Ct. at 1478.

In *Condon*, the Court upheld a federal regulatory scheme that restricted the ability of states to disclose a driver's personal information without consent. 528 U.S. at 151. In determining that the anticommandeering doctrine did not apply, the Court distinguished the law from those invalidated in *New York* and *Printz*:

> [This law] does not require the States in their sovereign capacity to regulate their own citizens. The [law] regulates the States as the owners of [Department of Motor Vehicle] data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

Id. In *Baker*, the Court rejected a Tenth Amendment challenge to a provision of a federal statute that eliminated the federal income tax exemption for interest earned on certain bonds issued by state and local governments unless the bonds were registered, treating the provision "as if it directly regulated States by prohibiting outright the issuance of [unregistered] bearer bonds." 485 U.S. at 507–08, 511. The Court reasoned that the provision at issue merely

"regulat[ed] a state activity" and did not "seek to control or influence the manner in which States regulate private parties." *Id.* at 514. "That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Id.* at 514–15. "[S]ubstantial effort[s]" to comply with federal regulations are "an inevitable consequence of regulating a state activity." *Id.* at 514.

In light of these cases, we conclude that the provisions of ICWA that Plaintiffs challenge do not commandeer state agencies. Sections 1912(a) and (d) impose notice and "active efforts" requirements on the "party" seeking the foster care placement of, or termination of parental rights to, an Indian child. Because both state agencies and private parties who engage in state child custody proceedings may fall under these provisions, 1912(a) and (d) "evenhandedly regulate[] an activity in which both States and private actors engage."[14] *See Murphy*, 138 S. Ct. at 1478. Moreover, sections 1915(c) and (e) impose an obligation on "the agency or court effecting the placement" of an Indian child to respect a tribe's order of placement preferences and require that "the State" maintain a record of each placement to be made available to the Secretary or child's tribe. These provisions regulate state activity and do not

[14] Similarly, section 1912(e) provides that no foster care placement may be ordered in involuntary proceedings in state court absent "a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *See* 25 U.S.C. § 1912(e). Section 1912(f) requires that no termination of parental rights may be ordered in involuntary proceedings in state court absent evidence beyond a reasonable doubt of the same. *See id.* at 1912(f). Neither section expressly refers to state agencies and, in conjunction with section 1912(d), both sections must be reasonably read to refer to "any party" seeking the foster care placement of, or the termination of parental rights to, an Indian child. Thus, like section 1912(d), sections 1912(e)–(f) "evenhandedly regulate[] an activity in which both States and private actors engage" and do not run afoul of the anticommandeering doctrine. *See Murphy*, 138 S. Ct. at 1478; *see also Condon*, 528 U.S. at 151.

require states to enact any laws or regulations, or to assist in the enforcement of federal statutes regulating private individuals. *See Condon*, 528 U.S. at 151; *Baker*, 485 U.S. at 514; *see also Printz*, 521 U.S. at 918 (distinguishing statutes that merely require states to provide information to the federal government from those that command state executive agencies to actually administer federal programs). To the contrary, they merely require states to "take administrative . . . action to comply with federal standards regulating" child custody proceedings involving Indian children, which is permissible under the Tenth Amendment.[15] *See Baker*, 485 U.S. at 514–15.

B. Preemption

Defendants argue that, to the extent there is a conflict between ICWA and applicable state laws in child custody proceedings, ICWA preempts state law. The Supremacy Clause provides that federal law is the "supreme Law of

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[15] In ruling otherwise, the district court discussed *Murphy* and emphasized that adhering to the anticommandeering rule is necessary to protect constitutional principles of state sovereignty, promote political accountability, and prevent Congress from shifting the costs of regulation to states. *See Murphy*, 138 S. Ct. at 1477. These principles do not compel the result reached by the district court. *See id.* First, the anticommandeering doctrine is not necessary here to protect constitutional principles of state sovereignty because ICWA regulates the actions of state executive agencies in their role as child advocates and custodians, and not in their capacity as sovereigns enforcing ICWA. *See id.* at 1478; *see also Condon*, 528 U.S. at 151 (concluding that the law in question there "does not require the States in their sovereign capacity to regulate their own citizens [but] regulates the States as the owners of data bases"). The need to promote political accountability is minimized here for similar reasons, as ICWA does not require states to regulate their own citizens. *See Murphy*, 138 S. Ct. at 1477 (noting concern that, if states are required to impose a federal regulation on their voters, the voters will not know who to credit or blame and responsibility will be "blurred"). Finally, the need to prevent Congress from shifting the costs of regulation to states is also minimized here, where some of the requirements at issue, like those in sections 1912(d) and 1915(c), simply regulate a state's actions during proceedings that it would already be expending resources on. ICWA's recordkeeping and notice requirements could impose costs on states, but we cannot conclude that these costs compel application of the anticommandeering doctrine. *See Condon*, 528 U.S. at 150 (a federal law that "require[d] time and effort on the part of state employees" was constitutional); *Baker*, 485 U.S. at 515 (that states may have to raise funds necessary to comply with federal regulations "presents no constitutional defect").

