

Implementing and Defending the Indian Child Welfare Act Through Revised State Requirements

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The Indian Child Welfare Act, enacted in 1978, was designed to protect Indian children and enhance the stability of Indian tribes and families. It sets forth minimum federal standards applicable in proceedings involving the termination of parental rights, pre-adoption placement, and adoption placement. From its inception, there has been resistance to the Act's provisions, and opponents now have increased incentive to oppose the legislation on constitutional and other grounds in light of a recent U.S. Supreme Court decision. But the Obama Administration has taken important steps to promote increased and uniform compliance and address a number of lingering implementation issues. The issuances by the Department of the Interior of non-binding guidelines in 2015 and of legislative rules in 2016 are opportunities for states to promptly examine their current practices and standards and voluntarily adopt the guidelines and regulations as enforceable state requirements. New York State is an example of a state that has evidenced support for implementation of the Act, but in a number of respects its current requirements fall short of the federal recommendations and rules. This Note urges states, with jurisdictions such as New York taking a leadership role, to act now to adopt the guidelines and regulations. Doing so will conform existing state practices to best practices and federal standards and, importantly, signal a strong commitment to the Act and to the best interests of Indian children, tribes, and families.

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I. INTRODUCTION

The Indian Child Welfare Act of 1978 (ICWA)¹ was enacted “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”² The legislation included findings

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ;

(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.³

Opposition to the statute has, however, existed since its enactment,⁴ and opponents have additional incentive to urge courts to ignore or narrow the Act’s provisions in light of a recent U.S. Supreme Court ruling.⁵ This Note identifies several of the types of attacks that have been and continue to be waged on the statute, and encourages, using New York State as an example, adop-

1. 25 U.S.C. §§ 1901–1903, 1911–1923, 1931–1934, 1951–1952, 1961–1963 (2012).

2. *Id.* § 1902.

3. *Id.* § 1901(3), (4), (5).

4. Barbara Atwood’s observation in 2002 that “[b]y some accounts the Act has been the victim of entrenched state court hostility ever since its enactment more than two decades ago” remains true today. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 587 (2002) (footnote omitted). This Note references judicial resistance but notes that opposition also comes from other sources.

5. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

tion by states of federal non-binding guidelines issued in 2015⁶ and of legislative rules promulgated in 2016⁷ as enforceable state requirements.

Preliminarily, a brief discussion of several of the Act's provisions may be helpful. The Act is applicable to Indian child custody proceedings. "Child custody proceedings" refers to foster care placement, the termination of parental rights, pre-adoptive placement, and adoptive placement proceedings.⁸ An "Indian child" is 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."⁹ New York State extends coverage to age 21 if the child entered foster care prior to his or her eighteenth birthday. "Indian tribe" is defined in ICWA as "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"¹⁰

Section 1911 of ICWA provides that "[a]n 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."¹¹ In state court proceedings for foster care placement or termination of parental rights, a state 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"¹² "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

6. Guidelines for State Courts and Services in Indian Child Custody Proceedings, 80 Fed. Reg. 10,146 (Feb. 25, 2015).

7. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (to be codified at 25 C.F.R. § 23).

8. 25 U.S.C. § 1903(1) (2012).

9. *Id.* § 1903(4).

10. *Id.* § 1903(8).

11. *Id.* § 1911(a).

12. *Id.* § 1911(b).

have a right to intervene at any point in the proceeding.”¹³ Tribal court proceedings are afforded full faith and credit.¹⁴

Section 1912 provides that, in any involuntary proceeding in a state court concerning foster care placement or termination of parental rights, notice by registered mail must be provided to the parent or Indian custodian and to the Indian child’s tribe.¹⁵ In addition, “[a]ny 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.”¹⁶ The section also establishes heightened evidentiary standards to justify foster care placement (clear and convincing evidence 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”) or termination of parental rights (“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”).¹⁷ Section 1913 addresses the voluntary termination of parental rights and consent to foster care placement.¹⁸ Section 1915 establishes a placement preference for adoptions; “in the absence of good cause to the contrary,” adoption placements should be made, in order of preference, “with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”¹⁹ Similar preferences are set forth for foster care and pre-adoptive placements.²⁰ If a tribe establishes “by resolution” a “different order of preference,” 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”²¹ “Where appropriate, the preference of the Indian child or parent shall be considered”²²

13. *Id.* § 1911(c).

14. 25 U.S.C. § 1911(d) (2012).

15. *Id.* § 1912(a).

16. *Id.* § 1912(d).

17. *Id.* § 1912(e), (f).

18. *Id.* § 1913.

19. *Id.* § 1915(a).

20. 25 U.S.C. § 1915(b) (2012).

21. *Id.* § 1915(e).

22. *Id.*

This Note concludes that states should proceed to incorporate recently issued federal guidelines and regulations into their enforceable state requirements. It uses New York State as an example for several reasons. New York's present requirements exceed those of ICWA in several respects, and New York judges have received training with regard to federal statutory provisions and state regulations for many years. Moreover, there is little evidence of judicial antagonism in New York State. Yet there are troubling indications that compliance with the statute, particularly in New York City, may nonetheless be inconsistent or lacking. Part II, therefore, discusses ICWA implementation in New York State, and illustrates that even a seemingly "progressive" state may fall short of the goal of ensuring that the statute is both recognized and consistently and properly applied by child welfare agencies and courts. Part III examines, by reference to both judicial and federal agency developments, why state formal adoptions of guidelines issued by the Department of the Interior in 2015 and of legislative rules promulgated in 2016 are important to facilitate and ensure compliance with the statute. The guidelines and regulations, in part, seek to address illegal practices that have occurred in some jurisdictions and, if implemented and enforced by states, would promote uniformity in application of the statute by courts and agencies. They also respond to a recent Supreme Court opinion that has been viewed by some observers as narrowing the scope of the statute. But the guidelines and regulations also set forth the informed views of the Department on a variety of matters that were not addressed in that litigation. The decision, and the constitutional arguments against the statute that were raised in the case but not addressed by the majority, are discussed in Part III as well. What is clear is that the statute is, at least in some jurisdictions and in some contexts, under attack and that concerted efforts are needed to ensure that it both survives and is properly implemented.

Part IV compares existing New York requirements with the 2015 guidelines and the 2016 regulations, explains why they are deficient in several important respects, and recommends that the State either promptly undertake a rulemaking proceeding on its own or respond affirmatively to a petition for rulemaking. This Note concludes, in Part V, with recommendations for training, court observation, and participation by law school clinics, tribes, and advocacy groups both in the filing of amicus briefs in cases in

which ICWA is challenged and with regard to implementation of the guidelines and regulations once they are incorporated into state requirements.

II. NEW YORK STATE AND ICWA COMPLIANCE

For several decades before Congress acted, Indian children were routinely removed from their homes and placed in foster care or adopted by non-Indians. “In New York, 1 out of 74.8 Indian children were in foster care, while the non-Indian rate was 1 out of every 226. An estimated 96.5% of those Indian children were placed in non-Indian foster homes. And New York’s Indian children were placed for adoption at a per capita rate 3.3 times the rate of non-Indian children.”²³ New York also had “a long history of laws and policies focused on assimilating Indian children and families, resulting in separation of children from families.”²⁴ The Whipple Commission, a group formed by the General Assembly to examine the status of Indians within the State in the late 1800s, described Indians as pagans and encouraged the removal of children from Indian homes.²⁵ Indian children were rou-

23. Carrie E. Garrow, *Government Law and Policy and the Indian Child Welfare Act*, N.Y. ST. B. ASS’N J. 10, 13 (Mar.–Apr. 2014) (footnotes omitted). Nationwide, in 1969 eighty-five percent of Indian children in foster care were placed in non-Indian homes. The number of Indian children in the foster care system in South Dakota, a state with a high Native American population, was sixteen times greater than the rate for non-Indian children. In Wisconsin the risk of separation from parents of Indian children was sixteen hundred percent greater than that risk for non-Indian children.

Kelsey Vujnich, *A Brief Overview of the Indian Child Welfare Act, State Court Responses and Actions Taken in the Past Decade to Improve Implementation Outcomes*, 26 J. AM. ACAD. MATRIM. LAW 183, 186–87 (2013) (footnotes omitted). “Not only did Indian children suffer the trauma of separation from their homes but, in addition, Indian youths raised in non-Indian settings often encountered difficulty in forming a positive identity later in life, exhibiting serious emotional and psychological problems. . . . Indian families suffered from the loss of their children, and tribes, in turn, lost their membership.” Atwood, *supra* note 4, at 604 (footnotes omitted). “The reasons for these removals were often not related to the threat of abuse or neglect, but rather to a lack of understanding of tribal child-rearing and cultural practices, as well as bias of those involved in making key decisions in the child welfare process.” DAVID E. SIMMONS, NAT’L INDIAN CHILD WELFARE ASS’N, IMPROVING THE WELL-BEING OF AMERICAN INDIAN AND ALASKA NATIVE CHILDREN AND FAMILIES THROUGH STATE-LEVEL EFFORTS TO IMPROVE INDIAN CHILD WELFARE ACT COMPLIANCE 2 (Sept. 2014), http://www.nicwa.org/government/documents/Improving%20the%20Well-being%20of%20American%20Indian%20and%20Alaska%20Native%20Children%20and%20Families_2014.pdf [<https://perma.cc/4D4R-TUVL>].

24. Garrow, *supra* note 23, at 15.

25. N.Y. ST. ASSEMB., REPORT OF SPECIAL COMMITTEE TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK 51 (1889); *see also* Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudeno-*

tinely and in large numbers removed from their homes and placed in boarding schools.²⁶ The Thomas Asylum for Orphan and Destitute Indian Children in Batavia, New York, was one such school.²⁷

New York's practices were consistent with those of many other states, and so ICWA was designed to stop programs and policies that resulted in the separation of Indian children from their families. At first glance, New York State appears to be a model of compliance with the statute. For example, the Department of Social Services (DSS) promulgated regulations that, in several respects, go beyond ICWA²⁸ and thus "provide additional protections to Indian children."²⁹ Implementation and training of judges and child welfare workers has occurred through groups such as the New York Tribal Courts Committee, which "created a platform for collaboration and communication through committee visits to reservations and meetings with the leadership of participating tribal Nations."³⁰ Training of family court judges has oc-

saunee, 46 BUFF. L. REV. 805, 826 (1998) ("The investigating committee explored and condemned every aspect of Haudenosaunee law, custom, land tenure, lifestyle and religious practice.").

26. Porter, *supra* note 25, at 74.

27. *Id.*; see also COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (Nell Jessup Newton ed., 2012) (describing practices of removing children from their homes and placing them in boarding institutions).

28. ICWA provides that any "State or Federal law [that] provides a higher standard of protection [than ICWA] to the rights of the parent or Indian custodian of an Indian child . . . shall apply . . ." 25 U.S.C. § 1921 (2012).

29. Garrow, *supra* note 23, at 16. Carrie Garrow summarized the differences:

Unlike federal law, New York State does not require the child to be a biological child of a member of a tribe within the state. New York's regulations include biological children of a member of any federally recognized tribe, who live on a reservation or tribal land, regardless of enrollment, to be covered under the act as well. Last, New York includes children ages 18 to 21 who are in foster care, are attending school, or lack the ability to live independently, to encompass a larger population of Indian children. . . . Unlike ICWA, New York's regulations include a definition of a qualified expert who may testify as to whether continued custody is likely to result in serious physical or emotional harm to the child.

Id. (footnotes omitted).

30. JUSTINE VAN STRAATEN & PAUL G. BUCHBINDER, CTR. FOR CT. INNOVATION, THE INDIAN CHILD WELFARE ACT: IMPROVING COMPLIANCE THROUGH STATE-TRIBAL COOPERATION 10 (2011), <http://www.courtinnovation.org/sites/default/files/documents/ICWA.pdf> [<https://perma.cc/7MUB-YDMX>]. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., STATES' CONSULTATION AND COLLABORATION WITH TRIBES AND REPORTED COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT: INFORMATION FROM STATES' AND TRIBES' 2015-2019 CHILD AND FAMILY SERVICES PLANS 156-63 (Dec. 17, 2015), <http://www.acf.hhs.gov/programs/cb/resource/states-tribes-cfspd-2015-2019> [<https://perma.cc/GB9N-L7VQ>] (detailing tribal consultation and collaboration during reporting period).

curred periodically for a number of years. Similarly, New York state courts have not, at least in the reported decisions, evidenced the degree of hostility to the Act demonstrated by courts in some southern and western states.³¹ But non-compliance may nonetheless exist, and New York City may harbor much of it.

The “most recent estimates indicate that, nationally, Native American children are overrepresented in the foster care system at a rate of 2.1.”³² The ratio “means that the proportion of Native American children in foster care is more than twice as high as the proportion in the general population.”³³ To be clear, a high disproportionality rate does not necessarily mean that there are identifiable actual violations of the procedural and substantive provisions of ICWA. Disproportionate placement of Indian children in state systems can result from a number of factors:

The most critical issues of noncompliance involve (1) lack of regular oversight of ICWA implementation; (2) . . . children not being identified early in child welfare proceedings, (3) tribes not receiving early and proper notification of child welfare proceedings involving their member children and families, (4) lack of placement homes that reflect the preferences defined within ICWA, (5) limited training and support

31. See, e.g., *In re Baby Boy C.*, 805 N.Y.S.2d 313 (N.Y. App. Div. 2005) (rejecting the existing Indian family doctrine).

32. ALICIA SUMMERS & STEVE WOOD, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, MEASURING COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT: AN ASSESSMENT TOOLKIT 4 (Feb. 28, 2014), http://www.ncjfcj.org/sites/default/files/ICWA_Compliance_Toolkit_Final.pdf [<https://perma.cc/D6YF-T6R6>].

