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14 IN THE UNITED STATES DISTRICT COURT
 15 FOR THE DISTRICT OF ARIZONA

16 Carol Coghlan Carter, *et al.*,

17 Plaintiffs,

18 v.

19 Kevin Washburn, *et al.*,

20 Defendants.

No. CV-15-01259-PHX-NVW

**BRIEF OF CASEY FAMILY
 PROGRAMS AND TWELVE
 OTHER NATIONAL CHILD
 WELFARE ORGANIZATIONS
 AS AMICI CURIAE IN
 SUPPORT OF MOTIONS TO
 DISMISS**

23 **INTERESTS OF AMICI CURIAE**

24 *Amici curiae* are Casey Family Programs, the Annie E. Casey Foundation, the
 25 Center for the Study of Social Policy, the Child Welfare League of America, the
 26 Children’s Defense Fund, the Donaldson Adoption Institute, the First Focus Campaign
 27 for Children, FosterClub, Generations United, the National Alliance of Children’s Trust
 28 and Prevention Funds, the National Center on Adoption and Permanency, the North

1 American Council on Adoptable Children, and the W. Haywood Burns Institute. *Amici*
2 are national child welfare organizations with decades of firsthand experience developing
3 and implementing the best practices and policies for child welfare decisionmaking.
4 *Amici* are united in their view that, in the Indian Child Welfare Act, Congress enacted
5 the gold standard for child welfare policies and practices that should be afforded to all
6 children, and that it would work serious harm to child welfare programs nationwide for
7 this Court to curtail the Act’s protections and standards. Statements of interest of each
8 *amicus curiae* are provided in an appendix to this brief.¹

9 **INTRODUCTION AND SUMMARY OF ARGUMENT**

10 Through decades of experience, *amici* have found that the cornerstone of an
11 effective child welfare system is the presumption that children are best served by
12 supporting and encouraging their relationship with birth parents who are interested in
13 raising them and are able to do so safely, unless and until the parental relationship must
14 be permanently severed. When children are unable to safely remain with their parents,
15 *amici* have found that their interests are best served by creating policies and procedures
16 maximizing the likelihood that they will be raised by relatives. These bedrock
17 principles, which are applicable to all children and serve as the cornerstone of *amici*’s
18 work in child welfare, are codified in the Indian Child Welfare Act (“ICWA”).

19 Accordingly, in alleging (Compl. ¶ 3) that “[c]hildren with Indian ancestry” are
20 “[a]lone among American children” in being uniquely disadvantaged by ICWA,
21 plaintiffs get it exactly backwards. Congress provided a framework for custody
22 decisions in ICWA that systematically serves the best interests of children and that
23 incorporates the established model for child welfare and placement decisionmaking.
24 ICWA’s standards requiring child welfare agencies to engage in active efforts to

25
26 ¹ A separate set of attorneys from the firm representing *amici* is representing intervenor
27 Gila River Indian Community, but neither those attorneys nor counsel for any other
28 party has authored this brief in whole or in part. No party (including intervenor) or
party’s counsel, nor any person other than *amici* or their members, has contributed
money intended to fund preparation or submission of this brief.

1 preserve and reunify families, and limiting the circumstances in which parental rights
2 can be terminated or children can be removed from their families, embody the first
3 principle in child welfare: children's best interests are served by maintaining their ties
4 with their parents so long as it is safe to do so. When children must be removed from
5 their families due to abuse and/or neglect, ICWA's placement preferences codify the
6 best practice in child welfare of favoring extended family placements, including
7 placement within a child's broader kinship community. Moreover, in the decades
8 following ICWA's enactment, Congress has incentivized states to adopt child welfare
9 principles for all children that are similar to ICWA's standards. Congress's judgment
10 that these standards serve the best interests of children is sound and should not be
11 second-guessed; ICWA applies the gold standard for child welfare decisions for all
12 children, and unraveling its protections could cause significant harm for Indian children.

13 **ARGUMENT**

14 **I. ICWA EMBODIES THE BEST PRACTICES IN CHILD WELFARE OF** 15 **ALLOWING FAMILIES TO REMAIN TOGETHER AND** 16 **ENCOURAGING REUNIFICATION**

17 **A. The Primary Principle in Child Welfare is that Children are Best** 18 **Served by Preserving and Strengthening Their Family Relationships**

19 *Amici* work in child welfare across the spectrum of proceedings in which the
20 relationships of children to their parents are affected: from family support and advocacy
21 services, to foster care and kinship placements, to the permanent termination of parental
22 rights and the creation of new families through adoption. Through decades of
23 experience, *amici* have found that the cornerstone of an effective child welfare system is
24 the presumption that children are best served by supporting and encouraging their
25 relationship with parents who are interested in raising them and are able to do so safely.