the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Conflict preemption occurs when "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Murphy*, 138 S. Ct. at 1480. For a federal law to preempt conflicting state law, two requirements must be satisfied: The challenged provision of the federal law "must represent the exercise of a power conferred on Congress by the Constitution" and "must be best read as one that regulates private actors" by imposing restrictions or conferring rights. *Id.* at 1479–80. The district court concluded that preemption does not apply here, as ICWA regulates states rather than private actors. We review de novo whether a federal law preempts a state statute or common law cause of action. *See Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001).

Congress enacted ICWA to "establish[] minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902. Defendants contend that these minimum federal standards preempt conflicting state laws. Plaintiffs contend that preemption does not apply here because ICWA regulates states and not individuals, and nothing in the Constitution gives Congress authority to regulate the adoption of Indian children under state jurisdiction.

ICWA specifies that Congress's authority to regulate the adoption of Indian children arises under the Indian Commerce Clause as well as "other constitutional authority." 25 U.S.C. § 1901(1). The Indian Commerce Clause provides that "[t]he Congress shall have Power To . . . regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has repeatedly held that the Indian Commerce Clause grants Congress plenary

power over Indian affairs. *See Lara*, 541 U.S. at 200 (noting that the Indian Commerce and Treaty Clauses are sources of Congress's "plenary and exclusive" "powers to legislate in respect to Indian tribes"); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982) (discussing Congress's "broad power . . . to regulate tribal affairs under the Indian Commerce Clause"); *Mancari*, 417 U.S. at 551–52 (noting that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from," inter alia, the Indian Commerce Clause). Plaintiffs do not provide authority to support a departure from that principle here.

Moreover, ICWA clearly regulates private individuals. *See Murphy*, 138 S. Ct. at 1479–80. In enacting the statute, Congress declared that it was the dual policy of the United States to protect the best interests of Indian children and promote the stability and security of Indian families and tribes. 25 U.S.C. § 1902. Each of the challenged provisions applies within the context of state court proceedings involving Indian children and is informed by and designed to promote Congress's goals by conferring rights upon Indian children and families.[16] *See* H.R. REP. No. 95-1386, at 18 (1978) ("We conclude that rights arising under [ICWA] may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion."

[16] Arguably, two of the challenged provisions of ICWA could be construed to simultaneously "confer[] rights" on Indian children and families while "imposing restrictions" on state agencies. *See Murphy*, 138 S. Ct. at 1479–80. Section 1915(c) requires "the agency or court effecting [a] placement" to adhere to a tribe's established order of placement preferences, and section 1915(e) requires states to keep records and make them available to the Secretary and Indian tribes. 25 U.S.C. § 1915(c), (e). However, *Murphy* instructs that for a provision of a federal statute to preempt state law, the provision must be "*best read* as one that regulates private actors." *See* 138 S. Ct. at 1479 (emphasis added). In light of Congress's express purpose in enacting ICWA, the legislative history of the statute, and section 1915's scope in setting forth minimum standards for the "Placement of Indian children," we conclude that these provisions are "best read" as regulating private actors by conferring rights on Indian children and families. *See id.*

(quoting *Second Employers' Liability Cases*, 223 U.S. 1, 59 (1912))). Thus, to the extent ICWA's minimum federal standards conflict with state law, "federal law takes precedence and the state law is preempted." *See Murphy*, 138 S. Ct. at 1480.

IV. Nondelegation Doctrine

Article I of the Constitution vests "[a]ll legislative Powers" in Congress. U.S. CONST. art. 1, § 1, cl. 1. "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The limitations on Congress's ability to delegate its legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *See United States v. Mazurie*, 419 U.S. 544, 556–57 (1975). ICWA section 1915(c) allows Indian tribes to establish through tribal resolution a different order of preferred placement than that set forth in sections 1915(a) and (b).[17] Section 23.130 of the Final Rule provides that a tribe's established placement preferences apply over those specified in ICWA.[18] The district court determined that these provisions violated the nondelegation doctrine, reasoning that section 1915(c) grants Indian tribes the power to change legislative preferences with binding effect on the states, and Indian tribes, like private entities, are not part of the federal government of the United States and cannot exercise federal legislative or executive regulatory power over non-Indians on non-tribal lands.

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[17] The section provides: "In the case of a placement under subsection (a) or (b) of this section, 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, as provided in subsection (b) of this section." 25 U.S.C. § 1915(c).

