No. 19-619

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Petitioners,

v.

BRYCE CALDWELL, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ames Circuit

JOINT APPENDIX

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SUPREME COURT OF THE UNITED STATES

ORDER LIST

Certiorari Granted

September 6, 2019

19-619 United States Department of the Interior v. Caldwell

The petition for a writ of certiorari is granted on the following two questions:

1. Whether the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*, and the final rule implementing the statute violate equal protection.

2. Whether the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*, and the final rule implementing the statute violate the anti-commandeering component of the Tenth Amendment.

IN THE UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT

BRYCE CALDWELL, ET AL. v. UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.	Docket No. 18-1611

Before Clyde, Denton, and McPherson, Circuit Judges.

CLYDE, J.:

In 1978, Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq.*, to address "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." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1998); *see Adoptive Couple v. Baby Girl*, 570 U.S. 637, 642 (2013). This case raises two distinct constitutional challenges to ICWA and a final rule enacted in 2016 to implement the statute. First, does the law discriminate on the basis of a protected class in violation of equal protection? Second, does the law commandeer state agencies and courts in violation of the anti-commandeering component of the Tenth Amendment? Although ICWA has a salutary purpose, we conclude that the statute and the final rule are constitutionally infirm on both grounds. We therefore reverse the district court's grant of summary judgment to defendants.

I.

In enacting ICWA more than four decades ago, Congress recognized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). ICWA accordingly establishes "minimum Federal standards for

the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. ICWA 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).

In child-custody proceedings involving Indian children, ICWA imposes a variety of duties on state agencies and prescribes procedural and substantive rules that state courts must follow. Of particular relevance here, ICWA establishes placement preferences in foster care, preadoptive, and adoptive proceedings involving Indian children. The statute requires that in adoption proceedings involving "an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a place with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a).

In June 2016, the Bureau of Indian Affairs (BIA) promulgated a final rule designed to interpret and implement ICWA. *See Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,778 (June 4, 2016) (codified at 25 C.F.R. pt. 23) (Final Rule). Among other provisions, the Final Rule addresses the circumstances that constitute "good cause" to deviate from ICWA's placement preferences and provides that a party urging a court to depart from those preferences must demonstrate that good cause exists by clear and convincing evidence. See 25 C.F.R. §§ 23.103(c)(1), 23.132(b). In addition, the Final Rule imposes additional procedural responsibilities on state courts and agencies in connection with proceedings involving Indian children. *See, e.g.*, *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 524 (N.D. Tex. 2018) (summarizing requirements), rev'd, --- F.3d -- (5th Cir. Aug. 9, 2019).

This case involves constitutional challenges to ICWA and the Final Rule brought by the State of Ames and by a non-Indian family seeking to adopt an Indian child in Ames. In February 2014, baby C.J. was born to A.W. and P.J., an unmarried couple. A.W. is not an Indian, but P.J. is an enrolled member of the Akava Nation, a tribe that has a reservation in Ames. Individuals are eligible to be enrolled members of the Akava Nation only if they can establish their biological lineal descent from an Akava Nation person whose name appeared on the official allotment roll when the Akava Nation Reservation was established in 1935. Specifically, the Akava Nation Constitution requires an individual to establish that he is "of at least one-eighth degree Akava Nation Indian blood" to be eligible for membership. Akava Nation Const. Art. III(B). Although C.J. is not an enrolled member of the Akava Nation, he qualifies as an "Indian child" under ICWA because he is eligible for enrollment in the tribe and his biological father is an enrolled member of the tribe.

Four months after he was born, C.J. was removed from his biological mother's care by Child Protective Services (CPS), a division of the Ames Department of Family and Protective Services (ADFPS). At that point, C.J.'s status as an Indian child under ICWA was not known because his mother was unaware of his father's tribal affiliation and his father, who had never been a part of his life, could not at that time be located. C.J. was placed in foster care with plaintiffs Bryce and Candace Caldwell, a non-Indian couple residing in Ames.

In December 2016, an Ames state court terminated the parental rights of C.J.'s biological parents, which made him eligible for adoption under Ames law. In the course of the termination proceedings, ADFPS learned that P.J. was an enrolled member of the Akava Nation, and the State thereafter followed ICWA's dictates. In accordance with ICWA, the Akava Nation was

notified of C.J.'s foster placement with the Caldwells. The Akava Nation did not identify an alternative placement for C.J. at that time.

In February 2017, the Caldwells filed a petition to adopt C.J. The Akava Nation thereafter identified an alternative adoptive couple who are members of the Sousetta Tribe, which also has a reservation in Ames. C.J. is not eligible for membership in the Sousetta Tribe because he does not have the requisite ancestry or blood quantum required by that tribe, but ICWA nevertheless provides that placement with an Indian family of a different tribal affiliation is preferred over placement with a non-Indian family. The alternative adoptive couple formally intervened in the proceeding.

