

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

(1) JANE DOE; )  
(2) JOHN DOE; )  
(3) MARY ROE; )  
(4) RICHARD ROE, individually and on )  
behalf of )  
(5) BABY DOE, )

Plaintiffs,

vs.

Case No. 2015-CV-471-JED-FHM

(1) SCOTT PRUITT, in his official capacity as )  
Oklahoma Attorney General; )  
(2) TODD HEMBREE, in his official capacity )  
as Cherokee Nation Attorney General; and )  
(3) ED LAKE, in his official capacity as the )  
Director of the Department of Human )  
Services. )

Defendants.

**DEFENDANT TODD HEMBREE’S MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER JURISDICTION  
AND FAILURE TO STATE A CLAIM AND SUPPORTING BRIEF**

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**DEFENDANT TODD HEMBREE’S MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER JURISDICTION  
AND FAILURE TO STATE A CLAIM AND SUPPORTING BRIEF**

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendant Todd Hembree, in his official capacity as Cherokee Nation Attorney General, moves the Court for dismissal of this action for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

**INTRODUCTION**

Plaintiffs Jane and John Doe are the parents of an infant child, Baby Doe, who allegedly qualifies as an “Indian child” under both the Oklahoma Indian Child Welfare Act (“OICWA”) and its federal counterpart, the Indian Child Welfare Act (“ICWA”). Plaintiffs Mary and Richard Roe seek to adopt Baby Doe through a private adoption. In this action, Plaintiffs challenge the constitutionality of OICWA’s requirement that an Indian tribe be given notice of an adoption proceeding involving a birth parent who has voluntarily enrolled as a member of that tribe.<sup>1</sup>

Plaintiffs’ claims suffer from at least three fundamental flaws, any one of which is sufficient to require dismissal of this action. First, they ask this Court to interfere with an ongoing state court adoption proceeding, rather than permitting the state court to evaluate their challenge to OICWA as required by principles of comity and the doctrine of abstention. Second, Plaintiffs do not allege *any* action on the part of General Hembree, much less an act by him that violates their constitutional rights. Finally, despite clear and controlling precedent to the contrary, Plaintiffs misconstrue the relevant statutory schemes and seek to apply a heightened

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<sup>1</sup> ICWA and OICWA also apply where the child is a member of a tribe, but the Amended Complaint contains no allegation that Baby Doe currently is a tribal member.

(and erroneous) standard of review to their constitutional claims. Because the tribal notice requirements clearly further the Oklahoma Legislature's legitimate goals of reducing challenges to final judgments, increasing judicial efficiency, and furthering tribal self-government, Plaintiffs have not alleged an equal protection or due process violation under the United States Constitution, and Plaintiffs' claims fail as a matter of law.

## **THE RELEVANT STATUTES**

### **I. The Federal Indian Child Welfare Act.**

In 1978, Congress enacted the Indian Child Welfare Act ("ICWA") in response to "extensive evidence indicating that large numbers of Indian children were being separated from their families and tribes and were being placed in non-Indian homes through state adoption, foster care, and parental rights termination proceedings, and that this practice caused serious problems for the children, their parents, and their tribes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 30 (1989) (syllabus of the Court). For example, the legislative record indicates that Indian children were eight times more likely to be adopted than non-Indian children and that "[a]pproximately 90% of the Indian placements were in non-Indian homes." *Id.* at 33. Congress heard extensive testimony regarding the negative impact of these practices not only on Indian children and their parents but also on the tribes of which these children were members. One tribal official testified:

Culturally, the chances of Indian survival are significantly reduced if our 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.

*Id.* at 34 (quoting Hearing on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. (1978)). In response to this and other evidence, Congress expressly recognized in ICWA its intent to protect the interests of the tribes themselves, finding that “there is no resource more vital to the continued existence and integrity of Indian tribes than their children . . . .” 25 U.S.C. § 1901(3); *see* H.R. Rep. No. 95-1386, at 19 (1978) (noting that Congress enacted ICWA to establish “minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family *and the Indian tribe*”) (emphasis added).