[18] "If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply." 25 C.F.R. § 23.130.

Defendants argue that the district court's analysis of the constitutionality of these provisions ignores the inherent sovereign authority of tribes. They contend that section 1915 merely recognizes and incorporates a tribe's exercise of its inherent sovereignty over Indian children and therefore does not—indeed cannot—delegate this existing authority to Indian tribes.

The Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine. *See Mazurie*, 419 U.S. at 557 ("[I]ndependent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'"); *United States v. Sharpnack*, 355 U.S. 286, 293–94 (1958) (holding that a statute that prospectively incorporated state criminal laws "in force at the time" of the alleged crime was a "deliberate continuing adoption by Congress" of state law as binding federal law in federal enclaves within state boundaries); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 80 (1824) ("Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject."). "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Mazurie*, 419 U.S. at 557. Though some exercises of tribal power require "express congressional delegation," the "tribes retain their inherent power to determine tribal membership [and] to regulate domestic relations among members . . . ." *See Montana v. United States*, 450 U.S. 544, 564 (1981); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) ("tribes retain the power to create substantive law governing internal tribal affairs" like tribal citizenship and child custody).

In *Mazurie*, a federal law allowed the tribal council of the Wind River Tribes, with the approval of the Secretary of the Interior, to adopt ordinances to control the introduction of alcoholic beverages by non-Indians on privately

owned land within the boundaries of the reservation. *See* 419 U.S. at 547, 557. The Supreme Court held that the law did not violate the nondelegation doctrine, focusing on the Tribes' inherent power to regulate their internal and social relations by controlling the distribution and use of intoxicants within the reservation's bounds. *Id.* *Mazurie* is instructive here. ICWA section 1915(c) provides that a tribe may pass, by its own legislative authority, a resolution reordering the three placement preferences set forth by Congress in section 1915(a). Pursuant to this section, a tribe may assess whether the most appropriate placement for an Indian child is with members of the child's extended family, the child's tribe, or other Indian families, and thereby exercise its "inherent power to determine tribal membership [and] regulate domestic relations among members" and Indian children eligible for membership. *See Montana*, 450 U.S. at 564.

State Plaintiffs contend that *Mazurie* is distinguishable because it involves the exercise of tribal authority on tribal lands, whereas ICWA permits the extension of tribal authority over states and persons on non-tribal lands. We find this argument unpersuasive. It is well established that tribes have "sovereignty *over both their members and their territory*." *See Mazurie*, 419 U.S. at 557 (emphasis added). For a tribe to exercise its authority to determine tribal membership and to regulate domestic relations among its members, it must necessarily be able to regulate all Indian children, irrespective of their location.[19] *See Montana*, 450 U.S. at 564 (tribes retain inherent power to regulate domestic relations and determine tribal membership); *Merrion*, 455 U.S. at 170 (tribes retain power to govern tribal citizenship and child custody). Section 1915(c), by recognizing the inherent powers of tribal sovereigns to

[19] Indeed, as the BIA noted in promulgating the Final Rule, at least 78% of Native Americans lived outside of Indian country as of 2016. *See* 81 Fed. Reg. at 38,778, 38,783.

determine by resolution the order of placement preferences applicable to an Indian child, is thus a "deliberate continuing adoption by Congress" of tribal law as binding federal law. *See Sharpnack*, 355 U.S. at 293–94; *see also* 25 U.S.C. § 1915(c); 81 Fed. Reg. at 38,784 (the BIA noting that "through numerous statutory provisions, ICWA helps ensure that State courts incorporate Indian social and cultural standards into decision-making that affects Indian children"). We therefore conclude that ICWA section 1915(c) is not an unconstitutional delegation of Congressional legislative power to tribes, but is an incorporation of inherent tribal authority by Congress. *See Mazurie*, 419 U.S. at 544; *Sharpnack*, 355 U.S. at 293–94.

V. The Final Rule

The district court held that, to the extent sections 23.106–22, 23.124–32, and 23.140–41 of the Final Rule were binding on State Plaintiffs, they violated the APA for three reasons: The provisions (1) purported to implement an unconstitutional statute; (2) exceeded the scope of the Interior Department's statutory regulatory authority to enforce ICWA with binding regulations; and (3) reflected an impermissible construction of ICWA section 1915. We examine each of these bases in turn.

A. The Constitutionality of ICWA

Because we concluded that the challenged provisions of ICWA are constitutional, for reasons discussed earlier in this opinion, the district court's first conclusion that the Final Rule was invalid because it implemented an unconstitutional statue was erroneous. Thus, the statutory basis of the Final Rule is constitutionally valid.