At a subsequent hearing on the Caldwells' adoption petition, the Caldwells sought to establish good cause to depart from ICWA's placement preferences. The Caldwells testified about their bond with and deep love for C.J., and they presented testimony by an expert in child development who stated that C.J. would suffer severe emotional and psychological harm if he were removed from their home.

The Ames family court denied the Caldwells' petition to adopt C.J. The court did not question the Caldwells' fitness to serve as adoptive parents, but it concluded that they had not satisfied their burden to show by clear and convincing evidence that good cause existed to depart from ICWA's placement preferences. Following the family court's decision, the alternative adoptive couple voluntarily dismissed their petition to adopt C.J. due to the adoptive father's unanticipated health issues. The Caldwells then obtained an order staying any change in C.J.'s placement pending appeal of their adoption petition.

The Caldwells, joined by Ames, filed this suit against various federal agencies and officials charged with implementing and enforcing ICWA and the Final Rule.[1] Plaintiffs contend that ICWA and the Final Rule violate equal protection and the anti-commandeering component of the Tenth Amendment. The district court disagreed and granted summary judgement to defendants. This appeal followed.

II.

We first consider plaintiffs' argument that ICWA and the Final Rule violate the constitutional guarantee of equal protection.[2] Plaintiffs contend that ICWA and the Final Rule impermissibly mandate racial and ethnic preferences in the placement of Indian children. Defendants respond that ICWA and the Final Rule instead permissibly draw distinctions based on political classifications.

At the outset, the parties dispute what level of scrutiny applies to the equal protection challenge in this case. Defendants emphasize that the Supreme Court has several times held that statutes differentiating between individuals based on membership in a federally recognized Indian tribe do not impose suspect racial classifications. The leading case is *Morton v. Mancari*, 417 U.S. 535 (1974), in which the Supreme Court upheld a BIA policy that gave hiring preferences to tribal Indians over non-Indians. *Id.* at 554-55. *Mancari* held that the provision drew a political classification rather than a racial classification, which was permissible "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation

[1] Ames and the Caldwells filed a joint complaint and have filed joint briefs throughout this litigation. We refer to them collectively as plaintiffs, except where it is necessary to refer to them individually for clarity.

[2] Defendants have not raised any procedural defenses or threshold justiciability issues in this case. We accordingly confine our analysis to the merits of the constitutional arguments that have been raised.

toward the Indians." *Id.* at 555. Defendants argue that, like the statute at issue in *Mancari*, ICWA differentiates children based on a political classification rather than a racial one because children who are racially Indian do not fall within ICWA's "Indian child" definition if their parents are not enrolled members of a federally recognized tribe and because some children qualify under ICWA even though they lack Indian blood based on varying enrollment criteria across different tribes.

Plaintiffs contend that ICWA relies on a racial classification because its definition of "Indian child" is based on lineal descent from historic tribal members and because many tribes have explicit blood quantum requirements. Plaintiffs assert that *Mancari* has been effectively overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), which held that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." *Id.* at 227. Alternatively, plaintiffs assert that *Mancari* applies only when a statute involves the authority of the BIA and adopts a classification that is limited to tribal members and "further[s] Indian self-government." *Mancari*, 417 U.S. at 555. Plaintiffs argue that the Supreme Court rejected a broader reading of *Mancari* in *Rice v. Cayetano*, 528 U.S. 495 (2000), which struck down a law limiting the right to vote in certain elections to native Hawaiians on the ground that "ancestry can be a proxy for race." *Id.* at 514. Plaintiffs contend that strict scrutiny applies in this case because ICWA's placement preferences lack the necessary connection to tribal self-government or tribal lands and because the definition of "Indian child" under ICWA sweeps in children who are not tribal members but are merely eligible to become such members because of their ancestry and Indian blood quantum.

The parties further dispute whether ICWA satisfies the requisite level of constitutional scrutiny. Plaintiffs contend that even if *Mancari* applies, ICWA cannot be upheld because it

creates a placement preference not only for the Indian child's own tribe but also for all other tribes, even if the child is not eligible for enrollment in a different tribe. Accordingly, plaintiffs contend that ICWA does not rationally advance tribal self-government. And plaintiffs further contend that ICWA fails strict scrutiny because it is not narrowly tailored to a compelling governmental interest. Defendants respond that ICWA is constitutional under *Mancari* because it protects Indian children and promotes the "continued existence and integrity of Indian tribes," in fulfillment of Congress's "unique obligation toward the Indians." 25 U.S.C. § 1901(3); *Mancari*, 417 U.S. at 555. And defendants further contend that, even if strict scrutiny applies, ICWA is narrowly tailored to advance the government's compelling interest in fulfilling its trust obligation toward Indian tribes and Indian children.

