Texas v. Zinke

Parties:

- The Plaintiffs include non-Indian foster parents wishing to adopt Indian children:
  (1) Chad and Jennifer Brackeen, wishing to adopt a two-year-old boy;
  (2) Nick and Heather Libretti, wishing to adopt a twenty-month-old girl; and
  (3) Jason and Danielle Clifford, wishing to adopt a six-year-old girl.
- Additionally, Altagracia Socorro Hernandez is a Plaintiff in this case because her child has been fostered by the Librettis since birth and she believes ICWA is interfering with her wishes to have the Librettis adopt her baby.
- The States of Texas, Louisiana, and Indiana are also included as Plaintiffs in this action under claims that ICWA interferes with state sovereign authority over domestic issues within state borders.
- The Plaintiffs have shared and separate claims in this case, and will be noted as such in the claims section of this summary.
- It should be noted that the Librettis are from Nevada and the Cliffords are from Minnesota, and neither state has joined Texas as parties to this suit.
- The Defendants include Ryan Zinke, in his official capacity as the secretary of the U.S. Dept. of Interior (DOI), Brian Rice in his official capacity as director of the Bureau of Indian Affairs (BIA), John Tahsuda III in his official capacity as acting assistant aecretary for Indian Affairs, and the BIA and DOI.

Facts:

(1) Brackeens

- A.L.M, the two-year-old boy in question, is an "Indian child" as defined by ICWA, because his biological mother is an enrolled member of the Navajo Nation, and his father is an enrolled member of the Cherokee Nation. He is eligible for enrollment with both tribes.
- A.L.M. was born in Arizona in 2015, and a few days later, his mother brought him to his paternal grandmother in Texas. 10 months later, Texas removed him from his grandmother and placed him in foster care with the Brackeens.
- Before he was placed in foster care with the Brackeens, he was identified by Texas Child Protective Services as an "Indian child" within the meaning of ICWA, and as required by the Final Rule, 25 C.F.R. § 23.11, both the Cherokee and Navajo Nations were notified of his placement with the Brackeens. Allegedly, neither the Child Protective Services agency nor the Cherokee Nation or Navajo Nation were able to identify an ICWA-preferred foster placement for A.L.M, so he remained with the Brackeens.
- Under Texas law, as of May 2, 2017, A.L.M.'s biological parental rights were terminated and he was free to be adopted.
- In June 2017, the Navajo Nation notified the family court suggesting a potential alternative placement for A.L.M. in New Mexico.
- In July 2017, the Brackeens filed a petition to adopt A.L.M. and no one intervened in the proceeding. The Brackeens relied on case law excerpts from *Adoptive Couple v. Baby Girl*, stating that ICWA preferences didn't apply in their case because they were the only party before the family court seeking to adopt A.L.M. The trial court determined the Brackeens did not identify good cause for A.L.M to be permanently adopted by the Brackeens instead of the family in New Mexico.
- The Brackeens filed an appeal in Texas, and then filed this lawsuit in federal court.
- Texas appeared, having asserted amicus curiae, arguing that ICWA violates the right of equal protection of the laws under the Constitution. Texas was not a party to that action, but asserted a strong interest in the matter and petitioned the court for permission to submit a brief in that action with the intent of influencing the court's decision.

(2) Librettis & Hernandez

- Baby O. was born in Nevada in 2016, and during the pregnancy, the mother, Ms. Hernandez, decided she wanted to put the baby up for adoption.
- Baby O.'s birth father is descended from members of the Ysleta del Sur Pueblo (Tigua or Tiwa Tribe), in El Paso, Texas. Baby O.'s paternal grandmother is a registered member of that tribe.

- The Libretti couple lives in Nevada, and already has two adopted children they had initially fostered. They met with Ms. Hernandez before Baby O.'s birth to discuss adoption.
- The Ysleta Pueblo intervened in the custody proceedings of Baby O. and seeks to send her into foster care on the reservation in Texas. The tribe has repeatedly offered potential foster placements for Baby O., and to date a total of 36 placements have been identified, which Nevada child services has begun reviewing.
- The Librettis have expressed intent to petition for adoption of Baby O.
- Nevada has determined that ICWA proceedings apply to Baby O.