ICWA thus reflects congressional belief that “an Indian child’s tribe should be involved in the process even when the [child custody] proceedings are in state courts rather than tribal courts.” *Kiowa Tribe of Okla. v. Lewis*, 777 F.2d 587, 592 (10th Cir. 1985) (noting that 25 U.S.C. § 1911(c) “expressly gives the child’s Indian tribe the right to intervene in state court proceedings involving the child’s custody”). Indeed, the Supreme Court has recognized that ICWA authorizes Indian tribes to challenge adoptions in state courts even if those adoptions are voluntary. *Holyfield*, 490 U.S. at 39 & n.12. In *Holyfield*, the Court notes that the tribe had standing to challenge the private placement adoption in that case because “ICWA specifically confers standing on the Indian child’s tribe to participate in child custody adjudications.” *Id.*

In support of this statement, the Court cites two ICWA provisions: (1) § 1911(c), which provides that “[i]n any State court proceeding for the . . . termination of parental rights to,<sup>2</sup> an

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<sup>2</sup> ICWA defines “termination of parental rights” as “any action resulting in the termination of the parent-child relationship.” 25 U.S.C. § 1903(1)(ii). Adoption is a statutorily-created procedure that cannot occur unless and until the rights of any living birth parents are terminated by the court. Thus, a voluntary adoption consists of two key steps. First, the court must terminate the parental rights of the birth parents. Then, the court may enter the decree of

Indian child,<sup>3</sup> . . . the Indian child’s tribe shall have the right to intervene at any point in the proceedings”; and (2) § 1914, which authorizes a tribe to “petition any court of competent jurisdiction to invalidate” a termination of parental rights “upon a showing that such action violated any provision of sections 1911, 1912, and 1913” of ICWA. *Holyfield*, 490 U.S. at 39 & n.12. Neither provision differentiates in any way between voluntary and involuntary proceedings.

Similarly, ICWA mandates that certain preferences apply in “*any* adoptive placement of an Indian child under State law.” 25 U.S.C. § 1915(a) (emphasis added). In such proceedings, “a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” *Id.* Thus, federal law requires that a state court adjudicating the adoption of an Indian child must (1) permit the child’s tribe to intervene in those proceedings, and (2) “in the absence of good cause to the contrary,” apply the adoptive preferences set forth in § 1915.

## **II. The Oklahoma Indian Child Welfare Act.**

In 1982, the Oklahoma Legislature passed the Oklahoma Indian Child Welfare Act (“OICWA”) to “clarif[y]” the “state policies and procedures” regarding Oklahoma’s implementation of ICWA. Okla. Stat. tit. 10, § 40.1. OICWA states:

It shall be the policy of the state to recognize that Indian tribes and nations have a valid governmental interest in Indian children . . . .  
It shall be the policy of the state to cooperate fully with Indian tribes in Oklahoma in order to ensure that the intent and provisions of the federal Indian Child Welfare Act are enforced.

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adoption. Accordingly, any adoption proceeding in an Oklahoma court—voluntary or involuntary—necessarily includes an inquiry as to whether parental rights should be terminated.

<sup>3</sup> ICWA defines “Indian child” as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4).



*Id.* Twelve years later, the legislature amended OICWA to “make clear [that] a parent involved in a voluntary ‘child custody proceeding’ involving an Oklahoma Indian child may not ignore the application of the Federal Act as a matter of personal choice.” *Cherokee Nation v. Nomura*, 160 P.3d 967, 975 (Okla. 2007). The Oklahoma Supreme Court determined that the amendments occurred at least partly in response to the United States Supreme Court’s decision in *Holyfield*, 490 U.S. 30. *See id.* at 974-75. *Holyfield* involved the voluntary adoption of twins whose birth parents were members of the Mississippi Band of Choctaw Indians and resided on that reservation. 490 U.S. at 37. The mother travelled off the reservation to give birth in a non-Indian hospital 200 miles away. *Id.* The birth parents then consented to an adoption of the twins in state court. *Id.* at 37-38. The tribe moved to vacate the adoption decree on the ground that ICWA vested exclusive jurisdiction in the tribal court because the birth parents—and thus the twins—were domiciled on the reservation. *Id.* at 38. The Supreme Court agreed with the tribe, noting that tribal jurisdiction under 25 U.S.C. § 1911(a) “was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the 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. The Court concluded that the birth mother could not defeat the tribe’s rights and ICWA’s jurisdictional scheme simply by choosing to leave the reservation to give birth. The Oklahoma Legislature thus codified this holding in Okla. Stat. tit. 10, § 40.3(B) by clarifying that OICWA “applies to all state voluntary and involuntary child custody court proceedings involving Indian children . . . .”