The question of whether ICWA draws a political or racial classification is a difficult one. We recognize that many courts have rejected equal protection challenges to ICWA, including most recently the Fifth Circuit. *See Brackeen v. Bernhardt*, No. 18-11479, Slip Op. 19-26 (5th Cir. Aug. 9, 2019). On balance, however, we believe the district court decision in the *Brackeen* case is more persuasive in concluding that *Mancari* does not apply and that ICWA's classifications qualify as race-based because they extend to children who do not live on reservations and are not enrolled members of tribes but are merely eligible for enrollment based on their ancestry and blood quantum. *See Brackeen*, 338 F. Supp. 3d at 533-34. Applying strict scrutiny, we further conclude that ICWA is not narrowly tailored to a compelling governmental interest. We therefore hold that ICWA violates equal protection principles.

III.

We next consider whether ICWA and the Final Rule unconstitutionally commandeer the States in violation of the Tenth Amendment. Under the anti-commandeering principle, "the Federal Government may not compel States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997). The anti-commandeering principle protects state sovereignty, promotes political accountability, and prevents Congress from shifting the cost of regulation from the federal government to the States. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018).

Plaintiffs contend that ICWA and the Final Rule transgress the anti-commandeering principle by requiring state agencies and courts to carry out the federal policy and program of placing Indian children with Indian families. With respect to state courts, plaintiffs observe that ICWA requires the application of federal standards to adjudicate state-created causes of action in an area—domestic relations—that falls within the State's exclusive power to regulate. *See Sosna v. Iowa*, 419 U.S. 393, 404 (1975). And plaintiffs further assert that ICWA imposes numerous obligations on state executive officials and judicial officers, thereby conscripting them into executing a federal program.

Defendants contend that ICWA and the Final Rule comport with the Tenth Amendment. In defendants' view, ICWA does not commandeer state courts but instead simply preempts state family law in certain respects. To support that claim, defendants rely on the Supreme Court's observation that "[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). Defendants assert that Congress may impose minimum federal standards in state-created causes of action when

Congress has authority to legislate in an area, as it undoubtedly does in the field of Indian affairs. Defendants further contend that the procedural duties and obligations ICWA imposes on state executive officers do not amount to impermissible commandeering. Defendants argue that the provisions apply to private parties as well as States, that they merely set minimum procedural standards for child-custody proceedings involving Indian children as a matter of federal law, and that they constitute requirements to share information, which cannot amount to commandeering.

There are reasonable arguments on both sides of the Tenth Amendment issue presented in this case. Although we consider the issue close, we ultimately conclude that ICWA and the Final Rule violate the anti-commandeering principle. We believe that ICWA and the Final Rule impermissibly commandeer state courts by requiring the application of federal standards within state-law causes of action in the area of domestic relations, which "belongs to the laws of the states and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890). In addition to imposing duties on state judges, ICWA and the Final Rule impermissibly change the content of state family codes. For example, the statute and implementing regulations alter the best-interest-of-the-child standard that would otherwise apply in Ames. *Compare* 25 U.S.C. § 1915, *with* Ames Fam. Code § 162.016 (requiring that adoption be "in the best interest of the child"). ICWA and the Final Rule further alter intervention standards, burdens of proof, evidentiary rules, and time periods for withdrawal of consent to or collateral attacks on certain custody determinations. And ICWA and the Final Rule also impose recordkeeping and notice duties on state courts. *See, e.g.*, 25 U.S.C. §§ 1917 1951(a); 25 C.F.R. §§ 23.138, 23.139, 23.140.

Additionally, we hold that ICWA and the Final Rule impermissibly commandeer state executive officials by imposing a number of duties and obligations on those officials in

furtherance of carrying out what is effectively a federal program for the placement of Indian children. Under ICWA and the Final Rule, a state agency must, among other things, use "active efforts" to prevent the breakup of Indian families, 25 U.S.C. § 1912(d); make notifications in accordance with federal law, 25 U.S.C. § 1912(a), 25 C.F.R. § 23.11; maintain records of placements of Indian children, 25 U.S.C. §§ 1912(b), 1915(e); and follow certain procedures when an Indian child is removed from a home on an emergency basis, 25 U.S.C. § 1922. These requirements impose affirmative duties on state officials, for which the States will bear the cost, and they blur accountability by giving the impression that state courts and agencies are responsible for ICWA's standards.

We recognize that this holding creates a split of authority with the Fifth Circuit's recent decision in *Brackeen*. *See Brackeen*, Slip Op. at 26-35. Once again, however, we find the district court's decision in that case to be more persuasive. *See Brackeen*, 338 F. Supp. 3d at 538-41. In requiring state courts and agencies to apply federal substantive and procedural standards in the field of parent-child relations, we conclude that ICWA violates the anti-commandeering principle.

IV.