(3) Cliffords

- Child P. was born in 2011. Her maternal grandmother is a registered member of the White Earth Band of Ojibwe. Her mother told the court that Child P. was not eligible for tribal membership, and the White Earth Band confirmed with the court that Child P. was not eligible for membership in the tribe. The court still sent notices as required under ICWA in 2014 and 2015 informing the White Earth Band that Child P. was in the custody of the state.
- Child P. was placed in foster care in 2014 after her biological parents were arrested. She had various foster care placements with relatives or other foster parents. After two years of being in foster care, a Minnesota court terminated the parental rights of her birth parents, and Child P. was fostered by the Cliffords in 2016.
- In January 2017, the White Earth Band wrote to the court stating that Child P. was eligible for membership.
- The Cliffords have expressed intent to formally adopt Child P.
- The Minnesota state court has concluded that ICWA applies to all custody determinations regarding Child P.

(4) Point of Information on the Jurisdiction and Venue

- The amended complaint still maintains that the jurisdiction and venue are properly brought before the United States District Court for the Northern District of Texas, Fort Worth Division, although some of the changes made include the addition of two foster parent couples in Nevada and Minnesota, and two states, Louisiana and Indiana.

Arguments/Claims: The State of Texas is challenging the constitutionality of ICWA and the 2016 ICWA regulations. As the January 17, 2018, ICWA Defense Project conference call stated, the claims have not changed since the complaint was amended.[1]

1.) 2016 ICWA Regulations violate the APA

SHARED CLAIMS

- Plaintiffs argue that the ICWA regulations violate the Administrative Procedures Act (APA) because they are arbitrary and capricious.[2] The courts must "hold unlawful and set aside agency action[s], findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In order for a court to find an agency action to be arbitrary and capricious, it must find that the action was not a product of reasoned decision-making, failed to consider an important aspect of the problem, or was so implausible that it could not be ascribed to a difference in view or the product of agency expertise.
- The additional claim under the APA is that the regulations violate the APA because the placement preferences required by ICWA violated the foster parents' equal protection rights under the Fifth Amendment of the Constitution.

[1] NICWA participates in recurring conference calls with the ICWA Defense Project to discuss current strategies and updates regarding upcoming litigation. Kate Fort confirmed that the claims have not changed at all, even if some parties have been added as Plaintiffs.
[2] APA, 5 U.S.C. § 706(2)(A). The court is not authorized to substitute its judgment for that of the agency, but should make sure the agency has considered relevant data and articulated a satisfactory explanation for its decision.

2.) *ICWA §§ 1901–1923; 1951–1952*[3] *& the 2016 Federal Regulations are unconstitutional*.

SHARED CLAIMS

a) Tenth Amendment[4]—State v. Federal Powers
- Plaintiffs argue that ICWA and its federal regulations violate the Tenth Amendment because the federal government cannot regulate state adoption and foster care placements.
- Further, the plaintiffs argue that the anti-commandeering principle[5] is violated by making Texas and other states implement a federal child custody regulatory regime.
- Texas, Indiana, and Louisiana all regulate the domestic relations of individuals domiciled within their borders, as stated in their state codes (Title 1 of Texas Family Code; La. Child Code arts. 100-1673; Ind. Code Sections 31-9-1-1 to 31-41-3-1).
- States argue that ICWA and the final rule alter the application of these state family laws to Indian children and impose significant delays on permanency for those children.
- The final rule covers topics of adoption and foster care, which are not permissible subjects of regulation under the Tenth Amendment, and further violates that amendment by regulating placement through State Plaintiffs' governments. The final rule therefore is not a valid exercise of federal authority and is unconstitutional.

