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

CHAD EVERET BRACKEEN, et al.	§	
	§	
and	§	
	§	
STATE OF TEXAS,	§	
STATE OF LOUISIANA, and	§	
STATE OF INDIANA,	§	
	§	
Plaintiffs,	§	Civil Action No. 4:17-cv-868-O
	§	
v.	§	
	§	
RYAN ZINKE, in his official capacity as	§	
Secretary of the United States	§	
Departmentof the Interior, et al.,	§	
	§	
Defendants,	§	
	§	
and	§	
	§	
CHEROKEE NATION, et al.,	§	
	§	
Intervenor-Defendants.	§	

BRIEF IN SUPPORT OF MOTION OF CHEROKEE NATION, ONEIDA NATION, QUINAULT INDIAN NATION, AND MORONGO BAND OF MISSION INDIANS TO STAY PENDING APPEAL

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Intervenor-Defendants the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians (the "Tribes") submit this brief in support of their Motion for this Court to stay the final judgment (ECF No. 167) pending appeal. The Tribes intend to appeal the judgment. A stay is warranted by the traditional factors governing a stay pending appeal. A stay is also warranted because the Tribes have presented a substantial case on the merits when a serious legal question is involved and the equities favor a stay. The Tribes have conferred with counsel for the other parties; the Individual Plaintiffs and State Plaintiffs oppose the Motion; the Federal Defendants consent to the Motion.

BACKGROUND

In 1978, after years of study and extensive hearings, Congress passed the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963, to address the shocking fact that state child-welfare agencies, with the approval of state courts, were removing a huge percentage of American Indian children from their Indian families and communities. Seeking to "protect the best interests of Indian children," *id.* § 1902, and recognizing that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," *id.* § 1901(3), Congress in ICWA imposed "minimum Federal standards for the removal of Indian children from their families," *id.* § 1902. ICWA has largely proven successful in advancing the best interest of Indian children and preserving their relationships with their parents, families, and tribes.

On October 25, 2017—almost 40 years after ICWA was enacted—Plaintiffs filed the instant action seeking to declare key sections of this long-standing statute

unconstitutional. (ECF No. 1.) Plaintiffs did not move for a preliminary injunction, and they did not litigate this case with any sense of urgency. Almost two months after filing the initial complaint, Plaintiffs filed an amended complaint. (ECF No. 22.) The Federal Defendants then moved to dismiss the amended complaint (ECF No. 27), but instead of addressing the Federal Defendants' arguments, Plaintiffs amended their pleading yet again and filed their Second Amended Complaint on March 22, 2018 (ECF No. 35)—five months after they filed their initial complaint. The Individual Plaintiffs and State Plaintiffs each filed a motion for summary judgment. (ECF Nos. 72, 79.) After extensive briefing and a hearing, this Court granted summary judgment in favor of Plaintiffs on October 4, 2018. (ECF No. 166) ("Order"). The Court also entered judgment and dismissed this case with prejudice. (ECF No. 167.)

ARGUMENT

A four-factor test governs a motion to stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantively injure the other parties interested in the proceeding; and (4) [whether] public interest [favors a stay]." *Weingarten Reality Invs. v. Miller*, 66 F.3d 904, 910 (5th Cir. 2011) (alterations in original). These factors are not applied "in a rigid … [or] mechanical fashion." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983).

Further, a party need not always satisfy these traditional stay factors. "[A] movant need only present a substantial case on the merits when a serious legal

question is involved and show that the balance of equities weighs heavily in favor of granting a stay." *Campaign for Southern Equality v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014); *see also Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (a stay is "appropriate when a serious legal question is presented, when little if any harm would befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success."). "[T]he authority to hold an order in abeyance pending review allows an appellate court to act responsibly when faced with serious legal questions that merit careful scrutiny and judicious review." *Bryant*, 773 F.3d at 57 (quotation marks omitted).

A stay is warranted here for two independent reasons. First, the four traditional factors favor a stay. Second, the Tribes have presented a substantial case involving a serious legal question and the balance of the equities favors a stay.

I. The Traditional Four Factors Support a Stay.

The four traditional factors governing this Court's discretion support a stay. First, the Tribes are likely to succeed on the merits on appeal. Second, the Tribes would be irreparably injured absent a stay. Third, a stay will not injure any other parties. And, finally, the public interest strongly supports issuing a stay.

