Appeal No. 09-4113, 09-4129

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRITNEY JANE LITTLE DOVE NIELSON,

Petitioner - Appellee,

vs.

SUNNY KETCHUM and JOSHUA KETCHUM,

Respondents - Appellants,

CHEROKEE NATION,

Intervernor - Appellee.

Appeal from the United States District Court
for the District of Utah, No. 2:08-CV-00490-TS
Honorable Ted Stewart

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

Nielson, Appellee, agrees with the Appellant's Statement of the Case with the Inclusion of the following clarifications/additions:

Appellee joins in the added clarifications/additions of the Cherokee Nation to the Statement of the Case. (See Cherokee Nation, Statement of the Case, Page 1) and further adds that Nielson was not represented by counsel at the Relinquishment hearing on November 6, 2007.

Although the Honorable Rodney S. Page determined that Nielson was not a member of the Cherokee Nation, it was never determined by Judge Page that C.D.K. was not an "Indian child" pursuant to the definition of the Indian Child Welfare Act. 25 U.S.C. §1903.

The Cherokee Nation pursuant to its own laws and its own governing body, enacted the Cherokee Nation Citizenship Act, which was partially designed to protect the tribe pursuant to the Indian Child Welfare Act by creating a temporary membership for newborn children who are direct descendants of original enrollees. Such protection would make mandatory the procedural requirements enacted by Congress for the protection of Indian tribes and Indian families. The Cherokee Nation Citizenship Act's temporary membership is consistent with the purpose of Congress in enacting the Indian Child Welfare Act.

By enacting the Citizenship Act, the Cherokee Nation was exercising its inherent authority to determine membership in the Cherokee Tribe. Such determination is a political decision by the Cherokee Nation pursuant to its Constitution and is not

reviewable by federal or state courts. Additionally, tribal determinations as to membership, whether temporary or permanent, are final and conclusive and cannot be second-guessed by the Appellants. Since membership issues are clearly within the province of the Cherokee Nation and its institutions that apply and interpret the law governing tribal membership, any effort by this Court or a state court to determine tribal membership is a direct infringement on tribal self-government and outside the court's jurisdictional authority.

It is uncontested that the procedural requirements of ICWA were not complied with. Pursuant to Section 1913(a) any consent obtained prior to, or within ten (10) days of the child's birth is invalid. The federal district court had authority to review and invalidate any action, including the adoption, in violation of the ICWA pursuant to Section 1914.

STATEMENT OF FACTS

Nielson, Appellee generally agrees with the Appellant's Statement of the Facts with the Inclusion of the following clarifications/additions:

1. Nielson joins with the Cherokee Nation in the added clarifications/additions to the Statement of Facts.
2. Nielson, a 17 year-old mother and appellant, voluntarily relinquished her parental rights less than forty-eight (48) hours after C.D.K.'s birth on November 6, 2007. (Aplt. App. at 89).

3. The Second Judicial District Court failed to inquire whether C.D.K. was an Indian child and did not consider the ICWA when it terminated Nielson's parental rights. (Aplt. App. at 90-92).
4. The Second Judicial District Court, in the adoption proceedings, found that it was in the best interest of C.D.K. to be adopted by the Ketchums. (Aplt. App. at 90-92).
5. The adoption of C.D.K. was finalized on May 13, 2008. The adoption proceedings were finalized according to the Utah Adoption Act, Utah Code Ann. § 78B-6-101 *et seq.* (Aplt. App. at 94).
6. The Cherokee Nation, as part of its inherent sovereign authority, enacted the Cherokee Nation Membership Act, which provides for the temporary automatic membership of newborn children who are the direct descendent of an original enrollee of the Tribe. See The Cherokee Nation Membership Act, §5A (Aplt. App. at 337).
7. On May 29, 2008, the Cherokee Nation sent Jim Hanks a letter declaring that C.D.K. was a member of the Cherokee Nation for the first 240 days following his birth. See Letter dated May 29, 2008 (Aplt. App. at 372).
8. The Cherokee Nation made the determination that C.D.K. was a member of the Cherokee Nation because he was a direct descendent of an original enrollee of the Tribe. (Aplt. App. at 372).
9. The Cherokee Nation made the determination that C.D.K. was a member of the Cherokee Nation, even though his name was not placed on the Cherokee Register. (Aplt. App. at 372).

10. Section 5A of the Cherokee Nation Membership Act was enacted for the specific purpose of protecting the rights of the Cherokee Nation under the Indian Child Welfare Act 25 U.S.C. 1901, et. Seq. (Aplt. App. at 337, 372).
11. C.D.K. was an enrolled member or citizen of the Cherokee Nation from his birth, beginning on November 5, 2007 and continuing for 240 days thereafter. (Aplt. App. at 372).
12. On the 25th day of June, 2008, Nielson filed a petition in Federal District Court for the District of Utah to have her consent to termination of parental rights *and the adoption* invalidated pursuant to 25 U.S.C. § 1914. (Aplt. App. at 10).*emphasis added*).
13. Nielson filed a Motion for Partial Summary Judgment in Federal District Court requesting the federal district court find that C.D.K. was an Indian child within the meaning of the ICWA, to invalidate the consent to termination of parental rights and to invalidate the adoption for failure to follow the federal minimum standards of Section 1913 of the ICWA. (Aplt. App. at 35,36).
14. In the Federal District Court, the adoptive parents, the Ketchums, also filed a Motion for Summary Judgment asking the federal court to find that C.D.K. was not an Indian child pursuant to the ICWA based on the determination that the Membership Act was in violation of the United States Constitution and the Cherokee Nation Constitution. (Aplt. App. at 111, 113).
15. On June 4, 2009, the United States District Court for the District of Utah granted Nielson's Motion for Summary Judgment holding that C.D.K. was an Indian child pursuant to ICWA and that the adoption must be invalidated pursuant to §1914.

16. In its June 3, 2009, Memorandum Decision the Federal District Court held that "because the parties agree that the procedural requirements of the ICWA were not fully complied with, the adoption of C.D.K. by respondents *must* be invalidated pursuant to 25 U.S.C § 1914. Id. at 1263. *In re Adoption of C.D.K.*, 629 F. Supp. 2d 1258, 1263-64 (Utah Central Div. 2009) (Aplt. App. at 457). (*emphasis added*).

17. In its June 3, 2009, Memorandum Decision the Federal District Court also invalidated Nielson's consent to termination of parental rights over C.D.K. (Aplt. App. at 467).