b) Full Faith and Credit Clause[6] and Equal Footing Doctrine[7]
- Plaintiffs argue ICWA is unconstitutional because it violates the equal footing doctrine and the full faith and credit clause of the Constitution.
- The clause extends only between states, not between states and Indian tribes; tribes are not on equal footing with states, so therefore do not deserve full faith and credit under Art. IVV. Here the Plaintiffs rely on a Ninth Circuit Court case, *Wilson v. Marchington,* 127 F.3d 805 (9th Cir. 1997) to support that claim.

c) Indian Commerce Clause[8]
- Plaintiffs argue ICWA is unconstitutional because the Indian commerce clause does not provide Congress with the authority to pass ICWA, and no other enumerated power supports Congress' intrusion into this area of traditional state authority.
- Children are not articles of commerce; nor can their placement be said to substantially affect commerce with Indian nations.

d) Guarantee Clause[9]

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[3] The sections not being challenged by the Plaintiffs are §§ 1931–1934 pertaining to grants for on- or near-reservation programs and child welfare codes, grants for off-reservation programs for additional services, funds for on- and off-reservation programs, and the definition of "Indian" for certain purposes, as well as §§ 1961–1963 pertaining to copies of this document to the states and severability.
[4] The Tenth Amendment helps to define the concept of federalism, which is the relationship between federal and state governments. The text of the amendment states "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people"(U.S. Const. amend. X.).
[5] The anti-commandeering doctrine was used by the Supreme Court in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States,* 521 U.S. 898 (1997), which prohibits the federal government from commandeering state governments, specifically from imposing targeted, affirmative, coercive duties upon state legislators or executive officials. The doctrine poses an external constraint upon congressional power, but lacks any explicit textual basis.
[6] U.S. Const. Art. IV, § 1. The full faith and credit clause addresses the duties that states within the United States must respect: the "public acts, records, and judicial proceedings of every other state." Its connection to family law has most recently been applied by the Supreme Court in 2016 in *V.L v. E.L*, stating that under this clause, the State of Alabama must recognize the adoption decree granted to a same-sex couple by a Georgia state court in 2007, regardless of how that court came to its conclusion granting the decree.
[7] U.S. Const. Art. IV, § 3, Cl. 1. The Constitution grants to Congress the power to admit new states. The equal footing doctrine is the principle that all states admitted to the Union under the Constitution since 1789 enter on equal footing with the original 13 states already in the Union at that time.
[8] See 81 Fed. Reg. at 38.789; *see also* 25 U.S.C. § 1901(1). The Indian commerce clause was adopted to grant Congress power to regulate Indian trade between people under state or federal jurisdiction and the tribes, whether or not under state or federal jurisdiction. The clause provided Congress with authority to override state laws, but did not grant a police power over the Indians, nor a general power to otherwise intervene in tribal affairs.

- Plaintiffs argue that ICWA is unconstitutional because it violates the guarantee clause of the Constitution, guaranteeing states the right to a republican form of self-government. The guarantee clause provides that Congress may not interfere with states' autonomy to such an extent that it prevents them from enjoying untrammeled self-government.

FOSTER PARENTS' CLAIMS

e) Fourteenth Amendment[10] and Fifth Amendment[11]—Equal Protection and Due Process

- The foster parents claim that preventing them from adopting interferes with a familial relationship, and particularly that the ICWA federal regulations violate their substantive due process rights, which includes a fundamental liberty right[12] between foster parents and children.
- The final rule imposes a naked preference for "Indian families" over families of any other race and puts an extraordinary burden on non-Indian families of demonstrating good cause to depart from those placement preferences.
- The final rule's classification of race preferences for adoption and foster care is discriminatory against non-Indians, is based on race and ancestry, and violates the constitutional guarantee of equal protection under the Fourteenth Amendment.
- Further, subjecting Indian children to a heightened risk of placement that is contrary to their best interests and based solely on their race and ancestry is in violation of equal protection principles under the Fifth Amendment. For the foster parents, placing the children with non-relatives who happen to be members of an Indian tribe is not narrowly tailored to any important government interest.