For the foregoing reasons, the district court's judgment granting summary judgment in favor of defendants is

REVERSED.

FILED: AUGUST 12, 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES

U.S. District Court
District of Ames
FILED
May 14, 2017

BRYCE CALDWELL, CANDACE CALDWALL, AND STATE OF AMES, Plaintiffs v. UNITED STATES DEPARTMENT OF INTERIOR, ET AL. Defendants	Civil Action No. _____

VERIFIED COMPLAINT

Plaintiffs Bryce Caldwell and Candace Caldwell, individuals living in Ames, and the State of Ames, by and through undersigned counsel, hereby file suit against the United States Department of the Interior; the Bureau of Indian Affairs; the United States; the Secretary of the United States Department of the Interior in his official capacity; the Director of the Bureau of Indian Affairs in his official capacity; and the Acting Assistant Secretary for Indian Affairs in his official capacity, and allege as follows:

INTRODUCTION

1. This is an action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706, and the United States Constitution, brought to challenge the constitutionality of the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (ICWA), and a final rule that purports to interpret and implement ICWA, *Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,778 (June 4, 2016) (codified at 25 C.F.R. pt. 23) (Final Rule). Bryce and Candace Caldwell want to adopt and forever care for C.J., a toddler who is three years old and has lived with the Caldwells in foster care for almost his entire life. An Ames family court denied the Caldwells' adoption petition because C.J. qualifies as an "Indian child" under ICWA and the Final Rule, and the

family court found that the Caldwells could not establish "good cause" to deviate from ICWA's placement preferences, which mandate placement with an "Indian family" over a non-Indian family like the Caldwells. The family court has entered an order staying any change in C.J.'s placement pending appeal. This action is brought to invalidate provisions of ICWA and the Final Rule that violate the federal Constitution, which would clear the way for the Caldwells to adopt C.J. The State of Ames joins as a plaintiff in this action because ICWA and the Final Rule intrude upon its sovereign authority in the field of domestic relations.

JURISIDCTION AND VENUE

2. This action arises under the Constitution and laws of the United States. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-06.

3. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, and by the general legal and equitable powers of this Court.

4. Venue lies in this Court pursuant to 28 U.S.C. § 1391(e)(1) because the action is against officers of the United States and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District.

PARTIES

5. Plaintiffs Bryce and Candace Caldwell are foster parents to C.J., a 39-month-old child who has lived with the Caldwells since he was four months old. Bryce and Candace Caldwell do not have Indian ancestry or the requisite blood quantum to qualify for membership in an Indian tribe. Accordingly, the Caldwells are not an Indian family within the meaning of ICWA and the Final Rule. The Caldwells have brought this action because ICWA and the Final Rule are interfering with their ability to adopt C.J.

6. Plaintiff Ames is a sovereign State possessing authority over family-law issues within its borders. The Ames Department of Family and Protective Services (ADFPS) is an executive agency responsible for child-custody proceedings in Ames. ADFPS therefore is responsible for compliance with ICWA and the Final Rule in Ames. Ames family courts possess jurisdiction over child-custody issues in actions arising under the Ames Family Code.

7. Defendant United States Department of the Interior is a federal executive department of the United States.

8. Defendant Bureau of Indian Affairs is a federal agency within the Department of the Interior.

9. The Secretary of the United States Department of the Interior is a cabinet secretary. He is sued in his official capacity.

10. The Director of the Bureau of Indian Affairs is a federal executive branch official. He is sued in his official capacity.

11. The Acting Assistant Secretary for Indian Affairs at the Bureau of Indian Affairs is a federal executive branch official. He is sued in his official capacity.

FACTS

A. Relevant Statutory And Regulatory Background

12. Ames, like all States, comprehensively regulates in the area of domestic relations. Under the Ames Lone Star Family Law Incorporation Act, codified at Ames Fam. Code § 1, Ames has incorporated all aspects of Texas family law as its own. Attached to this complaint as Exhibit A is a true and correct copy of the Ames Lone Star Family Law Incorporation Act, Ames Fam. Code § 1.

13. Title 5 of the Ames Family Code, which mirrors in all respects Title 5 of the Texas Family Code, governs the parent-child relationship, including termination of parental rights and adoption proceedings. *See* Ames Fam. Code §§ 101.001-266.013.

14. When child custody disputes arise in Ames, the "primary consideration" in determining the child's placement is the "best interest of the child." Ames Fam. Code §§ 153.002; 161.001(b)(2). In recognition that it harms children to unduly prolong custody determinations, Ames requires its courts to take prompt action when confronting disputes concerning the placement of a child so that the child's living environment is stable. Ames Fam. Code §§ 105.004, 109.002, 161.002, 162.005. And to ensure finality in child-placement decisions, "the validity of an adoption order is not subject to attack after six months after the date the order was signed." Ames Fam. Code § 162.012(a).