In the 1994 amendments, the Oklahoma Legislature also added provisions to ensure that a tribe receives timely notice of any state court custody proceeding involving an Indian child that

is or may become a member of that tribe. Section 40.4, which is challenged by Plaintiffs in this case, provides:

In all Indian child custody proceedings of the [OICWA], including voluntary court proceedings and review hearings, ***the court shall ensure that the*** district attorney or other ***person initiating the proceedings shall send notice*** to the parents or to the Indian custodians, if any, and ***to the tribe that is or may be the tribe of the Indian child***, and to the appropriate Bureau of Indian Affairs area office . . . .

Okla. Stat. tit. 10, § 40.4 (emphasis added). Further, the act requires that “determination of the Indian status of a child shall be made as soon as practicable in order to ensure compliance with the notice requirements of Section 40.4 . . . .” *Id.* § 40.3(E). These notice provisions, too, likely were added in response to the *Holyfield* case. In *Holyfield*, the tribe had not been notified or served with process regarding the state court adoption proceeding involving the twins. Br. for the Appellant, *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (No. 87-890), 1987 WL 880195, at \*4. In the tribe’s absence, the state court entered a final decree of adoption which, despite the court’s apparent awareness of ICWA, contained no reference to ICWA or the children’s Indian background. *Holyfield*, 490 U.S. at 39. After learning of the adoption, the tribe moved to vacate that decree two months after it had been entered. *Id.* This challenge ultimately led to the Supreme Court’s ruling three years later. By including a notice requirement in section 40.4 of OICWA, the Oklahoma Legislature ensured that a tribe’s participation in a child custody adjudication—the right to which was expressly recognized by the Supreme Court in *Holyfield*, 490 U.S. at 39 & n.12—will occur well ***before*** an adoption is finalized and ***not*** in a post-decree challenge occurring months, if not years, after the child has been placed in an adoptive home.

Plaintiffs also challenge section 40.6 of OICWA, which provides that the “placement preferences specified in 25 U.S.C. § 1915, shall apply to all preadjudicatory placements, as well as preadoptive, adoptive and foster care placements.” Okla. Stat. tit. 10, § 40.6. Because § 1915

by its very terms applies to “*any* adoptive placement of an Indian child under State law,” § 1915 should be applied in Baby Doe’s adoption proceeding even in the absence of this provision of OICWA.<sup>4</sup> 25 U.S.C. § 1915(a) (emphasis added).

Finally, section 40.6 of OICWA includes one additional requirement not found in its federal counterpart. It provides:

In all placements of an Indian child by the Oklahoma Department of Human Services (DHS), or by any person or other placement agency, DHS, the person or placement agency shall utilize to the maximum extent possible the services of the Indian tribe of the child in securing placement consistent with the provisions of [OICWA]. This requirement shall include cases where a consenting parent evidences a desire for anonymity in the consent document executed pursuant to Section 60.5 of this title. If a request for anonymity is included in a parental consent document, the court shall give weight to such desire in applying the preferences only after notice is given to the child’s tribe and the tribe is afforded twenty (20) days to intervene and request a hearing on available tribal placement resources which may protect parental confidentiality, provided that notice of such hearing shall be given to the consenting parent.