18. Once her consent was invalidated, Nielson sought return of the child through a Writ of Execution by the Court based upon the fact that the adoption was invalidated. (Aple App. At 001)

19. To be clear, Nielson also filed with the District Court a withdraw of consent to placement with the Kethcums, which resulted in the Court's Amended Order clarifying that the adoption was not vacated pursuant to the fraud and duress claims. (Aple App. At 005) (The fact that the adoption was not vacated pursuant to fraud and duress claims is not before this Court on appeal).

20. The Ketchums, also under the belief that the Court invalidated the adoption and that the child would be returned immediately, objected and filed a Motion for Stay Pending Appeal. (Aplt. App. at 510).

21. Neilson, in response to the Court denying her request for immediate return, filed an Expedited Petition for Return of Custody in Central District Court for the District of Utah pursuant to the invalidation of her consent to termination of parental rights. (Aple App. At 009).

22. In response, the Central District Court for the District of Utah issued a Briefing Order requesting that all parties file a Brief on whether (1) Section 1916 permits immediate return of the child; (2) whether the district court had jurisdiction to return the child under Section 1916 of the ICWA; and (3) whether the Court should issue a Stay. (Aplt. App. at 506).The Briefing Order did not ask the parties to brief the court on whether the Court had jurisdiction to invalidate the adoption pursuant to 25 U.S.C. §1914.

23. After a hearing on these issues, the federal district court amended its judgment and held that it did not have subject matter jurisdiction to order the immediate return of the child because the immediate return of the child was only available under the biological mother's 1913(d) claims. (Aplt. App. at 507-508).

24. The Central District Court for the District of Utah indicated that its understanding was that once the relinquishment of parental rights were invalidated, the remedies available to the biological mother were limited to those in section 1916 of the ICWA. (Aplt. App. at 508-509).

25. The Court then refused to invoke jurisdiction under Section 1916 to return the child. (Aplt. App. at 509).

26. The Court held that the state court was the only competent court to make findings regarding the best interest of the child under Section 1912 of the ICWA and to order the immediate return of the child pursuant to 25 U.S.C. §1916. (Aplt. App. at 509).

27. The Ketchums appealed the decision of the Federal District Court, which has led to the matter before this Court. (Aplt. App. at 512).

28. Nielson took another route, believing that the federal court had made a ruling that was entitled to full faith and credit in the state district courts of Utah.

29. Nielson immediately filed with the Second Judicial District Court on the 23rd day of June, 2009, a motion to re-open case number 072700191, Motion to Invalidate the Adoption of C.D.K.[1] Biological Mother's Petition for Return of Custody and Extraordinary Relief; Biological Mother's Memorandum in Support of Petition for Return of Custody and Extraordinary Relief; and Biological Mother's Ex Parte Verified Motion for Expedited Hearing re: Motion to Invalidate the adoption of C.D.K. and Petition for Return of Custody. (The Second Judicial District Court Proceedings are current before the Utah Supreme Court for review and are not at issue here.)

30. The Second Judicial District Court ultimately declined to return the child to the biological mother stating that the action to invalidate consent to termination of parental rights was a procedural misstep and thus Utah's statute of limitations operated to prevent Nielson's Petition to invalidate the adoption and Petition to return

[1] Nielson, the biological mother, outlined the issues already decided by the federal district court and instructed that the only thing left of the Second Judicial District Court was to invalidate its own adoption and return C.D.K to her custody.

C.D.K. to her custody was barred by the Utah Adoption Act. (This fact is provided only for a summary of the proceedings and is not currently before this Court on appeal).

31. Nielson timely filed an appeal in the Utah Court of Appeals. (Addendum Exhibit "A")

32. The Utah Court of Appeals certified the case for immediate transfer to the Utah Supreme Court. This matter was in the briefing stage before the Utah Supreme Court at the time of the submission of Nielson's brief. (Addendum Exhibit "B")

SUMMARY OF ARGUMENT

The Cherokee Nation's Membership Act is consistent with the intentions of Congress in enacting the Indian Child Welfare Act. Membership determinations made by a Tribe have been left untouched and only Congress has the authority to abrogate this right. The United Supreme Court has found that membership determinations are final and unreviewable by state and federal courts. Finally, in the interpretation of the ICWA, many courts have followed such reasoning to conclude that a tribe's membership determination is final and conclusive.

The Cherokee Nation is a sovereign nation empowered to enact laws and to clarify its own Constitution in furtherance of the interests of the tribe, including the political determination of its members for the future existence of its tribe. Pursuant to its inherent sovereign authority and right to make political determinations, the Cherokee Nation has enacted the Cherokee Nation Citizenship Act (hereinafter "Citizenship Act"), which provides that C.D.K. was a member of the Cherokee Nation for the first two-hundred-forty (240) days of his life. The Cherokee Nation's determination that C.D.K. was a

member of the Tribe should be final and conclusive. Cherokee Nation Cit. Act, Ch. 2, §11(A). The Citizenship Act is a valid method of extending membership because it does not violate the Cherokee Nation Constitution.

One of the purposes for the Citizenship Act was to avoid situations such as the current case before this Court where a descendant is born and placed in an adoptive home before there is a chance to apply for membership through the traditional method. Without the Citizenship Act, the descendant's status as a member of the Cherokee Nation would not be protected under the Indian Child Welfare Act (hereinafter "ICWA"). Fortunately, C.D.K.'s status as a member of the Cherokee Nation has been protected for purposes of the ICWA because C.D.K. was a member of the Cherokee Nation.

C.D.K.'s membership status was proven through sufficient evidence demonstrating C.D.K.'s blood line and approval by the Bureau of Indian Affairs (hereinafter "BIA"). Specifically, the court below properly relied upon a self-authenticating document to determine that C.D.K. was an Indian child pursuant to the ICWA. The BIA issued a certified public document on July 14, 2008 that set forth the degree of Indian blood for Nielson, the document also contained a genealogical background of Nielson demonstrating the names and Cherokee Membership numbers of Nielson's ancestors who were original enrollees of the tribe. The Certificate of Percentage of Indian Blood issued by the BIA was under seal and was made and issued by a public office, thus it is a self-authenticating document pursuant to the Federal Rules of Evidence Rule 902.

Nielson further joins in the Cherokee Nation's argument that the court properly relied on indirect evidence that was sufficient to conclude that C.D.K. was an Indian child.