B. The Scope of the BIA's Authority

Congress authorized the Secretary of the Interior to promulgate rules and regulations that may be necessary to carry out the provisions of ICWA. *See* 25 U.S.C. § 1952. Pursuant to this provision, the BIA, acting under

authority delegated by the Interior Department, issued guidelines in 1979 for state courts in Indian child custody proceedings that were "not intended to have binding legislative effect." 44 Fed. Reg. at 67,584. The BIA explained that, generally, "when the Department writes rules needed to carry out responsibilities Congress has explicitly imposed on the Department, those rules are binding." *Id.* However, when "the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding." *Id.* With respect to ICWA, the BIA concluded in 1979 that it was "not necessary" to issue binding regulations advising states how to carry out the responsibilities Congress assigned to them; state courts were "fully capable" of implementing the responsibilities Congress imposed on them, and nothing in the language or legislative history of 25 U.S.C. § 1952 indicated that Congress intended the BIA to exercise supervisory control over states. *Id.* However, in 2016, the BIA changed course and issued the Final Rule, which sets binding standards for state courts in Indian child-custody proceedings. *See* 25 C.F.R. §§ 23.101, 23.106; 81 Fed. Reg. at 38,779, 38,785. The BIA explained that its earlier, nonbinding guidelines were "insufficient to fully implement Congress's goal of nationwide protections for Indian children, parents, and Tribes." 81 Fed. Reg. at 38,782. Without the Final Rule, the BIA stated, state-specific determinations about how to implement ICWA would continue "with potentially devastating consequences" for those Congress intended ICWA to protect. *See id.*

In reviewing "an agency's construction of the statute which it administers," we are "confronted with two questions." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). First, we must examine whether the statute is ambiguous. *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the

agency, must give effect to the unambiguously expressed intent of Congress." *Id.* But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842–43. We must uphold an agency's reasonable interpretation of an ambiguous statute. *Id.* at 844.

Under *Chevron* step one, the question is whether Congress unambiguously intended to grant the Department authority to promulgate binding rules and regulations. ICWA provides that "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." 25 U.S.C. § 1952. The provision's plain language confers broad authority on the Department to promulgate rules and regulations it deems necessary to carry out ICWA. This language can be construed to grant the authority to issue binding rules and regulations; however, because "Congress has not directly addressed the precise question at issue," we conclude that section 1952 is ambiguous. *See Chevron*, 467 U.S. at 843.

Moving to the second *Chevron* step, we must determine whether the BIA's current interpretation of its authority to issue binding regulations pursuant to section 1952 is reasonable. *See* 467 U.S. at 843–44. Defendants argue that section 1952's language is substantively identical to other statutes conferring broad delegations of rulemaking authority. Indeed, the Supreme Court has held that "[w]here the empowering provision of a statute states simply that the agency may make . . . such rules and regulations as may be necessary to carry out the provisions of this Act . . . the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation." *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) (internal quotation marks omitted); *see also City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 306 (2013) (noting a lack of

"case[s] in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field"). Here, section 1952's text is substantially similar to the language in *Mourning*, and the Final Rule's binding standards for Indian child custody proceedings are reasonably related to ICWA's purpose of establishing minimum federal standards in child custody proceedings involving Indian children. *See* 25 U.S.C. § 1902. Thus, the Final Rule is a reasonable exercise of the broad authority granted to the BIA by Congress in ICWA section 1952.

Plaintiffs contend that the BIA reversed its position on the scope of its authority to issue binding regulations after thirty-seven years and without explanation and its interpretation was therefore not entitled to deference. We disagree. "The mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion. But if these pitfalls are avoided, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) (internal citations and quotation marks omitted). The agency must provide "reasoned explanation" for its new policy, though "it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.*

The BIA directly addressed its reasons for departing from its earlier interpretation that it had no authority to promulgate binding regulations,

explaining that, under Supreme Court precedent, the text of section 1952 conferred "a broad and general grant of rulemaking authority." 81 Fed. Reg. at 38,785 (collecting Supreme Court cases). The BIA further discussed why it now considered binding regulations necessary to implement ICWA: In 1979, the BIA "had neither the benefit of the *Holyfield* Court's carefully reasoned decision nor the opportunity to observe how a lack of uniformity in the interpretation of ICWA by State courts could undermine the statute's underlying purposes." 81 Fed. Reg. at 38,787 (citing *Holyfield*, 490 U.S. at 30).