26 This principle is reflected in a number of best practices in child welfare that
27 seek to limit the separation of children from parents and to enable reunification, if
28 possible, when a separation has occurred. It is also applied by the majority of states as
the guiding principle for determining the best interests of the child. *See* Child Welfare

1 Information Gateway, *Determining the Best Interests of the Child: Summary of State*
2 *Laws* 2 (2012) (finding the most frequently stated guiding principle in state statutes for
3 determining the best interests of the child is the “importance of family integrity and
4 preference for avoiding removal of the child from his/her home”).

5 *First*, a best practice in child welfare is to provide appropriate services to
6 parents and families *before* there is any separation of a child from either parent. Among
7 the most important components of a sound child welfare system is the requirement that
8 agencies and others responsible for children’s well-being be vigilant in striving to keep
9 children in their families. Research and experience confirm that when it is possible for
10 children to stay with their families, children’s interests are best served. *See, e.g.,*
11 Kristine Nelson, *et al., A Ten-Year Review of Family Preservation Research* 1 (2009);
12 The Annie E. Casey Foundation, *Every Kid Needs A Family* 11 (2015) (“Whenever
13 possible, children should remain at home with their parents or with a caring relative.”).
14 It is thus no surprise that practitioners and child advocates recognize the importance of
15 “provid[ing] [parents] with services and support and ... empower[ing] [them] to change
16 their lives,” so that “children c[an] be safely protected and treated within their own
17 homes” and avoid the trauma and lasting negative effects of family separation. CWLA,
18 STANDARDS OF EXCELLENCE FOR SERVICES TO STRENGTHEN AND PRESERVE FAMILIES
19 WITH CHILDREN 20 (2003) (“Services Standards”).

20 *Second*, although the protection of children is paramount, children’s well-
21 being is best served if they are removed from their families only when necessary to
22 protect them from serious harm. *See* CWLA, STANDARDS OF EXCELLENCE FOR
23 SERVICES TO ABUSED AND NEGLECTED CHILDREN AND THEIR FAMILIES § 1.24 (1998)
24 (“The removal of a child from the home ... is a drastic action that should be considered
25 only when there is imminent danger to the child’s life and safety, or when other
26 measures to alleviate risk have failed or will not provide sufficient protection.”). This
27 has been an animating principle of child welfare practice since the time of ICWA’s
28 enactment in the late 1970s. At that time, prominent child welfare advocates were

1 pressing for child welfare interventions to be limited to cases of “[s]erious bodily injury
2 inflicted by Parents upon their Child, or an attempt to inflict such injury, or the repeated
3 failure of Parents to prevent their Child from suffering such injury,” or when children
4 were abandoned or victims of sexual abuse. Joseph Goldstein, *et al.*, BEFORE THE BEST
5 INTERESTS OF THE CHILD 193-195 (1979).² Most prominently, the American Bar
6 Association and the Institute for Judicial Administration proposed formal standards with
7 the same limitations: a child should be subject to court jurisdiction only when (i) a
8 “child has suffered, or there is a substantial risk that a child will imminently suffer, a
9 physical harm . . . which causes, or creates a substantial risk of causing, disfigurement,
10 impairment of bodily functioning, or other serious physical injury”; (ii) “a child is
11 suffering serious emotional damage, evidenced by severe anxiety, depression, or
12 withdrawal, or untoward aggressive behavior toward self or others”; or (iii) “a child has
13 been sexually abused.” Joint Comm’n on Juvenile Justice Standards, Inst. of Judicial
14 Admin., *ABA Standards Relating to Abuse and Neglect* § 2.1 (1982).

15 *Third*, if temporary separation of a child from her family is unavoidable, the
16 presumptive initial goal of the child welfare system is reunification. *See* National
17 Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines:
18 Improving Court Practice in Child Abuse and Neglect Cases* 5 (2000) (“Consistent with
19 child safety, families should be preserved, reunified and strengthened so they can
20 successfully rear their children.”); *see also* Child Welfare Information Gateway,
21 *Supporting Reunification and Preventing Reentry Into Out-of-Home Care* 1 (2012)
22 (“Once a child or youth has been removed from the care of his or her parents, safe and
23 timely family reunification is the preferred permanency option.”).

24 *Fourth*, it is a best practice to encourage and preserve a child’s ties with her
25 parents even if those ties are initially undeveloped due to early separation of the child

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27 ² *See also* Robert Mnookin, *Foster Care: In Whose Best Interests?*, 43 HARV. EDUC.
28 REV. 599 (1973); Michael Wald, *State Intervention on Behalf of ‘Neglected’ Children: A
Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

1 from the parents. “The first permanency plan” for any child “is to provide services to
2 the birth parents to determine whether they are willing and able to assume parenting
3 responsibilities for their child,” and the “first goal” of child welfare services “is
4 reunification of the child with the birth parents.” CWLA, STANDARDS OF EXCELLENCE
5 FOR ADOPTION SERVICES § 4.14 (2000) (“Adoption Standards”).