Okla. Stat. tit. 10, § 40.6. This provision merely requires a person or agency who is involved in placing an Indian child to enlist the assistance of the relevant Indian tribe “to the maximum extent possible.” Like section 40.4, it seeks to obtain early involvement of all interested parties in placement proceedings and to take advantage of tribal expertise in finding ICWA-appropriate placements. Moreover, the statute expressly takes into account any requests for confidentiality

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<sup>4</sup> While OICWA arguably may extend ICWA preferences to preadjudicatory placements such as emergency custody, those types of placements are not at issue here. Rather, Plaintiffs challenge the statute as applied to an adoptive placement, which is clearly covered by ICWA itself.

by the birth parent(s) and contemplates that the tribe may assist in this regard by providing “available tribal placement resources which may protect parental confidentiality.”<sup>5</sup> *Id.*

## **ARGUMENT AND AUTHORITIES**

### **I. The Court Should Abstain From Interfering With Ongoing State Court Proceedings.**<sup>6</sup>

The application of OICWA (and ICWA) is dependent upon the initiation of a state court “child custody proceeding.” Although Plaintiffs’ Amended Complaint is silent on the issue, General Hembree has reason to believe that an adoption proceeding regarding Baby Doe currently is pending in the District Court for Oklahoma’s Fourteenth Judicial District. If so, then under the statutory schemes of ICWA and OICWA, that state court bears responsibility for “ensur[ing] that the . . . person initiating the proceeding” has sent the appropriate notice to “the tribe that is or may be the tribe of the Indian child.” Okla. Stat. tit. 10, § 40.4. Further, it is the state court that must determine compliance with OICWA as a whole. By seeking a declaration here that the challenged provisions of OICWA are unconstitutional and attempting to enjoin their enforcement, Plaintiffs ask this Court to interject itself into an ongoing state adoption proceeding and to instruct the state court as to the applicable law. This is a textbook case for *Younger* abstention.

The Tenth Circuit has recognized that *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny “espouse a strong federal policy against federal court interference with pending state

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<sup>5</sup> Under § 1915, the first choice for an Indian child’s placement is with a member of the child’s extended family. Where a birth parent does not want his or her family to know about the child, the court may honor the request for confidentiality and go to the second-choice placement under ICWA, *i.e.*, placement with “other members of the Indian child’s tribe.” 25 U.S.C. § 1915(a). The tribe can provide invaluable assistance in locating such placements. In fact, the Cherokee Nation and many other tribes maintain lengthy lists of tribal members who are qualified and willing to adopt Indian children.

<sup>6</sup> A request for abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), is a challenge to the Court’s subject matter jurisdiction. *See D. L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1228 (10th Cir. 2004).

judicial proceedings absent extraordinary circumstances.” *Morrow v. Winslow*, 94 F.3d 1386, 1393 (10th Cir. 1996) (quoting *Middlesex Cnty. Ethics Comm’n v. Garden State Bar Ass’n*, 457 U.S. 423, 431 (1982)). Under the *Younger* doctrine, “federal courts should not ‘interfere with state court proceedings by granting equitable relief—such as injunctions of important state proceedings or declaratory judgments regarding constitutional issues in those proceedings—’ when a state forum provides an adequate avenue for relief.” *Weitzel v. Div. of Occupational & Prof’l Licensing Dep’t of Commerce*, 240 F.3d 871, 875 (10th Cir. 2001) (citation omitted). The doctrine applies where three criteria are met: (1) there exists an ongoing state proceeding, judicial in nature; (2) the state proceeding implicates important state interests; and (3) the state proceeding affords an adequate opportunity for the federal plaintiff to raise constitutional challenges. *See Middlesex Cnty.*, 457 U.S. at 432. All of these requirements easily are met here.

First, as discussed above, there must be an ongoing judicial proceeding in Oklahoma state court in order to trigger the application of OICWA (which Plaintiffs challenge here), and Hembree has reason to believe that such a proceeding has been filed. Thus, the first requirement for abstention is met.

Second, the Supreme Court and Tenth Circuit have held that proceedings involving the welfare of children and families necessarily implicate important state interests. In *Moore v. Sims*, 442 U.S. 415 (1979), the Court held that a federal district court should have abstained under *Younger* from a suit that sought injunctive relief directed at a state court custody proceeding. In the state court action, the Texas Department of Human Resources obtained temporary custody of the appellees’ minor children based on evidence that one of them had been abused. Rather than pursue state appellate remedies, the appellees filed suit in federal court, seeking injunctive relief against the state court and challenging the constitutionality of the state

statute that authorized the children's removal from their parents. In holding that abstention was appropriate, the Supreme Court noted that "[f]amily relations are a traditional area of state concern." *Id.* at 435.