15. ICWA and the Final Rule alter the application of Ames's family law to Indian children. ICWA was enacted in 1978. It establishes "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster and adoptive homes." 25 U.S.C. § 1902. The statute 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).

16. ICWA requires States to adhere to specified placement preferences in child custody proceedings involving children who qualify as "Indian children" under the statute. 25 U.S.C. § 1915. As relevant here, "[i]n any adoptive placement under State law," ICWA requires that "preference shall be given" to "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (2) other Indian families," unless there is "good cause" for a

different placement. 25 U.S.C. § 1915(a). ICWA further requires state agencies and courts to defer to an Indian tribe's alteration of these placement preferences if the child's tribe establishes a different order by resolution. 25 U.S.C. § 1915(c).

17. ICWA and the Final Rule alter numerous aspects of state-court proceedings involving Indian children. For example, under ICWA, a state court must: transfer proceedings involving an Indian child to tribal courts in specified circumstances, *see* 25 U.S.C. § 1911(b); grant mandatory intervention to an Indian custodian and the child's tribe at any time during the proceeding, *see* 25 U.S.C § 1911(c); delay foster-care and parental-termination proceedings until 10 days after notice has been provided to the parents, tribe, Indian custodian, or Secretary of the Interior, *see* 25 U.S.C. § 1912(a); permit a parent or Indian custodian to withdraw consent to foster-care placement, voluntary termination of parental rights, or a final adoption decree as specified by the statute, 25 U.S.C. § 1913; and permit an Indian child, parent, Indian custodian, or tribe to petition for invalidation of a placement or the termination of parental rights if the process did not comply with ICWA, 25 U.S.C. § 1914. Under the Final Rule, a state court must, *inter alia*, ask participants on the court record whether a child is an Indian child, 25 C.F.R. § 21.107(a); request reports or other testimony from state agencies that due diligence was used to identify and work with all of the tribes which may be associated with the child, 25 C.F.R. § 23.107(b)(1); and defer to a tribe's judgment about whether the child is eligible for membership in that tribe, 25 C.F.R. § 23.108(a).

18. ICWA and the Final Rule also impose numerous duties, obligations, and costs on state agencies. For example, ICWA requires state agencies to use "active efforts" to prevent the breakup of Indian families, 25 U.S.C. § 1912(d), 25 C.F.R. §§ 23.2, 23.120; find qualified expert witnesses for proceedings involving Indian children, 25 U.S.C. §§ 1912(e) and (f); maintain

records regarding ICWA compliance and make those records available to the child's tribe and the federal government upon request, 25 U.S.C. § 1915(e); notify an Indian child's parents or Indian custodian and tribe of child-custody proceedings involving the child, 25 U.S.C. § 1912(a); and provide the Secretary with a copy of final adoption decrees involving Indian children, 25 U.S.C. § 1951(a).

19. ICWA and the Final Rule also displace state family law provisions and instead supply federal substantive standards in state-law causes of action adjudicated by state courts. For example, ICWA prevents the termination of parental rights for an Indian child unless there is "evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that 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). The Final Rule codifies ICWA's placement preferences, 25 C.F.R. § 23.130, and further specifies the circumstances when "good cause" exists to deviate from those placement preferences, 25 C.F.R. § 23.132. In determining whether the good-cause standard is satisfied, the Final Rule specifies that a court may not depart from the preferences "based on the ordinary bonding or attachment that results from time spent in a non-preferred placement that was made in violation of ICWA." 25 C.F.R. § 23.132(e).

20. Ames receives millions of dollars in federal funding as a result of complying with ICWA, including funding through Title IV-B, Part 1 of the Social Security Act. *See* 42 U.S.C. § 622(b)(9) (States receiving such funding must have a plan for child welfare services that includes a description of "the specific measures taken by the State to comply with [ICWA]."). If Ames were not in substantial compliance with ICWA, the federal government could withhold those funds. *See* 45 C.F.R. § 1355.36.

B. Facts

21. There are two federally recognized Indian tribes in Ames: the Akava Nation, and the Sousetta Tribe. Both tribes have reservations in Ames. In 2010, the U.S. Census Bureau reported that the population of American Indian and Alaska Native persons living in Ames exceeded 100,000.

22. Under the Akava Nation's Constitution and Bylaws, "[a]ll persons of Indian blood whose names appear on the official allotment roll of the Akava Nation Reservation, approved April 11, 1935, are enrolled members of the Akava Nation." Akava Nation Const. Art. III(A). In addition, "[a]ll persons born after April 11, 1935, who are of at least one-eighth degree Akava Nation Indian blood, are eligible to become enrolled members of the Akava Nation." Akava Nation Const. Art. III(B). "For purposes of determining eligibility for enrolled membership, Akava Nation Indian blood shall mean biological lineal descent from any Akava Nation person whose name appears on the official allotment roll of the Akava Nation Reservation, approved April 11, 1935." Akava Nation Const. Art. III(B). A true and correct copy of relevant provisions of the Akava Nation Constitution and Bylaws is attached as Exhibit B to this Complaint.