6 *Finally*, it is a key best practice to require courts to follow pre-established,
7 objective rules that operate above the charged emotions of individual cases and that
8 presume that preservation of a child’s ties to her parents is in her best interests. *See*
9 National Council of Juvenile and Family Court Judges, *supra*, at 14. Application of the
10 best-interests-of-the-child standard should be guided by substantive rules and
11 presumptions because “judges too may find it difficult, in utilizing vague standards like
12 ‘the best interests of the child,’ to avoid decisions resting on subjective values.” *Smith*
13 *v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 835 n.36 (1977).
14 Courts should not terminate a child’s relationship to a parent based on “imprecise
15 substantive standards that leave determinations unusually open to the subjective values
16 of the judge.” *Santosky v. Kramer*, 455 U.S. 745, 762-763 (1982).

17 **B. ICWA Adopts and Implements the First Principle of Family**
18 **Preservation and Reunification**

19 In considering ICWA, Congress was faced with the need to develop a body of
20 family law in one area where Congress, rather than the States, can directly legislate
21 regarding such matters—Indian affairs. *See* 25 U.S.C. § 1901(1) (invoking
22 “Congress[’s] ... plenary power over Indian affairs”). In developing federal standards
23 to apply across the full range of child custody proceedings “to protect the best interests
24 of Indian children,” *id.* § 1902, Congress properly embraced, for Indian children, the
25 key best practices that in *amici*’s experience serve the best interests of all children.

26 Congress sought in ICWA to increase the likelihood that parent-child and
27 familial relationships would be preserved by requiring that “active efforts” to support
28 and develop a child’s relationship with her parents and extended family be made before

1 that relationship is permanently ended. Specifically, ICWA requires that any party
2 seeking to “effect a foster care placement of, or termination of parental rights to, an
3 Indian child under State law” must establish “that active efforts have been made to
4 provide remedial services and rehabilitative programs designed to prevent the breakup
5 of the Indian family.” 25 U.S.C. § 1912(d).

6 ICWA also implements the best practice of presuming that it is in a child’s best
7 interests to preserve ties with her parents by appropriately limiting the circumstances in
8 which a child can be removed from her family. A child may be placed in foster care
9 only if clear and convincing evidence establishes that the “continued custody of the
10 child by the parent or Indian custodian is likely to result in serious emotional or physical
11 damage to the child.” 25 U.S.C. § 1912(e). Moreover, to ensure that no child is
12 wrongfully separated permanently from her family, Congress requires that grounds for
13 terminating the parent-child relationship of Indian children be proven beyond a
14 reasonable doubt. *Id.* § 1912(f). This reasonable-doubt standard is consistent with the
15 Supreme Court’s post-ICWA recognition that “[b]efore a State may sever completely
16 and irrevocably the rights of parents in their natural child,” the Constitution “requires
17 that the State support its allegations by *at least* clear and convincing evidence.”
18 *Santosky*, 455 U.S. at 747-748 (emphasis added).

19 Plaintiffs contend that Indian children are denied their rights to equal protection
20 of the law because Congress required more than the constitutional minimum to
21 terminate their parents’ rights, whereas Arizona hews to the constitutional floor. *See*
22 *Compl.* ¶ 77. But other states share Congress’s judgment in ICWA—and *amici*’s
23 judgment from decades of experience—that the best interests of children are served by a
24 termination standard exceeding the constitutional minimum. *See, e.g., In re Adam R.*,
25 992 A.2d 697, 700 (N.H. 2010) (reasonable doubt standard to terminate parental rights
26 in New Hampshire).

27 Finally, ICWA ensures that children’s best interests are served even-handedly by
28 enforcing a uniformly applicable presumption in favor of maintaining parent-child ties,

1 rather than allowing unguided judicial decisionmaking that risks infusing the best-
2 interests-of-the-child standard with case-specific biases. *See generally* 25 U.S.C.
3 § 1912(f); *see also* H.R. Rep. No. 95-1386, 95th Cong., 2d Sess. 19 (1978) (the purpose
4 of ICWA is to serve the best interests of children, but without structure the best interest
5 standard “is vague, at best”). In mandating a strong showing of parental unfitness in
6 any involuntary termination proceeding and requiring active efforts to support existing
7 child-parent relationships before they are severed, 25 U.S.C. § 1912(d)-(f), ICWA’s
8 substantive standards are consistent with *amici*’s field-tested experience regarding how
9 best to achieve the most favorable outcomes for vulnerable children and families.³

10 **II. ICWA EMBODIES THE BEST PRACTICES IN CHILD WELFARE OF** 11 **ENCOURAGING KINSHIP AND COMMUNITY PLACEMENTS**

12 Beyond its strong protections for preserving and supporting a child’s
13 relationships with her parents, ICWA implements the best practices in child welfare with
14 respect to alternative placements for children: extended family first and foremost, and
15 placements within a child’s broader community as a secondary option.