For the above reasons, the court correctly construed the facts and inferences in favor of Nielson because the Ketchums filed a Motion for Summary Judgment alleging insufficient facts to establish C.D.K. was a direct descendent of an original enrollee. Alternatively, Nielson has established through sufficient evidence that she was a direct descendant for purposes of the Citizenship Act and the Cherokee Nation determined that C.D.K. was a member pursuant to the Citizenship Act, which determination should be final and conclusive.

Additionally, the Cherokee Nation's determination that C.D.K. was a member at the time of enrollment is a legal issue that resolves the factual dispute of whether or not ICWA should apply to the Consent and Relinquishment of Nielson's parental rights. Ketchums put forth legal issues that are resolved in favor of the Cherokee Nation and Nielson, insofar that the controlling legal standard grants Indian tribes broad authority to determine eligibility and membership in their Tribe and also supports a Tribe's membership determination as being conclusive.

APPLICABLE STANDARD OF REVIEW

Appellee agrees with Appellant's assertion of Standard of Review in so far as the review of all issues is "de novo" review. However, Appellee also asserts that Summary Judgment is also appropriate where unresolved issues are primarily legal rather than factual, which allows the court to view the evidence through the prism of the controlling

legal standard. *Nebraska v. Wyoming*, 507 U.S. 584 (1993); See *Qwest Corp. v. AT&T Corp*., 479 F.3d 1206, (10th Cir. 2007); *Crain v. Board of Police Comm'rs*, 920 F.2d 1402, 1405-06 (8th Cir. 1990).

ARGUMENT

I. THE CHEROKEE NATION, IN ACCORDANCE WITH ITS INHERENT RIGHT TO DECIDE ITS MEMBERSHIP AND IN ACCORDANCE WITH THE PURPOSES OF THE ICWA HAS DETERMINED THAT C.D.K. IS AN INDIAN CHILD.

A. In Incorporating the ICWA Requirements in Child Custody Proceedings, Courts Should Look to Tribal Membership Determinations as Binding as a Matter of Political Determination by the Tribe.

The express purpose of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. Sec. 1902. It has long been recognized that "there is no greater resource that is more vital to the continued existence and integrity of Indian tribes than their children and the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian Tribe." 25 U.S.C. 1901(3).

As a result of Congressional Findings, Tribal membership is treated under the ICWA as a matter of political affiliation rather than racial origin: "The ICWA recognizes the political affiliation that follows from tribal membership in a federally recognized tribe, rather than a racial or ancestral Indian origin." (*In re Vincent M.* (2007) 150 Cal.App.4th 1247, 1267). *See also* (Welf. & Inst. Code, § 224, subd. (c)) (Throughout the ICWA, the language consistently reflects the fact that Indian tribes have an interest in Indian-child

welfare proceedings apart from the parties and that the information provided by the parties bearing on whether the child is Indian may be incomplete.) *In re M.C.P.,* 153 Vt. 275 (1989) (determining that the question of whether the minor was an Indian child was one for the tribe to determine). For example, "The notice provision, 25 U.S.C. § 1912(a), applies not only when the trial court finds the juvenile is an Indian child but also when the court 'has reason to know that an Indian child is involved.' *Id.* Additionally, Section 1911 provides that at any point in a foster care placement proceeding, or in a termination for parental rights proceeding, a tribe may intervene. 25 U.S.C. 1911(c). Not only does this demonstrate Congress' intent that Tribes be provided with notice and an opportunity to intervene, it also reflects the fact that Indian tribes are in a better position to determine the membership of individuals who have some relationship to the tribe and the court should defer to this expertise. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989); *In re M.E.M.*, 725 P.2d 212 (Mont. 1986); *In re Baby Girl Doe*, 865 P.2d 1090 (Mont. 1993); *In re Junious M.*, 193 Cal. Rptr. 40 (Ct. App. 1983) (certified for partial publication); *In re J.R.S.*, 690 P.2d 10 (Alaska 1984).

In addition to the language of the ICWA, the Bureau of Indian Affairs—the executive agency charged with administering the ICWA-- has promulgated guidelines to assist courts in cases regarding the Indian Child Welfare Act. *Junious M.*, 144 Cal.App.3d 786 (1983)(even though the guidelines are not binding, they are entitled to great weight as constructed by the executive agency charged by Congress to administer the ICWA). The BIA Guidelines Regarding ICWA state specifically that "[t]he determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that

tribe, or that the biological parent is or is not a member of that tribe is conclusive." Section B.1. Determination That Child Is an Indian (i). The Commentary to the guideline states "This guideline makes clear that the best source of information on whether a particular child is Indian is the tribe itself. It is the tribe's prerogative to determine membership criteria." BIA Guidelines, Section B.1 Commentary.

Even the United States Department of the Interior Website demonstrates that such determinations are reserved for the individual tribes and that such membership determinations vary from tribe to tribe. http://www.doi.gov/enrollment.html The Interior's Webiste on tribal enrollment information specifically provides that "Tribal enrollment requirements preserve the unique character and traditions of each tribe. The tribes establish membership criteria based on shared customs, traditions, language, and tribal blood." http://www.doi.gov/enrollment.html Further, "[each] tribe determines whether an individual is eligible for membership." http://www.doi.gov/enrollment.html.

The United States Supreme Court has also held that a tribe's authority to determine its membership, "has been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32, 98 S.Ct. 1670, 1684 n.32, 56 L.Ed.2d 106 (1978). In a later case, the Supreme Court again maintained that the inherent right to determine membership still belonged to the tribe. *Montana v. United States*, 450 U.S. 544, 564 (1981).

The Supreme Court's holding has been followed by a majority of courts across the nation that adhere to the rule that tribal determination of membership or membership eligibility is final and conclusive. *In re Junious M.,* 144 Cal. App. 3d 786 (Cal. App. 1st