A. The Tribes are likely to succeed on the merits on appeal.

As an initial matter, because of the nature of this dispute, this factor is not dispositive. Even if it is "difficult for the Court to conclude that defendants are likely to succeed on appeal," a stay is still warranted because of the "presumption of

constitutionality of congressional action." *Hechinger v. Metro. Washington Airports Auth.*, 845 F. Supp. 902, 910 (D.D.C.), *amended on reh'g in part* (Feb. 15, 1994), *aff'd*, 36 F.3d 97 (D.C. Cir. 1994). "The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships." *Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, C.J., in chambers). This presumption applies here.

In any event, the Tribes are likely to succeed on the merits on appeal. The Court is familiar with the parties' arguments, but the reasons that each of the Court's holdings is likely to be reversed are set forth below.

1. Equal protection.—The Tribes argued that ICWA was subject only to rational basis review because the statute made a political, not racial, classification under *Morton v. Mancari*, 417 U.S. 535 (1974), and the many cases following *Mancari*. In its order, the Court rejected this argument. It stated that "the preference in *Mancari* applied 'only to *members* of "federally recognized" tribes,'" while ICWA's definition of "Indian child" extends to "children simply eligible for membership who have a biological Indian parent." Order 24–25. The Court concluded: "By deferring to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, the ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race," and therefore was subject to strict scrutiny. *Id.* at 26.

This holding is likely to be reversed on appeal. The Supreme Court found ancestry to be a proxy for race in *Rice v. Cayetano*, 528 U.S. 495 (2000), because the law did not require *any* political relationship with a separate sovereign. ICWA, by contrast, requires just such a political tie—the child must either be a member of a tribe or be eligible for membership and a biological child of a member. *See* 25 U.S.C. § 1903(4).

Moreover, in criticizing the application of ICWA to children who are eligible for membership, the summary judgment order overlooked the *context* of ICWA's application. *Mancari* involved hiring preferences for adults. By contrast, ICWA applies to children, including those only days old. *See*, *e.g.*, 25 U.S.C. § 1913(a) (consent to termination of parental rights invalid if within 10 days after birth). No tribe grants automatic membership to eligible newborns or children, *cf. Nielson v. Ketchum*, 640 F.3d 1117 (10th Cir. 2011); those eligible for membership must apply, which can be a lengthy and detailed process, requiring documentation. To apply for membership in defendant-intervenor Cherokee Nation, for example, the applicant must complete a detailed application and submit (*inter alia*) copies of their birth certificate and citizenship documents for an immediate family member or, if none, certified state birth and death records documenting lineage back to the Dawes Rolls. *See* http://www.cherokee.org/Services/Tribal-Citizenship/Citizenship. Needless to say, it is impossible for this paperwork to be completed, submitted, and approved for a newborn. Application of ICWA's requirements to children who are eligible for tribal membership, and who have a parent who is a member, is therefore

essential to achieve ICWA's goals; otherwise many thousands of parents could lose their parental rights before ICWA would even apply—destroying Congress's purpose in enacting the statute. Indeed Congress contemplated this very issue when it passed ICWA, deciding "to protect the valuable rights of a minor Indian who is eligible for enrollment in a tribe":

> This minor, perhaps infant, Indian does not have the capacity to initiate the formal mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom. Obviously, Congress has power to act for their protection. The constitutional and plenary power of Congress over Indians, and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.

H.R. Rep. 95-1386 at 17 (1978).

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

This holding is likely to be reversed on appeal. "The Supreme Court has resoundingly rejected every nondelegation challenge that it has considered since 1935. . . ." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 328 (2002). The Court erred in claiming that ICWA delegated legislative power, as Congress determined the relevant placement preferences and simply allowed tribes, through formal decision, to "establish a different order of preference." 25 U.S.C.

§ 1915(c). Moreover, the Court is simply wrong in contending that *any* delegation to an Indian tribe is impermissible because a tribe is not a "federal actor." As the Tribes explained in their summary judgment brief (ECF No. 118, at 37–38), the Supreme Court has held precisely the opposite. *See United States v. Mazurie*, 419 U.S. 544, 556–57 (1975). And Congress has repeatedly delegated authority to tribes. "Title 25 of the U.S. Code, for example, contains many examples of such delegation," including (in addition to ICWA) the Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801–2809, and the Indian Self-Determination Act, 25 U.S.C. §§ 450–458. Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 Harv. Envtl. L. Rev. 475, 478 n.18 (2007).