16 If removal from her parents is unavoidable, the first choice in child welfare
17 practice for an alternative placement is the child’s extended family, for both temporary
18 and adoptive placements. *See* National Council of Juvenile and Family Court Judges,
19 *supra*, at 10–11 (2000) (“An appropriate relative who is willing to provide care is
20 almost always a preferable caretaker to a non-relative.”); Adoption Standards § 1.10
21 (“The first option considered for children whose parents cannot care for them should be
22 placement with extended family members when a careful assessment clearly indicates
23

24 ³ Similarly, in the case of voluntary relinquishments, ICWA ensures that consents are
25 fully voluntary, prohibits relinquishment for 10 days after birth, and provides for a
26 period during which revocation of consent can occur. 25 U.S.C. § 1913. Organizations
27 that promote best practices for adoption similarly recommend “waiting periods of at
28 least several days after childbirth before signing relinquishments and adequate
revocation periods during which birthparents can change their minds.” Evan B.
Donaldson Adoption Institute, *Safeguarding the Rights and Well-Being of the*
Birthparents in the Adoption Process, at 5 (2007).

1 the ability, willingness, and capacity of those individuals to care for the children.”);
2 CWLA, STANDARDS OF EXCELLENCE FOR KINSHIP CARE SERVICES § 1.4 (“Kinship
3 Care Standards”) (“Kinship care ... should be the first option considered and assessed
4 when a child is placed in the custody of a child welfare agency....”).

5 Placement within the extended family is advised because kinship care
6 “maximizes a child’s connection to his or her family.” Adoption Standards § 8.24; *see*
7 Tiffany Conway & Rutledge Hutson, *Is Kinship Care Good for Kids?* 2 (2007) (“[T]he
8 research tells us that many children who cannot live with their parents benefit from
9 living with grandparents and other family members.”) (emphasis omitted). Children in
10 temporary kinship care are less likely to experience multiple placements and more likely
11 to be successfully reunified with their parents, among other beneficial outcomes. *See*
12 Kinship Care Services, at 5. In addition, “[a]doption by kinship caregivers can have
13 many advantages for children who cannot be reunited with their parents.” Adoption
14 Standards § 4.23.⁴ Recognizing the benefits of extended family placements, many
15 states have employed the “Family Finding model,” which calls for searching intensively
16 to identify family members and other adults close to a child in foster care, and involving
17 those adults in developing and carrying out a permanency plan for the child. *See* Sharon
18 Vandivere & Karin Malm, *Family Finding Evaluations: A Summary of Recent Findings*
19 (Child Trends Publication # 2015-01), Jan. 2015.

20 The benefits of extended family placements are not limited to biological
21 relatives, but extend to placements within a child’s larger community. Child welfare
22 agencies consider “members of [a child’s] tribes or clans, godparents, stepparents, or
23 other adults who have a kinship bond with the child” as potential resources for kinship
24 care. Kinship Care Standards § 1.1. For all children, best practices dictate that child
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26 ⁴ *See also* Marc A. Winokur, *et al.*, *Matched Comparison of Children in Kinship Care*
27 *and Foster Care on Child Welfare Outcomes*, 89 FAMILIES IN SOC’Y: J. CONTEMP. SOC.
28 SCIENCES 338, 344-345 (2008) (reporting better outcomes for children in kinship care
on several metrics).

1 welfare agencies should assess a child’s “family friends ... and neighbors,” along with
2 members of a child’s tribe or clan where applicable, “to determine their willingness and
3 ability to provide care and protection before seeking a nonrelative placement.” *Id.*
4 § 2.8.

5 Preserving a child’s ties with this extended network of adults who can provide
6 family-like relationships is important for all children, but may be of special importance
7 to children from Native American communities. In those communities, the concept of
8 family often includes other important relationships with adults who may be considered
9 “aunts,” “uncles,” or “grandparents,” regardless of bloodlines. See Allison Barlow &
10 John T. Walkup, *The First Americans Have Much to Teach Us*, 47 J. AM. ACAD. CHILD
11 ADOLESCENT PSYCHIATRY 843, 844 (2008). In fact, one of Congress’s “particular
12 points of concern” in enacting ICWA “was the failure of non-Indian child welfare
13 workers to understand the role of the extended family in Indian society.” *Mississippi*
14 *Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 35 n.4 (1989).

15 Furthermore, as with all decision-making regarding whether to remove children
16 from their families (*see p. 6, supra*), the best practice is to structure choices about
17 temporary or adoptive placements around a set of objective criteria, rather than leaving
18 decisionmaking to an unbridled best-interests-of-the-child standard. That standard is
19 vague; decisions based only on that standard are supported not by evidence-based
20 practices but instead by “limited science.” Robert E. Emery *et al.*, *A Critical*
21 *Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6
22 PSYCHOLOGICAL SCI. IN THE PUB. INTEREST 1 (2005). The interests of children are
23 better served when laws governing their placement in foster care and adoptive homes
24 are grounded in objective principles designed to guide and constrain judicial decision-
25 making—including preferences for a child’s extended family and placement within
26 family-like, community-based relationships.