Similarly, the Tenth Circuit has recognized a state interest in adjudicating child placement decisions *under ICWA* that is sufficient to satisfy the second prong of *Younger*. In *Morrow v. Winslow*, the court held that the district court should have abstained from an action brought by an Indian father claiming that Oklahoma adoptive procedures violated ICWA and his due process rights. 94 F.3d 1386 (10th Cir. 1996). The Tenth Circuit noted:

[The state judge presiding over the adoption proceedings] has a special obligation in connection with the judicial administration of the proceeding in the best interest of the child. The state, although not a party, obviously has an interest in the orderly conduct of the proceedings in its courts in a manner which protects the interests of the child and the family relationship. . . . [W]e should not permit "the luxury of federal litigation of issues presented by ongoing state proceedings," which involve family relations, a traditional area of state concern.

*Id.* at 1397 (internal citation omitted); *see also Yancey v. Bonner*, 323 F. App'x 674 (10th Cir. 2009) (recognizing continued applicability of *Morrow* and affirming district court's decision that *Younger* abstention was required where Indian father had sufficient opportunity to raise ICWA claims in ongoing state court appeal of adoption proceeding). There is no reason for this Court to deviate from the clear precedent recognizing the State of Oklahoma's significant interest in adjudicating child custody proceedings under one of the very statutes that is at issue in this case.

Finally, the state court adoption proceeding provides Plaintiffs with an adequate opportunity to raise their constitutional challenges to OICWA. Indeed, the Supreme Court in *Moore* declared that it was "unwilling to conclude that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise in child-welfare litigation." 442 U.S. at 435; *see also Morrow*, 94 F.3d at 1398 (holding that the

Oklahoma adoption proceeding “does ‘afford an adequate opportunity’ to raise the [plaintiff’s] ICWA and constitutional claims”) (citation omitted).

Because the three *Younger* criteria are met, Plaintiffs’ challenge to the constitutionality of OICWA should be heard by the court charged with actually applying and enforcing that statute, *i.e.*, the court presiding over Baby Doe’s adoption proceedings, and *not* this Court.

## **II. Plaintiffs Have Failed To State A Legally Cognizable Claim For Relief.**

Plaintiffs’ Amended Complaint should also be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The factual allegations of a complaint must be sufficiently precise to raise a right to relief above the speculative level. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-56 (2007); *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007). A district court should dismiss a complaint if the plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “Plausible” in this context refers “to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs ‘have not nudged their claims across the line from conceivable to plausible.’” *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570).

The “mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.” *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). Accordingly, the complaint must contain enough specific allegations of fact to show that if all the alleged facts—and only the alleged facts—are believed to be true, the plaintiff has a claim for relief. *See Twombly*, 550 U.S. at 555; *Robbins*, 519 F.3d at 1247-48. Here, Plaintiffs’ Amended Complaint fails to meet this pleading standard.

**A. Plaintiffs have not stated a claim against Defendant Hembree under the relevant civil rights statutes.**

Plaintiffs purport to state claims under 42 U.S.C. § 1983<sup>7</sup> for violations of their due process and equal protection rights under the United States Constitution. (Am. Compl. ¶¶ 45-64, Dkt. No. 22.) Yet Plaintiffs' Amended Complaint contains no allegation that General Hembree did anything to deprive them of their alleged rights under the Constitution. In fact, the only allegation specifically addressing him states:

Todd Embree [sic] is the Cherokee Nation Attorney General. He and his office are responsible for the prosecution of all Cherokee Nation actions necessary under the Indian Child Welfare Act.

(*Id.* ¶ 11.) Thus, Plaintiffs do not allege that General Hembree has taken any actions at all. They simply have not stated a claim against General Hembree upon which relief may be granted.

**B. Plaintiffs have not alleged that they have suffered or will suffer a violation of their constitutional rights.**

Even if Plaintiffs could link their claims to some action or omission of General Hembree (which they cannot), they still have failed to state claims for relief in this case.