3. Tenth Amendment Anti-Commandeering.—The Court's holding that ICWA impermissibly commandeers the states also is likely to be reversed. The Court applied cases in which the Supreme Court found that Congress impermissibly commandeered the state legislative process (*New York* and *Murphy*) and the state executive branch (*Printz*), but overlooked the Supreme Court's express holding that "the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions." *Printz v. United States*, 521 U.S. 898, 907 (1997). Indeed, "[f]ederal statutes enforceable in state courts, 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 v. United States*, 505 U.S. 144, 178–79 (1992). Because all challenged provisions of ICWA and the Final

Rule either impose obligations directly on state courts or are most naturally read that way (*see* ECF No. 118, at 31–33), the statute and regulations do not impermissibly commandeer the states.[1]

4. APA claims.—The Court also erred in its resolution of the APA claims. Contrary to the Court's order, the APA does not permit the courts to second-guess expert administrative agencies on the "necessity" of a federal regulation. The BIA explained in detail the inconsistent application of certain provisions of ICWA by state courts, undermining Congress's purpose in enacting the statute and necessitating federal regulation to establish uniformity. (ECF No. 118, at 41–42.) Citing the Final Rule, the Court faulted the BIA for failing to "address how, suddenly, it no longer believes that ICWA primarily tasks … state courts and agencies with the authority to apply the statute as they see fit." Order 41. But BIA never took the position that state courts and agencies could apply the statute in any manner "as they see fit," and almost 40 years of experience demonstrated to the agency the necessity for federal guidance. More fundamentally, the Court overlooked the Solicitor of Interior's detailed explanation for why BIA believed that it had authority to promulgate the Final Rule. *See* Memorandum 37037 from Solicitor of Interior to Secretary of Interior on Implementation of the Indian Child Welfare Act by Legislative Rule at 16–17 (June 8, 2016), *available at* www.doi.gov/sites/doi.gov/files/uploads/m-37037.pdf. Finally, contrary to the Court's

[1] The Court's grant of summary judgment based on the Indian Commerce Clause is based solely on its commandeering holding, so is likely to be reversed for the same reasons.

holding, there is nothing in ICWA that denies BIA authority to establish the "good cause" definition; the agency based the regulation on a detailed review of the inconsistent state-court application of the statute, and this Court erred in reading into the statute a prohibition on a heightened standard that Congress never included in ICWA.

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

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

Congress adopted ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. ICWA therefore provides significant protections for tribes and Indian children, with the goal of ensuring that Indian children remain in the Indian community. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989). These protections are necessary during the pendency of this appeal.

First, absent a stay, the Tribes may lose their statutory rights in state-court proceedings involving Indian children in Texas, Louisiana, and Indiana. This means, among other things, that the Tribes may no longer receive notice of child-custody and termination-of-parental-rights proceedings involving Indian children; may be denied their statutory right to exclusive jurisdiction over certain Indian children; may be denied mandatory intervention; and may be denied their statutory right to challenge child-placement and parental-termination decisions. Just as important, Indian children may be denied the protections Congress thought essential to prevent the unjustified breakup of Indian families, including

restrictions on the validity of a parent's voluntary consent to termination of parental rights; the right of a child domiciled on a reservation to have custody determined by a *tribal* court rather than a state court; the requirement that active efforts be made to maintain an Indian family; and the preference for continuing placement of Indian children with their families and communities. In other words, the judgment below, if not stayed pending appeal, may permit Texas, Louisiana, and Indiana to return to the unconscionable practices that Congress found objectionable when it enacted ICWA 40 years ago.

These are not hypothetical concerns. As of October 2018, the Cherokee Nation has received formal notice under ICWA, and intervened in pending child custody cases, with respect to at least *52 children* in Texas who are "Indian children" as defined in that statute and who are in the custody of Texas child welfare agencies. Decl. of Nikki Baker Limore ¶ 2 (attached as Exhibit A). The Court's judgment, if not stayed, may deprive the Cherokee Nation of its statutory rights in these cases, and all Tribes their statutory rights in many others, both current and future.