27 ICWA fully implements these best practices by making “a member of the child’s
28 extended family” the first-priority placement when it is necessary either to place the

1 child in foster care temporarily or to terminate parental relationships. 25 U.S.C.
2 § 1915(a), (b). Consistent with the critical importance of supporting or maintaining a
3 child's ties with an extended family beyond blood relatives and a child's larger social
4 network, ICWA provides for temporary or adoptive placement within a child's tribe as a
5 secondary alternative. *Id.* In all cases, a court can make a different placement if "good
6 cause" so requires. *Id.*

7 Plaintiffs allege that these placement preferences discriminate against Indian
8 children because they do not "look to the interests-of-the-child factors that state courts
9 have traditionally applied." Compl. ¶ 86. But ICWA does not elevate an invalid racial
10 preference above the best interests of the child, as plaintiffs allege. Congress's
11 determination to guide placement decisions by substantive (but rebuttable)
12 presumptions of the proper placement, consistent with child-welfare best practices, is
13 precisely what best serves the interests of all children in *amici's* judgment.

14 Plaintiffs further decry engagement of a child's tribal community through the
15 "active efforts" provision, which in their view "single[s] out and afford[s] separate,
16 unequal treatment" that harms Indian children. Compl. ¶¶ 68-69; *see* 80 Fed. Reg.
17 10146, 10150 (Feb. 25, 2015) (active efforts "are intended primarily to maintain and
18 reunite an Indian child with his or her family *or tribal community*") (emphasis added).
19 To the contrary, this provision embodies the child welfare best practice of engaging a
20 child's community in support of family preservation efforts. *See* CWLA, Services
21 Standards 136 ("Although parents have the primary responsibility for ensuring their
22 child's safety and well-being, they need ongoing support from the community to
23 succeed."). And it makes sense to engage a child's tribal community in seeking to
24 preserve the child's family and broader familial network. Engaging a child's tribe is
25 more likely to lead to the identification of additional resources that can help support the
26 family, or a family member who can care for the child, if necessary—all of which

1 furthers, not hinders, the child’s well-being.⁵

2 It is also consistent with the highest standards of child welfare for the Bureau’s
3 implementing guidelines to provide that a child’s ordinary bonding with a temporary
4 non-family custodian does not constitute good cause for deviating from ICWA’s
5 placement preferences when that bonding stems from a placement that does not comply
6 with ICWA. *See* 80 Fed. Reg. at 10,158. Contrary to plaintiffs’ contention, this does
7 not impermissibly “force a child ... to sever existing relationships in order to create new
8 racially-conforming ones.” Compl. ¶ 87. *Amici* recognize that it can be difficult for
9 children to shift from one custody arrangement to another. But the concepts of bonding
10 and attachment have serious limitations as applied in an unguided best-interests-of-the-
11 child analysis. *See* David E. Arrendondo & Lenord P. Edwards, *Attachment, Bonding,*
12 *and Reciprocal Connectedness*, 2 J. CTR. FOR FAM. CHILD. & CTS. 109, 110-111 (2000)
13 (discussing the ways that bonding and attachment theory “may mislead courts”). The
14 way to limit any disruption, moreover, is to mandate careful adherence to procedures
15 that minimize errors in temporary or initial custodial placements. It is not a best
16 practice to “reward those who obtain custody, whether lawfully or otherwise, and
17 maintain it during any ensuing (and protracted) litigation,” *Mississippi Band of*
18 *Choctaw Indians*, 490 U.S. at 54 (citation omitted), by treating relationships established

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22 ⁵ In enacting ICWA’s placement preferences, Congress was responding to evidence that
23 very few adoptive placements were being made within the tribal community. *See, e.g.,*
24 *Problems that American Indian Families Face in Raising Their Children and How*
25 *These Problems are Affected by Federal Action or Inaction: Hearings Before the*
26 *Subcomm. on Indian Affairs, S. Comm. on Interior and Insular Affairs*, 93rd Cong. 61
27 (1974) (statement of Dr. Carl Mindell) (“Once you’re at the point of thinking about
28 adoption ... welfare agencies are not making adequate use of the Indian communities
themselves. They tend to look elsewhere for adoption type of homes.”); *Indian Child*
Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Committee on Indian
Affairs, 95th Cong. 271 (testimony of Virgil Gunn) (of 136 adoptions of Colville
children in last 10 years, only 20 were with Indian families).

1 by temporary, non-ICWA-compliant placements as good cause to depart from ICWA's
2 mandates.⁶

3 **III. CONGRESS HAS ENCOURAGED STATES TO ADOPT CHILD** 4 **WELFARE PRACTICES CONSISTENT WITH ICWA FOR ALL** 5 **CHILDREN**

6 As described above, ICWA embodies and gives effect to the best practices, long
7 endorsed by *amici*, governing the most effective and protective child welfare procedures
8 and decisionmaking for all children and families. Congress confined and tailored its
9 judgment in ICWA to Indian children because Indian affairs is one of the rare areas in
10 which Congress exercises direct legislative authority over family law, which is
11 otherwise broadly governed by the States. Nonetheless, since ICWA's enactment,
12 Congress has used federal spending to encourage states to adopt child welfare practices
13 similar to the standards embodied in ICWA.