In *Holyfield*, the Supreme Court considered the meaning of the term "domicile," which ICWA section 1911 left undefined and the BIA left open to state interpretation under its 1979 Guidelines. 490 U.S. at 43, 51. The Court held that "it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law," given that "Congress was concerned with the rights of Indian families vis-à-vis state authorities" and considered "States and their courts as partly responsible for the problem it intended to correct" through ICWA. *Id.* at 45. Because Congress intended for ICWA to address a nationwide problem, the Court determined that the lack of nationwide uniformity resulting from varied state-law definitions of this term frustrated Congress's intent. *Id.* The *Holyfield* Court's reasoning applies here. Congress's concern with safeguarding the rights of Indian families and communities was not limited to section 1911 and extended to all provisions of ICWA, including those at issue here. Thus, as the BIA explained, all provisions of ICWA that it left open to state interpretation in 1979, including many that Plaintiffs now challenge, were subject to the lack of uniformity the Supreme Court identified in *Holyfield* and determined was contrary to Congress's intent. 81 Fed. Reg. at 38,782. Thus, in light of *Holyfield*, the BIA has provided a "reasoned explanation" for departing from its earlier interpretation of its

authority under section 1952 and for the need of binding regulations with respect to ICWA. *See Fox Television Stations*, 556 U.S. at 515.

In addition to assessing whether an agency's interpretation of a statute is reasonable under *Chevron*, the APA requires that we "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Contrary to Plaintiffs' contentions, the BIA explained that the Final Rule resulted from years of study and public outreach and participation. *See* 81 Fed. Reg. 38,778, 38,784–85. In promulgating the rule, the BIA relied on its own expertise in Indian affairs, its experience in administering ICWA and other Indian child-welfare programs, state interpretations and best practices,[20] public hearings, and tribal consultations. *See id.* Thus, the BIA's current interpretation is not "arbitrary, capricious, [or] an abuse of discretion" because it was not sudden and unexplained. *See Smiley*, 517 U.S. at 742; 5 U.S.C. § 706(a)(2). The district court's contrary conclusion was error.

C. The BIA's Construction of ICWA Section 1915

ICWA section 1915 sets forth three preferences for the placement of Indian children unless good cause can be shown to depart from them. 25 U.S.C. § 1915(a)–(b). The 1979 Guidelines initially advised that the term "good cause" in ICWA section 1915 "was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." 44 Fed. Reg. 67,584. However, section 23.132(b) of the Final Rule specifies that "[t]he party seeking departure from [section 1915's] placement preferences should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." 25 C.F.R.

[20] Since ICWA's enactment in 1978, several states have incorporated the statute's requirements into their own laws or have enacted detailed procedures for their state agencies to collaborate with tribes in child custody proceedings.

§ 23.132(b). The district court determined that Congress unambiguously intended the ordinary preponderance-of-the-evidence standard to apply, and the BIA's interpretation that a higher standard applied was therefore not entitled to *Chevron* deference.

Defendants contend that the Final Rule's clear-and-convincing standard is merely suggestive and not binding. They further aver that the Final Rule's clarification of the meaning of "good cause" and imposition of a clear-and-convincing-evidence standard are entitled to *Chevron* deference. Plaintiffs respond that state courts have interpreted the clear-and-convincing standard as more than just suggestive in practice, and the Final Rule's fixed definition of "good cause" is contrary to ICWA's intent to provide state courts with flexibility.

Though provisions of the Final Rule are generally binding on states, the BIA indicated that it did not intend for section 23.132(b) to establish a binding standard. *See* 25 C.F.R. § 23.132 ("The party seeking departure from the placement preferences *should* bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." (emphasis added)). The BIA explained that "[w]hile the final rule advises that the application of the clear and convincing standard 'should' be followed, it does not categorically require that outcome . . . [and] the Department declines to establish a uniform standard of proof on this issue." *See* 81 Fed. Reg. at 38,843.

The BIA's interpretation of section 1915 is also entitled to *Chevron* deference. For purposes of *Chevron* step one, the statute is silent with respect to which evidentiary standard applies. *See* 25 U.S.C. § 1915; *Chevron*, 467 U.S. at 842. The district court relied on the canon of *expressio unius est exclusio alterius* ("the expression of one is the exclusion of others") in finding that Congress unambiguously intended that a preponderance-of-the-evidence

standard was necessary to show good cause under ICWA section 1915. The court reasoned that because Congress specified a heightened evidentiary standard in other provisions of ICWA, but did not do so with respect to section 1915, Congress did not intend for the heightened clear-and-convincing-evidence standard to apply. This was error. "When interpreting statutes that govern agency action, . . . a congressional mandate in one section and silence in another often suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion." *Catawba Cty., N.C. v. E.P.A.*, 571 F.3d 20, 36 (D.C. Cir. 2009). "[T]hat Congress spoke in one place but remained silent in another . . . rarely if ever suffices for the direct answer that *Chevron* step one requires." *Id.* (cleaned up); *see also Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) ("Under *Chevron,* we normally withhold deference from an agency's interpretation of a statute only when Congress has directly spoken to the precise question at issue, and the *expressio* canon is simply too thin a reed to support the conclusion that Congress has clearly resolved this issue.") (internal citations and quotation marks omitted).