**1. Plaintiffs' equal protection claim fails as a matter of law.**

In Count II of their Amended Complaint, Plaintiffs contend that OICWA discriminates against them on the basis of race and violates their rights to equal protection under the Constitution. However, it is well established that classifications based on a person's status as Native American are *not* classifications based on race for purposes of the Equal Protection Clause. *See, e.g., Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont.*, 424 U.S. 382, 390-91 (1976) (rejecting equal protection challenge to statute vesting tribal court with exclusive jurisdiction over custody proceeding regarding Indian child because such statute did "not derive

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<sup>7</sup> Plaintiffs also purport to state a claim under 42 U.S.C. § 1988. (Am. Compl. at 11, 13, Dkt. No. 22.) However, that statute merely authorizes the award of attorneys' fees in certain circumstances and does not provide the basis for a substantive claim for relief.



from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.”); *see also Morton v. Mancari*, 417 U.S. 535, 554 (1974) (government-employment preference for qualified Native Americans was “granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . .”). Rather, Congress may distinguish between Indians and non-Indians based on tribal sovereignty and Congress’ ability to “single out [Indians] for particular and special treatment” in order to fulfill the United States’ “unique obligation toward the Indians.” *Mancari*, 417 U.S. at 552, 555.

This conclusion has even greater force where, as here, the applicability of the statute at issue hinges on tribal *membership* instead of Indian lineage. Like ICWA (25 U.S.C. § 1903(4)), OICWA defines “Indian child” as any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. Okla. Stat. tit. 10 § 40.2(2). A person may have Indian ancestry without maintaining membership in an organized Indian tribe. These are two separate inquiries. OICWA applies only where one of a child’s birth parents has done the latter, *i.e.*, chosen to seek out (or at least retain) a political affiliation with a tribe, along with the benefits and responsibilities of membership in that tribe. It does not apply to non-member children whose parents are not tribal members, even if they would be eligible for such membership.

Because the applicability of OICWA does not hinge on a racial classification but only a political one, the statute need only bear a rational relationship to a legitimate state interest. *United States v. Shavanaux*, 647 F.3d 993, 1001-02 (10th Cir. 2011) (“We review for a rational basis ‘legislation that singles out Indians for particular and special treatment.’”). Under a rational basis analysis, courts are not required to determine the actual intent of the legislature in adopting

the statute. *Crider v. Bd. of Cnty. Comm'rs*, 246 F.3d 1285, 1289 (10th Cir. 2001). Rather, a court should “look only to whether a ‘reasonably conceivable’ rational basis exists.” *Id.* at 1290 (quoting *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2002)). Here, that test easily is met.

First, the state has a legitimate interest in the finality of its judgments, especially those judgments that address child custody decisions. As noted by the United States Supreme Court in *Holyfield* and discussed above, ICWA gives Indian tribes the right to participate in custody proceedings regarding Indian children either through intervention or a post-decree challenge. 490 U.S. at 39 & n.12. By requiring that tribes be given notice of custody proceedings at their commencement, ICWA ensures that tribes will have the opportunity to participate well *before* the decree is entered. This significantly reduces the likelihood that a tribe could challenge an adoption decree months or years after the decree is entered and the child has been “permanently” placed in an adoptive home. Preventing this type of post-decree challenge clearly is in the best interest of the state and all of the parties, particularly the child.

Further, in many cases, the tribe serves as a valuable resource for the state court and the parties in addressing and complying with ICWA’s requirements. Some tribes, including the Cherokee Nation, have child services departments containing employees with significant ICWA experience. Indeed, it is not unusual for a court to recognize a tribal child services worker as the required expert witness in an Indian child custody proceeding, thus sparing the parties the burden of finding and retaining another expert to provide the required testimony. In addition, many tribes, like the Cherokee Nation, maintain lists of prospective adoptive parents who are tribal members and who already have passed rigorous background testing and home studies. For example, the Cherokee Nation currently has 155 certified Cherokee adoptive homes that stand

ready to accept Indian children. Thus, section 40.6 properly recognizes that Indian tribes can be significant assets in placement decisions regarding Indian children, and its requirement that parties utilize that resource “to the maximum extent possible” clearly serves legitimate state interests.