14 For example, the Adoption Assistance and Child Welfare Act of 1980 hinges
15 federal matching funds for foster care expenditures on state law's provision that, in each
16 case, "reasonable efforts will be made (A) prior to the placement of a child in foster
17 care, to prevent or eliminate the need for removal of the child from his home, and (B) to
18 make it possible for the child to return to his home." Pub. L. No. 96-272 § 101, 94 Stat.
19 501, 503 (1980); *compare* ICWA, 25 U.S.C. § 1912(d) (requiring "active efforts"). The
20 Adoption and Safe Families Act of 1997 amended the "reasonable efforts" standard by
21 providing some aggravated circumstances in which it would not apply, but otherwise

22 ⁶ State courts have also long recognized that the bonding that may occur in temporary
23 placements should not disrupt the overall goals of the child welfare system of
24 reunification or extended family placement. *See In re Michael B.*, 604 N.E.2d 122, 130
25 (N.Y. 1992) ("To use the period during which a child lives with a foster family, and
26 emotional ties that naturally eventuate, as a ground for comparing the biological parent
27 with the foster parent undermines the very objective of voluntary foster care[.]"); *In re*
28 *Halloway*, 732 P.2d 962, 971-972 (Utah 1986) ("The adoptive parents argue that we
should consider the bonding that has taken place between themselves and Jeremiah in
reaching a decision in this matter. ... Such a standard would reward those who obtain
custody ... and maintain it during any ensuing (and protracted) litigation.").

1 reaffirmed Congress’s commitment that “reasonable efforts shall be made to preserve
2 and reunify families” before children are permanently placed elsewhere. 42 U.S.C.
3 § 671(a)(15). Although the “reasonable efforts” and “active efforts” standards are
4 different, *see* 80 Fed. Reg. at 10151, that difference merely reflects longstanding
5 principles of federalism. Given the primary role of states in governing family
6 relationships, it makes sense for Congress to leave them discretion whether to hew to
7 the minimum “reasonable efforts” standard or adopt the higher “active efforts” standard.
8 Moreover, Congress has provided grants to states to fund the kinds of services that make
9 up “active efforts” and are critical for supporting vulnerable families, such as
10 community-based family support and preservation services, including “preplacement
11 preventive services.” 42 U.S.C. § 629a(a)(1)(B).

12 In addition, for many years, Congress has recognized the importance of relying
13 on relatives and extended kin as preferred caregivers when children are unable to be
14 raised by their parents. In order to obtain federal matching funds, a state must “consider
15 giving preference to an adult relative over a non-related caregiver when determining a
16 placement for a child, provided that the relative caregiver meets all relevant State child
17 protection standards,” and must exercise “due diligence” to identify, locate, and notify
18 relatives when children enter the foster care system. 42 U.S.C. § 671(a)(19), (29); *see*
19 *also Miller v. Youakim*, 440 U.S. 125, 142 n.21 (1979) (noting “Congress’
20 determination that homes of parents and relatives provide the most suitable environment
21 for children”). Congress has further recognized that placement within the community is
22 best, requiring states to prioritize placement “in close proximity to the parents’ home,”
23 among other requirements. 42 U.S.C. § 675(5)(A).

24 * * * * *

25 ICWA does not represent a departure from Congress’s judgment about the best
26 interests of all children. Rather, ICWA is the full expression of that judgment in a
27 comprehensive system for child welfare that embodies the best practices in the field.
28 Congress chose the pathway and practices that are best for all children; ICWA’s

1 legislative reach was more limited because the scope of Congress’s direct legislative
2 authority over child welfare matters is limited. For that reason, Plaintiffs’ effort
3 (Compl. ¶¶ 3, 91-95, 107) to portray ICWA as imposing some special disadvantage on
4 Indian children—predicated on their fundamentally flawed conception of child-welfare
5 best practices and ICWA’s sound application of those practices—is flatly wrong.

6 **CONCLUSION**

7 This Court should grant the motions to dismiss.

8 Respectfully submitted,

9 By: /s/ James E. Tysse

10 Pratik A. Shah

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2015, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and service to counsel of record in this proceeding.