STATES' CLAIMS

f) Spending Clause[13]

- Texas argues the 2016 regulations coerce states to engage in unconstitutional conduct by threat of losing federal child welfare grants, constituting an abuse of Congress' spending clause power.

g) Non-delegation[14] Doctrine

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[9] U.S. Const. Art. IV, § 4. The guarantee clause states that the United States "shall guarantee to every state in this Union a Republican Form of Government, and shall protect each of them against Invasion, and on Application of the legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence."

[10] The Fourteenth Amendment addresses many aspects of citizenship and the rights of citizens, most commonly used to address "equal protection of the laws" and "due process" rights. The due process clause of this amendment serves three main functions in modern constitutional law: (1) it incorporates [against the states] specific protections defined in the Bill of Rights; (2) it contains a substantive component referred to as substantive due process; and (3) it is a guarantee of fair procedure, referred to as procedural due process. U.S. Const. amend XIV. If a right is denied to everyone, it is an issue of substantive due process. If a right is denied to some individuals but not others, it is an issue of equal protection. Any action that abridges a right deemed fundamental, when also violating one's equal protection, is evaluated under a strict scrutiny standard.

[11] The Fifth Amendment along with the Fourteenth Amendment prohibits governmental deprivations of "life, liberty, or property, without due process of law." Substantive due process generally refers to limitations on the actual substance of legislation (U.S. Const. amend V). *See Footnotes 6 and 8.*

[12] The Bill of Rights lists specifically enumerated rights, or those that are so fundamental that any law restricting such a right must both serve a compelling state purpose and be narrowly tailored to that compelling purpose. Enumerated rights in the Constitution include but are not limited to: the right to interstate travel, the right to parent one's own children, protection on the high seas from pirates, the right to privacy, the right to marriage, and the right to self-defense. Any restrictions a government statute or policy places on these rights are evaluated with strict scrutiny. *See Footnote 6.*

[13] U.S. Const. Art. I, § 8, Cl. 1. The taxing and spending clause grants the federal government its power of taxation, and with the power to tax implicitly comes the power to spend the revenues raised to meet the objectives and goals of the government. Congress can also use its power to either punish disfavored conduct or encourage favored conduct. Congress can even attach conditional strings to a state's receipt of federal funding, as long as: (1) the conditions for receipt are stated clearly and the beneficiary is aware of the conditions and consequences; (2) the conditions imposed are related to the spending in question; (3) the incentive is not so significant as to turn cooperation into coercion (*South Dakota v. Dole,* 483 U.S. 203 [1987]).

- Texas argues the 2016 regulations unconstitutionally delegate to tribes legislative power that is reserved to Congress, because they require Texas to follow the placement preferences instead of state law. Essentially the claim is that the State Plaintiffs are directly and substantially injured by the delegation of power over placement preferences because it violates the Constitution's separation of powers through abdication of Congress' legislative responsibility and requires State Plaintiffs to honor the legislation of tribes in each child custody matter.
- The state also argues that the regulations' departure from ICWA's placement preferences is arbitrary and capricious because they are contrary to § 1915 of ICWA and are an "unexplained and unsupported departure" from the 1979 guidelines.

Defendant's Motion to Dismiss

(1) On February 13, 2018, Defendant Ryan Zinke, in his official capacity as secretary of the Department of Interior, filed a motion to dismiss this case under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.[15][16]

- When a party is challenging subject matter jurisdiction under Rule 12(b)(1), it can make a "facial" or "factual" attack. A facial attack occurs when a party files such a motion without submitting evidence such as affidavits or testimony, while a factual attack occurs when a party submits evidentiary materials.
- The Plaintiff then has the burden to prove by a preponderance of the evidence that the trial court does have subject matter jurisdiction.
- The Defendant here asserts that the Court does not need to accept legal conclusions including any factual allegation as true.[17]

The claims in the Defendant's argument are as follows:

A. Individual Plaintiffs lack standing

- For Article III standing to sue, a Plaintiff must demonstrate that it has suffered an injury in fact that is fairly traceable to the challenged conduct o the defendant and that is likely to be redressed by a favorable judicial decision[18].
- Plaintiffs in this case have alleged injury only from ICWA § 1915(a) adoptive preferences, § 1913(d) vacatur of voluntary adoptions if there is fraud or duress, and Final Rule § 23.132(c)(5) for findings of unavailability of a preferred placement.
- Plaintiffs fail to demonstrate an imminent, concrete harm that is fairly traceable to ICWA or redressable by this court.
    - The final rule advises that state courts can deviate from the placement preferences based on the views of an Indian child's biological parents.