Under *Chevron* step two, the BIA's current interpretation of the applicable evidentiary standard is reasonable. *See Chevron*, 467 U.S. at 844. The BIA's suggestion that the clear-and-convincing standard should apply was derived from the best practices of state courts. 81 Fed. Reg. at, 38,843. The Final Rule explains that, since ICWA's passage, "courts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress's intent in ICWA to maintain Indian families and Tribes intact." *Id.* Because the BIA's current interpretation of section 1915, as set forth in Final Rule section 23.132(b), was based on its analysis of state cases and geared toward furthering Congress's intent, it is reasonable and entitled to *Chevron*

deference. Moreover, the BIA's current interpretation is nonbinding and therefore consistent with the 1979 Guidelines in allowing state courts flexibility to determine "good cause." Section 23.132(b) of the Final Rule is thus valid under the APA. *See* 5 U.S.C. § 706(a)(2).

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For these reasons, we conclude that Plaintiffs had standing to bring all claims and that ICWA and the Final Rule are constitutional because they are based on a political classification that is rationally related to the fulfillment of Congress's unique obligation toward Indians; ICWA preempts conflicting state laws and does not violate the Tenth Amendment anticommandeering doctrine; and ICWA and the Final Rule do not violate the nondelegation doctrine. We also conclude that the Final Rule implementing the ICWA is valid because the ICWA is constitutional, the BIA did not exceed its authority when it issued the Final Rule, and the agency's interpretation of ICWA section 1915 is reasonable. Accordingly, we AFFIRM the district court's judgment that Plaintiffs had Article III standing. But we REVERSE the district court's grant of summary judgment for Plaintiffs and RENDER judgment in favor of Defendants on all claims.

PRISCILLA R. OWEN, Circuit Judge, concurring in part and dissenting in part:

I agree with much of the majority opinion. But I conclude that certain provisions of the Indian Child Welfare Act (ICWA)[1] and related regulations violate the United States Constitution because they direct state officers or agents to administer federal law. I therefore dissent, in part.

The offending statutes include part of 25 U.S.C. § 1912(d) (requiring a State seeking to effect foster care placement of an Indian child to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful"), § 1912(e) (prohibiting foster care placement unless a State presents evidence from "qualified expert witnesses . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"), and § 1915(e) (requiring that "[a] record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section" and that "[s]uch record[s] shall be made available at any time upon the request of the Secretary or the Indian child's tribe"). Regulations requiring States to maintain related records also violate the Constitution.[2]

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[1] 25 U.S.C. §§ 1901 et seq.

[2] *See* 25 C.F.R. § 23.141:

> (a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

The Supreme Court has made clear that Congress cannot commandeer a State or its officers or agencies: "[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[3] "The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States."[4] "The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms."[5] The Supreme Court has recognized that "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority."[6]

The defendants in the present case contend that the Indian Commerce Clause[7] empowers Congress to direct the States as it has done in the ICWA.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

[3] *Printz v. United States*, 521 U.S. 898, 925 (1997).
[4] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018).
[5] *Id.* at 1476.
[6] *Id.*
[7] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

They are mistaken. "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."[8]

The panel's majority opinion concludes that the ICWA does "not commandeer state agencies"[9] because it "evenhandedly regulate[s] an activity in which both States and private actors engage."[10] This is incorrect with respect to the part of 25 U.S.C. § 1912(d) addressed to foster care placement, § 1912(e), § 1915(e), and 25 C.F.R. § 23.141.

Though § 1912(d) nominally applies to "[a]ny party seeking to effect a foster care placement of . . . an Indian child under State law,"[11] as a practical matter, it applies only to state officers or agents. Foster care placement is not undertaken by private individuals or private actors. That is a responsibility that falls upon state officers or agencies. Those officers or agencies are required by § 1912(d) to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[12] That directive means that a State cannot place an Indian child in foster care, regardless of the exigencies of the circumstances, unless it first provides the federally specified services and programs without success. Theoretically, a State could decline to protect Indian children in need of foster care. It could, theoretically, allow Indian children to remain in abusive or even potentially lethal circumstances. But that is not a realistic choice, even if state

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[8] *Murphy*, 138 S. Ct. at 1477 (quoting *New York v. United States*, 505 U.S. 144, 178 (1992)).

[9] *Brackeen v. Bernhardt*, __ F.3d __, __, 2019 WL 3759491, at *14 (5th Cir. 2019).

[10] *Id.* (quoting *Murphy*, 138 S. Ct. at 1478).