Dist. 1983); *In re S.M.H.,* 103 P. 3d 976, 981 (Kan. App. 2005) ("A tribe's determination of membership or membership eligibility is conclusive and final"); *In re N.E.G.P.,* 626 N.W. 2d 921, 924 (Mich. App. 2001) ("Question whether a person is a member of a tribe is for the tribe itself to answer"); *Matter of Petition of Philip A.C.*, 149 P.3d 51, 56 (Nev. 2006) ("Whether a person is a member of a Native American Tribe for ICWA is for the tribe itself to determine."); *In re Application of Angus*, 60 Or. App. 546, 552-53 (1982) (citations omitted) ("In the absence of a congressional definition, an Indian tribe has authority to determine its own membership. Formal membership requirements differ from tribe to tribe, as do each tribe's method of keeping track of its own membership. There is thus no one method of proof of membership, but the testimony of a representative of the tribal government would be probative evidence of membership."); *People ex. Rel. J.A.S.*, 160 P.2d 257, 261 (Colo. Ap. 2007) ("A tribe's determination of membership or membership eligibility is conclusive and final."); *State ex rel. Juvenile Dep't of Lane County v. Tucker*, 76 Ore. App. 673, 677-680 (Or. Ct. App. 1985) ("We conclude that the testimony of the president of the native village council was sufficient to prove that the child is eligible for membership in an Indian tribe and that, therefore, she is an Indian child."); *In re Dependency of T.L.G.* , 126 Wn. App. 181, 190-191 (Wash. Ct. App. 2005) ("Tribes control the rules of their membership, and whether [the person in question] is a member is a question only the tribe can definitively answer.") *Dependency of E. S.*, 92 Wn. App. 762, 770 (Wash. Ct. App. 1998) ("[A] tribe's declaration that a child is or is not a member is conclusive." Therefore the Tribe has the authority to even "change its determination of a child's status. That is, it may determine at a point in time that a given

child is not enrollable and later change its mind and determine that the child is enrollable. The BIA guidelines explain that '[i]t is the tribe's prerogative to determine membership criteria and to decide who meets those criteria.'"); B.J. Jones, *Indian Child Welfare Act Handbook*: *A legal Guide to the Custody and Adoption of Native American Children*, 74 (1995) (citing *Matter of Dependency and Neglect of A.L.,* 442 N.W.2d 233 (S.D. 1989). ("If an Indian tribe makes a determination that a child is a member of that tribe, that finding is entitled to absolute allegiance even if the child in question has no Indian blood.").

Again, Congress intended to protect the most vital resource to Indian Tribes by enacting the Indian Child Welfare Act. "Culturally, the chances of Indian survival are significantly reduced if Indian children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships."

Hearings before the Subcommittee on Indian Affairs and Public Lands of the Committee on Interior and Insular Affairs, House of Representatives, 95th Cong, 2d Sess, at 193 (Feb. 9 & Mar. 9, 1978)

C.D.K. is an Indian child because he was automatically an enrolled member of an Indian tribe (the Cherokee Nation) upon birth for the first 240 days of his life. Cherokee Nation law provides for the temporary automatic membership of newborn children who are the direct descendants of an original enrollee of the Tribe. (Aplt. App. at 337).The

Cherokee Nation Membership Act was enacted "for the purpose of protection of the rights of the Cherokee Nation under the Indian Child Welfare Act." Id. at (a). Specifically, section 5A provides that: "Such temporary Tribal Membership shall be effective automatically from and after the birth of the child for all purposes although the name of the child is not entered on the Cherokee Register." Id.

The Cherokee Nation specifically outlined in its letter to Jim Hanks that the reason behind enactment of the Citizenship Act was for the purpose of protecting its children under the Indian Child Welfare Act. (Aplt. App. at 372).See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597 (1989)("The numerous prerogatives accorded the tribes through the Indian Child Welfare Act's substantive provisions must be seen as a means of protecting not only the interests of individual Indian children and families but also of the tribes themselves.").

The Citizenship Act protects the interest of the Tribe and the descendants of tribal members and protects the descendant's status as a member by providing for temporary membership directly following birth. The Citizenship Act ensures that the protections of ICWA apply to all child custody proceedings of descendants of Cherokee members. Any action taken contrary to the Cherokee Nation's determination that C.D.K. is a member of the Cherokee Nation for the child's first 240 days following his birth would seriously impair the Nation's ability to protect its interest in the minor children of the Cherokee Nation and its right to continue as a self-governing community.

Even though the Ketchums would have this Court believe that the Citizenship Act is contrary to the provisions of ICWA and the intentions of Congress, the Ketchums cite

no authority for this contention. Additionally, Nielson has provided this Court with numerous cases to demonstrate that the determination of membership by a Tribe is conclusive for purposes of ICWA.

Based on Congress' choice of words in Section 1901, the interpretative guidelines promulgated by the BIA, overwhelming case law, and policy considerations, the Court should conclude as a legal standard that the Cherokee Nation is not only better equipped to decide the child's membership status, but also that it is the Cherokee Nation's inherent sovereign right to make such political determinations for the preservation of its tribe. Further, the Cherokee Nation's determination that C.D.K. was a member of the Tribe for the first two hundred forty (240) days of his life should be final and conclusive.

Although the Kethcums knew that the child's grandmother was enrolled, that Nielson. was of "Indian extraction" and had an Indian name "Little-Dove", the Kethcums failed to notify the Cherokee Nation and seek its determination of the child's Indian status. A failure to do so is an error "since the question of whether the minor was an Indian child was one for the tribe to determine." Ketchum's argument that the Membership Act seriously jeopardizes any rights of the adoptive parents is without merit and is contrary to the provisions of the ICWA. The Ketchums had the opportunity to seek a determination from the Tribe and failed to do so. The only analysis considered by the Ketchums was whether or not Nielson was Indian under the Act, which reasoning fails because it does not consider the Indian child's status.

Finally, the question of membership is not a question for this Court to decide. The Cherokee Nation through its Constitution and ordinances has enacted the Citizenship Act

for further protection under the ICWA and it is not within this Court's purview to overturn that determination.

B. The Cherokee Nation Enacted The Citizenship Act Pursuant to The Cherokee Nation Constitution.

The Cherokee Nation was acting within its own Constitutional authority when it enacted the Citizenship Act. The Cherokee Nation Constitution specifically states, "*Nothing* in this Constitution shall be construed to prohibit the Cherokee Shawnee or Delaware-Cherokee from pursuing their inherent right to govern themselves, provided that it does not diminish the boundaries or jurisdiction of the Cherokee Nation or conflict with Cherokee law." See Cherokee Nation Constitution, Article IV. Section 1 (C. N. Const. art. IV, §§1,2. (Aplt. App. at 148-161). Further, Section 2 of Article IV provides that, "the Council may empower the Registrar to keep and maintain other vital records." (Aplt. App. at 292)

The Citizenship Act does not diminish the boundaries or jurisdiction of the Cherokee Nation or conflict with Cherokee Law. The Cherokee Nation Constitution was designed to empower the Cherokee Nation to clarify membership and to enlarge the protection of the Tribe by providing for "temporary" membership of newborn children. This is not only consistent with the inherent authority of the Cherokee Nation to enact laws for the benefit and protection of its members, but also is consistent with Congress' intentions of protecting the most sacred resource of the Tribe; its children. Without the protection of the Citizenship Act, the Cherokee Nation is likely to lose more of its children without the opportunity for the child to be enrolled prior to adoption.