Finally, as discussed above, both ICWA and OICWA were intended to protect not only Indian children and parents but also the tribes, who had been losing their most valuable resources, *i.e.*, their children. Both statutes reflect the view that “an Indian child’s tribe should be involved in the [adoption] process even when the [child custody] proceedings are in state courts rather than tribal courts.” *Lewis*, 777 F.2d at 592. By requiring that tribes be notified of adoption proceedings involving their members, OICWA permits tribes to have meaningful involvement in the process and thus furthers the legitimate “cause of Indian self-government.” *Morton*, 417 U.S. at 553-54. Accordingly, Plaintiffs have not alleged a violation of their rights under the Equal Protection Clause.

2. Plaintiffs also fail to allege a substantive due process violation.

Plaintiffs further claim that “Defendants” have interfered with Plaintiffs’ substantive rights under the Due Process Clause. (Am. Compl. ¶¶ 45-55, Dkt. No. 22.) The right to substantive due process “guards against arbitrary legislation by requiring a relationship between a statute and the government interest it seeks to advance.” *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009). In this regard, courts differentiate between infringements on fundamental and non-fundamental rights. Where a statute infringes on a fundamental right, “the infringement must be narrowly tailored to serve a compelling governmental interest.” *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). However, if a statute impacts a lesser right, there need be “no more than a ‘reasonable fit’ between governmental purpose . . . and the means chosen to advance that purpose.” *Reno v. Flores*, 507 U.S. 292, 305 (1993); *see*

*Seegmiller v. LaVerkin City*, 528 F.3d 762, 771-72 (10th Cir. 2008) (“Absent a fundamental right, the state may regulate an interest pursuant to a validly enacted state law or regulation rationally related to a legitimate state interest.”).

- a. Plaintiffs do not identify a fundamental right that allegedly will be violated if they comply with OICWA.

The first step in any substantive due process analysis is to identify the right that allegedly has been or will be infringed. *See Browder v. City of Albuquerque*, 787 F.3d 1076, 1078 (10th Cir. 2015). Then, the court must determine “whether that right counts as a ‘fundamental’ one, a limited class of rights sometimes described by the Court as those that can fairly claim to be ‘objectively, deeply rooted in this Nation’s history and tradition.’” *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)).

Here, Plaintiffs generally allege that Defendants have infringed on their rights to “liberty, dignity, privacy, and family integrity.” (Am. Compl. ¶¶ 48-50, Dkt. No. 22.) But the crux of the Amended Complaint seems to be Plaintiffs’ contention that OICWA interferes with their alleged “right to *privately* pursue a private placement adoption.” (*Id.* ¶¶ 48, 49 (emphasis added).) Specifically, they challenge OICWA’s provisions requiring that tribes receive notice of voluntary custody proceedings involving Indian children and be consulted in the initial placements of those children. (*Id.* ¶¶ 22-28, 40.) Plaintiffs have identified no authorities suggesting that they have a fundamental right to shield the existence of an adoption proceeding from a party that is specifically authorized to intervene in that proceeding by federal law (which is not challenged here).<sup>8</sup> *See Holyfield*, 490 U.S. at 39 & n.12 (recognizing tribe had the ability to challenge the

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<sup>8</sup> Plaintiffs complain that *OICWA* “gives the Tribes the right to intervene in a voluntary case” and thus to receive the confidential information typically shared among the parties to such a case. (Am. Compl. ¶¶ 26, 41, Dkt. No. 22.) But, as shown above, *ICWA already gives tribes the right to intervene in such proceedings*.

voluntary state court adoption at issue in that case because “ICWA specifically confers standing on the Indian child’s tribe to participate in child custody adjudications”); *Lewis*, 777 F.2d at 592 (noting that 25 U.S.C. § 1911(c) “expressly gives the child’s Indian tribe the right to intervene in state court proceedings involving the child’s custody.”); 25 U.S.C. § 1911(c) (“In any State court proceeding for the . . . termination of parental rights to, an Indian child, the . . . Indian child’s tribe shall have the right to intervene at any point in the proceedings.”).