33. *Id.* “While many states have little to no disproportionality, others have in care rates more than 10 times the general population rate (i.e., Minnesota).” *Id.* at 4. Minnesota’s disproportionality rate in 2011 was 12, an increase from 8.1 in 2000. ALICE SUMMERS ET AL., NAT'L COUNCIL JUV. & FAM. CT. JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE 1 (May 2013), <http://www.ncjfcj.org/sites/default/files/Disproportionality%20Rates%20for%20Children%20of%20Color%20in%20Foster%20Care%202013.pdf> [<https://perma.cc/77BR-UBMZ>]. Other states with high disproportionality rates include Nebraska, Iowa, Wisconsin, South Dakota, Utah, North Dakota, Oregon, Alaska, New Hampshire, Idaho, Montana, and Washington. SUMMERS & WOOD, *supra* note 32, at 4. New York State’s rate is less than 1. SUMMERS ET AL., *supra*, at 4. That does not, however, mean that no violations of ICWA are occurring. ICWA does not contain specific data collection requirements, and ICWA advocacy groups “have very little information on ICWA compliance nationally or within any given state.” E-mail from Addie Smith, Nat'l Indian Child Welfare Ass'n, to author (Apr. 8, 2015, 12:05 EST) (on file with author); see also CTR. FOR ADV. STUDIES IN CHILD WELFARE, UNIV. OF MINN., POLICY BRIEF NO. 1, CHILD WELL-BEING IN MINNESOTA: A PRIMER FOR THE 2013–2014 LEGISLATIVE SESSION 2 (2013), http://casew.umn.edu/wp-content/uploads/2013/11/policyreport-update.WEB_.pdf [<https://perma.cc/Q4Q8-8YDZ>] (referencing Minnesota Department of Human Services data).

for state and private agency staff to develop knowledge and skills in implementing ICWA, and (6) inadequate resources for tribal child welfare agencies to participate and support their state and private agency counterparts.³⁴

Disproportionality scores are referenced in the literature, but may have little relationship to the degree to which compliance with the Act is occurring. One of the reasons they are mentioned is because little other information may be pertinent to ascertaining the extent of compliance. For example, the few “[e]mpirical study results are scattered, inconsistent, and highly specific to the state or jurisdiction being examined.”³⁵ Likewise, “there is no reliable mechanism for detecting a state’s failure to follow ICWA’s mandates in any individual case, a general recognition that state and tribal entities lack the requisite knowledge and resources to ensure compliance, or the fact that those protected by ICWA are often not aware of the law or how to seek the remedies available.”³⁶

New York’s disproportionality rate, for example, is low.³⁷ But just as a relatively high score may itself be deceptive, the problem of systemic violations is not necessarily isolated to those states that have high disproportionality scores; when children are often never identified as Indian, scores are untrustworthy.³⁸ In states such as New York where large numbers of Indian children live off-reservation, courts may not inquire early in the proceeding about the possible Indian status of the child, resulting in tribes not being notified, and the proceeding not being conducted in accordance with ICWA. The potential for failing to promptly identify children as Indian is magnified in metropolitan areas where “it is especially difficult for state child welfare authorities to identify children who are covered by ICWA for the obvious reason that these children do not live on clearly delineated reservations but within the broader multi-ethnic population of the city.”³⁹ New

34. SIMMONS, *supra* note 23, at 7.

35. JASON R. WILLIAMS ET AL., CASEY FAM. PROGRAMS, A RESEARCH AND PRACTICE BRIEF: MEASURING COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT 7 (2015), <http://www.casey.org/media/measuring-compliance-icwa.pdf> [https://perma.cc/V3CC-5Q4V].

36. VAN STRAATEN & BUCHBINDER, *supra* note 30, at 3–4.

37. The 2011 rate was 0.8. See SUMMERS ET AL., *supra* note 33, at 4.

38. No comprehensive study of ICWA compliance has been conducted in New York State.

39. VAN STRAATEN & BUCHBINDER, *supra* note 30, at 5.

York City “is an important example of this phenomenon. . . . New York City has no mechanism in place to identify prospective foster children as Native American, as defined by ICWA.”⁴⁰ This comment, made by the Center for Court Innovation in a 2011 report, was not substantiated in the report; only monitoring of proceedings can determine whether family courts routinely question whether an Indian child is involved and if they require documentation of public agency or private adoption service efforts to determine a child’s status.⁴¹ The accusation that no such mechanism exists in New York City is, however, particularly troublesome: in the absence of early inquiry and prompt identification, tribes are not notified of a proceeding, the child is not treated differently in the process, and placement in a non-Indian foster care or adoptive home is much more likely to occur.

III. RECENT FEDERAL AGENCY AND JUDICIAL DEVELOPMENTS DEMONSTRATE THE NEED TO REVISE STATE REQUIREMENTS

An examination of potential revisions to state-level requirements is particularly timely in that the Department of the Interior’s Bureau of Indian Affairs has substantially updated non-binding guidelines that had not been revised since 1979.⁴² While the guidelines reflect an increased federal interest in providing updated guidance to state courts, state child welfare agencies, and private adoption groups, they will not by themselves resolve long-standing interpretative issues and correct violations, unless there are state-level initiatives to incorporate and meaningfully enforce the agency’s positions. An even more recent development, on June 14, 2016, further demonstrates the Department’s commitment to ICWA. The Interior Department concluded a notice-and-comment rulemaking process and promulgated legislative regulations⁴³ that incorporate a number of the non-binding guide-

40. *Id.* “According to the 2000 U.S. Census, New York City has the largest Native American population of any American city at 87,241.” *Id.* at 4–5 (footnote omitted).

41. No program currently attempts to engage in even limited case reviews and court observations in New York City, for data collection purposes or otherwise. For a recommendation that standard methods for measuring compliance be adopted, see WILLIAMS ET AL., *supra* note 35, at 13. See *infra* Part V for proposed judicial observation programs for New York State.

42. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6.

43. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23).

lines pertaining to state courts and make them enforceable requirements.⁴⁴ While the 2016 regulations should preempt inconsistent state-level rules or procedures,⁴⁵ states are not obligated to formally revise their existing rules.⁴⁶ For reasons discussed below,⁴⁷ this Note recommends that states promptly begin efforts to incorporate both the federal non-binding guidelines, which set forth suggested standards for state courts, child welfare agencies, and private adoption groups, and the agency's legislative rules, which seek to regulate state courts, into enforceable state regulations. As the promulgated rules set forth federal minimum standards that states may exceed in stringency or degree of protection,⁴⁸ states should resolve inconsistencies between the 2015

44. *Id.* at 38,782 (“Although the Department initially hoped that binding regulations would not be ‘necessary to carry out the Act,’ see FR 67,584 (Nov. 23, 1979), a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law.”); see also Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14,880 (proposed May 20, 2015), <http://www.gpo.gov/fdsys/pkg/FR-2015-03-20/pdf/2015-06371.pdf> [<https://perma.cc/X8DH-SMRD>]. The proposal “incorporate[d] many of the changes made to the recently revised guidelines into regulations” in order to “ensure consistency in implementation of ICWA across all States.” *Id.* at 14,881, 14,882 (“The proposed rule makes several of the provisions issued in the recently published [Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6] binding as regulation.”).

45. Indian Child Welfare Act Proceedings, *supra* note 43, at 38,851 (“Congress’s clear intent in ICWA is to displace State laws and procedures that are less protective.”).

46. *Id.* at 38,850 (“The final rule includes a new section, FR § 23.143, that provides that the provisions of this rule will not affect a proceeding under State law for foster-care rights, pre-adoptive placement, or adoptive placement which was initiated or completed prior to 180 [days] after the publication date of this rule, but will apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody of placement of the same child.”).

47. It should be noted that, “in practice . . . [the use of guidance] is much more common than notice-and-comment regulation.” Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1814 (2015) (footnote omitted). The use of guidance has become particularly frequent in the implementation of complex statutes. *Id.* at 1815 (footnote omitted) (“It has been the primary way, for example, that agencies have delivered instructions to state officials implementing the ACA.”). Mark Seidenfeld observed that, pursuant to the Administrative Procedure Act, an agency might permissibly enforce a guidance document if certain conditions are satisfied. Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 351 (2011). This Note does not, however, encourage federal agency attempts to directly enforce the 2015 ICWA guidelines, or any updated guidance, despite suggestions that some agencies have deliberately used guidelines as an avoidance device. See, e.g., Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 785–87 (2010) (noting the observations but concluding that the concern is overstated). Instead, this Note proposes that states, with New York demonstrating leadership in this area, promptly adopt federal guidelines as state-enforceable requirements.

48. *Id.* at 38,851 (“The regulations are intended to provide a binding, consistent, nationwide interpretation of the minimum requirements of ICWA. If State law provides a

guidelines and the 2016 regulations⁴⁹ by, through a rulemaking process, proposing adoption of the more comprehensive or protective approaches as state-level requirements. Likewise, should the Department issue updated guidelines either prior to or after the effective date of the promulgated rules,⁵⁰ states should consider whether to incorporate the most recent guidelines with the understanding that states may adopt, as enforceable requirements, recommendations from any previous version of agency-issued guidelines to the extent they do not conflict with federal minimum requirements,⁵¹ and with a presumption that, in the event that further updated guidelines are less comprehensive or protective, they should adopt and enforce the 2015 guidelines.

A. THE IMPACT OF *ADOPTIVE COUPLE v. BABY GIRL*

The topic is also timely in light of a recent Supreme Court decision that has provided fodder for anti-ICWA and anti-tribal advocates and could result in broad attacks on ICWA in courts in New York State and elsewhere. In *Adoptive Couple v. Baby Girl*⁵² (the “Baby Veronica” case), the most recent and only the second time⁵³ the Supreme Court has taken up ICWA, the Court was

higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under ICWA, as interpreted by this rule, State law will still apply.”).

49. Because the proposed regulations largely tracked the language of the guidelines, the preamble of the promulgated regulations can be generally consulted for descriptions of how the final rule compares with the guidelines. See Indian Child Welfare Act Proceedings, *supra* note 43, at 38,855–62.

50. The regulations become effective December 12, 2016. *Id.* at 38,778. “The Department anticipates issuing updated guidelines prior to the effective date of this rule (180 days from issuance).” *Id.* at 38,780.

51. *Id.* at 38,851 (“ICWA provides that, where 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 under [ICWA], the State or Federal court shall apply the State or Federal standard.”).

52. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

53. In its first decision interpreting the statute, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), the Court interpreted the plain meaning of “domiciled.” *Holyfield* was viewed by some commentators as a strong endorsement of the statute. See, e.g., Vujnich, *supra* note 23, at 196. The Court stressed that Congress had been concerned “over the placement of Indian children in non-Indian homes . . . based in part on evidence of the detrimental impact on the children themselves of such placement outside their culture.” *Holyfield*, 490 U.S. at 49–50 (footnote omitted). Such placements “threaten[ed] ‘the future and integrity of . . . Indian families.’” *Id.* at 45 n.18 (quoting 124 CONG. REC. 38103 (1978) (letter from Rep. Morris K. Udall to Assistant Attorney Gen. Patricia M. Wald)). The Court also noted that the legislative history included “considerable emphasis on the impact on the tribes themselves of the massive removal of their children.” *Id.* at

confronted with what seemed to be, from the facts emphasized by the majority opinion, an almost ideal case for opponents of the statute.

A couple in South Carolina sought to adopt a child despite an objection raised by the child's father, an unwed enrolled member of the Cherokee Nation.⁵⁴ While the birth mother, a non-Indian, was pregnant, the father and the mother broke off their engagement and the mother ceased communication with the father.⁵⁵ The father provided no financial support to the mother at any time, either during the pregnancy or in a number of months following the child's birth.⁵⁶ Moreover, the birth father allegedly agreed to relinquish his parental rights in response to a text message sent by the birth mother.⁵⁷ Only after the mother put the child up for adoption did the father formally object.⁵⁸ The South Carolina Supreme Court held that the adoption could not be finalized because ICWA's provision regarding termination of parental rights, section 1912(f), had been violated.⁵⁹ That section provides that parental rights may not be terminated "in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child." The Act's "application to Baby Veronica resulted in

34. And it observed that "[o]ne of the particular points of concern" that led to enactment "was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society." *Id.* at 35 n.4.

54. *Adoptive Couple*, 133 S. Ct. at 2558.

55. *Id.*

56. *Id.*

57. *Id.* at 2557.

58. *Id.* at 2559. The complete facts are more nuanced. See Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 301–10 (2015). The birth father, upon hearing of the pregnancy, asked the birth mother to move up their planned marriage and move in with him at the military base at which he was stationed; the family court determined after hearing testimony that the father never intended to relinquish parental rights; the father traveled to visit the mother while she was pregnant, but she refused to see him or to accept his offer of financial support; the letter the private adoption agency sent to the tribe misspelled his name and incorrectly stated his birthdate; the birth mother initially described the child's heritage as Hispanic; the mother refused to notify the birth father that she had entered the hospital to deliver; and the father immediately challenged the adoption when he became aware of the proceeding. In any event, as Barbara Atwood noted, "the protections of ICWA must extend to parents of Native children even when those parents fail to live up to an abstract ideal of parenting." Barbara A. Atwood, *A Response to Professor Berger's 'In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. F. 1, 3 (2015).

59. *Adoptive Couple v. Baby Girl*, 398 S. Ct. 625 (2012).

the tearful scene of her being taken away from her adoptive parents at the age of two by a father whom she had never met.”⁶⁰

The Supreme Court reversed, finding that section 1912(f) applies only when a parent actually has or has had legal or physical custody, and that the biological father had neither.⁶¹ Hence, the Court also held that another section of ICWA, section 1912(d), was inapplicable; that section provides that an involuntary termination of a parent’s rights may not occur unless there have been “active efforts” to “provide remedial services . . . designed to prevent the breakup of the Indian family.”⁶² Since the father never had legal or physical custody, there was, in the Court’s view, no “Indian family” currently in existence — the “breakup” had occurred long before the father opposed the adoption.⁶³ Section 1915(a), a section that requires courts to prefer adoption placement with the child’s family, her tribe, or other tribes, likewise did not apply since no other Indians were attempting to adopt the child.⁶⁴ “This set in motion the second wrenching change of custody in the girl’s short life, which was carried out with dispatch when the adoptive parents took her from her Cherokee father back to a home that she likely barely remembered.”⁶⁵

What is significant, for purposes of this Note, are two aspects of the decision and the controversy concerning the proposed adoption.⁶⁶ First, the litigation generated high-profile involvement, including in the briefing, by organizations and entities that have viewed the Court’s decision against the biological father as a significant victory in their advocacy and litigation efforts against the

60. Sarah Krakoff, *Constitutional Concern, Membership, and Race*, 9 FLA. INT’L U. L. REV. 295, 299 (2014).

61. *Adoptive Couple*, 133 S. Ct. at 2560–64.

62. *Id.*

63. *Id.*

64. *Id.* at 2556.

65. Krakoff, *supra* note 60, at 299.

66. For a thorough analysis of the opinion, see Marcia A. Zug, *The Real Impact of Adoptive Couple v. Baby Girl: The Existing Indian Family Doctrine is Not Affirmed, But the Future of the ICWA’s Placement Preferences is Jeopardized*, 42 CAP. U. L. REV. 327 (2014). Several courts, most notably the Wyoming and Alaska supreme courts, have subsequently applied *Adoptive Couple* to find that ICWA Section 1915 placement preferences are not applicable in particular circumstances. *In re Termination of Parental Rights to A.R.W.*, 343 P.3d 407, 411–12 (Wyo. 2015) (“Appellant has not asserted that he has any Native American heritage that would qualify A.R.W. as an ‘Indian child’ under the ICWA. . . . Further, A.R.W.’s mother consented to termination of her parental rights in the adoption proceedings.”); *Native Vill. of Tunanak v. State*, 334 P.3d 165, 167 (Alaska 2014) (“We discern no material factual differences between the Baby Girl case and this case, so we are unable to distinguish the holding in Baby Girl.”).

statute. Those groups will likely continue to oppose implementation and enforcement of ICWA. What began in the South Carolina courts with support from a private adoption agency and its attorney, supplemented by a lone public relations spokesperson, morphed into a case that attracted high-profile groups and well-known counsel.⁶⁷ Such representation did not come inexpensively, and the groups that funded or otherwise supported the appeal of the South Carolina Supreme Court's ruling saw *Adoptive Couple* as a high-profile case involving what they viewed as sympathetic facts.