Article IV Section 1 of the Cherokee Constitution contains the only mandatory requirement for obtaining membership in the Cherokee Tribe. Section one states that citizens "*must* be original enrollees or descendents of original enrollees listed on the Dawes Commission Rolls." The use of the word "must" indicates that the condition must be met in order to obtain membership. Throughout the remainder of Article IV, the nondiscretionary term "shall" is used in numerous places, but only in connection with the establishment and maintenance of the Cherokee Register. Nowhere is there nondiscretionary language that makes registration on the Cherokee Register the sole means of obtaining membership in the tribe. Instead, Section two of Article IV states plainly that the Register "shall be established…to be kept by the registrar, for the inclusion of *any* Cherokee for citizenship purposes." The term "any" is of significance. Among the synonyms of the word "any" are related words and terms such as "some", "several" or "a few". Had the authors of the Cherokee constitution meant to provide membership exclusively through registration on the Cherokee Register they would have used language that would have restricted membership to that method such as "for the inclusion of *all* Cherokee for citizenship purposes."

The Court below properly recognized the fact that there are no constitutional provisions violated by the Citizenship Act. The court stated, "Because the Constitution of the Cherokee Nation does not explicitly prohibit the Membership Act, this Court is an improper forum for determining whether the Membership Act violates the Constitution." (Aplt. App. At 465).The Respondent agrees resoundingly with the court below, the ultimate decision as to what the authors of the Cherokee Constitution intended, should be

decided in the proper forum. The proper forum of questions of the Cherokee Nation Constitutional construction is within the purview of the Cherokee Nation Courts and Nielson asks this court to allow the tribe its inherent right to define membership under its Constitution.

The Ketchums' attempt to foreclose on other possible means of obtaining tribal membership by introducing the deposition of an assistant to the Cherokee Registrar, Ms. Jana Leach. In the deposition, Counsel for Ketchums questioned Ms. Leach on whether she was aware of other methods of obtaining tribal membership. Ms. Leach consistently responded that she had heard of the Cherokee Citizenship Act but did not know how it applied to children and did not understand the automatic membership provision of newborns. Mr.'s Leach demonstrated that she was not competent to testify on that issue and her testimony is not conclusive or determinative in this matter. Included below is the additional text of Ms. Leach's deposition.

Questions by Mr. Hanks:

Question: Ms. Leach, you've heard of the Cherokee Citizenship Act, haven't you?

Answer: Yes, I have.

Question: *Do you know what it – how it applies to newborn children?*

Answer: *No, I don't.*

Question: Okay. There is a provision of the Membership Act that has been raised in this case to – for the purpose of providing an automatic membership to newborn children for 240 days following their birth if they are direct descendents of an original enrollee. *Do you understand that provision?*

Answer: *No, I don't.*

Mr. Hanks: Okay. Maybe I could just ask here, Bandy [Ms. Inman], do you know whom I could talk to that

Answer: No

Ms. Inman: *I'm going to object to that last question because we've already determined she wasn't aware of the Membership Act.*

(Aplt. App. at 171)

Again, the twenty-four (24) lines preceding the portion of Ms. Leach's deposition that Ketchums included in their brief indicate that Ms. Leach lacked knowledge about how the temporary automatic enrollment provision of the Cherokee Citizenship Act affected newborn children. Ms. Leach's lack of knowledge in this area cannot be used by Ketchums to exclude other methods of tribal enrollment.

Because the Cherokee Constitution, as written, supports the possibility that other methods for obtaining membership exist and are valid, Ketchums' argument that "automatic temporary enrollment" violates the constitution is without basis.

C. This Court has no Jurisdiction to Review the Cherokee Nation Citizenship Act.

Tribal membership determinations are a political decision of the Tribe as a sovereign nation that is not subject to review by federal or state courts. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670 (1978). The Cherokee Nation existed as an independent political community long before the Colonies, Great Britain, or their institutions existed as recognized by Chief Justice John Marshall in *Worcester v.*

Georgia, 31 U.S. 515, 559, 8 L.Ed. 483 (1832). As such, tribes are sovereign governments whose authority does not flow from the United States Government. *Talton v. Mayes*, 163 U.S. 376 (1896). Additionally, pursuant to a treaty with the United States of America, the Cherokee Nation has retained its status as a sovereign nation, authorized to govern itself, and all persons who have settled within their territory, free from any right of legislative interference by states. *Worcester v. Georgia*, 31 U.S. 515, 530 (1832).

Although tribes are no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). For example, the United States has held that tribes have the sole authority, not reviewable by federal or state courts, to define their tribal membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49. Additionally, Tribes have the power to make their own laws regarding internal matters, such as the Citizenship Act. *Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897). As a result, tribes are also empowered to enforce those regulations in their own forums. *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

Additionally, the political question doctrine, which arose from separation of powers concerns, precludes as nonjusticiable considerations of cases in which there exists a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 317, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962).

The Cherokee Nation, as a federally recognized Indian Tribe, is a sovereign nation with the authority to regulate its political and social affairs. The determination of membership and the enactment of a tribal ordinance are both internal and political

matters reserved to the Cherokee Nation by its Constitution, by Congress, by the administrative agency delegated to oversee Indian tribes, and by the United States Supreme Court. Any contest to the Citizenship Act should be brought before and reviewed by the Cherokee Nation courts.

The Ketchums find *Allen v. Cherokee Nation Tribal Council*, persuasive in that the Cherokee Nation lacked the ability to make any membership determination not defined by the Constitution. Judicial Appeals Council, 2006 (JAT-04-09). That case specifically held that: "[t]he council lacks the power to redefine tribal membership absent a constitutional amendment. The Council is empowered to enact enrollment procedures, but those laws must be consistent with the constitution." Id. At 3. The *Allen* case is distinguished from the present case because the "Cherokee blood" requirement in *Allen* was in direct conflict with a provision that requires that "citizens must be original enrollees or descendants of original enrollees…" and as such was an attempt to redefine the constitutional requirements for citizenship. Id. While, in this case the Citizenship Act makes clear that the membership being extended to children under the temporary automatic enrollment provision does not redefine citizenship requirements, instead, the Act is consistent with the Constitutional requirement that citizens of the Cherokee Nation must be descendents of original enrollees. Because the Act extends temporary tribal membership to children while at the same time following the "descent" requirement, the Act is a constitutionally permissible method of providing children with temporary tribal membership.