[11] 25 U.S.C. § 1912(d).

[12] *Id.*

law did not apply across the board and include all children, regardless of their Indian heritage.

Certain of the ICWA's provisions are a transparent attempt to foist onto the States the obligation to execute a federal program and to bear the attendant costs. Though the requirements in § 1912(d) are not as direct as those at issue in *Printz v. United States*,[13] the federal imperatives improperly commandeer state officers or agents:

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. *See Texas v. White*, 7 Wall. [700,] 725 [(1868)]. It is no more compatible with this independence and autonomy that their officers be "dragooned" (as Judge Fernandez put it in his dissent below, [*Mack v. United States*], 66 F.3d[1025,] 1035 [(9th Cir. 1995)]) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.[14]

Similarly, § 1912(e) provides that "[n]o foster care placement may be ordered" unless there is "qualified expert witness[]" testimony "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[15] This places the burden on a State, not a court, to present expert witness testimony in order to effectuate foster care for Indian children. If the federal government has concluded that such testimony is necessary in every case involving an Indian child's foster care placement, then the federal government should provide it. It cannot require the States to do so.

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[13] 521 U.S. 898 (1997).
[14] *Id.* at 928.
[15] 25 U.S.C. § 1912(e).

The requirements in 25 U.S.C. § 1912(d) apply to termination of parental rights, not just foster care placement.[16] The laws of Indiana, Louisiana, and Texas each permit certain individuals to petition for the termination of parental rights in some circumstances,[17] and § 1912(d) applies to all parties seeking termination, not just state actors.[18] At least superficially, § 1912(d) appears to be an evenhanded regulation of an activity in which both States and private actors engage.[19] But it is far from clear based on the present record that § 1912(d) applies in a meaningful way to private actors and if so, how many private actors, as compared to state actors, have actually met its requirements. Additionally, it appears that the State plaintiffs contend that "the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments."[20] I would remand for further factual development. It may be that in the vast majority of *involuntary* parental termination proceedings, the party seeking the termination is a state official or agency. It also seems highly unlikely that individuals or private actors seeking termination of parental rights (if and when permitted to do so under a State's laws) will have been in a position "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family."[21] It seems much more likely that these requirements fall, de facto, on the shoulders of state actors and agencies.

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[16] *Id.* § 1912(d).

[17] *See*, *e.g.*, IND. CODE §§ 31-35-2-4, 31-35-3.5-3 (2018); IND. CODE § 31-35-3-4 (2013); LA. CHILD. CODE ANN. art. 1122 (2019); TEX. FAM. CODE ANN. § 102.005 (West 2019); TEX. FAM. CODE ANN. § 161.005 (West Supp. 2019).

[18] 25 U.S.C. § 1912(d).

[19] *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018) ("The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.").

[20] *Printz v. United States*, 521 U.S. 898, 932 (1997).

[21] 25 U.S.C. § 1912(d).

The records-keeping requirements in 25 U.S.C. § 1915(e) and 25 C.F.R. § 23.141 are direct orders to the States.[22] They do not apply to private parties in parental termination or foster care placement proceedings. They do not apply "evenhandedly [to] an activity in which both States and private actors engage."[23]

The Supreme Court expressly left open in *Printz* whether federal laws "which require only the provision of information to the Federal Government" are an unconstitutional commandeering of a State or its officers or agents.[24] But the principles set forth in *Printz* lead to the conclusion that Congress is without authority to order the States to provide the information required by § 1915(e) and related regulations. Even were the burden on the States of creating, maintaining, and supplying the required information "minimal and only temporary," the Supreme Court has reasoned that "where . . . it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate."[25] The Supreme Court stressed, "It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."[26]

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[22] *Id.* at § 1915(e) ("A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made . . . ."); 25 C.F.R. § 23.141 ("The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child . . . .").

[23] *Brackeen v. Bernhardt*, __ F.3d __, __, 2019 WL 3759491, at *14 (5th Cir. 2019) (quoting *Murphy*, 138 S. Ct. at 1478).

[24] 521 U.S. at 918.

[25] *Id.* at 932.