These groups are united in the view that ICWA is counterproductive and unconstitutional. They include the American Academy of Adoption Attorneys, which issued a press release after the decision was issued that incorrectly implied that the ruling affected all children with mixed race parents,⁶⁸ the National Council for Adoption, which likewise erroneously suggested that the Court had applied a "best interest" standard in ruling for the prospective adoptive couple,⁶⁹ the Christian Alliance for Indian Children Welfare,⁷⁰ and the Citizens Equal Rights Alliance.⁷¹ The

67. Lisa Blatt of Arnold & Porter LLP represented the petitioners; Paul Clement, a former Solicitor General, represented the guardian ad litem. *Adoptive Couple*, 133 S. Ct. at 2556.

68. Jack Trope & Adrian T. Smith, *The Continued Protection of Indian Children and Families After Adoptive Couple v. Baby Girl: What the Case Means and How to Respond*, 11 AM. INDIAN L.J. 434, 440 n.25 (2014).

69. *Id.*

Outside of foster care and adoptions by relatives, adoptions are largely conducted through private agencies, attorneys, and facilitators. These entities charge large fees for their services — in 2009, the average cost to adopt an infant was \$32,000, and highs around \$100,000 have long been possible. These private interests depend on a supply of adoptable babies — an increasingly rare commodity in the United States — and on completed adoptions.

Berger, *supra* note 58, at 299. The Council did, however, present a webinar concerning ICWA that featured as instructor a representative of a pro-tribal group. *See Webinars*, NAT'L COUNCIL FOR ADOPTION (Jan. 22, 2015), <http://www.adoptioncouncil.org/adoption-professionals/webinars> [<https://perma.cc/CUY2-CTU9>].

70. The group's website makes its position clear:

Though ICWA Supporters say safeguards within the Indian Child Welfare Act prevent misuse, scores of multi-racial children have been hurt. Kids, never involved with the reservation, are forcefully removed from safe, loving home and placed with strangers — sometimes unsafe strangers. These children need help.

CHRISTIAN ALL. FOR INDIAN CHILD WELFARE, <http://caicw.org> [<https://perma.cc/9HBM-88SA>] (last visited Apr. 13, 2016). The group issued a press release that mischaracterized the 2015 Interior guidelines as imposing "immediate" mandatory requirements upon state courts. *See* Press Release, Christian Alliance for Indian Child Welfare, BIA Issues New "Anti-Family" ICWA Rules (Feb. 25, 2015), http://caicw.org/2015/02/24/bia-issues-new-anti-family-icwa-guidelines/#.VxT_L_8UX9k [<https://perma.cc/RMR4-6QWM>].

National Council for Adoption subsequently filed a lawsuit challenging the 2015 guidelines as an impermissible exercise of legislative rulemaking.⁷² But these groups are not the only opponents, and some of them are relatively new to the debate. The New York Attorneys for Adoption and Family Formation is an anti-ICWA group that is apparently closely tied to the American Academy of Adoption Attorneys. The Academy, in a press release and in a recent webinar, said that it strongly opposes both the new federal guidelines and proposed regulations and believes that they exceed the agency's authority.⁷³ The Goldwater Institute, which in mid-2015 brought a lawsuit alleging that ICWA is unconstitutional,⁷⁴ contends that broad-based litigation is necessary because "[s]o long as ICWA stands, countless children will be left in abusive homes and prevented from or delayed in becoming part of a permanent loving homes."⁷⁵

71. The group's mission statement asserts that "Federal Indian Policy is unaccountable, destructive, racist, and unconstitutional." CITIZENS EQUAL RIGHTS ALL., <http://citizensalliance.org> [<https://perma.cc/NGF2-8AHD>] (last visited Apr. 13 2016). The group's website also includes a "letter to Congress" urging revisions to ICWA that would essentially remove the Section 1915 placement preferences from the statute. CERA's *Letter on the ICWA to Congress*, CITIZENS EQUAL RIGHTS ALL., <http://citizensalliance.org/ceras-letter-icwa-congress> [<https://perma.cc/2QCR-4REW>] (last visited Apr. 5, 2016).

72. Nat'l Council for Adoption v. Jewell, No. 1:15-cv-00675-GBL, 2015 WL 9854389 (E.D. Va. Nov. 20, 2015).

73. See *BIA Guidelines: National Adoption Association Disappointed with New Federal Indian Child Welfare Guidelines*, AM. ACAD. OF ADOPTION ATT'YS, <http://www.adoptionattorneys.org/aaaa/childrens-rights/bia-guidelines> [<https://perma.cc/5LAC-X4YP>] (last visited Apr. 13, 2016); see also Suzette Brewer, *Indian Country Braces for Battle with Adoption Industry Over ICWA Guidelines*, INDIAN COUNTRY TODAY MEDIA NETWORK (Mar. 30, 2015), <http://indiancountrytodaymedianetwork.com/2015/03/30/indian-country-braces-battle-adoption-industry-over-icwa-guidelines-159800> [<https://perma.cc/5VWZ-LCQR>]. An association of state court judges, including family court judges, welcomed the guidelines; see Press Release, Nat'l Council of Juvenile & Family Court Judges, NCJFCJ Encourages Judges to Apply Revised BIA ICWA Guidelines (May 9, 2015), <http://www.ncjfcj.org/ICWA-Revised> [<https://perma.cc/2DJJ-ZPBJ>]; see also Tom Cole & Betty McCollum, *Taking Care of Native Children*, HILL: CONG. BLOG (Nov. 25, 2015, 7:00 AM), <http://thehill.com/blogs/congress-blog/civil-rights/261207-taking-care-of-native-children> [<http://perma.cc/QX7P-46Y7>] (voicing support for the statute generally).

74. A.D. v. Washburn, No. 2:15-CV-01259-PHX-NVW (D. Ariz. filed July 6, 2015).

75. Clint Bolick, Opinion, *The Wrongs We are Doing Native American Children*, NEWSWEEK (Nov. 12, 2015, 3:48 PM), <http://www.newsweek.com/wrongs-we-are-doing-native-american-children-389771> [<https://perma.cc/PT2Q-8FBV>]; Mark Flatten, *Death on a Reservation*, GOLDWATER INST. (Jul. 7, 2015), https://goldwater-media.s3.amazonaws.com/cms_page_media/2015/8/14/Final%20Epic%20pamplet.pdf [<https://perma.cc/9FJX-SFC8>].

B. THE CONSTITUTIONAL ARGUMENTS AGAINST ICWA

Adoptive Couple is also important for any discussion of federal enforcement efforts and state implementation, because the Supreme Court acknowledged but avoided an equal protection argument made by the couple and their supporters. In light of the Court's treatment of the issue, *Adoptive Couple* will likely encourage increased constitution-based attacks on the statute in state and lower federal courts. Although a full discussion of the strength of the equal protection argument, which was briefed in the *Adoptive Couple* litigation but not addressed by the Court, is beyond the scope of this Note, the Supreme Court previously concluded, in *Morton v. Mancari*,⁷⁶ that a preference given to Indians in hiring was not unconstitutional because it "is not directed toward a 'racial' group consisting of 'Indians'; it applies only to members of 'federally recognized' Tribes . . . [and] is political rather than racial in nature."⁷⁷

Since *Mancari*, the Court has, albeit largely in decisions in the 1970s, reiterated its view that "the peculiar semisovereign . . . status of Indians justifies special treatment."⁷⁸ The overwhelm-

76. *Morton v. Mancari*, 417 U.S. 535 (1974). For a detailed discussion of the opinion, which argues that the Court should either continue to adhere to *Mancari* or view statutes that benefit Indians as a "constitutionally sanctioned use of race," see Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 995–96 (2011). A similar argument — that such measures "further" equal protection, rather than violate it, because "racial discrimination for Indian peoples had less to do with defining individuals according to race than with defining tribes as racial groups and denying them sovereignty and property" — is found in Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CAL. L. REV. 1165, 1196 (2010). See also Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1131–32 (2012) (arguing that *Mancari* prevents "entrench[ment] [of] historical discrimination against indigenous peoples" and advances the "unique government-to-government relationship between tribes and the federal government").

77. *Mancari*, 417 U.S. at 553 n.24.

78. See, e.g., *Washington v. Wash. St. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) ("The simplest argument to [the equal protection allegation] is that this Court has already held that these treaties [concerning tribal fishing rights] confer enforceable special benefits on signatory Indian tribes . . ."); see also *Washington v. Confed. Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979) (arguing that "the unique legal status of Indians under federal law" permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive") (quoting *Mancari*, 417 U.S. at 551–52); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 304 n.42 (1978) (quoting *Mancari*, 417 U.S. at 554); *United States v. Antelope*, 430 U.S. 641, 646 (1977) ("The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications."); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 479–80 (1976) (finding constitutional argument foreclosed by

ing weight of the academic commentary agrees with *Mancari*.⁷⁹ The majority opinion in *Adoptive Couple* avoided tackling the constitutional argument, while speculating that applying the entirety of ICWA in the particular factual context before the Court “would raise equal protection concerns.”⁸⁰ The majority’s narrowed application,⁸¹ in the face of increased disapproval of racial classifications by the Supreme Court,⁸² avoided the need to ad-

Mancari); Fisher v. District Court, 424 U.S. 382, 390 (1976) (“[S]uch disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.”). The *Antelope* Court interpreted “all legislation affecting Indian tribes as ‘a necessary and appropriate consequence of federal guardianship under the Constitution.’” Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 279 (1984) (quoting *Antelope*, 430 U.S. at 647 n.8). The Ninth Circuit recently emphasized that *Mancari* is applicable even in contexts in which a statute could impose “disproportionate burdens [] on Indians.” United States v. Zepeda, 792 F.3d 1103, 1113 (9th Cir. 2015); see also E.E.O.C. v. Peabody W. Coal Co., 773 F.3d 977, 988 (9th Cir. 2014) (explaining that tribal hiring preference is a political, rather than a racial, classification). But see Williams v. Babbitt, 115 F.3d 657, 665 (9th Cir. 1997) (“While *Mancari* is not necessarily limited to statutes that give special treatment to Indians on Indian land, we do read it as shielding only those statutes that affect uniquely Indian interests.”); *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 730 (Cal. Ct. App. 2001) (referencing *Williams* and declaring that “child custody or dependency proceedings [do not] involve uniquely Native American concerns”); Malabad v. N. Slope Borough, 42 F. Supp. 2d 927, 937 (D. Alaska 1999) (“*Mancari* is based on the relationship between sovereign governments; that is, Indian tribes and the federal government. . . . The Ninth Circuit interprets *Mancari* as shielding only those statutes that affect uniquely Indian interests.”).

79. See, e.g., Berger, *supra* note 58, at 335; Atwood, *supra* note 4, at 631.

80. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013). The dissent addressed the equal protection claim and stressed that *Mancari* dictates that Indian tribal classifications and preferences are non-discriminatory. See *id.* at 2584–85 (Sotomayor, J., dissenting). A number of state courts have dismissed equal protection challenges against ICWA pursuant to the rationale of the Supreme Court in *Mancari*. See, e.g., *In re K.M.O.*, 280 P.3d 1203, 1215 (Wyo. 2012); *In re Beach*, 246 P.3d 845, 849 (Wash. Ct. App. 2011); *In re N.B.*, 199 P.3d 16, 23 (Colo. Ct. App. 2007); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Guardianship of D.L.L. & C.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980); *Angus v. Joseph*, 655 P.2d 208, 213 (Or. Ct. App. 1982) (“We hold the protection of the integrity of Indian families to be a permissible goal that is rationally tied to the fulfillment of Congress’ unique guardianship obligation toward the Indians and that the ICWA is therefore not unconstitutional.”); *In re Eleanor Armell*, 550 N.E.2d 1060, 1068 (Ill. App. Ct.) (“The ICWA does not involve a suspect class.”); *In re Pima Cty. Juv. Action*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981).

81. Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 201 n.178 (2014) (“The Supreme Court’s recent opinion in *Adoptive Couple* . . . reveals the Court’s increasing skepticism of laws, like [ICWA], that are meant to preserve and advance Indian autonomy, sovereignty, and cultural survival.”).

82. See, e.g., Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2417–19 (2013) (emphasizing that “[a]ny racial classification must meet strict scrutiny” and are “inherently suspect”) (citations omitted); see also Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 592 n.268 (2014) (noting that the Court in *Adoptive Couple*

dress the ongoing applicability of *Mancari* or its implications for ICWA. Nonetheless, anti-ICWA advocates may construe *Adoptive Couple* as signaling that the Court has equal protection concerns about the Act in general, so they may attempt to convince lower courts to expressly address the equal protection argument.⁸³

Anti-ICWA groups and their allies will likely also seek to advance the argument made in Justice Thomas' *Adoptive Couple* concurrence⁸⁴: that ICWA may have been enacted in excess of Congressional authority to legislate pursuant to the Indian Commerce Clause.⁸⁵ An Indian Commerce Clause claim was, along with equal protection, Tenth Amendment, and due process allegations, advanced in a lawsuit filed in 2015 by the Goldwater Institute in the District of Arizona.⁸⁶ The "plenary," "broad," and "exclusive" authority of Congress with regard to Indian affairs is a foundational principle of Indian law.⁸⁷ The authority is not limited to tribes as sovereigns or to tribal reservations or Indian lands.⁸⁸ This plenary power is derived from other sources in the

"entirely declined to apply the framework that it has otherwise deemed applicable in the affirmative action context").

83. For an argument that the *Adoptive Couple* decision was a "missed opportunity" that ought not be the end of the effort, see Christopher Deluzio, *Tribes and Race: The Court's Missed Opportunity in Adoptive Couple v. Baby Girl*, 34 PACE L. REV. 509 (2014). One commentator has suggested that it is not necessary for courts to find that *Mancari* is inapplicable to the ICWA context in order to

recognize that parents have fundamental rights under the Fourteenth Amendment to the United States Constitution and those rights provide a higher standard of protection to parents in cases involving voluntary terminations of parental rights in general, and specifically with respect to the biological parent's right to choose adoptive parents for their children.

Teri Dobbins Baxter, *Respecting Parents' Fundamental Rights in the Adoption Process: Parents Choosing Parents for Their Children*, 67 RUTGERS U. L. REV. 905, 950 (2015). That can occur, the writer argues, by judicial interpretation of 25 U.S.C. § 1921, which provides that "[i]n 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 subchapter, the State or Federal court shall apply the State or Federal standard." *Id.*

84. *Adoptive Couple*, 133 S. Ct. at 2566–71 (Thomas, J., concurring).