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[14] The non-delegation doctrine is a principle in administrative law that Congress cannot delegate its legislative powers to agencies, but rather should instruct agencies to regulate and give them an "intelligible principle" on which to base their regulations (*Whitman v. American Trucking Associations, Inc.,* 531 U.S. 457 [2001]). Such a standard has rarely been used to strike down legislation.
[15] Subject matter jurisdiction is defined as the power of a court to adjudicate a particular type of matter and provide the remedy demanded. Generally courts read congressional grants of subject matter jurisdiction narrowly and resolve ambiguities in favor of denying jurisdiction (https://www.law.cornell.edu/wex/subject_matter_jurisdiction).
[16] *Doe v. Tangipahoa Parish Sch. Bd.,* 494 F.3d 494, 496-97 (5th Cir. 2007); *Barber v. Bryant,* 860 F.3d 345, 352 (5th Cir. 2017). Plaintiffs have the burden to establish standing as the party asserting jurisdiction, and it is presumed that a cause lies outside this jurisdiction.
[17] *Ashcroft v. Iqbal,* 555 U.S. 662, 678 (2009).
[18] Standing elements—*Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992).

    - Nothing in ICWA or the final rule prevented the state court from making such a determination.
- The Brackeens' claims are moot because the Texas court has already finalized their adoption of A.L.M.
- The Librettis' claim that the final rule's requirement for a diligent search for adoptive placements delays their possible future adoption of Baby O. is not supported by anything more than a speculative harm from the purported delay.
    - Any injury from delay would not be fairly traceable to ICWA.
- The Cliffords have not alleged any specific injury from ICWA, and Child P.'s adoption by her grandmother is supported by state law.
- Individual Plaintiffs lack standing to assert the rights of Indian children A.L.M., Baby O., or Child P.
    - As foster parents, the Individual Plaintiffs do not speak for the Indian children in this case, and the interests of foster parents are "not in parallel and, indeed, are potentially in conflict" with the interests of the foster children."[19]

B. State Plaintiffs lack standing to bring their claims

- A state does not have standing as *parens patriae*[20] to bring an action against the federal government.[21]
- The United States, not a state, represents its citizens as parens patriae.
- The State Plaintiffs have failed to allege fiscal injury, and the purported costs are "purely speculative, and at most only remote and indirect."[22]
    - The Complaint provided no specificity of the fiscal burden, if any, that is directly caused by the challenged provisions of ICWA or the final rule.

C. All Plaintiffs lack standing to challenge ICWA because Defendants are not the cause of any alleged injuries and relief targeting Defendants will not provide redress

- Defendants are not the cause of Plaintiffs' alleged injuries from ICWA.
    - Plaintiffs complained of injuries of delay and expense, but if those injuries are valid, they would flow from the implementation of ICWA by state courts, not from any actions by Defendants.
    - There are no allegations that Defendants are currently enforcing, threatening imminent enforcement, or have ever enforced ICWA's requirements against Plaintiffs.[23]
    - The only allegation of harm traceable to federal officials derives from a potential denial of federally funded "child welfare grants" under the Social Security Act.
- This court cannot redress Plaintiffs' alleged harms from ICWA through injunctive or declaratory relief targeting Defendants.
    - A court's remedial power is limited to the parties before it, those under the parties' control, and those in concert with them.[24]
    - Because State Plaintiffs have opted to challenge ICWA in Texas federal court rather than in their own state courts, their own courts may continue to treat ICWA as constitutional, regardless of the outcome of this case.