23. Under the Sousetta Tribe Constitution, persons whose names appear on the Census Roll of the Sousetta Tribe as of November 30, 1937, are enrolled members of the Sousetta Tribe. Sousetta Tribe Const. Art. II, § 1. In addition, "[a]ny child of a member of the Sousetta Tribe, wherever born," is eligible for enrollment in the Sousetta Tribe, "provided the child is of at least 1/4 degree Sousetta Tribe Indian blood, as measured by lineal descent from Sousetta Tribe members." Sousetta Tribe Const. Art. II, § 2. A true and correct copy of relevant provisions of the Sousetta Tribe Constitution is attached as Exhibit C to this Complaint.

24. Baby C.J. was born on February 6, 2014, to A.W. and P.J., an unmarried couple. A.W., C.J.'s biological mother, has no tribal affiliation. P.J., C.J.'s biological father, is an enrolled member of the Akava Nation but does not live on the Akava Nation reservation. P.J. has never had custody of C.J. C.J. has never lived on or visited the Akava Nation reservation. A true and correct copy of P.J.'s tribal membership enrollment record and certificate of Indian blood, which has been redacted to remove personally identifying information, is attached as Exhibit D to this Complaint.

25. For the first four months of his life, C.J. resided with A.W. in Ames City, Ames. In June 2014, when C.J. was four months old, Child Protective Services (CPS), a division of ADFPS, removed C.J. from A.W.'s care and placed him in foster care with the Caldwells. At that time, C.J. was not identified as an "Indian child" within the meaning of ICWA, apparently because A.W. was not aware of P.J.'s ancestry and tribal affiliation and because P.J. could not be located.

26. C.J. has lived with the Caldwells ever since his foster placement in their home in June 2014. The Caldwells love C.J., have cared for him nearly his entire life, and regard him as a member of their family. The Caldwells wish to adopt C.J. and legally become his parents.

27. On December 9, 2016, C.J.'s biological parents had their parental rights terminated in a voluntary proceeding, which cleared the way for C.J. to be adopted under Ames law. In the course of the termination proceedings, P.J.'s tribal affiliation was discovered. At that point, it was determined that C.J. qualifies as an "Indian child" under ICWA. The Akava Nation was notified of C.J.'s foster placement with the Caldwells. The Akava Nation was unable to identify an ICWA-preferred foster placement for C.J. at that time, and he remained in foster care with the Caldwells.

28. On February 3, 2017, the Caldwells brought an original petition to adopt C.J. in Ames family court. In accordance with ICWA, the Akava Nation was notified of the adoption proceeding. Two weeks later, the Akava Nation notified the family court that it had identified an alternative adoptive couple, both of whom are members of the Sousetta Tribe and so rank above the Caldwells under ICWA's placement preferences even though C.J. is not eligible for enrollment in the Sousetta Tribe. The alternative adoptive couple formally intervened in the adoption proceeding.

29. On April 4, 2017, the family court held a hearing on the Caldwells' petition to adopt C.J. The Caldwells argued that good cause existed to depart from ICWA's placement preferences. To support that argument, the Caldwells each testified about their deep love for and bond with C.J. The Caldwells also presented expert testimony by a developmental psychologist who averred that C.J. would suffer severe emotional and psychological harm if he were removed from the Caldwells' home. The development psychologist observed that the Caldwells were the only parents C.J. had ever known and that he was flourishing under their care.

30. On April 14, 2017, the family court entered an order denying the Caldwells' petition to adopt C.J. The court did not question the Caldwells' fitness to serve as adoptive parents. But the court ruled that ICWA's placement preferences applied and that the Caldwells had not met their burden to show by clear and convincing evidence that good cause existed to depart from those preferences. The court cited the regulations implementing ICWA, which provide that "good cause" cannot be established "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).

31. Shortly after the family court denied the Caldwells' petition to adopt C.J., the alternative adoptive couple who were members of the Sousetta Tribe voluntarily dismissed their petition to adopt C.J. because the adoptive father had just received an adverse medical diagnosis and the couple felt they were no longer in a position to follow through with the adoption. The Akava Nation identified an alternative foster-care, but not adoptive, placement with a different Sousetta tribe member. The Caldwells sought an emergency order staying any change in C.J.'s placement pending appeal of the denial of their adoption petition. The Caldwells informed the family court that they intended to file suit in federal court to challenge the constitutionality of ICWA and the Final Rule. The State of Ames appeared as *amicus curiae* in support of the Caldwells' stay request. On May 1, 2017, the family court entered a temporary order staying any change in placement pending the resolution of the Caldwells' appeal. That appeal remains pending and is stayed pending determination of the Caldwells' constitutional challenges to ICWA and the Final Rule. *See* 5 U.S.C. § 702 (a challenge to the legality of the Final Rule under the APA must be brought in a "court of the United States").