85. U.S. CONST. art. I, § 8, cl. 3.

86. *A.D. v. Washburn*, No. 2:15-CV-01259-PHX-NVW (D. Ariz. filed July 6, 2015).

87. See, e.g., *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975); *United States v. Lara*, 541 U.S. 193, 200 (2004).

88. 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."); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions."); *Perrin v. United States*, 232 U.S. 478, 482 (1914) (plenary authority exists "whether upon or off a reservation and whether

Constitution as well, including the Treaty Clause,⁸⁹ the Property Clause,⁹⁰ and the Debt Clause.⁹¹ Accordingly, “tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.”⁹² Some Indian law scholars, most notably Alex Skibine, have argued that there should be a limit to the reach of plenary Congressional authority, particularly or perhaps exclusively in cases in which tribes seek judicial review of federal statutory measures that arguably disadvantage them.⁹³ But the

within or without the limits of a state”); *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974) (“The plenary power of Congress . . . is drawn both explicitly and implicitly from the Constitution itself.”); *Dick v. United States*, 208 U.S. 340, 356–57 (1908) (“Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes . . .”); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 62–63 (1996) (describing the Indian Commerce Clause); *Rice v. Cayetano*, 528 U.S. 495, 519 (2000) (“Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs.”). “The central function of the Indian Commerce Clause is . . . to provide Congress with plenary power to legislate in the field of Indian affairs.” *Lara*, 541 U.S. at 200.

89. U.S. CONST. art. II, § 2, cl. 2.

90. *Id.* art. IV, § 3, cl. 2.

91. *Id.* art. I, § 8, cl. 1. See, e.g., *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 172 n.7 (1973) (“The source of federal authority over Indian matters . . . derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.”); *United States v. Kagama*, 118 U.S. 375, 379–80 (1886) (broad congressional authority “arises, not so much from the clause in the constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are . . .”); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 397 (1980) (concluding that Congress’ broad constitutional power to pay the Nation’s debts included the power to waive the *res judicata* effect of a judgment in favor of the United States).

92. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); see also *Blackfeather v. United States*, 190 U.S. 368, 373 (1903) (“The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize.”); *Washington v. Confed. Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979) (“States do not enjoy this same unique relationship with Indians . . .”). Justice Breyer’s majority opinion in *Lara* suggested, in dictum, an additional source, namely the “preconstitutional powers necessarily inherent in a Federal Government, namely, powers that this Court has described as ‘necessary concomitants of nationality.’” *Lara*, 541 U.S. at 201 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–22 (1936)). See Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 528 (2007) [hereinafter Fletcher, *Preconstitutional*] (“The *Lara* dictum . . . appears to be the second time in America’s constitutional history that the Supreme Court has asserted that the federal government — in this case Congress — has authority that existed prior to the ratification of the Articles of Confederation and the Constitution and, it would appear, survived the ratification of both.”); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 167 (2006).

93. See Alex T. Skibine, *Using the New Equal Protection to Challenge Federal Control over Tribal Lands*, 36 PUB. LAND & RESOURCES L. REV. 3, 32 (2015) (“[P]lenary’ does not mean ‘absolute’ power over tribal resources in that Congress cannot deny tribes their constitutional rights to vested property rights unless the law is enacted pursuant to the trust doctrine and is truly for the benefit of the Tribes.”); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within “Our Federalism”: Beyond the Dependency Para-*

reach of the plenary power, whatever its source(s), has “long been recognized and rarely been questioned.”⁹⁴ Professor Bethany Berger opined that Justice Thomas “joined with the majority opinion because it better accorded with his belief that an originalist reading of the Indian Commerce Clause should end federal Indian law as we know it.”⁹⁵ While judicial acceptance of this argument, which was not briefed by the parties and gained no support from the other justices in *Adoptive Couple*, would perhaps be even more disruptive of federal Indian law than a rejection of *Mancari*, there is arguably little basis for it in even an original understanding of the Clause.⁹⁶ Opponents may also argue, as they did in *Adoptive Couple*,⁹⁷ that application of ICWA to states is, at least in some contexts, inconsistent with the Tenth Amendment. Some courts have cited the Tenth Amendment as justification for a narrow reading of ICWA.⁹⁸

digm, 38 CONN. L. REV. 667 (2006); Newton, *supra* note 78, at 197 (“[E]xtraordinary deference to congressional power over Indians is closely related to the courts’ failure to protect Indian tribal rights.”).

94. Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After United States v. Lara*, 35 ENVTL. L. 471, 490 (2005). *But cf.* Del. Tribal Bus. Comm’n v. Weeks, 430 U.S. 73, 84 (1977) (briefly observing that the plenary power is “not absolute,” noting that an equal protection or due process claim might possibly lie, but immediately thereafter referencing *Mancari*). And it is worth noting that the search for a meaningful stopping point for plenary authority that would afford tribes recourse ought be tempered by the realization that “[u]ndermining the theoretical foundations of federal plenary power might serve to limit federal authority over Indian affairs, but it might also destroy much of what Indian people and tribes relied upon as their best hopes for a remedy.” Fletcher, *Preconstitutional*, *supra* note 92, at 524.

95. Berger, *supra* note 58, at 318.

96. *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1033–37 (2015) (arguing that Justice Thomas’ historical narrative overlooks important aspects of the discussions at the Constitutional Convention and inaccurately concludes that a narrow scope of federal power was intended).

97. *See, e.g.*, Brief for Petitioners, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2103) (No. 12-399), 2013 WL 633597.

98. *See In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996) (applying the “existing Indian family exception” as a form of constitutional avoidance to find that ICWA was inapplicable). For a critique of the use of constitutional avoidance, see Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109 (2015). Although an extensive discussion of Tenth Amendment concerns is beyond the scope of this Note, three points are briefly worth noting. First, if Congress has authority to legislate in an enumerated area, such as its authority with regard to Indian affairs, there is no legitimate Tenth Amendment concern. *See New York v. United States*, 505 U.S. 144, 156 (1992). Second, the Supreme Court has long recognized that Congress may “pass laws enforceable in state courts.” *New York*, 505 U.S. at 178; *Testa v. Katt*, 330 U.S. 386, 390–91 (1947). Indeed, numerous federal states are directly applicable to and require compliance by state courts, including statutes involving foster children and adoptions. *See, e.g.*, *Fostering Connections to Success and Increasing Adoptions Act*, Pub. L. No. 110-351, 112 Stat. 39349 (2008); *Keeping Children*

C. OTHER EXAMPLES OF JUDICIAL NARROWING OF OR HOSTILITY TO THE ACT

Adoptive Couple is not the only recent manifestation of judicial hostility to the Act. The existing Indian family (EIF) exception “is an entirely judge-made doctrine that bars application of the ICWA when either the child or the child’s parents have not maintained a significant social, cultural, or political relationship with his or her tribe.”⁹⁹ A finding that the EIF applies means that courts will not apply ICWA. In some cases, courts have focused on whether the child was sufficiently Indian,¹⁰⁰ in others on the parents,¹⁰¹ and in still others on both the child and the parents.¹⁰²

and Families Safe Act, Pub. L. No. 95-266, 2 Stat. 205 (2003); Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997). Finally, even to the extent that the statute could be alleged to “commandeer” state child welfare agency personnel, see *Printz v. United States*, 521 U.S. 898 (1997), it does so in the context of their work in and related to judicial proceedings. See *FERC v. Mississippi*, 456 U.S. 742 (1982).

99. Cheyanna L. Jaffke, *Judicial Indifference: Why Does the “Existing Indian Family” Exception to the Indian Child Welfare Act Continue to Endure?*, 38 W. ST. U. L. REV. 127, 136 (2011); see also Atwood, *supra* note 4, at 625.

100. See, e.g., *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); see also Zug, *supra* note 66, at 336–37 (describing the “shocking” case of *Rye*, where “the court applied the exception to an Indian child raised by Indian parents on an Indian reservation. . . . The child was born on [a] reservation, was an enrolled member of the Standing Rock Sioux Tribe, and was a ward of the Standing Rock Sioux Tribal Court. . . . The court dismissed all these facts and found the ICWA inapplicable based on its conclusion that the child had primarily grown up in a non-Indian environment, did not speak the Sioux language, and did not practice its religion or customs.”).

101. One of best-known examples of an EIF decision that focuses on the relationship between the child’s parents and the tribe is *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996). There, the court set forth the following test for determining whether the parents are sufficiently Indian, examining whether the parents

privately observed tribal customs and, among other things, whether, despite their distance from the reservation, they participated in tribal community affairs, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, participated in Indian religious, social, cultural[,] or political events [that] are held in their own locality, or maintained social contracts with other members of [t]ribe.

Id. at 531. There is a split in the California courts of appeal, with most courts rejecting the EIF exception. See, e.g., *In re Vincent M.*, 59 Cal. Rptr. 3d 321 (Cal. Ct. App. 2007). For a criticism of the *In re Bridget R.* test as, among other things, being insensitive to “the realities of tribal life,” see Carole Goldberg, *Descent Into Race*, 49 UCLA L. REV. 1373, 1388 (2002). “[C]ourts applying the EIF doctrine have permitted the involuntary termination of parental rights even in cases in which the Indian parent had exercised custody, as long as the courts determined that those parents had not been living an Indian lifestyle.” Zug, *supra* note 66, at 341.

102. “In situations where the American Indian child never lived as a part of an American Indian family and had no association with American Indian culture, the [EIF means

The EIF exception and its various iterations have been discussed in a number of articles, with some debate about why seven states¹⁰³ have adopted and nineteen have rejected the exception. Professor Barbara Atwood, writing in 2002, saw the states that adopted the exception as reflective of “a subtext in which state judges grapple with the identity question and their desire to preserve continuity in children’s lives.”¹⁰⁴ Others saw darker motives.¹⁰⁵ Cheyanna L. Jaffke, writing in 2011, contended that “[t]he existing Indian family exception is a blemish on states whose courts choose to adopt and use it. The courts either blindly think that they know what is best for American Indian children and their tribes (intolerance) or they simply do not care (indifference).”¹⁰⁶

The reasons underlying adoption of the exception are of academic interest, but ultimately they are irrelevant for any consideration of compliance with ICWA, because the exception “ignores the plain language”¹⁰⁷ of the statute. The definition of “Indian

that] ICWA may not be applied even though the biological parent had such associations.” Jaffke, *supra* note 99, at 136–37.

103. The states are Alabama, Indiana, Louisiana, Missouri, Nevada, and Tennessee. See Trope & Smith, *supra* note 68, at 464 n.155 (listing decisions). Cases in which courts have specifically rejected EIF include *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16 (Colo. App. 2007); *In re A.J.S.*, 204 P.3d 543 (Kan. 2009); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re A.B.*, 663 N.W.2d 625 (N.D. 2003). Several states have statutory provisions that reject application. See, e.g., CAL. WELF. & INST. CODE § 224(c) (2014); IOWA CODE § 232B.5 (1999); MINN. STAT. § 260.771 (2010); OKLA. STAT. 10, § 40.1 (2010).

104. Atwood, *supra* note 4, at 624. But Atwood clearly concluded that “[t]he exception, which rewrites the Act’s definition of ‘Indian child’ without statutory basis, undercuts the sovereign authority of tribes to determine their own membership,” *id.*, and that “[s]tate courts’ reliance on the existing Indian family exception is improper as a matter of formal statutory construction and underlying policy.” *Id.* at 636.

105. See, e.g., Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the “Existing Indian Family” Exception (Re)Imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329 (2008); Cheyanna L. Jaffke, *The “Existing Indian Family” Exception to the Indian Child Welfare Act: The States’ Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 739 (2006); Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419 (1998); Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption Under the Indian Child Welfare Act*, 28 ARIZ. ST. L.J. 589 (1996) (all viewing the exception as a deliberate effort to undermine the statute).

106. Jaffke, *supra* note 99, at 129.

107. *Id.* at 142. As Jaffke noted:

[d]espite a clear definition of “Indian child” in the ICWA, state courts unilaterally define who is a “real” American Indian child. Congress was unambiguous when it defined the key terms of the ICWA: “Indian child” and “Indian child pro-

child” is unrelated to whether the child lives on a reservation, maintains tribal customs, or is in the custody of an Indian parent. Not only is the EIF exception inconsistent with the definition of “Indian child,” the statute provides 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” the family, other tribal members, or other Indian families.¹⁰⁸ The Justice Department argued against judicial adoption of the exception in its amicus brief in *Adoptive Couple*,¹⁰⁹ and the 2015 Interior Department guidelines specifically state the agency’s view that the EIF exception is inconsistent with, and has no basis in, the statute.¹¹⁰ While the promulgated rules do not expressly prohibit invocation of the exception,¹¹¹ they likewise provide that state courts cannot utilize specified listed factors¹¹² that have traditionally been referenced by courts in adopting and implementing the exception.¹¹³

The exception has waxed and waned in popularity,¹¹⁴ but despite the fact that the *Adoptive Couple* Court did not take up peti-

ceeding.” The use of the . . . exception disregards the plain language of the ICWA, especially the definition of “Indian child.”

Id.

108. 25 U.S.C. § 1915(a) (2012) (emphasis added).

109. Brief for the United States as Amicus Curiae Supporting Affirmance, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 1099169.

110. See Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,148.

111. Indian Child Welfare Act Proceedings, *supra* note 43, at 38,802 (“The final rule no longer uses the nomenclature of the exception, and instead focuses on the substance, rather than the label, of the exception.”).

112. *Id.* at 38,779 (“The final rule clarifies when ICWA applies, while making clear that there is no exception to applicability based on certain factors used by a minority of courts in defining and applying the so-called ‘existing Indian family,’ or EIF, exception.”).

113. *Id.* at 38,802 (“[T]he court may not determine that ICWA does not apply to the case based on factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her Indian parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum.”).

114. Some authors have suggested that, when the EIF is applicable, tribes can attempt to ameliorate its negative impacts through contract agreements in which the non-Indian adoptive parents voluntarily agree to maintain the child’s contact with the tribe. “[T]hese contact agreements allow the child to stay or become invested in his or her tribal culture, and maintain a connection with his or her heritage.” Christina Lewis, *Born Native, Raised White: The Divide Between Federal and Tribal Jurisdiction with Extra-Tribal Native American Adoption*, 7 GEO. J. L. & MOD. CRITICAL RACE PERSP. 245, 260 (2015); see also Ronald M. Walters, *Goodbye to Good Bird: Considering the Use of Contact Agreements to Settle Contested Adoptions Arising Under the Indian Child Welfare Act*, 6 U. ST. THOMAS L. J. 270 (2008). However, “it would be far better if ICWA were enforced in the first place.” *Id.* at 294.

tioners' specific invitation to expressly uphold and apply it,¹¹⁵ and that there are numerous grounds for concluding that the Court did not provide an implicit endorsement,¹¹⁶ anti-ICWA groups may argue otherwise.¹¹⁷ They may view the Court's reasoning as at least an indirect basis for renewing efforts in states that have never addressed the issue or have rejected the exception.¹¹⁸ Further, in states that have already adopted the exception, anti-ICWA groups will likely argue that the Court has now somehow given the EIF exception its blessing. Because some courts that have adopted the exception have done so to avoid finding that ICWA is unconstitutional,¹¹⁹ the majority's avoidance of the equal protection argument in *Adoptive Couple* will, for anti-ICWA groups, give force to the notion that the best way to avoid the constitutional problem is simply to find that the statute is entirely inapplicable when either the child or her parents are not "Indian" enough.