Second, the protections ICWA affords to Indian children and Indian communities remain necessary today. For example, Indian children are four times more likely to be placed in foster care at their first encounter with the court system than are non-Indian children.[2] Indian children are placed in foster care at a higher

[2] *See* Robert B. Hill, *An Analysis of Racial/Ethnic Disproportionality & Disparity at the National, State, and County Levels*, Casey-CSSP Alliance for Racial Equity in Child Welfare 10–11 (2007), *available at* https://www.cssp.org/publications/child-

rate than white children despite no significant statistical difference between Indian and non-Indian families receiving child-welfare services.[3] And in 2015, Indian children in the United States remained overrepresented in the foster-care system by a factor of 2.7 as compared to non-Indian children.[4] As bad as these statistics are, they would only become worse if the judgment is not stayed pending appeal.

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

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

There is no risk that a stay will injure the Plaintiffs in this litigation.

With respect to the State Plaintiffs, the only real injury they risk if a stay is entered is the loss of federal funding should they fail to comply with ICWA. All of the State Plaintiffs are currently complying with ICWA and do not risk losing that funding. Indeed, the Tribes are not aware of *any* state that *ever* lost funding due to non-compliance with ICWA.

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welfare/alliance/an-analysis-of-racial-ethnic-disproportionality-anddisparity-at-the-national-state-and-county-levels.pdf.

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

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

Moreover, the State Plaintiffs have been subject to ICWA for the last *40 years*. Never once during those many decades did the State Plaintiffs contend that ICWA imposed any injury on them. Indeed, just recently Louisiana adopted a law requiring the state to comply with ICWA as a matter of state law. *See* 2018 La. Sess. Law Serv. Act 296 (effective Aug. 1, 2018). And seven other states—which have the same obligations under ICWA as the State Plaintiffs—filed a brief in this case arguing *for* the constitutionality of ICWA (ECF No. 137), refuting the suggestion that the statute injures the states.

Nor did the State Plaintiffs litigate this case with dispatch—they amended their complaint twice, over the course of five months, and never moved for a preliminary injunction. It is far too late for them to contend that a stay pending appeal will cause them injury. *See, e.g.*, *Gonannies, Inc. v. Goupair.Com, Inc.*, 464 F. Supp. 2d 603, 609 (N.D. Tex. 2006) ("Evidence of an undue delay in bringing suit may be sufficient to rebut the presumption of irreparable harm.").

Nor will the Individual Plaintiffs suffer any harm. This Court's order and judgment will not affect *any* of the Individual Plaintiffs. Chad and Jennifer Brackeen have already adopted A.L.M. (ECF No. 35 ¶ 152.) ICWA may apply to them in the future only if that adoption is collaterally attacked, but that harm is speculative considering no party contested their adoption. Nick and Heather Libretti live, and sought to adopt Baby O in, Nevada. (*Id.* ¶¶ 157, 164–69.) Altagracia Socorro Hernandez, who is Baby O's biological mother, also lives in Nevada. (*Id.* ¶ 162.) Nevada was not a party to this lawsuit and neither Nevada's

child-welfare agencies nor its courts are bound by this Court's ruling; the ruling therefore has no effect on the Libretti's ability to adopt Baby O. And Danielle and Jason Clifford, who are the foster parents of Child P and are attempting to adopt her, live in Minnesota. (*Id.* ¶¶ 172–77.) As Minnesota also is not a party to this lawsuit, neither its child-welfare agencies nor its courts are bound by this Court's ruling either. Therefore, a stay will not affect any of the Individual Plaintiffs.

D. The public interest supports a stay.

Finally, the public interest supports a stay. As discussed *supra*, the failure to enforce ICWA runs the significant risk of harming Indian children and their families, Indian tribes, and Indian communities. Indeed, ICWA's protections for Indian children and families are now widely considered the "gold standard" among national child welfare organizations. *See* Brief of Casey Family Programs, *et al.*, as *Amici Curiae* in Support of Respondent Birth Father, *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 2013 WL 1279468 at *2 (March 28, 2013) ("[I]n the Indian Child Welfare Act, Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children . . . [I]t would work serious harm to child welfare programs nationwide . . . to curtail the Act's protections and standards."). The harm caused by eliminating this "gold standard" establishes that the public interest favors a stay.

Furthermore, there is a "unique trust relationship between the United States and the Indians." *Oneida Cnty. v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). ICWA is a direct product of that unique trust relationship. *Doe v. Mann*, 285 F.

Supp. 2d 1229, 1234 (N.D. Cal. 2003). It is in the public interest to continue the United States' efforts to protect Indian children and families.