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27 I hereby certify that on October 23, 2015, I arranged for a copy of the foregoing
28 to be hand-delivered on the following day to:

29 Honorable Neil V. Wake
30 United States District Court
31 Sandra Day O'Connor U.S. Courthouse, Suite 524
32 401 West Washington Street, SPC 52
33 Phoenix, AZ 85003-2154

1 Dated this 23rd day of October, 2015

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/s/James E. Tysse_____

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APPENDIX

1
2 Casey Family Programs is the nation's largest operating foundation focused
3 entirely on foster care and improving the child welfare system. Casey Family Programs
4 has provided direct family services to children and families involved in public and tribal
5 foster care systems for more than 40 years. It also works to improve the child welfare
6 system by consulting with child welfare agencies and providing research and education
7 to policymakers about best practices in the child welfare area. The Indian Child Welfare
8 Act both embodies and has served as a model for the child welfare principles and
9 policies that are critical to Casey Family Programs' work, and Casey Family Programs
10 has filed other amicus briefs related to the interpretation and application of the Act. *See,*
11 *e.g., Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

12 The Annie E. Casey Foundation is a private charitable organization dedicated to
13 improving the well-being of our nation's most vulnerable children. The Foundation
14 collaborates with public agencies, nonprofit organizations, policymakers and
15 community leaders to develop innovative, cost-effective solutions for challenging social
16 problems. For more than 60 years, the Foundation has supported programs and
17 initiatives to secure and sustain lifelong family connections for children and youth in
18 foster care, and for 36 years, the Foundation provided direct foster care and related child
19 welfare services in New England and Maryland. This work, along with the Foundation's
20 system improvement initiatives, direct consulting work with numerous public child
21 welfare agencies, and grantmaking, has contributed to significant and measurable
22 transformations in these systems and helped to improve outcomes for children and their
23 families. Federal policies such as the Indian Child Welfare Act set substantive and
24 procedural standards that are central to the Foundation's goal of ensuring that child
25 welfare systems operate effectively and efficiently to strengthen families.

26 The Center for the Study of Social Policy (CSSP) is a national, nonprofit
27 organization, headquartered in Washington, D.C., with offices in New York and Los
28 Angeles, which advances innovative ideas and public policies to secure equal

1 opportunities and better futures for all children and families, especially those most often
2 left behind. For more than 30 years, CSSP has supported elected officials, public
3 administrators, families, and neighborhood residents to take the actions they need to
4 ensure that children can thrive. CSSP's current work focuses on improving child
5 welfare systems, with a particular focus on racial equity; improving the healthy sexual
6 and gender identity development for all children and youth in the child welfare system;
7 accelerating the development of effective, integrated, local early childhood systems;
8 ensuring the optimal development for children and youth through strategies to develop
9 protective factors for young children and older youth; and providing local leaders with
10 the tools needed to transform neighborhoods into healthy communities.

11 Established in 1920, the Child Welfare League of America ("CWLA") is the
12 nation's oldest and largest membership-based child welfare organization. CWLA is a
13 coalition of public and private agencies serving vulnerable children and families,
14 including those in tribal communities, by advancing standards of excellence,
15 accreditation, and the best research-based practices with respect to child welfare work.
16 In particular, CWLA is recognized nationally as the standard-setter for child welfare
17 services and publishes thirteen "Standards of Excellence" as a means to achieve
18 professionalism and uniformity in the administration of child welfare services, including
19 in particular Standards of Excellence for Adoption Services. CWLA adheres to and
20 supports ICWA in its Standards of Excellence. CWLA's Standards also influence and
21 improve child welfare practices throughout North America, as well as inform the
22 Standards of Accreditation for agency administration, management, and service delivery
23 for accredited child welfare agencies.

24 The Children's Defense Fund ("CDF") Leave No Child Behind® mission is to
25 ensure every child a Healthy Start, a Head Start, a Fair Start, a Safe Start and a Moral
26 Start in life and successful passage to adulthood with the help of caring families and
27 communities. CDF has worked relentlessly for more than four decades to ensure a level
28 playing field for all children and to keep them out of the Cradle to Prison Pipeline®.

1 CDF champions policies, programs and practices that lift children out of poverty, ensure
2 their access to health care, offer them quality early childhood experiences and a quality
3 education, protect children from abuse and neglect and delinquency, and keep children
4 safely out of foster care and the juvenile justice system. CDF provides a strong,
5 effective and independent voice for all children of America and pays particular attention
6 to the needs of poor children, children of color and those with disabilities. One of
7 CDF's earliest reports, *Children Without Homes: An Examination of Public*
8 *Responsibility to Children in Out of Home Care*, identified, among other findings, a
9 pervasive, implicit anti-family bias that often shapes decisions about children at risk of
10 removal from their families or in out-of home care. CDF works collaboratively at the
11 federal, state and local levels to achieve policy and practice reforms to keep children
12 safely with their families, and only when that is not possible, to place children in the
13 most family-like setting appropriate and within reasonable proximity to their families
14 and community, to seek safe reunification with the support of needed services for the
15 child and the parents in a timely fashion, and only when reunification is not appropriate,
16 to move children promptly to new permanent families through adoption or kinship
17 guardianship.