ICWA provides that when a state court has before it a proceeding for foster care placement or for the termination of parental rights regarding an Indian child that is not residing on his or her reservation, 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."¹²⁰ Some state courts have declined to transfer cases to tribal courts because the proceeding is at an advanced stage.¹²¹ While these

115. Brief for Petitioners, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No. 12-399), 2013 WL 633597.

116. See, e.g., Zug, *supra* note 66, at 338-48; Trope & Smith, *supra* note 68, at 463-64; see also Shreya A. Fadia, Note, *Adopting "Biology Plus" in Federal Indian Law: Adoptive Couple v. Baby Girl's Refashioning of ICWA's Framework*, 114 COLUM. L. REV. 2007, 2028 (2014) ("[A] close reading of state courts' application of this exception and the Court's recent decision reveals that the two approaches are not the same.").

117. For an argument that *Adoptive Couple* may pose a sufficient threat to justify seeking statutory changes to reject EIF and otherwise preserve Congress' original intent, see Kathleena Kruck, Note, *The Indian Child Welfare Act's Waning Power After Adoptive Couple v. Baby Girl*, 109 NW. U. L. REV. 445 (2015).

118. New York is one of those states in which a lower court initially adopted the exception, with an appellate court reversing. See *In re Baby Boy C.*, 805 N.Y.S.2d 313 (N.Y. App. Div. 2005); Michael L. Hanuszcak & Janet J. Dougherty, *Family Law*, 57 SYRACUSE L. REV. 1219, 1239 (2007) (summarizing opinion).

119. See, e.g., *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996); see also *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 718-19, 730-31 (Cal. Ct. App. 2001).

120. 25 U.S.C. § 1911(b) (2012) (emphasis added).

121. See, e.g., *People ex rel. A.T.W.S.*, 899 P.2d 223 (Colo. Ct. App. 1994) (child had been removed from parental custody for three years when tribe filed petition to transfer case; child had resided with foster family and permanency hearing was in progress); *In re*

decisions may have been consistent with earlier federal guidelines, the Interior Department's 2015 revisions make clear that a right to transfer should be available "at any stage of a proceeding."¹²² The regulations provide, as a minimum standard, that "[t]he right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding."¹²³ A tribe may, despite having received notice of a proceeding involving an Indian child, decide to postpone filing a request to transfer until a later stage of the process.¹²⁴ However, in many cases "late" petitions to transfer have occurred because the tribe did not receive timely notice.¹²⁵ Bethany Berger notes that "[s]ome of this non-compliance is due to ignorance or carelessness, but there is evidence that it is also part of a common technique to facilitate private adoptions of Indian children by non-Indians."¹²⁶

The new Interior regulations and guidelines seek to address the problem in several ways. First, they state that the judicial and agency inquiries of whether a child in a proceeding (even a voluntary proceeding) is an Indian child should occur as soon as

M.H., 956 N.E.2d 510, 552 (Ill. App. Ct. 1st Dist. 2001) (tribe's petition was filed two years "after child was placed in foster care and more than 15 months after the Tribe received notice of the proceedings"); *In re Welfare of Child of: T.T.B. & G.W.*, 724 N.W.2d 300 (Minn. 2006) (tribe did not file petition to transfer until the initial permanency hearing had begun). In some cases, state courts have upheld refusals to transfer at an "advanced stage" of the "proceeding" even though there was insufficient notice to the tribe and therefore an inability to request transfer at an earlier stage. *See, e.g., In re J.J.*, 454 N.W.2d 317 (S.D. 1990); *In re A.L.*, 442 N.W.2d 233 (S.D. 1989). And other courts have refused to entertain explanations that it was either tribal policy or a reasonable case-specific determination to await the outcome of a state court parental right termination before attempting to transfer. *See, e.g., In re D.M.*, 685 N.W.2d 768, 772 (S.D. 2004); *In re E.S.*, 964 P.2d 404 (Wash. App. 1998).

122. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,149. The non-binding guidelines previously issued by the Department in 1979 listed, as a discretionary reason that could constitute "good cause" to deny a transfer request, a judicial finding that "[t]he proceeding is at an advanced stage and the petitioner did not file the petition promptly after receiving notice of the hearing." Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979). The 2015 non-binding guidelines, however, deleted the reason, on the ground that ICWA contains no such justification for denial of a petition to transfer.

123. Indian Child Welfare Act Proceedings, *supra* note 43, at 38,872 (to be codified at 25 C.F.R. § 23.115(b)).

124. *See* Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,149.

125. *See, e.g., In re Morris*, 815 N.W.2d 62, 65 (Mich. 2012) ("[T]he proper remedy for an ICWA-notice violation is to conditionally reverse the trial court and remand for resolution of the ICWA-notice issue . . .").

126. Berger, *supra* note 58, at 305. "By placing a child with a hopeful family before providing notice to a child's parents or tribe, agencies may create 'facts on the ground' that make it less likely that the original illegal placement will be disrupted." *Id.*

possible, and they set forth specific ways in which courts should assess whether agencies have made proper inquiries about the child.¹²⁷ Second, they do not include the previously suggested justification¹²⁸ for rejecting a filed petition on the ground that it was untimely. Third, the guidelines state that notice should be provided to the tribe at each stage in the process, i.e., temporary foster care placement, termination of parental rights, pre-adoptive placement, and adoptive placement.¹²⁹ Fourth, the guidelines make clear that the tribe has the right to intervene at any time, even at the adoptive placement stage.¹³⁰

Also troublesome is the willingness of some courts to interject a state law “best interests of the child” standard in examining petitions to transfer a proceeding to a tribal court.¹³¹ As Barbara Atwood notes, “[t]he use of a best interests analysis in deciding a motion to transfer to tribal court confuses substantive concerns with jurisdictional questions and is squarely in conflict with the ICWA.”¹³² The explanations for the decisions are numerous and include skepticism about the capacity and fairness of tribal courts: “State courts have repeatedly signaled their belief that transfer to tribal courts will lead to placements contrary to the Native American children’s welfare. Difference is labelled incompetence; those who are different are regarded as not entitled to enunciate their own values and as unable to use power rationally

127. Indian Child Welfare Act Proceedings, *supra* note 43, at 38,869–70 (to be codified at 25 C.F.R. § 23.107); Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,148, 10,152.

128. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,586 (Nov. 26, 1979).

129. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,153–54.

130. *Id.* at 10,148–49.

131. See, e.g., *In re Juv. Action No. JS-8287*, 828 P.2d 1245 (Ariz. Ct. App. 1991); *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1355–56 (Cal. Ct. App. 2014); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 308 (Ind. 1988); *In re Appeal in Maricopa Cty.*, 667 P.2d 228 (Ariz. App. 1983); *In re T.S.*, 801 P.2d 77, 79–80 (Mont. 1990); *Carney v. Moore (In re N.L.)*, 754 P.2d 863, 869 (Okla. 1988); *In re Guardianship of J.C.D.*, 686 N.W.2d 647, 650 (S.D. 2004). A recent Virginia decision, *Dinwiddie Dept. of Soc. Servs. v. Nunnally*, 764 S.E.2d 526 (Va. 2104), rejected application of the “traditional” best interests standard but approved use of a “more limited” standard that inquires whether transfer of the case to tribal court would result in “immediate serious emotional or physical harm, or a substantial risk of such harm, to [the] child.” *Id.* at 526. The dissent viewed both approaches as inconsistent with the statute. *Id.* at 529; see also *People ex rel. J.L.P.*, 870 P.2d 1252 (Colo. App. 1994); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 169 (Tex. App. 1995) (both rejecting best interest as a “good cause” to deny transfer).

132. Atwood, *supra* note 4, at 624 n.153.

and responsibly.”¹³³ Writing in 1994, Jeanne Louise Carriere proposed that Congress simply remove the term “good cause” from the statute to address the problem.¹³⁴ But a legislative change is not necessary. Much like the EIF exception, the courts that refuse to transfer based on “best interests” are acting in contravention of the statute by effectively adding language to ICWA despite the absence of any suggestion that Congress intended the standard to apply.

D. OTHER RECENT DEVELOPMENTS

As a result of general concerns about ICWA implementation, particularly in a post-*Adoptive Couple* environment, and because of anecdotal evidence “such as transporting Indian children across state lines in order to sidestep ICWA, the disregard of ICWA’s placement preferences, adoption attorneys urging circumvention of the law, and judges denying tribes a presence during child custody proceedings,”¹³⁵ the National Indian Child Welfare Association,¹³⁶ the National Congress of American Indians,

133. Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 648 (1994). The 2015 non-enforceable Interior guidelines provide that when an Indian parent or a tribe seeks to transfer a case to tribal court, it is “presumptively” in the best interests of the child for the court to approve the request. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,156; *see also* State v. Elise M. (*In re Zylena R.*), 825 N.W.2d 173, 185 (Neb. 2012) (“[B]est interests should not be a factor in resolving the issue of whether there is good cause to deny a motion to transfer a case involving an Indian child from state court to tribal court”); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 168–71 (Tex. App. 1995) (rejecting application of best interest standard in context of jurisdictional determination); *People ex rel. J.L.P.*, 870 P.2d 1252, 1258–59 (Colo. App. 1994) (same); *In re Ashley Elizabeth R.*, 863 P.2d 451, 456 (N.M. Ct. App. 1993) (same); *In re Armell*, 550 N.E.2d 1060, 1065 (Ill. Ct. App. 1990) (same).

134. Carriere, *supra* note 133, at 648–49.

135. Press Release, Nat’l Indian Child Welfare Ass’n, Native American Leaders Call for DOJ Investigation of ICWA Violations (Feb. 3, 2014), <http://www.nicwa.org/press/documents/RELEASENativeAmericanLeadersCallforDOJInvestigationofICWAViolations.pdf> [<https://perma.cc/B35H-KKXP>].

136. In April 2014 testimony before the Attorney General’s Task Force on Children Exposed to Violence, Terry Cross, the Executive Director of the Association, said that [i]t is important to note that some instances of ICWA non-compliance occur when practitioners purposefully circumvent the law. NICWA receives thousands of phone calls a year from AI/AN parents, grandparents, tribal leaders, and tribal social workers seeking help and information on their ICWA cases. Each year NICWA is particularly troubled by the number of phone calls we receive that describe situations where social workers and attorneys appear to be willfully ignoring ICWA’s application to a case. Recently, NICWA has received a few phone calls from tribal attorneys and AI/AN practitioners describing adop-

the Native American Rights Fund, and the Association on American Indian Affairs met with the Acting Attorney General for Civil Rights in early 2014 to urge that the Department of Justice “take a stronger role in enforcing compliance.”¹³⁷ Attorney General Eric Holder subsequently announced in late 2014 that the Department of Justice was undertaking a new initiative regarding ICWA.¹³⁸

There had, until recently, been little federal oversight of ICWA. The statute does not designate a specific agency as having ongoing oversight responsibility, and the Department of Health and Human Services (HHS)¹³⁹ described the limited data collection that presently occurs as inadequate in an April 2005

tion trainings that not only questioned the importance of ICWA but also provided “trips and tricks” on how ICWA can be “avoided” in the adoption process.

Terry Cross, Nat’l Indian Child Welfare Ass’n, Testimony on Keeping Our Children Connected to Our Community (Apr. 16, 2014), http://www.nicwa.org/government/documents/NICWATestimonyTaskForceonAIANChildrenExposedtoViolence_Apr2014.pdf

[<https://perma.cc/4PDD-T7PN>]; see also Matthew L. M. Fletcher & Kathryn E. Fort, *Indian Children and Their Guardians Ad Litem*, 93 B.U. L. REV. ANNEX 59, 59 (2013), available at <http://www.bu.edu/bulawreview/files/2013/11/FLETCHER-AND-FORT.pdf>

[<https://perma.cc/F5NX-5PYV>] (“[M]any [guardians ad litem] throughout the nation subvert the national policy embodied by the ICWA by advocating against the implementation of the statute in case after case.”). An example of circumvention in the reported decisions is *In Re Bridget R.*, 49 Cal. Rptr. 507, 517 (Cal. Ct. App. 1996), where the father initially self-reported himself as Native American, but upon being advised that the “adoption would be delayed or prevented if Richard’s Indian ancestry were known, [the father] filled in a revised form, omitting the information that he was Indian.” See also *In re Adoption of Infant Boy Crews*, 803 P.2d 24, 26 (Wash. Ct. App. 1991) (The birth mother acknowledged that “at a meeting with [a private adoption counselor] in April, [the counselor] inquired whether [the birth mother] had any Indian blood. [The birth mother] responded that she did, but did not know how much. [The counselor] then told [the mother] that an investigation into potential tribal affiliation would delay the adoption, and might require that the baby reside in a foster home.”); *Catholic Soc. Servs. v. CAA*, 783 P.2d 1159, 1161 (Alaska 1989) (detailing that the adoption agency did not notify birth mother of rights); *In re Adoption of Kenton H.*, 725 N.W.2d 548 (Neb. 2007) (where the state agency caseworker urged the birth mother to give up the child in voluntary adoption and the mother signed the relevant papers while hospitalized and affected by morphine).

137. Press Release, *supra* note 135.

138. Attorney Gen. Eric Holder, Remarks at White House Tribal Nations Conference (Dec. 3, 2014), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-during-white-house-tribal-nations> [<https://perma.cc/AK5N-W843>].

139. The HHS Administration for Children and Families is authorized to collect information as part of its oversight of funding for state child welfare services pursuant to the Social Security Act. On April 2, 2015, HHS announced that it would propose amendments to its Adoption and Foster Care Analysis Reporting System regulations to require that state Title IV-E agencies include certain ICWA-related data. Proposed Rule, Adoption and Foster Care Analysis and Reporting System, 80 Fed. Reg. 17,713 (Apr. 2, 2015); see also Supplemental Notice of Proposed Rulemaking, Adoption and Foster Care Analysis and Reporting System, 81 Fed. Reg. 20,283 (Apr. 7, 2016).