This Court is not in the position to review membership determinations made by the Cherokee Nation because determinations are of a political nature. Additionally, the Ketchums do not have standing to contest the Tribe's Constitution or Tribal law as being unconstitutional. This matter is nonjusticiable and should be excluded from review pursuant to the political question doctrine. Alternatively, the Cherokee Nation's Citizenship Act is not contrary to the Cherokee Nation Constitution.

D. Nielson Submitted Sufficient Evidence to Demonstrate that C.D.K. is a Descendant of an Original Enrollee.

The court properly relied upon evidence presented to determine that C.D.K. was a direct descendent of an Original Enrollee pursuant to the Cherokee Nation Constitutional requirements. The court concluded, and Nielson agrees, that there was sufficient indirect evidence. (Aplt. App. At 8); Cherokee Nation's Brief, page 6 (citing *Holland v. United States*, 348 U.S. 121, 140 (1954)).

Additionally, the Federal Rules of Evidence provide for the admissibility of several types of self-authenticating documents; among these documents that may be introduced absent additional foundation is a certified public document. Rule 902 of the Federal Rules of Evidence in pertinent part provides:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (1) Domestic public documents under seal**.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political

> subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.
>
> (4) Certified copies of public records**.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

To authenticate a document under Fed. R. Evid. 901(a), courts "do not require absolute certainty in authentication, but rather 'evidence sufficient to support a finding that the matter in question is what its proponent claims. *United States v. Mojica*, 746 F.2d 242 (5th Cir. 1984). The Tenth Circuit recently explained a means of authentication specifically applicable in summary judgment proceedings that draws upon these liberal standards for showing that something is "what its proponent claims." *Law Co., Inc. v. Mohawk Const. and Supply Co*., Inc.,577 F.3d 1164 (10th Cir. 2009) In the Tenth Circuit case of *Law Co., Inc. v. Mohawk Const. and Supply Co*., Inc., the circumstance that the opponent had initially produced the proffered document in response to discovery provided grounds for sufficient authentication of the documents at issue, specifically because those documents were produced on letterhead. 577 F.3d 1164 (10th Cir. 2009) *Chavez v. Thomas & Betts Corp*., 396 F.3d 1088, 1101 (10th Cir. 2005)

Ketchums seek to overturn the decision of the District Court for lack of a proper evidentiary foundation of the documents supporting Nielson's Indian Lineage. The Ketchums assert that the only documentation offered to the District Court to prove that C.D.K descended from enrolled members of the Cherokee Nation are "unsworn

documents listing the names of purported ancestors." Here, C.D.K.'s relation to enrolled member's of the Cherokee tribe was conclusively established prior to the decision which the Ketchums appeal from, and the court below properly relied upon the evidence presented to it on this matter. On the fourteenth (14) day of July, 2008, The Bureau of Indian Affairs (hereinafter referred to as "BIA") issued a certified document setting forth the Indian Ancestry of Nielson. In that document, the BIA certified that Nielson's maternal great-great-grandfather, John Glass, Membership #32431, was a full-blooded enrolled member of the Cherokee tribe. The document was certified by the BIA as evidenced by the certification stamped on the document. (Aplt. App. at 371). Additionally, the Cherokee Nation notified Ketchums' Attorney Jom Hanks in a letter on tribal letterhead sent on May 29, 2008 that C.D.K. was an Indian Child pursuant to the ICWA.

Here, the court was within its authority to accept as authentic the evidence before it confirming Nielson's descent from original Cherokee Enrollees because the document relied upon by the court was a certified copy of a public record under seal. The Court had before it a "Certificate of Degree of Indian Blood" stating the degree of Indian blood of Nielson. In addition to certifying Nielson's degree of Indian blood, the certificate also contains a report of Nielson's lineage, including Nielson's direct ancestors, who were original enrollees of the Cherokee Tribe. The Court also had before it evidence of the tribal ancestry of Nielson in the form of the May 29th letter informing Mr. Hanks of C.D.K.'s status as an Indian Child.

It is obvious that if Nielson was certified as a descendant of an original enrollees, then her biological issue would also have that same ancestry. There is no doubt here that C.D.K. is the biological issue of Nielson Furthermore, in addition to Nielson's grandfather's enrollment in the tribe, Nielson's biological mother, L.R. is also an enrolled member of the Cherokee Nation (Cherokee Nation Membership # 300388). L.R.'s biological father, T.S. was also an enrolled member (Cherokee Nation Membership # C0099307) The Court below properly viewed C.D.K.'s Indian Ancestry as establishedby indirect evidence and pursuant to rules 901 and 902 of the Federal Rules of Evidence.

II. THE DETERMINATION THAT C.D.K. IS AN INDIAN CHILD FOR PURPOSES OF THE ICWA AND CHEROKEE NATION CITIZENSHIP ACT IS NOT A VIOLATION OF THE UNITED STATES CONSTITUTION.

Congressional findings and enactment of the Indian Child Welfare Act is not a violation of the United States Constitution. One of the most important facets of Indian law is that the United States relationship with Indian nations and tribes is based upon a political, government-to-government status and is not based on the race or ethnicity of a people. *United States v. Antelope*, 430 U.S. 641, 645-46 (1977). Furthermore, because Indian tribes have also been determined to be sovereign nations dependant upon the United States, there attaches a strict fiduciary duty of the United States Government to Indian tribes. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)(characterizing the relation of the Cherokee Nation to the United States as that of a ward to his guardian). As a result, federal legislation that benefits Indian nations and Indian people with higher degrees of protection is not in violation of the United States Constitution. *Regents of the*

University of California v. Bakke, 438 U.S. 265, 304 n. 42 (1978); *Fisher v. District Court*, 424 U.S. 382, 390 (1976).

Additionally, since Tribes predate the Constitution they have historically been regarded as being unrestrained by constitutional provisions that specifically limit federal and state authority. *Talton v. Mayes*, 163 U.S. 376 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Ketchums' argument that the automatic temporary enrollment provisions of the Cherokee Citizenship Act violate an individual's liberty interest, or any other provision of the Constitution, is wholly without merit. Under the placement preferences of the ICWA, the Kethcums should not have even been the first consideration for an adoptive placement. See 25 U.S.C. §1915. Legally, C.D.K. should have been placed with an extended family member or with a tribal member over the Ketchums. The automatic temporary enrollment provisions of the Cherokee Citizenship Act do not constitute a breach of the freedom of association because the Tribe is acting according to its sovereign right, which is a political right. Additionally, the federal government has a trust responsibility toward the Cherokee Nation and the right to determine membership of an Indian child in order to receive the added protection under the ICWA is not a violation of a non-Indian adoptive parent's rights. Finally, the Kethcums' argument that the Citizenship Act violates C.D.K.'s liberty interest of association falls because the Ketchums have no more authority than Congress which has already determined the best interest of Indian children is served by their placement with Indian families and tribes.