[19] *Elk Grove Unif. Sch. Dist. v. Newdow,* 542 U.S. 1, 15 (2004) holding that non-custodial parent could not pursue claim on behalf of daughter where she disagreed that she was injured.
[20] *Parens patriae* is Latin for "parent of the nation." In law, this refers to the public policy power of the state to intervene against an abusive or negligent parent, legal guardian, or informal caretaker, and to act as the parent of any child or individual in need of protection.
[21] *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 610 n.16 (1982).
[22] *Massachusetts v. Mellon,* 262 U.S. 447, 485-86 (1923).
[23] *Younger,* 401 U.S. at 42, "Persons having no fears of state prosecution except those that are imaginary or speculative … lack standing."
[24] Fed. R. Civ. P. 65(d)(2); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 108-12(1969).

- Plaintiffs cannot challenge the final rule as an indirect attack on ICWA because they do not have standing to challenge ICWA directly.
    - The APA does not relieve Plaintiffs of the obligation to demonstrate standing.[25]
    - Where Plaintiffs challenge requirements that merely repeat statutory requirements, such as the final rule, there is no redress because even in the absence of the regulatory requirement, ICWA's requirements still apply.

D. The court should abstain from review of Plaintiffs' claims under *Younger*

- The *Younger* abstention doctrine provides that federal courts should abstain whenever a state's interests in an ongoing judicial proceeding "are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government."[26]
    - This court has applied *Younger* in the context of constitutional challenges to pending state court proceedings involving child custody and support matters
    - Younger instructs a federal court to abstain from interfering in the state proceedings involved in this case if three factors[27] are present:
        - There are ongoing state judicial proceedings;
        - The proceedings implicate important state interests; and
        - There is an adequate opportunity to raise federal claims in the state proceedings.
    - All three factors are met here.
- State courts are in a better position to evaluate the particular circumstances of a concrete case.

E. Claims by the Cliffords and Librettis should be dismissed under Rule 19 for failure to join necessary and indispensable party

- For these Plaintiffs to secure the relief they desire, a favorable decision would have to bind Nevada and Minnesota state courts and their executive agencies. Nevada and Minnesota are necessary parties, and even if they were named so, it is not clear that either state would be bound by a judgment of this court.
- Rule 19 requires a joinder of an absent "person" where "in that person's absence, the court cannot accord complete relief among existing parties." Rule 19(b) says that if that party is a state possessing sovereign immunity and cannot be joined, then "the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed."
    - The court looks at a few factors, which all support dismissal in this case.
    - First, a judgment regarding the applicability of ICWA in Nevada and Minnesota prejudices those States' sovereign interest in the welfare of children.
    - Second, no protective measures or shaping of the relief can mitigate prejudice here.
    - Third, a judgment rendered in the absence of Nevada and Minnesota would not be adequate because if neither of those states' courts or agencies are bound, then no relief is available to the Librettis or Cliffords.
    - Fourth, Plaintiffs have an adequate remedy if this case is dismissed for nonjoinder.
    - Each state has their own capable state court systems that routinely handle child welfare proceedings and apply the relevant laws, including ICWA.

F. State Plaintiffs waived their arguments challenging the final rule by failing to raise the issue to the agency during the notice and comment period

[25] *Bennett v. Spear,* 520 U.S. 154, 162-63 (1997).
[26] *Pennzoil Co. v. Texaco, In.,* 481 U.S. 1, 11 (1987).
[27] *Middlesex Cty. Ethics Comm. V. Garden State Bar Ass'n,* 457 U.S. 423, 432 (1982).

- The State Plaintiffs did not present their objections to the Bureau of Indian Affairs during the notice and comment period of the Final Rule, and thereby waived their APA arguments to challenge.
- In administrative law, a rule[28] exists stating that absent special circumstances, a party must ordinarily present its comments to the agency during the rulemaking in order for the court to consider the issue.
    - This rule ensures that courts do not "usurp the agency's function," and applies to questions of law, including constitutional objections to agency action.[29]
- None of the State Plaintiffs submitted comments to the BIA during the comment period. Texas DFPS did submit an untimely comment, and stated that it "fully supports ICWA" and that the department's commitment to the "letter and spirit of ICWA is clear."