Government Accountability Office report.¹⁴⁰ In response, HHS declared that it lacks “authority, resources, or expertise,”¹⁴¹ and the Bureau of Indian Affairs of the Department of the Interior likewise formally stated that it “has no oversight authority” to ensure compliance.¹⁴² The Department of the Interior took its most significant steps in 1979 and early 2015, when it issued non-binding guidelines to assist state courts (and, in 2015, state agencies as well) in interpreting and implementing the Act.¹⁴³ The 2015 guidelines, among other things, provide guidance both to courts and to any “private State-licensed agency or public agency and their employees, agents or officials involved in and/or seeking to place a child in a child custody proceeding.”¹⁴⁴ The guidelines include extensive revisions and set forth the Department’s view on a number of matters that have arisen since 1979, but like the earlier guidelines, they are not federally enforceable and do not purport to be.¹⁴⁵ The Department has, most recently, promulgated binding and preemptive legislative rules applicable

140. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATE GOVERNMENTS (2005). The report concluded that data collection and review by HHS “does not ensure that ICWA issues will be addressed.” *Id.* at 51.

141. *Id.* app. III, at 80.

142. *Id.* app. IV, at 82. Section 1915(e) of ICWA authorizes the Interior Department Secretary to inspect records of state agencies pertaining to implementation of the statute, but that authority has apparently rarely, if ever, been utilized. In addition, 25 U.S.C. §§ 1931–1932 authorize the Department to provide grants for the establishment of child and family service programs by tribes.

143. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,149; 44 Fed. Reg. 67,584 (Nov. 26, 1979).

144. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,151.

145. A federal district court, in an October 20, 2015 ruling, rejected a claim brought by the National Council for Adoption that the 2015 guidelines were illegally issued because they were not the product of notice-and-comment rulemaking. *See* Memorandum Opinion and Order, Nat’l Council for Adoption v. Jewell, No. 1:15-cv-00675-GBL (E.D. Va. Oct. 20, 2015); *see also* *In re* Interest of Tavian B., No. S-15-129, 2016 LEXIS 24, at *3 (Neb. Feb. 19, 2006) (“The BIA guidelines provide guidance to state courts and child welfare agencies implementing ICWA and promote compliance with ICWA’s stated goals by providing a framework and best practices for compliance.”); *Kent K. v. State*, No. S-15708 (Alaska Feb. 3, 2016) (explaining that the guidelines are not binding); *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 766 (D.S.D. 2015) (“The DOI Guidelines are not binding on the court but are an administrative interpretation of ICWA entitled to great weight.”); *Gila River Indian Cmty. v. Dep’t of Child Safety*, 363 P.3d 148, 152 (Ariz. App. 2015) (“Although the Guidelines are not binding, we nevertheless consider them in interpreting ICWA.”); *In re V.L.R.*, No. 08-15-00250-CV, 2015 WL 7280987 (Tex. App. Nov. 18, 2015) (explaining that the 2015 guidelines are not binding).

to state courts,¹⁴⁶ but, as noted below, there are questions about legality and enforceability and the rules do not apply directly to state agencies or to private entities. A 2014 report issued by the National Indian Child Welfare Association and other pro-ICWA advocacy groups summarized the then-current extent of federal oversight, noting that

ICWA is the only major federal child welfare law that does not have oversight assigned to a specific federal agency and a regular evaluation of implementation, either process or outcome related. Reports of noncompliance go uninvestigated by any federal agency, no implementation data is regularly collected and analyzed, and performance improvement plans are not required for agencies that are out of compliance even when the noncompliance is documented.¹⁴⁷

The 2015 guidelines do not, themselves, address, much less resolve, these concerns. The Department, in promulgating standards applicable to state courts, referenced¹⁴⁸ a statutory cause of action, 25 U.S.C. § 1914, which provides that an Indian child, his or her tribe, and his or her parents may sue to correct violations in, at a minimum, certain individual cases, such as when there has been a specific illegal foster care placement or a particular wrongful termination of parental rights.¹⁴⁹ The statutory provision does not, however, provide for an express cause of action for federal or state judicial review of violations of the placement

146. Indian Child Welfare Act Proceedings, *supra* note 43, at 38,780 (“[W]hile the proposed rule would have been directed to both State courts and agencies, the Department has focused the final rule on the standards to be applied in State-court proceedings. Most ICWA provisions address what standards State courts must apply before they take actions such as exercising jurisdiction over an Indian child, ordering the removal of an Indian child from her parent, or ordering the placement of the Indian child in an adoptive home.”).

147. SIMMONS, *supra* note 23, at 7.

148. Indian Child Welfare Act Proceedings, *supra* note 43, at 38,853 (“The final rule clarifies the right of particular parties to seek to invalidate a foster-care placement or termination of parental rights based on certain violations of ICWA.”).

149. 25 U.S.C. § 1914 provides:

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 section 1911, 1912, and 1934 of this title.

preferences set forth in § 1915 of the Act.¹⁵⁰ Although there are no reported opinions directly addressing the issue, a court could also perceive § 1914 itself to give an Indian child, a parent or custodian, or a tribe a cause of action to seek broad institutional reform with regard to foster care placements and terminations of parental rights.

In addition, some courts may conclude that lawsuits by tribes and Indian parents that seek institutional reform, at least on a prospective basis and perhaps with regard to particular state agency practices, need not necessarily depend upon an assertion that § 1914 provides a statutory cause of action. In a recent decision, a federal district court in South Dakota ruled in favor of the Oglala Sioux and Rosebud Sioux Tribes and three Indian parents against a state judge and state Department of Social Services officials in a lawsuit alleging statutory violations.¹⁵¹ The plaintiffs sought to halt a practice in which defendants conduct expedited temporary custody hearings within 48 hours after Indian children are removed from their homes on suspicion of neglect or when a warrant is served. The hearings frequently result in the removal of the Indian child for at least a 60-day period. Although the “48 hour” hearings are largely conducted in accordance with state law, parents are not permitted to testify, and defendants

never allow the parents to see the affidavit filed in support of that petition, never allow the parents to comment on whether continued custody is the least restrictive alternative, never allow the parents to comment on whether the state has engaged in active efforts to prevent a break-up of the family, and never allow the parents to obtain counsel and resume the hearing in a timely manner.¹⁵²

150. See *Navajo Nation v. Sup. Ct. of Wash. for Yakima Cty.*, 47 F. Supp. 1233 (E.D. Wash. 1999) (deciding that § 1915 did not include a cause of action regarding placement preferences).

151. *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015); see also *Order Denying Motions to Dismiss, Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017 (2014) (No. CIV. 13-5020-JLV).

152. Complaint at 15–16, *Oglala Sioux Tribe v. Van Hunnik*, No. 13-5020 (D.S.D. filed March 21, 2013), available at <https://turtletalk.wordpress.com/2013/03/21/ogla-la-sioux-tribe-v-van-hunnik-et-al-class-action-suit-to-force-south-dakota-judges-to-comply-with-indian-child-welfare-act> [<https://perma.cc/CSJ4-QGTX>].

The plaintiffs brought their lawsuit alleging repeated violations of ICWA's emergency removal provision¹⁵³ and the Due Process Clause of the Fourteenth Amendment.

The plaintiffs did not rely on section 1914 of ICWA for a statutory cause of action, but rather argued that section 1922 was violated. That section deals with emergency removals and provides that state officials "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."¹⁵⁴ The plaintiffs asserted that "[n]ever during Defendants' 48-hour hearings is there an inquiry into whether the cause of the [sought] removal has been rectified, nor does the court direct DSS to pursue that inquiry after the hearing. Yet, this is precisely what the 48-hour [process] must do in order to comply with ICWA."¹⁵⁵ The district court, in denying the defendants' motions to dismiss¹⁵⁶ and in its 2015 order granting relief, appeared to assume that alleged violation of a substantive provision such as section 1922 of ICWA could, by itself, create a valid claim for relief under the statute.¹⁵⁷ Moreover, the court rejected the defendants' argument that even if statutory violations could be asserted, they could not be vindicated through a 42 U.S.C. § 1983 action, and that section 1914 of ICWA constitutes a specific statutory remedy that displaces other rights of action.¹⁵⁸ The court, agreeing with the plaintiffs' view — that section 1914 established remedies for certain violations but did not preclude

153. 25 U.S.C. § 1922 (2012).

154. *Id.*

155. Complaint, *supra* note 152, at 29.

156. *Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017 (D.S.D. 2014).

157. After the federal district court refused to dismiss the case, the United States filed an amicus brief supporting the tribe's section 1922 argument, noting that

ICWA imposes a specific obligation on state officials, including state courts and departments of social services, to actively investigate and oversee emergency removals of Indian children to "insure" that the removal ends as soon as possible, and that Indian children are "expeditiously" returned to their parents or their tribe, or that the state commences a child custody proceeding subject to all of ICWA's protections. . . . The interest that parents have in the custody of their children is not to be lightly interfered with, even following an emergency situation. While an emergency proceeding such as the 48-hour hearing may not permanently deprive parents of their custody rights, even a temporary deprivation of physical custody requires a prompt and meaningful hearing.

Amicus Brief of the United States, *Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017 (D.S.D. 2014), available at <https://turtletalk.wordpress.com/2014/08/15/doj-amicus-brief-in-sd-icwa-class-action-case> [<https://perma.cc/KR5R-HX7N>]. The brief did not address the ICWA cause of action.

158. *Oglala Sioux Tribe*, 993 F. Supp. 2d at 1035–36.

other remedies through § 1983 actions — reasoned that section 1914 “supplements the remedies available under § 1983.”¹⁵⁹

If other courts accept tribal lawsuits based on assertions of substantive violations of particular provisions of ICWA, *parens patriae* standing to protect the interests of tribal members,¹⁶⁰ and claims under the Fourteenth Amendment, then arguments based on section 1914’s explicit cause of action may not be necessary.

IV. STATES SHOULD RESPOND BY REVISING THEIR REQUIREMENTS TO INCORPORATE THE FEDERAL GUIDELINES AND REGULATIONS

States should promptly begin the process of promulgating regulations that incorporate the federal 2015 guidelines and 2016 regulations as enforceable state requirements. When states addressed the initial, 1979, federal ICWA guidelines, they approached the non-binding recommendations of the Interior Department in several ways. Typically, states made no specific mention of the guidelines in their statutes or regulations.¹⁶¹ Instead, reference to the guidelines — and either acceptance of their language or rejection of the federal view — was left to state courts. Those courts varied widely in their treatment of the guidelines. Some state court decisions referenced the guidelines in support of their independent construction of ICWA.¹⁶² Others viewed the guidelines as providing assistance but not as binding.¹⁶³ Still others rejected both application of the guidelines in

159. *Id.* at 1036 (citing *Alaska Dep’t of Health & Soc. Servs. v. Native Vill. of Curyung*, 151 P.3d 388, 412 (Alaska 2006)).

160. Several courts have, in the ICWA context, held that tribes have *parens patriae* status to advance the interests of tribal members. See *Alaska Dep’t of Health & Soc. Servs. v. Native Vill. of Curyung*, 151 P.3d 388, 402 (Alaska 2006); *Native Vill. of Venetie IRA Council v. Alaska*, 155 F.3d 1150, 1152 (9th Cir. 1998) (both noting that Indian tribes have standing to bring suit “as *parens patriae* to prevent future violations” of ICWA).

161. See, e.g., IOWA CODE § 232B.2 (2015).

162. *L.G. v. Alaska Dep’t of Health & Soc. Servs.*, 14 P.3d 946, 952, 954–55 (Alaska 2000); *In re J.J.C.*, 302 S.W.3d 896, 900 (Tex. Ct. App. 2009) (explaining that the “guidelines do not have binding legislative effect”). An Erie County Surrogate’s Court, in the only reported New York decision concerning treatment of the 1979 guidelines, cited the guidelines as supporting its determination that a tribe did not have a right to be notified of a pending voluntary adoption proceeding. *In re Adoption of Baby Boy J.*, 944 N.Y.S.2d 871 (N.Y. Sur. 2012).

163. *In re Adoption of F.H.*, 851 P.2d 1361, 1364 (Alaska 1993); *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348, 351 (Minn. Ct. App. 2007).

state law and to the specific recommendation at issue.¹⁶⁴ Again, the DSS should, using New York as an example, promulgate regulations that incorporate aspects of the guidelines and binding regulations that are missing from existing state regulations, resolving any inconsistencies in favor of the federal guidelines and regulations. The DSS should adopt, in instances in which the 2015 guidelines are more protective of Indian children, families, and tribes than the federal minimum standards applicable directly to state courts, the approaches set forth in the guidelines. Likewise, the DSS should incorporate more protective 2015 language for its regulations in the event that the Interior Department issues further revised guidance that, with regard to a particular matter, tracks the language of the 2016 regulations. Finally, the DSS should make appropriate revisions to the Uniform Rules for the Family Court. If the agencies do not appear poised to promptly adopt the guidelines and federal regulations as enforceable requirements on their own initiative,¹⁶⁵ tribes and other interested groups should consider filing a petition for rulemaking.¹⁶⁶

164. *In re Candace A.*, 332 P.3d 578, 584 (Alaska 2014); Adoption of N.P.S., 868 P.2d 934, 936 (Alaska 1994) (“The guidelines assist but do not bind this court.” The court applied a state “best interest” standard, which was not endorsed by the 1979 federal guidelines, to justify “good cause” deviation from ICWA placement preferences).

165. The New York State Administrative Procedure Act does not specifically provide for petitions for rulemaking. However, the New York Constitution broadly acknowledges a right to petition, and rulemaking petitions have been filed with other state agencies pursuant to that authority. N.Y. CONST. art. I, § 9. Potential co-petitioners include, in addition to the federally and state-recognized tribes in New York State, the National Indian Child Welfare Association, the National Congress of American Indians, and the Native American Rights Fund (all national organizations, previously mentioned), the American Indian Community House of New York City, the American Indian Law Alliance, Lawyers for Children, The [New York City] Children’s Aid Society, and law school centers or clinics, particularly the Center for Indigenous Law, Governance and Citizenship at Syracuse University College of Law.

166. In addition, the Office of Children and Family Services should be urged to update their INDIAN CHILD WELFARE ACT COMPLIANCE DESK AID and GUIDE TO COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT to reference and discuss the federal guidelines, regardless of the outcome of a rulemaking initiative. See N.Y. ST. OFFICE OF CHILDREN & FAMILY SERVS., PUB. NO. 4757, A GUIDE TO COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT (2006), <http://www.ocfs.state.ny.us/main/publications/pub4757guidecompliance.pdf> [<https://perma.cc/QWD6-J63S>]; N.Y. ST. OFFICE OF CHILDREN & FAMILY SERVS., PUB. NO. 5046, INDIAN CHILD WELFARE ACT COMPLIANCE DESK AID THE DESK AID (2011), <http://ocfs.ny.gov/main/publications/Pub5046.pdf> [<https://perma.cc/Y4PJ-SKSJ>].