18 The Donaldson Adoption Institute is a national not-for-profit organization whose
19 mission is to provide leadership that improves adoption laws, policies, and practices in
20 order to better the lives of everyone touched by adoption. To achieve those goals, the
21 Institute conducts and synthesizes research, offers education to inform public opinion,
22 promotes ethical practices and legal reforms, and works to translate policy into action.

23 The First Focus Campaign for Children is a bipartisan organization advocating
24 for legislative change in Congress to ensure children and families are a priority in
25 federal policy and budget decisions. The organization is dedicated to the long-term goal
26 of substantially reducing the number of children entering foster care, and working to
27 ensure that the existing system of care protects children and adequately meets the needs
28 of families in the child welfare system. First Focus is especially concerned with

1 increasing federal investment in prevention efforts and providing support and services
2 for at-risk families to ensure that they avoid entering the child welfare system in the first
3 place. First Focus fully supports the Indian Child Welfare Act, and views it as a model
4 for child welfare principles and policies in the field.

5 FosterClub is the national network of young people in foster care. FosterClub's
6 mission is to lead the efforts of young people in and from foster care to become
7 connected, educated, inspired, and represented so that they can realize their personal
8 potential and contribute to a better life for their peers. For over a decade, FosterClub has
9 provided foster youth a place to turn for advice, information, and hope. With over
10 32,000 members, FosterClub elevates the collective voice of young people who have
11 experienced foster care, including Native American youth involved with the child
12 welfare system. FosterClub's young leaders engage and inform policymakers,
13 practitioners, and the public about the critical needs of children and youth through first-
14 hand stories about what life is like in the foster care system.

15 Generations United's mission is to improve the lives of children, youth, and older
16 adults through intergenerational collaboration, public policies, and programs for the
17 enduring benefit of all. For nearly three decades, Generations United has been the
18 catalyst for policies and practices stimulating cooperation and collaboration among
19 generations, evoking the vibrancy, energy, and sheer productivity that result when
20 people of all ages come together. Generations United believes that we can only be
21 successful in the face of our complex future if generational diversity is regarded as a
22 national asset and fully leveraged. Generations United's National Center on
23 Grandfamilies is a leading voice for issues affecting families headed by grandparents
24 and other relatives. Through the center, Generations United leads an advisory group of
25 organizations, caregivers and youth that sets the national agenda to advance public will
26 in support of these families. Center staff conduct federal advocacy, provide technical
27 assistance to state level practitioners and advocates, and train grandfamilies to advocates
28 for themselves. The Center raises awareness about the strengths and needs of the

1 families through media outreach, weekly communications, and awareness raising
2 events. It offers a broad range of guides, fact sheets, and tools for grandfamilies which
3 cover issues from educational and health care access to financial and legal supports.

4 The National Alliance of Children’s Trust and Prevention Funds is a national
5 leader in preventing child abuse and neglect and strengthening families. Its mission
6 includes efforts to promote and support a system of services, laws, practices and
7 attitudes that supports families by enabling them to provide their children with safe,
8 healthy, and nurturing childhoods. It is the only national organization that supports all
9 aspects of the work of state children’s trust and prevention funds, which are special
10 funds established in state law, funded by a variety of state revenue sources or donations,
11 and dedicated to child welfare programs. The Alliance provides training, technical
12 assistance, and publications that support effective child welfare practices throughout the
13 Country, including a 14-hour online training in how to help families build protective
14 factors that have been shown to increase the health and well-being of children and
15 families.

16 The National Center on Adoption and Permanency (“NCAP”) is a unique
17 nonprofit organization that provides a full range of multidisciplinary services, resources
18 and information relating to adoption, foster care and child welfare. NCAP’s mission is
19 to reshape permanency-related policy and practice in the U.S. so that they progress
20 beyond their primary, traditional goal of ensuring that all children live in safe,
21 permanent, loving homes—with their families of origin when possible, and in new
22 families when necessary—to a new paradigm with a more-vital objective: enabling
23 those children and their families to succeed.

24 The North American Council on Adoptable Children (“NACAC”) was founded
25 in 1974 by adoptive parents to meet the needs of children waiting for permanent
26 families and the families who adopt them. NACAC promotes and supports permanent
27 families for children and youth in the United States and Canada, especially those in
28 foster care and those who have special needs. Dedicated to the belief that every child

1 deserves a permanent, loving family, NACAC's activities include advocacy, parent and
2 youth leadership development, adoption support, and education and information
3 sharing. NACAC produces conferences, position statements, articles, and publications
4 highlighting best practices in child welfare and adoption. NACAC fully supports
5 ICWA and several of NACAC's position statements highlight the practices codified in
6 ICWA as best practices for all children and youth.

7 The W. Haywood Burns Institute works to improve the life outcomes of youth of
8 color and poor youth in public child serving systems. The Burns Institute facilitates a
9 collaborative environment where community and system stakeholders strategically use
10 data to reduce racial and ethnic disparities and supports capacity building of families
11 and organizations to redirect resources to community-based interventions, thus reducing
12 system involvement.

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