Unable to articulate how notice to a statutorily interested party would infringe on a fundamental right, Plaintiffs resort to purely hypothetical harm. They contend:

This notice [to the Cherokee Nation] would result in word spreading in the tribal offices of their adoption plan in violation of their privacy rights and if the tribe seeks out alternate placements then others in the tribal community will learn of their adoption plan and John and Jane Doe feel that the decisions that they have made for their child are confidential and are not the proper subject of discussions among tribal members.

Plaintiffs ignore the fact that any notice given pursuant to OICWA includes an instruction to maintain the confidentiality of this information. *See* Okla. Stat. tit. 10, § 40.4(6) (requiring that notice to tribe contain statement that “tribal officials should keep confidential the information contained in the notice”). In addition, if it intervenes in the proceeding, the Cherokee Nation would be subject to the rules of confidentiality governing adoption proceedings generally, including the statutory penalties for violating such laws. *See* Okla. Stat. tit. 10, § 7505-1.1(B) (all papers, records, and books relating to proceedings in adoption cases shall be confidential) and (E) (any person who discloses adoption records or information from adoption proceeding shall be guilty of a misdemeanor). Plaintiffs cannot base a due process violation on an unsubstantiated assumption that individuals within the Cherokee Nation will surely violate these statutory duties of confidentiality and commit a misdemeanor. *See, e.g., Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 118 (3d Cir. 1987) (finding adequate safeguards to

prevent unnecessary disclosure of confidential information to public where a statutory penalty for unauthorized disclosures exists) (citing *Whalen v. Roe*, 429 U.S. 589, 605-06 (1977))). In short, Plaintiffs have identified no fundamental right that will be breached if the challenged provisions of OICWA are followed here.

b. The notice provisions of OICWA serve legitimate state interests.

In the absence of a fundamental right, Plaintiffs’ substantive due process claim is not subject to strict scrutiny review and need only have a rational relationship to a legitimate state interest. *See Seegmiller*, 528 F.3d at 771-72. For the reasons set forth above in Part II.B.1, the challenged provisions of OICWA are rationally related to the protection of Indian tribes and the fulfillment of Congress’ unique obligation to Indians. They also further the state’s important interests in the finality of its judgments and the efficient functioning of custody proceedings involving Indian children. Accordingly, Plaintiffs’ substantive due process claim should be dismissed.

C. Counts III and IV do not state claims for relief.

In Counts III and IV, Plaintiffs appear to seek declaratory and injunctive relief holding that sections 40.3, 40.4, and 40.6 are void and precluding their enforcement. These are not legally cognizable claims for relief.

First, Count III contends that the State of Oklahoma “cannot legislate as to the Indian tribes” and that the challenged sections of OICWA are unenforceable because they “are beyond the scope of the jurisdiction conferred upon the states by ICWA and therefore are invalid.” (Am. Compl. ¶¶ 66, 68, Dkt. No. 22.) But the state does not purport to legislate as to the tribes. Rather, the Oklahoma Legislature has established certain procedures that govern *Oklahoma courts* in proceedings involving Indian children, including providing instructions regarding the mechanics of complying with ICWA. Indeed, the Oklahoma Supreme Court, in rejecting another

constitutional challenge to OICWA, has held that the statute’s notice provisions “do[] not restrict [ICWA], but in fact, support[] it in state court adoptions. Neither the purpose of the Federal Act nor the Oklahoma Act can be achieved without notice to the tribe or consideration of the placement preferences.” *Nomura*, 160 P.3d at 976; *see also id.* (“It would be difficult indeed to enforce the right to intervene in the proceeding without receiving notice of it.”). Thus, any claim that the Oklahoma Legislature had no authority to adopt these procedures has been implicitly rejected by the Oklahoma Supreme Court and fails as a matter of law.

Finally, Count IV is not a substantive cause of action but rather contains Plaintiffs’ request for a permanent injunction. Because this is more appropriately categorized as requested relief, it should be dismissed as a freestanding claim.

### **CONCLUSION**

For the reasons set forth above, Plaintiffs’ Amended Complaint should be dismissed in its entirety.

Respectfully submitted,

/s/ Graydon D. Luthey, Jr.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of October, 2015, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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