A. The Cherokee Citizenship Act furthers Congress's intention to provide higher standards of protection to the rights of Indian parents over those of adoptive parents or non-Indians.

The Ketchums' argue that the Cherokee Nation's Citizenship Act violates the United States Constitution because it violates the Ketchums' constitutional right to control the destiny of thier child. However, Congress and the Supreme Court in *Holyfield*, recognized that an Indian Tribe maintains an interest "distinct from, but on parity with," the interest of a natural parent when a child custody proceeding exists that involves an Indian child. *Mississipi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53, 109 S.Ct. 1597, 1610 (1989). The United States Supreme Court held that the efforts of individual members of the tribe could not thwart the Tribe's interests because Congress was, "concerned not solely about interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. Id. at 49.

Additionally, the language in Section 1921 of the ICWA provides guidance for courts in situations where laws of the various states provide increased protections beyond those provided in the ICWA. Section 1921 provides that:

> "In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child *than the rights provided under this subchapter*, the State or Federal court shall apply the State or Federal standard."
>
> 25 U.S.C. 1921 [emphasis added]

Essentially, Section 1921 requires that the increased protections of tribal law be applied over less protective state or federal law. This conclusion is illustrated in the

holding of the Oklahoma Supreme Court in *Cherokee Nation v. Nomura*, 160 P.3d 967 (OK 2007). In *Nomura* the Oklahoma Supreme Court considered the application of Oklahoma's Indian Child Welfare Act ("OICWA") in a situation where the Federal ICWA also applied and held consistent with Congressional intent, that the "higher standard of protection" applied and extended the rights that afforded the most protection not just to Indian parents and custodians but to the Indian tribe as well. Id. at 976.

As demonstrated in *Holyfield*, the parents of Indian children, and even adoptive parents, cannot make a unilateral decision to oust the interest of the Indian tribe because the Tribe has an interest in protecting its children. If it were the intent of Congress to allow Indian parents the right to place their children for adoption in a manner inconsistent with tribal authority, the biological parents in *Holyfield* would have been able to place their children for adoption regardless of the jurisdictional authority asserted by the Tribe.

Again, the Cherokee Nation's Citizenship Act is political and not racial, it is designed in part to protect its right in the newborn members of the Tribe that are placed for adoption. The added protection of ten days, for example, as compared to only twenty-four (24) hours is significant in terms of giving the Cherokee Nation the opportunity to intervene and even find possible placement preferences pursuant to Section 1915 of the ICWA.

Additionally, a further reading of ICWA renders the Ketchums' argument that the Citizenship Act is unconstitutional absurd because ICWA provides that an Indian child includes a child who is *eligible* for membership. 25 U.S.C. 1903(4)(b). This provision of the ICWA is very similar to the automatic temporary enrollment provision of the

Cherokee Citizenship Act because, like the act, section 1903(4)(b) causes children to be labeled as "Indian children" without the consent of the child or the parent and operates to extend the title of Indian child to those children who are not members even without their consent.

III. THE UNITED STATES DISTRICT COURT PROPERLY INVALIDATED THE CONSENT TO TERMINATION OF PARENTAL RIGHTS AND SHOULD HAVE INVALIDATED THE ADOPTION PURSUANT TO SECTION 1914 OF THE ICWA.

Although the District Court correctly held that the adoption must be invalidated it erroneously refused to invalidate the adoption pursuant to its own order. Federal courts have jurisdiction to hear ICWA cases pursuant to section 1914 of the Indian Child Welfare Act. *Roman-Nose v. N.M. Dept. of Human Services*, 967 F.2d 435 (10th Cir. 1992). Specifically when a state court violates one of the enumerated requirements under section 1914, which if violated gives the Indian child's parent the right to invalidate the adoption under Section 1914 the United States District Court has the authority to review and invalidate the state court proceeding. Id. Specifically, in *Roman-Nose*, this Court issued the sole holding that the federal district court did in fact have jurisdiction over the proceeding pursuant to 25 U.S.C. §1914 and thus it had the authority to *invalidate the state court ruling if the alleged violations were proven*. Id. (*emphasis added*).

In its June 3, 2009 Memorandum Decision, the District Court correctly held that C.D.K. was an Indian child, that the parties agreed the ICWA requirements were not met in the State Court adoption proceeding, and invalidated Nielson's consent to termination of parental rights. (Aplt. App. at 467).The Court held further that the adoption must be

invalidated pursuant to Section 1914 of the Indian Child Welfare Act. *In re Adoption of C.D.K.*, 629 F. Supp. 2d 1258, 1263-64 (Utah Central Div. 2009). (Aplt. App. at 464). However, after Nielson sought return of the child, the Court issued a briefing order requesting briefs on the following: (1) whether section 1916 permits immediate return of the child; (2) whether the district court had jurisdiction to return the child under Section 1916 of the ICWA; and (3) whether the Court should issue a Stay. *In re Adoption of C.D.K.*, 2009 U.S. Dist. LEXIS 51674, 4-5 (Utah Central D. 2009). The Briefing Order did not ask the parties to brief the court on whether the Court had jurisdiction to invalidate the adoption pursuant to 25 U.S.C. §1914.

In the hearing on the court's briefing order, the court refused to acknowledge that it had invalidated the adoption, even after holding that the adoption must be invalidated pursuant to Section 1914 of the Indian Child Welfare Act. The Court did not ask the parties for further briefing on the issue of whether the adoption should be invalidated or whether the court had jurisdiction to invalidate the adoption pursuant to Section 1914.

The district court dismissed the action for lack of subject matter jurisdiction still refusing to invalidate the adoption under its own presumed limitations of Section 1914. Further, the Court failed to consider the definition of consent to termination of parental rights, pursuant to the Indian Child Welfare Act, which includes any action that severs the parent-child relationship, which includes an adoption. *See also*, In re *Philip A.C.*, 149 P.3d 51, 56 (Nev. 2006)(holding that the definition of an adoption is included in the definition of termination for parental rights).