A. JUSTIFYING RULEMAKING TO ADOPT THE FEDERAL GUIDELINES AND REGULATIONS

Because rulemaking is a major undertaking, the question naturally to be posed is “why?” State agencies are, of course, under no obligation to accept non-binding federal guidelines, nor will the Interior Department require that states affirmatively revise their existing laws, regulations, or internal procedures should they be inconsistent with the 2016 federal standards applicable to state courts. Put simply, states should incorporate both the federal 2015 guidelines and the 2016 regulations into their binding regulations because, though ICWA has implications for child welfare systems and family courts, it was adopted and is primarily justified as an Indian statute, and the Department of the Interior has expertise in interpreting Indian statutes. As the Department would likely be given deference in a lawsuit challenging its determinations made pursuant to an Indian statute that it directly administers,¹⁶⁷ its expertise and experience should be recognized here as well. Moreover, even with regard to the requirements set forth in the 2016 legislative rules, piecemeal judicial acceptance of the new guidelines and regulations would require that individual judges either apply or refuse to apply them in particular cases dealing with specific issues.¹⁶⁸ Those rulings frequently would not be appealed,¹⁶⁹ so a uniform body of case law would either not develop at all or occur only slowly. It would, at best, likely take many years before substantial portions of the guidelines and regulations are eventually accepted and applied in New York state law through the judicial process. In the meantime, if New York’s courts, social service agencies, and private adoption entities com-

167. See, e.g., *Runs After v. United States*, 766 F.2d 347, 352 (9th Cir. 1985) (“It cannot be denied that the BIA has special expertise and extensive experience in dealing with Indian affairs.”).

168. See, e.g., *Adoption of N.P.S.*, *supra* note 164, 868 P.2d at 936 (declining to limit reasons for “good cause” deviations from statutory placement preferences to those set forth in guidelines). Or, with regard to the guidelines, state appeals courts would decline to apply them if they are not incorporated into state regulations. See, e.g., *In re M.K.T.*, No. 113,110, at 9 (Okla. Civ. App. May 1, 2015) (refusing to apply the 2015 Guidelines, describing them as “not binding and [as] instructive only”); *In re Interest of Nery V.*, 864 N.W.2d 728, 736 (Neb. Ct. App. 2015) (in a decision subsequent to issuance of 2015 Guidelines, applying instead the 1979 Guidelines).

169. For example, by 1996, only two ICWA cases in the Commonwealth of Kentucky had been reported. Jeff Brown, Rye v. Weasel: *Applying the Indian Child Welfare Act of 1978 to Satisfy Conflicting Interests and Congressional Intent*, 34 U. LOUISVILLE J. FAM. L. 935, 939 (1996).

ply with existing state regulations, they would operate in ways that in several significant respects are, as discussed below, inconsistent with the guidelines or regulations. Furthermore, the guidelines and regulations are meant to address and hopefully correct longstanding but potentially or clearly illegal activities, and therefore there is some urgency in their adoption and incorporation into state law. The purpose of the promulgation would not be to reexamine, much less delete, existing “more stringent than federal” New York requirements,¹⁷⁰ but rather to ensure that the state rules comport both with applicable federal minimum requirements and with federal best practice recommendations.

Another, more specific, question that surely will be asked is: apart from the speed with which federal standards are uniformly recognized and implemented by state courts, why should states undertake rulemaking procedures when ostensibly binding federal regulations have been promulgated that are applicable to courts? Because the 2016 regulations do not seek to directly address practices by state and private agencies, states should undertake to incorporate or otherwise recognize *both* the regulations and the federal guidelines, so that state-level requirements will comprehensively reflect the most current thinking of the Interior Department. In the absence of state adoption of either the guidelines or the regulations, courts will, as noted, presumably apply the federal regulatory minimum standards on a piecemeal basis, but are unlikely to adopt differing recommendations from the guidelines if they would require more of courts or of agencies if implemented. Without state initiatives to adopt both the guidelines and the regulations as enforceable requirements, there is a strong possibility that the protective criteria set forth in the 2015

170. Any petition should ideally address consistency with the guidelines and regulations and not other issues that have been raised regarding Indian children. A petition is more likely to succeed if it is focused on implementing the federal guidelines and rules rather than on issues concerning the extent to which ICWA might be further applied in New York State or other ancillary issues. For example, some have suggested that state-implemented ICWA standards should apply to additional types of proceedings, such as matrimonial proceedings. See, e.g., Peter J. Herne, *Best Interests of an Indian Child*, 86-APR N.Y. ST. B.J. 22, 24 n.26 (2014). Likewise, one author contended that New York courts might not apply ICWA standards in a custody case brought by a grandparent who can show, under state law, “extraordinary circumstances.” Jill E. Tompkins, *Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions*, 81 U. COLO. L. REV. 1119, 1179 (2010). However, the petition should focus on ensuring that New York State complies with federal standards recommended or mandated by the Department of the Interior.

guidelines for state and private agencies will largely be ignored or, if addressed, adopted in a random fashion. It is, moreover, debatable that the Interior Department has the statutory authority to issue regulations that bind state courts — and if it does, whether it has a mechanism of enforcement.¹⁷¹ The regulations are likely to be challenged,¹⁷² and lawsuits could result in a significant delay in implementation, a remand to the agency, or outright invalidation. State-level adoption would cure any deficiency by making the rule requirements mandatory under state law, regardless of the outcome of litigation around the rule. In any

171. When the 1979 guidelines were issued, the Department of the Interior emphasized that it was issuing guidelines because it believed it lacked statutory authority to impose binding requirements on state courts, and to do so would, in any event, trigger significant federalism concerns. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979) (“Nothing in the legislative history indicates that Congress intended this Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step.”). There are several statements to this effect in the preamble to the 1979 guidelines. The preamble to the proposed rules side-stepped the earlier language, stated that statutory authority exists, and broadly asserted that the proposal does not have significant impacts on federalism. ICWA itself provides that rules may be promulgated “[w]ithin one hundred and eighty days after November 8, 1978 . . .” Indian Child Welfare Act, 25 U.S.C. § 1952 (2012). It could be argued that the Department has general rulemaking authority with regard to Indian affairs as a result of two statutes which state that the agency is responsible for “the management of all Indian affairs and of all matters arising out of Indian relations,” 25 U.S.C. § 2 (2012), and can “prescribe such regulations as [it] may think fit for carrying into effect the various provisions of any act relating to Indian affairs.” 25 U.S.C. § 9 (2012). *But see* Texas v. United States, 497 F.3d 491, 509–10 (5th Cir. 2007) (finding that the authority under Sections 2 and 9 “only allows prescription of regulations that implement specific laws”). The Solicitor of the Department of the Interior issued, upon promulgation of the 2016 regulations, a comprehensive “M-opinion” detailing why the agency has statutory authority to issue legislative rules. Memorandum from Solicitor, U.S. Dep’t of the Interior to Secretary, U.S. Dep’t of the Interior, Implementation of the Indian Child Welfare Act by Legislative Rule (June 8, 2016), <https://turtletalk.wordpress.com/2016/06/08/solicitors-opinion-on-the-new-icwa-regulation/> [<https://perma.cc/JPQ9-6JG6>].

172. Indeed, at least two lawsuits were brought after the issuance of the 2015 guidelines, claiming that the agency violated the Administrative Procedure Act by not issuing them as the product of notice-and-comment rulemaking. *See supra* notes 85, 145; Ashby Jones, *Couples Sue Over Tribal Adoption Hurdles*, WALL ST. J. (Oct. 16, 2015), <http://www.wsj.com/articles/couples-sue-over-tribal-adoption-hurdles-1445014295> [<https://perma.cc/Q3X3-QLKN>]; Joaquin Gallegos, Letter to the Editor, *Tribes are Essential to the Well-being of Native American Children*, WASH. POST (Sept. 4, 2015), https://www.washingtonpost.com/opinions/tribes-are-essential-to-the-well-being-of-native-american-children/2015/09/04/2d6d7968-5268-11e5-b225-90edbd49f362_story.html [<https://perma.cc/MJ3T-X6TF>]. Lawsuits were also filed in 2015 challenging, on constitutional grounds, “more stringent than federal” requirements in Oklahoma and Minnesota regarding notification to tribes in voluntary adoption cases and participation by tribes in such cases, and provisions in the Michigan Indian Family Preservation Act concerning transfer of cases from state to tribal court. Jones, *supra*.

event, the regulations and the guidelines reflect both the agency's current views and expertise, and state regulations currently do not measure up to agency regulations and guidelines in a number of ways. Accordingly, states should address any inconsistencies at the earliest opportunity. If needed, states can make subsequent changes to incorporate updates to federal regulations or guidelines.

B. REVISING CURRENT NEW YORK STATE STANDARDS TO COMPORT WITH THE 2015 GUIDELINES AND 2016 REGULATIONS

This Part discusses several of the most notable differences between the existing New York regulations, found primarily at 18 N.Y.C.R.R. § 431.18, and the 2015 federal guidelines.¹⁷³ This Part also focuses on the federal guidelines rather than the 2016 regulations. To the extent that the 2016 regulations, in setting forth minimum binding standards applicable to courts, either do not address a recommendation set forth in the guidelines for state and private agencies or, as to state courts, are less comprehensive or protective than the guidelines, this Note recommends that the State adopt the language of the guidelines.¹⁷⁴

1. *Summary of Significant Differences*¹⁷⁵

- The DSS regulations provide that, in proceedings initiated by a social services officer, the official must show that “reasonable efforts” were made to “alleviate the need to remove the Indian child from his home.” The federal statute and the new guidelines state that “active efforts” must be used,

173. Because the federal guidelines apply to social services entities and officials (and in some cases, private adoption firms) as well as courts, they may require changes to the Uniform Rules for the Family Court, N.Y. CODES R. & REGS. tit. 22, pt. 205 (2016). The Family Court rules currently merely provide that, in a child custody proceeding, the court should ascertain whether the child is subject to ICWA, and proceed accordingly if the Act is applicable. N.Y. CODES R. & REGS. tit. 22, § 205.51 (2016).

174. For a more thorough explanation of how, with regard to requirements applicable to state courts, the final regulations vary from the proposed (which were largely copied from the guidelines), see a chart that compares the proposal with the promulgated rule, Indian Child Welfare Act Proceedings, *supra* note 43, at 38,855–862, and the preamble to the Final Rule. *Id.* at 38,790–854.

175. References to the current DSS regulations and to the BIA 2015 guidelines are set forth in the discussion *infra*.

and the guidelines make clear that “active” efforts are far more extensive than “reasonable” ones.

- The current DSS regulations do not address the guidelines’ provisions for the timing of notification to Indian parents and tribes.
- The DSS regulations do not include provisions mandating that courts and social workers make specific inquiries as to whether a child is an Indian.
- The DSS regulation regarding the determination of the tribe with the most significant contact with the child is inconsistent with the guidelines.
- The DSS regulation regarding notice to Indian parents/custodians does not include a number of the provisions set forth in the guidelines.
- The Family Court regulations include no language regarding transfer of cases to tribal courts. The new federal guidelines have provisions limiting state court discretion, which are designed to promote predictability and establish procedural protections.
- Although the DSS regulations properly reference the statutory standard of clear and convincing evidence in foster care placement proceedings, they do not include the language in the guidelines that describes what the standard means.
- The DSS regulation regarding expert witnesses do not set forth a descending order of preference.
- The DSS regulation regarding “good cause” to deviate from placement preferences is incomplete and inconsistent with the guidelines.

2. Discussion

The DSS regulations and State law provide that the New York state requirements apply to more types of proceedings than the federal statute. They apply to foster care, abuse/neglect proceedings under Article 10 of the New York Family Court Act, status offense, some voluntary, child custody or guardianship (non-parent), parental termination or surrender, pre-adoptive placement, and adoption proceedings, including both public and private adoptions and adoptions by stepparents. They do not apply to divorce, juvenile delinquency, paternity/support, or domestic

violence cases. Under current DSS regulations,¹⁷⁶ in an applicable proceeding that is initiated by a social services official, the official must demonstrate to the court that “reasonable efforts” were made “to alleviate the need to remove the Indian child from his home” before the proceeding began.¹⁷⁷ While the federal statute applies only to foster care placement, termination of parental rights, and adoptive placement, the statute and the new guidelines provide that “*active efforts*,” rather than “reasonable efforts,” should be utilized. A number of states have, like New York, applied their typical “reasonable effort” standards in ICWA cases, and commentators have noted that many judges, child welfare officials, and attorneys either do not know that ICWA uses a different standard, or they believe that the difference is not important.¹⁷⁸ As a result, “the active efforts requirement is still haphazardly applied.”¹⁷⁹ The guidelines expressly state that “active efforts” are different from and require more “effort” than “reasonable efforts.”¹⁸⁰ Moreover, the guidelines describe, with fifteen examples, none of which are mentioned in New York requirements, how active effort should be undertaken,¹⁸¹ and they stress that “active efforts must begin from the moment the possibility arises that the Indian child may be removed.”¹⁸² The guidelines also emphasize “that active efforts should be conducted while verifying whether the child is an Indian child; this clarification ensures compliance with ICWA in cases in which the status

176. N.Y. CODES R. & REGS. tit. 18, § 431.18(d) (2015).

177. *Id.*

178. See Megan Scanlon, *From Theory to Practice: Incorporating the “Active Efforts” Requirement in Indian Child Welfare Act Proceedings*, 43 ARIZ. ST. L.J. 629, 640–43 (2011). For a discussion of the difference between “active” and “reasonable” efforts, see Mark Andrews, “Active” Versus “Reasonable” Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes, 19 ALASKA L. REV. 85, 87 (2002). It should be noted that the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997), does not repeal or otherwise supersede ICWA in this regard. See, e.g., Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020, 4029 (Jan. 25, 2000) (“[N]othing in this regulation supersedes ICWA requirements . . .”); see also *In re J.L.*, 770 N.W.2d 853, 862–63 (Mich. 2009) (“Because the ICWA establishes ‘minimum Federal standards for the removal of Indian children from their families,’ 25 U.S.C. § 1902, and nothing in the ASFA indicates a congressional intent to supersede the ICWA, neither the ASFA nor its state law analogues relieve the DHS from the ICWA’s ‘active efforts’ requirement. . .”).

179. Scanlon, *supra* note 178, at 643.

180. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,149.

181. *Id.* at 10,150.

182. *Id.* at 10,148.

of whether the child is an Indian child is not verified until later in the proceedings.”¹⁸³

One of the most important aspects of the guidelines is the emphasis on “promot[ing] the early identification of ICWA applicability.”¹⁸⁴ To avoid “heartbreaking separations” and noncompliance,¹⁸⁵ the guidelines set forth specific steps that courts should undertake at the earliest possible stage in any proceeding. They also clarify that notice to the Indian parents and to the Indian tribe should occur at each proceeding, “not just for the first or last proceeding.”¹⁸⁶ Finally, they outline how notice should be provided, and emphasize that “the tribe has the right to intervene at any time.”¹⁸⁷ The current DSS regulations set forth a procedure for notification,¹⁸⁸ but otherwise do not include the language set forth in the new guidelines.