II. A Stay is Warranted Because the Tribes Have Presented a Substantial Case Involving a Serious Legal Question and the Equities Favor a Stay.

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

First, the Tribes have presented a "substantial case on the merits." While this Court may disagree with the Tribes' legal positions, their arguments are indisputably substantial. This is particularly true because many of Plaintiffs' claims are novel—the Supreme Court has not found a non-delegation violation since the New Deal; that Court has never found federal legislation benefitting tribes to violate the Equal Protection Clause; and ICWA has survived numerous constitutional challenges until now. *See, e.g.*, *Bryant*, 773 F.3d at 57 (holding that the question of whether Mississippi's statute barring same-sex marriage was constitutional presented a serious legal question for purposes of a stay, especially given that courts throughout the country had reached different conclusions).

Second, the balance of the equities favors a stay. Congress enacted ICWA in 1978, 40 years ago. Texas, Louisiana, and Indiana have been subject to the statute since that time. ICWA *directly* improved the dire situation found by Congress in 1978. As discussed *supra*, ICWA remains a necessary safeguard to keep Indian

children with their families and in their communities, when possible. And the Plaintiffs will not suffer any irreparable harm during a stay.

Finally, this Court's ruling will cause significant inconsistency in the law throughout the country. As the Fifth Circuit noted in *Bryant*, in issuing a stay pending appeal, "[t]he inevitable disruption that would arise from a lack of continuity and stability in this important area of the law" will harm the parties and "the public interest at large." *Id.* at 58. A stay is therefore warranted.

CONCLUSION

The Tribes respectfully request that the Court grant the Motion and stay this Court's judgment pending appeal.

Dated: October 10, 2018

Respectfully submitted,

By: /s/ *Adam H. Charnes*

Adam H. Charnes
State Bar No. 24090629
acharnes@kilpatricktownsend.com
Christin J. Jones
State Bar No. 24070017
cjones@kilpatricktownsend.com
KILPATRICK TOWNSEND & STOCKTON LLP
2001 Ross Avenue, Suite 4400
Dallas, Texas 75201
Telephone: (214) 922-7100
Telecopier: (214) 922-9277

Keith M. Harper
Northern Dist. of TX Bar No. 451956DC
kharper@kilpatricktownsend.com
Venus McGhee Prince
(*Admitted Pro Hac Vice*)
D.C. Bar No. 985717
vprince@kilpatricktownsend.com
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street, N.W.
Washington, DC 20005
Telephone: (202) 508-5800
Telecopier: (202) 315-3241

Thurston H. Webb
(*Admitted Pro Hac Vice*)
G.A. Bar No. 853388
twebb@kilpatricktownsend.com
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street NE
Atlanta, GA 30309
Telephone: (404) 815-6300
Telecopier: (404) 541-3127

Kathryn E. Fort
(*Admitted Pro Hac Vice*)
M.I. Bar No. P69451
fort@law.msu.edu
INDIAN LAW CLINIC
MICHIGAN STATE UNIVERSITY
COLLEGE OF LAW
648 N. Shaw Lane
East Lansing, MI 48823
Telephone: 517-432-6992

COUNSEL FOR CHEROKEE NATION, ONEIDA NATION, QUINAULT INDIAN NATION, AND MORONGO BAND OF MISSION INDIANS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 10th day of October, 2018, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(d).

/s/ *Adam H. Charnes*
Adam H. Charnes

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	§	
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	§	
and	§	
	§	
CHEROKEE NATION, et al.	§	
Intervenor-Defendants.	§	

DECLARATION OF NIKKI BAKER LIMORE

The Undersigned states the following:

1. My name is Nikki Baker Limore. I am the Executive Director of Indian Child Welfare for the Cherokee Nation. My duties include overseeing administrative operations for Cherokee Nation Indian Child Welfare Department and providing guidance to the 120 staff in 5 office locations which are located within the exterior boundaries of the Cherokee Nation.

2. As of October 2018, there are at least 52 minor children who qualify as an "Indian child" as defined in the Indian Child Welfare Act, who are in the custody of child welfare

Exhibit A`

agencies in the state of Texas, and as to whom the Cherokee Nation has received notice pursuant to ICWA and has intervened in the pending child custody proceedings.

I declare under penalty of perjury that the foregoing is true and correct and that it was executed on October 10, 2018

Nikki Baker Limore, J.D. OBA No. 19747
Executive Director, Indian Child Welfare
Cherokee Nation