Here, as in *Roman-Nose*, the biological mother brought an action in federal court alleging a state violation of section 1913(a) of the ICWA. Thus under section 1914, Nielson, like the biological mother in *Roman-Nose* had the right to petition a court of competent jurisdiction to invalidate the adoption. Nielson was successful in contesting her consent to termination of parental rights and the adoption under the ICWA. According to this Court's holding, the Federal District Court in *Roman-Nose* had jurisdiction over the proceeding and the authority to invalidate the adoption if the allegations were proven. Even according to the District Court's holding, the adoption should have been invalidated. *In re Adoption of C.D.K.*, 629 F. Supp. 2d 1258, 1263-64 (Utah Central Div. 2009). ("because the parties agree that the procedural requirements of the ICWA were not fully complied with, the adoption of C.D.K. *must* be invalidated pursuant to 25 U.S.C. § 1914.)[*emphasis added*].

The Court contradicted its own Memorandum Opinion in holding that it did not have jurisdiction pursuant to Section 1914 to invalidate the adoption. Further, the Court improperly held that it did not have supplemental jurisdiction to return C.D.K. to the custody of Nielson pursuant to Section 1916 because a Petition had not been filed according to Section 1912 of the ICWA.

Pursuant to the court's ruling, Nielson, with the order invalidating the consent to adoption in hand, petitioned the Second District Court of the State of Utah to return the child to her custody. The Court, citing Utah's statute of limitations for adoptions, refused to consider the matter because it found that a request to invalidate the adoption, pursuant to the federal court's holding, was a "contest" of the adoption. The effect of the lower

federal court's refusing to invalidate the adoption is contrary to the intentions and purposes of Congress as interpreted by this Court in *Morrow v. Winslow* in causing numerous delays through "piecemeal litigation". 94 F.3d 1386 (10th Cir. 1996).

CONCLUSION

The Federal District Court below correctly found that the Cherokee Constitution did not explicitly prohibit the Cherokee Citizenship Act. Further, the Court wisely and properly held that federal courts were an improper forum for determining whether the Membership Act violated the Cherokee Constitution. Determinations of tribal membership are best left to the tribes themselves. The court below validly relied upon indirect but admissible evidence in determining C.D.K.'s relation to original enorollees of the Cherokee tribe. Specifically, the court below properly relied upon a self-authenticating document to determine whether C.D.K. was an Indian child pursuant to the ICWA. Finally, the lower Court properly held that C.D.K. was an Indian child, that ICWA should have applied but was not followed, and that the adoption should be invalidated. As a result the court properly invalidated Nielson's consent to termination of parental rights and the final adoption should have been invalidated by the Federal District Court below and C.D.K. should have been returned to Nielson's custody to avoid piecemeal litigation and ongoing delays.

ORAL ARGUMENT STATEMENT

Nielson respectfully requests that this court affirm the lower Court's decision, however, if this court feels oral argument is necessary to resolve this issue, Appellee would be honored to present this case before the Court.

DATED this 11th Day of January, 2010.

TSOSIE & HATCH, LLC
/s/_____
Taralyn Jones
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

This brief contains 10,174 words, inclusive of headings and footnotes, and exclusive of attachments. It complies with the 14,000 word limitation set forth in Fed. R. App. P. Rule 32(7)(B).

Respectfully submitted this 11th day of January, 2010.

TSOSIE & HATCH, LLC
/s/_____
Taralyn Jones
Attorney for Appellee

CERTIFICATE OF SERVICE

This certifies that I caused a true and correct copy of the within and Foregoing APPELLEE'S BRIEF to be delivered:

[x] via Electronic filing/service using ECF System
[ ] via facsimile transmission, and/or
[ ] via the United States first-class mail, postage prepaid, and/or
[ ] via hand-delivery,

on the 11th day of January, 2010, to the following:

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I further certify that on the same date I served identical copies of all materials submitted to the Court in digital form or scanned PDF, that privacy redactions have not been necessary, that every document submitted in digital form or scanned PDF is an exact copy of the written document filed with the Court and that digital submissions have been scanned with the most recent version of a commercial scanning program, AVG 2007, and according to the program are free from viruses.

/s/_____
Taralyn Jones
Attorney for Appellee

EXHIBIT A

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IN THE SECOND JUDICIAL DISTRICT
DAVIS COUNTY, IN AND FOR THE STATE OF UTAH

IN THE MATTER OF THE ADOPTION OF: C.D.K., A Minor Child	**NOTICE OF APPEAL** Case Number: 072700191 Judge: Rodney S. Page [Indian Child Welfare Act]

(1) Notice is hereby given that B.J.N, the Biological Mother, and Appellant, by and through counsel, Taralyn A. Jones, appeals to the Utah Court of Appeals, the final Ruling on the (a) Biological Mother's Request to Re-Open Case #072700191; (b) Biological Mother's Motion to Invalidate the Adoption of C.D.K.; and (c) Biological Mother's Petition for Return of Custody and Extraordinary Relief of the Honorable Rodney S. Page entered in this matter on the 31st day of August, 2009.

(2) The appeal is taken from the entire judgment and memorandum opinion.

DATED this _____ day of September, 2009.

_____
Taralyn A. Jones
Attorney for Biological Mother/Appellant

References
Utah R. App. P. 3(a); 3(c); 3(d); 3(f); 4; 40(a)

CERTIFICATE OF MAILING

I hereby certify that on this ____ day of September, 2009, I mailed first class, postage pre-paid, a true and correct copy of the foregoing Notice of Appeal to:

Larry S. Jenkins
500 Eagle Gate Tower
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Salt Lake City, UT 84111

Dated this ___ day of Sept, 2009.

_____
John-Evan Waite

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing NOTICE OF APPEARANCE has been sent certified mail to the following addresses:

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DATED this _____ day of _____, 2009.

_____

EXHIBIT B

IN THE UTAH COURT OF APPEALS

---oo0oo---

In the matter of the adoption of C.D.K., a minor.	ORDER OF CERTIFICATION
B.J.N., Appellant, v. J.C.K. and S.E.K., Appellees.	Case No. 200900808-CA

This case is before the court on its own motion to certify the case "for immediate transfer to the Supreme Court for determination." Utah R. App. P. 43(a). Based on the affirmative vote of at least four judges of the Utah Court of Appeals,

IT IS HEREBY ORDERED that this appeal is certified for immediate transfer to the Utah Supreme Court for determination.

Dated this 20 day of October, 2009.

FOR THE COURT:

Pamela T. Greenwood,
Presiding Judge

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2009, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

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SECOND DISTRICT, FARMINGTON
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Dated this October 20, 2009.

By _____
Judicial Assistant

Case No. 20090808
SECOND DISTRICT, FARMINGTON, 072700191