[26] *Id.*

The panel's majority opinion concludes that the requirements of 25 U.S.C. § 1915(e) and 25 C.F.R. § 23.141 do not commandeer state officers or agents because they "regulate state activity and do not require states to enact any laws or regulations, or to assist in the enforcement of federal statutes regulating private individuals."[27] But the statute orders States to maintain records of each placement of an Indian child and requires those records to "evidenc[e] the efforts to comply with the order of preference specified in this section."[28] That directs States to assist in the enforcement of the ICWA by requiring States to document efforts to comply with the ICWA's preferences. The panel's majority opinion also cites three Supreme Court decisions, none of which supports its holding regarding the creation and maintenance of records.[29] The statute at issue in *Condon* prohibited States from disclosing or selling personal information they obtained from drivers in the course of licensing drivers and vehicles, unless the driver consented to the disclosure or sale of that information.[30] The Court's decision in *Condon* focused on that prohibition rather than the statute's additional requirement that certain information be disclosed to carry out the purposes of federal statutes including the Clean Air Act and the Anti Car Theft Act of 1992.[31] The *Baker* decision did not concern a requirement that States create and maintain records.[32] The federal statute at issue in *Baker* allowed a tax exemption for registered, but not bearer, bonds, and the statute "cover[ed] not only state bonds but also

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[27] *Brackeen*, __ F.3d at __, 2019 WL 3759491, at *14.

[28] 25 U.S.C. § 1915(e).

[29] *Brackeen*, __ F.3d at __, 2019 WL 3759491, at *14 (citing *Reno v. Condon*, 528 U.S. 141, 151 (2000); *Printz*, 521 U.S. at 918; *South Carolina v. Baker*, 485 U.S. 505, 514 (1988)).

[30] *Condon*, 528 U.S. at 143-44 (citing the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725).

[31] *Id*. at 145, 148-51.

[32] *See Baker*, 485 U.S. at 508-10.

bonds issued by the United States and private corporations."[33] As already discussed above, the *Printz* decision expressly left open the question of whether federal statutes requiring States to provide information was constitutional,[34] but the rationale of *Printz* compels the conclusion that some of the ICWA's commandments result in a commandeering of state officers and agents.

I agree with the panel's majority opinion that in some respects, the ICWA "merely require[s] states to 'take administrative . . . action to comply with federal standards regulating' child custody proceedings involving Indian children, which is permissible under the Tenth Amendment."[35] Unlike the congressional enactment at issue in *Murphy*, the ICWA does "confer . . . federal rights on private actors interested in"[36] foster care placement, the termination of parental rights to an Indian child, and adoption of Indian children. States cannot override or ignore those private actors' federal rights by failing to give notice to interested or affected parties or by failing to follow the placement preferences expressed in the ICWA. If a State desires to place an Indian child with an individual or individuals other than the child's birth parents, the State must respect the federal rights of those upon whom the ICWA confers an interest in the placement of the Indian child or Indian children more generally. But 25 U.S.C. § 1912(d) (to the extent it concerns foster care placement), § 1912(e), § 1915(e), and 25 C.F.R. § 23.141, require more than the accommodation of private actors' federal rights regarding the placement of Indian children. Those statutes and regulations commandeer state officers or agents by requiring them "to provide remedial services and rehabilitative

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[33] *Id.* at 510.
[34] *Printz*, 521 U.S. at 918.
[35] *Brackeen*, __ F.3d at __, 2019 WL 3759491, at *14 (quoting *Baker*, 485 U.S. at 515).
[36] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1467 (2018).

programs designed to prevent the breakup of the Indian family" and to demonstrate that such "efforts have proved unsuccessful";[37] to present "qualified expert witnesses" to demonstrate "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child";[38] and to create and maintain records of every placement of an Indian child as well as records "evidencing the efforts to comply with the order of preference specified in this section."[39]

That these statutes and regulations "serve[] very important purposes" and that they are "most efficiently administered" at the state level is of no moment in a commandeering analysis.[40] As JUSTICE O-CONNOR, writing for the Court in *New York v. United States*, so eloquently expressed, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[41]

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[37] 25 U.S.C. § 1912(d).
[38] *Id.* § 1912(e).
[39] *Id.* § 1915(e).
[40] *Printz v. United States*, 521 U.S. 898, 931-32 (1997).
[41] 505 U.S. 144, 187 (1992).

Appendix 10

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11479

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,

Plaintiffs - Appellees

v.

DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants - Appellants

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants - Appellants

Appeals from the United States District Court
for the Northern District of Texas

(Opinion August 9, 2019, Modified August 16, 2019,
5 Cir., 2019, 937 F.3d 409)

Before OWEN, Chief Judge, JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.[1]

BY THE COURT:

A majority of the circuit judges in regular active service and not disqualified having voted in favor, on the Court's own motion, to rehear this case en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

IT IS FURTHER ORDERED that the petition for rehearing en banc filed by appellees Chad Everet Brackeen, Jennifer Kay Brackeen, Altagracia Socorro Hernandez, Jason Clifford, Frank Nicholas Libretti, Heather Lynn Libretti, Danielle Clifford, is moot.

IT IS FURTHER ORDERED that the petition for rehearing en banc filed by appellees State of Texas, State of Indiana, State of Louisiana, is moot.

[1] Judge Ho is recused and did not participate in this decision.