Plaintiffs' Amended Complaint

(1) On March 22, 2018, Plaintiffs filed a second Amended Complaint

- *It adds the Department of Health and Human Services, the Secretary of the Department, and the United States as Defendants*
    - The United States Department of Health and Human Services (HHS) is a federal executive department of the U.S.
        - Plaintiffs contend that Defendants enforce compliance with 42 U.S.C. § 622(b)(9),[30] 677(b)(3)(G),[31] and will reduce or deny funding to states that do not comply with ICWA.
    - Alex M. Azar II is the secretary of the United States Department of Health and Human Services, being sued in his official capacity.
        - Plaintiffs contend that HHS and Secretary Azar withhold funds for failure to comply with Title IV-B and IV-E requirements, including failure to comply with and implement ICWA by state agencies and courts[32].
    - The United States is being sued under 28 U.S.C. § 1346.[33]
        - The goal here is likely to include the United States because of its capacity to pass the ICWA legislation in the first place.
- *It adds a discussion about the provisions in § 1913[34] and § 1914[35]*
    - Plaintiffs allege that these sections violate the Constitution.
    - Specifically, the Plaintiffs allege that ICWA overrides the provisions of state law that promote finality in adoptions by allowing an adoption order to come under collateral attack for up to two years after entry of the order (25 U.S.C. § 1913[d]).
    - Plaintiffs allege that ICWA § 1913 alters state laws regarding parental rights by permitting revocation of consent for foster care at any time (25 U.S.C. § 1913[b]), and revocation of voluntary termination of parental rights any time prior to entry of a final decree of termination (§ 1913[c]).
    - Plaintiffs allege that ICWA § 1914 has been applied to allow collateral attacks to adoptions after the close of the relevant window under state law. The Brackeens are allegedly "directly,

[28] *Appalachian Power Co. v. EPA,* 251 F.3d 1026, 1036 (D.C. Cir. 2001).
[29] *Chamber of Commerce of the United States of Am. v. Hugler,* 231 F. Supp. 3d 152, 202 (N.D. Tex. 2017).
[30] 42 U.S.C. § 622(b)(9), https://www.law.cornell.edu/uscode/text/42/622.
[31] 42 U.S.C. 677(b)(3)(G) https://www.law.cornell.edu/uscode/text/42/677.
[32] 45 C.F.R. § 1355.36, https://www.law.cornell.edu/cfr/text/45/1355.36.
[33] 28 U.S.C. § 1346—The district court shall have jurisdiction over any civil action against the United States in certain situations. Please see https://www.law.cornell.edu/uscode/text/28/1346.
[34] 25 U.S.C. § 1913—Parental rights; voluntary termination (https://www.law.cornell.edu/uscode/text/25/1913).
[35] 25 U.S.C. § 1914—Petition to court of competent jurisdiction to invalidate action upon showing of certain violations (https://www.law.cornell.edu/uscode/text/25/1914).

personally, and substantially injured" by ICWA's collateral attack provisions under § 1913(d) and 1914 because they "subject the Brackeen family to a period of uncertainty and mental anguish substantially longer than otherwise would be permitted under Texas law."

- *It also contends that certain provisions of the Social Security Act, namely Titles IV-B and IV-E, are not enforceable concerning the link between state compliance with ICWA and federal funding*
    - Plaintiffs allege that Title IV-B, Part 1 of the Social Security Act is another mechanism to coerce states to comply with ICWA, because it requires states that receive child welfare services program funding to file annual reports detailing their compliance with ICWA.

Tribal Motion for Intervention

(1) On March 28, 2018, the U.S. District Court for the Northern District of Texas, Fort Worth Division, entered an order finding the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians are entitled to intervene as Defendants of right and permissively pursuant to Rule 24(a)(2) and (b)(1)(B) of the Federal Rules of Civil Procedure.

* The federal Defendants plan to file another Motion to Dismiss in response to the new amended complaint.