32. The Caldwells are directly and deeply injured by the Final Rule and ICWA because those sources of law are being applied to delay and possibly prevent altogether the Caldwells' adoption of C.J. The Caldwells are further injured because they have been forced to expend substantial sums to litigate ICWA-related issues beyond the resources that would be necessary to adopt a non-Indian child. In addition, before their petition to adopt C.J. was denied, the Caldwells intended to provide foster care for and potentially adopt other children in need. Based on their experience with C.J. and their fear that their relationship with him will be severed because of ICWA's provisions, the Caldwells are reluctant to provide foster care for Indian children in the future.

33. Ames is directly injured by the Final Rule and ICWA. Ames possesses sovereign authority over family-law issues affecting its residents. ICWA and the Final Rule affect every case handled by ADFPS by requiring analysis of whether a child is an Indian child and, if so, altering numerous aspects of child-custody proceedings. ICWA and the Final Rule impose onerous duties and significant costs on executive agencies and state courts in Ames and alter the substantive standards that apply in state-created causes of action that will result in state-court judgments.

CAUSES OF ACTION

COUNT I

ICWA And The Final Rule Violate Equal Protection

34. Plaintiffs reallege Paragraphs 1-33 as if fully set forth herein.

35. The Fifth Amendment's equal protection guarantee prevents discrimination based on race and ethnicity. *See Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

36. ICWA and the Final Rule violate the Fifth Amendment's equal protection guarantee by discriminating on the basis of race and ethnicity. ICWA and the Final Rule impose placement preferences for Indian families over non-Indian families, which constitutes racial discrimination. ICWA and the Final Rule also unlawfully discriminate against Indian children by subjecting them to different placement standards that increase the risk that the placement will not be in the child's best interest. ICWA and the Final Rule thereby burden Indian children based on their or their parents' race and ancestry as determined by blood quantum.

37. ICWA and the Final Rule cannot survive any level of constitutional scrutiny under the equal protection guarantee.

COUNT II

ICWA And The Final Rule Violate The Tenth Amendment's Anti-Commandeering Principle

38. Plaintiffs reallege Paragraphs 1-37 as if fully set forth herein.

39. The Tenth Amendment to the U.S. Constitution 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 Supreme Court has recognized that the Tenth Amendment prohibits the federal government from commandeering the States: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *United States v. Printz*, 521 U.S. 898, 935 (1997).

40. ICWA and the Final Rule impermissibly impose obligations on state courts and alter state substantive law in the field of domestic relations.

41. ICWA and the Final Rule impermissibly impose duties and obligations on state executive officials.

42. ICWA and the Final Rule violate the Tenth Amendment's anti-commandeering principle because they commandeer state agencies and courts in proceedings involving child-custody placements for Indian children.

COUNT III

The Final Rule Implementing ICWA Violates The Administrative Procedure Act

43. Plaintiffs reallege Paragraphs 1-42 as if fully set forth herein.

44. Defendants are "agencies" under the APA, 5 U.S.C. § 551(1), and the Final Rule complained of herein is a "rule" under the APA, 5 U.S.C. § 551(4), and constitutes "[a]gency

action made reviewable by statute and final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704.

45. The APA prohibits agency actions that are "not in accordance with law." 5 U.S.C. § 706(2)(A). The Final Rule is not in accordance with law because it violates the equal protection component of the Fifth Amendment and the anti-commandeering principle of the Tenth Amendment.

46. Plaintiffs have no adequate remedy at law to redress the injuries they are suffering because of ICWA and the Final Rule.

PRAYER FOR RELIEF

WHEREFORE, in light of the foregoing, Plaintiffs respectfully request that judgment be entered in their favor and against defendants as follows:

A. A declaration that ICWA and the Final Rule violate equal protection and are unconstitutional and unenforceable on their face or as applied to plaintiffs.

B. A declaration that ICWA and the Final Rule violate the Tenth Amendment and are unconstitutional and unenforceable on their face or as applied to plaintiffs.