The DSS regulations provide that social services officials should “routinely inquire whether the child is a[n] Indian and notify the Family Court in writing where there is reason to believe the child involved is an Indian.”¹⁸⁹ The guidelines, however, would *require agencies to ask, in every case*, whether the child is an Indian child, and to “obtain verification, in writing, from all tribes in which it is believed that the child is a member or eligible for membership, as to whether the child is an Indian child.”¹⁹⁰ While the Family Court regulations merely state¹⁹¹ that a petition should note whether the child is an Indian child, the guidelines would require that courts “must ask, as a threshold question at the start of any State court child custody proceeding, whether there is reason to believe the child who is the subject of the proceeding is an Indian child by asking each party to the case, including the guardian ad litem and the agency representative, to certify on the record whether they have discovered or know of any information that suggests or indicates the child is an Indian

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. N.Y. CODES R. & REGS. tit. 18, § 431.18(c) (2015).

189. *Id.* § 431.18(e).

190. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,152.

191. N.Y. CODES R. & REGS. tit. 22, § 205.51 (2016).

child.”¹⁹² The guidelines set forth criteria for when there is “reason to believe.” Also, the guidelines establish an “active efforts” investigation requirement and list the specific types of information courts may require agencies to provide.¹⁹³

The DSS regulations provide¹⁹⁴ that the *court* (not the tribe) should make (with input from the social services district) a determination of which tribe has “the more significant contacts” with the child. The “more significant contacts” language comes from the statute,¹⁹⁵ but the regulations do not track the guidelines. The guidelines provide that only a *tribe* can make a determination of whether a child is a member or eligible for membership or whether a biological parent is a member of the tribe. If a tribe states that the child is a member or qualifies, that statement is binding.¹⁹⁶ If a child is a member of one tribe but may be eligible for membership in another, deference is given to the tribe that holds the membership.¹⁹⁷ If the child is not a member of any tribe, tribes with significant contacts will attempt to agree on how to designate the child.¹⁹⁸

The DSS notice requirements do not provide that Indian parents or custodians who are notified of a state proceeding have a right to petition the state court to transfer the proceeding to tribal court, absent objection from either parent. The New York regulations, unlike the guidelines, also do not provide that, if the parent or Indian custodian has limited English proficiency, notices should be translated or read and explained “in a language that the parent or Indian custodian understands.”¹⁹⁹ Unlike the guidelines,²⁰⁰ the New York regulations do not require that notices explain the potential consequences of the proceedings. They likewise do not provide that notices should include detailed genograms or ancestry charts,²⁰¹ which can be particularly important

192. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,152.

193. *Id.*

194. N.Y. CODES R. & REGS. tit. 18, § 431.18(a)(3) (2015).

195. 25 U.S.C. § 1903(5) (2012).

196. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,153 (“No other entity or person may authoritatively make the determination of whether a child is a member of the tribe or eligible for membership in the tribe.”).

197. *Id.*

198. *Id.*

199. *Id.* at 10,154.

200. *Id.*

201. *Id.*

for tribes seeking to determine whether a child is eligible for membership. And they do not make clear that, if the child is transferred interstate, both the originating state court and the receiving state court must provide notices to the tribes and seek to verify that the child is an Indian child.²⁰²

Unlike the federal guidelines,²⁰³ the current Family Court rules do not specifically address criteria for the transfer of child welfare proceedings to tribal courts.

The DSS regulations, properly using the higher evidentiary standard set forth in ICWA,²⁰⁴ provide that a foster care placement cannot occur unless there is a determination, by *clear and convincing evidence*, with testimony of at least one qualified expert witness, that continued custody with the child's Indian parents or Indian custodian is likely to result in serious emotional or physical damage to the child.²⁰⁵ However, the guidelines go further and make clear that clear and convincing evidence must "show a causal relationship between the existence of particular conditions in the home" and a likelihood of serious emotional or physical damage to the child if the child were to remain. The guidelines also provide that evidence only showing "community or family poverty," "single parenthood," "crowded or inadequate housing," "substance abuse," or "nonconforming social behavior" does not by itself constitute clear and convincing evidence.²⁰⁶ The DSS rules do not contain these additional provisions. The new federal guidelines set forth a list of characteristics or qualifications that potential expert witnesses should have, in descending order of preference.²⁰⁷ Under the guidelines, the first preference should be for a member of the child's tribe "who is recognized by the tribal community [as] knowledgeable in tribal customs as they pertain to family organization and childrearing practices."²⁰⁸ The New York regulations do not provide for a descending order of preference and omit the guidelines' second most preferred type

202. *Id.*

203. *Id.* at 10,156.

204. 25 U.S.C. § 1912(e) (2012).

205. N.Y. CODES R. & REGS. tit. 18, § 431.18(b)(1) (2015).

206. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,156–57.

207. *Id.* at 10,157.

208. *Id.*

of witness: a member of another tribe that is recognized as an expert witness by the child's tribe.²⁰⁹

Finally, in determining whether there is "good cause" to deviate from the statutory placement preferences, the guidelines not only consider parental requests, but they next consider the child's request provided that he or she is able to understand and comprehend the decision being made.²¹⁰ The DSS rules make no mention of the child's request. In addition, in determining whether there are extraordinary physical or emotional needs that might warrant placement other than as specified in ICWA, the guidelines note that courts should construe "physical or emotional needs" not to include "ordinary bonding or attachment that may have occurred" or the fact that the child has "for an extended period of time, been in another placement that does not comply with the Act."²¹¹ Importantly, the guidelines state that the standard "best interest of the child" standard is not applicable, because the statutory placement preferences themselves reflect the child's "best interests."²¹² The DSS rules do not include this language.

209. N.Y. CODES R. & REGS. tit. 18, § 431.18(a)(5) (2015).

210. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,158.

211. *Id.* The agency's view is consistent with the view of many social scientists that an emphasis on bonding may "mislead courts." See David E. Arrendondo & Hon. Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness: Limitations of Attachment Theory in the Juvenile and Family Court*, 2 J. CTR. FOR FAM. CHILD. & CTS. 109, 110–11 (2000); see also *In re C.H.*, 997 P.2d 776, 783–84 (Mont. 2000) (concluding that construing bonding, while "a normal and desirable outcome when, as here, a child lives with a foster family for several years" to be "good cause" would "essentially negate the ICWA presumption"); *In re Halloway*, 732 P.2d 962, 971–72 (Utah 1986) ("The adoptive parents argue that we should consider the bonding that has taken place between themselves and Jeremiah in reaching a decision in this matter. . . . [This] would reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation."). At least one New York court has, with regard to whether bonding should be considered in child placement cases, noted that "[t]o use the period during which a child lives with a foster family, and emotional ties that naturally eventuate, as a ground for comparing the biological parent with the foster parent undermines the very objective of voluntary foster care as a resource for parents in temporary crisis, who are then at risk of losing their children once a bond arises with the foster families." *In re Michael B.*, 604 N.E.2d 122, 130 (N.Y. 1992).

212. Guidelines for State Courts and Services in Indian Child Custody Proceedings, *supra* note 6, at 10,158; see also *In re Custody of S.E.G.*, 521 N.W.2d 357, 366 (Minn. 1994) ("Congress, in conjunction with numerous Indian tribal governments and the Bureau of Indian Affairs, has carefully and thoughtfully set out the nation's policy to prevent the destruction of Indian families and Indian tribes and to protect the best interests of Indian children by preventing their removal from their communities.").

V. ADDITIONAL STEPS SHOULD BE UNDERTAKEN BY TRIBES,
JUDICIAL TRAINING PROGRAMS, AND LAW SCHOOL CLINICS
FOR TRAINING, JUDICIAL OBSERVATION, AND PARTICIPATION IN
ICWA CASES

A. TRAINING

Promulgation of regulations should be accompanied by a training program that is specifically oriented to the new state requirements and preferably includes one or more speakers from the Department of the Interior. The training should be open to judges, child welfare agency personnel, tribal representatives, advocacy groups, and private adoption entities. Moreover, training on ICWA requirements needs to be ongoing; studies have shown that many judges, attorneys, and state social workers in southwestern states and in Minnesota (where there are many reservations and numerous Indian children in child custody proceedings) are unfamiliar with or lack an adequate understanding of ICWA.²¹³

B. JUDICIAL OBSERVATION

Training of judges, state child welfare agencies, and private adoption entities should ideally be coupled with a court observation program, perhaps conducted by one or more law school clinics. The court observations that are contemplated would not serve a particular purpose of bringing judges to task. Instead, case reviews and court observations, conducted by law school clinics or other programs, serve a data-gathering function so “state administrators and judges who might be reluctant to acknowledge a problem with ICWA compliance see in raw numbers that there is a problem and provide motivation to address it.”²¹⁴ The “most successful and widespread collection of ICWA

213. Scanlon, *supra* note 178, at 646–47 (“[I]n Arizona only two-thirds of state attorneys involved in ICWA proceedings read the [1979] BIA guidelines. Less than half of state judges in Arizona check the recommendations despite the high number of ICWA cases in this jurisdiction.”); Peter K. Wahl, *Little Power to Help Brenda? A Defense of the Indian Child Welfare Act and Its Continued Implementation in Minnesota*, 26 WM. MITCHELL L. REV. 811, 836–37 (2000); *see also* Lizbeth Gonzalez & Sharon S. Townsend, *The Teach ICWA Initiative*, 86-APR N.Y. ST. B.J. 31 (2014) (describing a training program in New York State).

214. Testimony of Terry Cross, *supra* note 136, at 12.

compliance data is the QUICWA Compliance Collaborative of the Minneapolis American Indian Center.”²¹⁵ QUICWA is an internet-based software program.²¹⁶ This type of program could be utilized by courtroom monitors, preferably supplementing a compliance toolkit developed by the National Council on Juvenile and Family Court judges to assist courts in aggregating their own data and in examining the extent of compliance with ICWA.²¹⁷

While New York City may be the locus of concern about ICWA compliance in New York State, family courts in Manhattan or another borough should not be the location of the first judicial observation program in the State. The sheer number of cases heard by the courts in the most populous counties presents daunting challenges regarding implementation and sustainability of such a program. For example, because no New York law school clinic is primarily focused on ICWA compliance, such a program would be dependent on having numerous student volunteers. One such model program was instituted in Lansing, Michigan, through Michigan State University (MSU) School of Law.²¹⁸ Casey Family Programs, a foundation that provides grants to improve foster care processes, provided funding for that program. An article by Kathryn Fort,²¹⁹ who has played an instrumental role in the Lansing area program, raises a number of questions regarding potential design and implementation of a data collection program, among them whether court approval is needed, who would supervise the program, what would be done with the data, and how the program would function if it depends (as it likely would) largely on student participation.

215. *Id.*

216. QUICWA, MINNEAPOLIS AM. INDIAN CTR., <http://www.maicnet.org/programs/indian-child-welfare/quicwa> [<https://perma.cc/6W4G-C295>] (last visited Mar. 29, 2016) (“It allows users to track placement histories of children, monitor and track compliance with ICWA through compliance checklist, track notice requirements and provision of qualified expert testimony, record/view tribal recommendations, record/view case plan progress updates, track petition filings and court hearings, track court orders including visitation orders, and take notes at the hearings attended.”).

217. SUMMERS & WOOD, *supra* note 32.

218. Kathryn E. Fort, *Observing Change: The Indian Child Welfare Act and State Courts*, 46 N.Y. ST. B.A. FAM. L. REV. (Feb. 1, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506014 [<https://perma.cc/KHH5-TVEZ>]; see also News Release, Mich. St. Univ. Coll. of Law, MSU Law Receives Casey Family Programs Support for Indian Child Welfare Project (Oct. 18, 2012), <http://www.law.msu.edu/news/2012/indian-child-welfare.html> [<https://perma.cc/X3FG-294N>].

219. Fort, *supra* note 218.

Fort observed²²⁰ that it would be important for courts to develop a “drop down menu item” in court records that specifically asks whether the child is an Indian; part of the program’s focus would be to include the applicability of ICWA as part of the “script” that judges routinely follow.²²¹ She noted that it takes time for judges to get used to the presence of an observer in the courtroom and that judges are on their best behavior when they are being observed.²²²

Some of the MSU-monitored cases involved an Indian child who was clearly involved and recognized by caseworkers and the court as such, but whose tribe could not be present for a hearing.²²³ Otherwise, it is difficult to identify on which cases, out of thousands, observers should sit in. Nonetheless, this Note recommends that law school clinics explore, whether working individually or collectively, the potential for working with local family courts to establish observation programs.

C. PARTICIPATION AS AMICI

New York may promulgate revised standards incorporating the recently issued federal guidelines and regulations, which may require frequent training for judicial and child support agency personnel. While judicial observation programs could bolster implementation of the updated provisions and of ICWA generally, these steps should also be coupled with a monitoring program that identifies ongoing cases in which law school clinics should consider filing amicus briefs. Law school clinics could conduct these programs working alongside tribes.

VI. CONCLUSION

ICWA will, most likely, never be a model of perfect state compliance. There are, however, steps that can and should be taken to improve compliance and resolve long-standing implementation issues. While New York legislation and regulation in some respects exceed federal requirements — the State is generally con-

220. Interview with Kathryn E. Fort, Staff Attorney & Adjunct Professor, Mich. St. Univ. (Mar. 13, 2015).

221. *Id.*

222. *Id.*

223. *Id.*

sidered to be a leader in ICWA compliance — there are troubling indications that compliance, particularly in urban areas and especially in New York City, may fall short of the goal of consistent and proper implementation. The Department of the Interior has issued comprehensive non-binding guidelines and undertaken a notice-and-comment rulemaking that has resulted in minimum standards applicable to state courts. The 2015 guidelines and the 2016 regulations evidence the Department's most current views about how the statute should be implemented, and they address a number of issues that have arisen since federal guidelines were first issued in 1979. They set forth recommended or mandated approaches that are, in several important respects, inconsistent even with those standards in jurisdictions such as New York that demonstrate leadership in ICWA implementation, training, and outreach to tribes.

New York, and similarly situated states that seem to support legislative goals and endeavor to comply with ICWA, could await the judicial acceptance of binding regulations and informally seek to implement federal best practice recommendations for agencies. However, there is reason for states such as New York to promptly adopt, preferably through notice-and-comment rulemaking, the federal guidelines and regulations as enforceable state requirements. By comprehensively addressing requirements for state and private agencies as well as courts, states will ensure their standards are consistent with federal recommendations of best practices. State agency initiatives should be supplemented with training programs for judges, child welfare agency personnel, attorneys, tribal representatives, and private adoption agencies. Finally, law school clinics or other similar programs should establish judicial observation programs to assist courts in properly identifying Indian children and consistently and appropriately applying the Act's provisions.