C. A declaration that the Final Rule violates the APA, is invalid, and must be set aside.

D. An injunction prohibiting defendants from implementing, administering, or enforcing provisions of ICWA and the Final Rule that violate equal protection, the Tenth Amendment, or the APA;

D. An award to plaintiffs of the costs of litigation, including reasonable costs, expenses, disbursements, and attorneys' fees; and

E. A grant of such other relief as may be just and proper.

Dated: May 15, 2017

Respectfully submitted,

Clara Dalton
Clara Dalton
Attorney General of Ames

Office of the Attorney General
1001 Main St.
Ames City, Ames

Attorney for Ames

Abigail Flemming
Abigail Flemming

Hill and Hammill, LLP
5100 S. Ames Blvd
Ames City, Ames

Attorney for Bryce and Candace Caldwell

EXHIBIT A

AMES LONE STAR FAMILY LAW INCORPORATION ACT
Ames Fam. Code § 1

Ames hereby incorporates and adopts verbatim as its own sovereign law all family code provisions from the Texas Family Code. Any provision of the Texas Family Code may be cited as a provision of the Ames Family Code (Ames Fam. Code) using the same section numbering as applies in Texas, and the Ames Department of Family and Protective Services shall have the same scope of work as the Texas Department of Family and Protective Services.

EXHIBIT B

CONSTITUTION AND BYLAWS OF THE AKAVA NATION (EXCERPTS)

PREAMBLE

We, the people of the Akava Nation, in order to show our gratitude to our Almighty God, to preserve our rights of self-government, and to provide for the orderly transaction of business in our community, establish this Constitution and Bylaws for the government of our people.

* * *

ARTICLE III – TRIBAL MEMBERSHIP

(A) All persons of Indian blood whose names appear on the official allotment roll of the Akava Nation Reservation, approved April 11, 1935, are enrolled members of the Akava Nation.

(B) All persons born after April 11, 1935, who are of at least one-eighth degree Akava Nation Indian blood, are eligible to become enrolled members of the Akava Nation. For purposes of determining eligibility for enrolled membership, Akava Nation Indian blood shall mean biological lineal descent from any Akava Nation person whose name appears on the official allotment roll of the Akava Nation Reservation, approved April 11, 1935.

Exhibit C

Sousetta Tribe Constitution (excerpts)

Article II – Tribal Membership

Section 1

The following persons shall be enrolled members of the Sousetta Tribe:

All persons whose names appear on the Census Roll of the Sousetta Tribe as of November 30, 1937; PROVIDED that subsequent corrections may be made to the Census Roll by the Sousetta Tribal Council at any time with the approval of the Secretary of the Interior.

Section 2

The following persons shall be eligible for enrollment as members of the Sousetta Tribe:

Any child of a member of the Sousetta Tribe, wherever born, provided the child is of at least 1/4 degree Sousetta Tribe Indian blood, as measured by biological lineal descent from Sousetta Tribe members.

Exhibit D

AKAVA NATION
P.O. Box 11204
Drummel, Ames

TRIBAL MEMBERSHIP ENROLLMENT RECORD
AND CERTIFICATE OF INDIAN BLOOD

This is to certify that the records of this office show that:

[redacted] [Redacted – P.J.]

is of 1/2 degree Akava Nation Indian Blood and is an enrolled member of the Akava Nation.

DOB: [redacted] [Redacted]

SSN: [redacted] [Redacted]

Tribal Enrollment Number: [redacted] [Redacted]

Tribal Chairman: Joseph Birdwatcher

Date: February 2, 2015

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

BRYCE CALDWELL, ET AL. v. UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.	Civil Action No. 17-1740

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Plaintiffs' motion for summary judgment, Defendants' opposition to that motion, Defendants' motion for summary judgment, and Plaintiffs' opposition to that motion. Defendants have not challenged the factual assertions in the complaint or introduced evidence to contradict those assertions, so the Court credits the facts alleged in the complaint and finds that no dispute of material fact exists. Having considered the motions, the case law, and the record evidence, the Court has concluded that Plaintiffs cannot succeed on their claims that the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*, and the final rule implementing the statute violate equal protection or the anti-commandeering component of the Tenth Amendment. Accordingly, Defendants' motion for summary judgment will be **GRANTED**, and Plaintiffs' motion for summary judgment is **DENIED**. The clerk is directed to issue an appropriate judgment and to close the docket of this case.

Dated: March 7, 2018

E. Gideon Ellison
United States District Court
For the District of Ames

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

BRYCE CALDWELL, et al., Plaintiffs-Appellants v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants-Appellees.	Civil Action No. 17-1740

NOTICE OF APPEAL

Plaintiffs Bryce Caldwell, Candace Caldwell, and the State of Ames, by and through undersigned counsel, hereby give notice that they are appealing the judgment entered on March 7, 2018, in the above-captioned matter to the United States Court of Appeals for the Ames Circuit.

Respectfully submitted,

Clara Dalton
Clara Dalton
Attorney General of Ames

Office of the Attorney General
1001 Main St.
Ames City, Ames

Attorney for Ames

Abigail Flemming
Abigail Flemming

Hill and Hammill, LLP
5100 S. Ames Blvd
Ames City, Ames

Attorney for Bryce and Candace Caldwell

Dated: March 10, 2018