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California

AB 3176 New California Legislation Implementing
the Indian Child Welfare Act:

Dependency Online Guide

JOB AID

November 2018

On September 27, 2018 the Governor renewed California's commitment to the Indian Child Welfare Act by signing [AB 3176 Indian Children](#).

This information is intended for practitioners and judicial officers with knowledge of and experience with the requirements of the Indian Child Welfare Act (ICWA) to inform them of the requirements of AB 3176 enacted by the California legislature to implement in California law the requirements of federal regulations governing court proceedings covered by ICWA (25 U.S.C. § 1901 et seq.). This Job Aid is not intended to be a complete analysis of AB 3176. The purpose of this document is to alert courts to the potential need for changes to court practice and procedure to comply with the requirements of AB 3176 beginning January 1, 2019.

When do the new regulations apply?

The new regulations apply to "proceedings" initiated after December 12, 2016. "Child custody proceeding" as defined includes four separate phases of a case that may all take place within a single ongoing case: the foster care placement, termination of parental rights, preadoptive placement, and adoptive placement phases of a case are all considered separate "proceedings" for ICWA purposes. (See 25 U.S.C. § 1903(1); 25 C.F.R. §§ 23.143 and 23.2 (1996).)¹ Thus, for a case filed *on or before* December 12, 2016, the new regulations apply as long as the child's adoption is not yet final when the case moves from one of the four separate proceedings defined by ICWA. When a case procedurally moves from the foster care placement phase (reunification) to the termination of parental rights (TPR) phase or from TPR to adoptive placement, the new regulations apply to the new phase of the case because it is considered a new proceeding for ICWA purposes. The new regulations may pose a challenge for courts in determining when a new proceeding has started for ICWA purposes within an ongoing case.

¹The definition of child custody proceeding found in 25 CFR 23.2 specifies that "[t]here may be several child-custody proceedings involving any given Indian child. Within each child-custody proceeding, there may be several hearings...."

How do the new requirements relate to California law and practice?

The new regulations are binding on state courts as the minimum federal standard that must be followed. For example, 25 Code of Federal Regulations part 23.106 (2016) confirms section 1921 of the Act itself, that where applicable state or other federal law provides a higher standard of protection, the higher standard shall apply.

Applying ICWA

The new regulations require ICWA inquiry at the beginning of each proceeding (25 C.F.R. § 23.107 (2016)), not each case. If there is “reason to know” that the child is an Indian child, but the status is not confirmed, the new regulations require the court to obtain evidence from the agency on the efforts made to determine the child’s status (*id.* at § 23.107(b)(1)), and “[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an “Indian child.” (*Id.* at § 23.107(b)(2).) This means that pending confirmation of the child’s status, all ICWA requirements must be met.

Emergency Removals (Detentions)

As a general rule, an Indian child cannot be removed from parental custody without compliance with ICWA requirements. The only exception is for “emergency proceedings” (25 U.S.C. 1922; see also chart at 81 Fed.Reg. 38868–38869 (June 14, 2016), attached.)

The new regulations limit the emergency removal power whenever there is “reason to know” that the child involved is an “Indian child” (25 C.F.R. § 23.113 (2016)). The petition seeking emergency removal must contain specific factual information and allegations including the basis for belief that the child is at risk of imminent physical damage or harm, interactions with the tribe, and efforts made to assist the parents to have the child returned. (*Id.* at § 23.113(d).)

The court must make a specific finding that the removal or placement is necessary to prevent imminent physical damage or harm to the child. (*Id.* at § 23.113(b)(1).)

As a general rule, an emergency removal cannot last more than 30 days without compliance with ICWA requirements unless the court makes certain findings. (*Id.* at § 23.113(e).) This means that the court must generally consider evidence of active efforts, testimony of a qualified expert witness, and evidence of whether the placement follows the placement preferences at a hearing that is within 30 days of the date the child was removed from the parents’ physical custody by the agency.

Jurisdiction

California courts may not have jurisdiction over proceedings (other than emergency proceedings) involving an Indian child if the child resides or is domiciled within the reservation of a tribe that exercises exclusive jurisdiction over child custody matters or if the child is already a ward of a tribal court. In a situation where the court lacks jurisdiction, 25 Code of Federal Regulations part 23.110 clarifies that the court must expeditiously inform the tribal court of the matter, dismiss the state court proceeding, and provide the tribal court with all information regarding the proceeding including, but not limited to, the pleadings and any court records.

Active Efforts

The new regulations (25 Code of Federal Regulations part 23.2) now define active efforts as “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. Where an agency is involved in the child-custody proceeding, active efforts must involve assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan...” and describes 11 examples of active efforts. Courts should ensure that when a case involves an Indian child, case plans and services meet these new active efforts requirements.

Qualified Expert Witness

Regarding witnesses, 25 Code of Federal Regulations parts 23.121 and 23.122 discuss the requirements for qualified expert witness testimony as well as who can serve as a qualified expert witness.

Placement Preferences

Regarding placement, 25 Code of Federal Regulations parts 23.129 through 23.132 address placement preferences for an Indian child. One important clarification is that the issue of placement must be reassessed each time a change in placement is required and at each separate phase of the proceedings. Thus, the court must reassess whether the child’s placement complies with the placement preferences when a case moves through each of the four ICWA phases: foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.

The new regulations place limitations on the factors that the court can consider in making a determination that there is “good cause” to deviate from the placement preferences. In particular, the court may not depart from the placement preferences based on the socioeconomic status of any placement relative to another placement (25 C.F.R. § 23.132 (d) (2016)), nor may the court find good cause to deviate from the placement preferences “based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.” (*Id.* at § 23.132(e).)

Transfers to Tribal Court

Transfers to tribal court are discussed under 25 Code of Federal Regulations parts 23.115 through 23.119. Particular issues to note are that the right to seek a transfer to tribal court may be exercised at any time, but that right attaches separately at the foster care placement and termination of parental rights phases of the case. (*Id.* at § 23.115.) Further, the regulations require that the tribal court be promptly notified of the

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petition to transfer (*Id.* at § 23.116), all parties have an opportunity to be heard, any “good cause” reasons to deny transfer are stated on the record, and the court’s decision be on the record or in a written order. (*Id.* at § 23.118.)

The new regulations list five factors that the court must not consider in determining whether “good cause” exists not to transfer jurisdiction: (1) whether the proceedings are at an advanced stage if the Indian child’s parent, Indian custodian, or tribe only recently received notice of the proceedings; (2) whether there was an earlier “proceeding” (i.e., foster care phase of the case) at which no petition to transfer was filed; (3) whether the transfer could affect the child’s placement; (4) the child’s cultural connections with the tribe; and (5) the socioeconomic conditions or any negative perception of tribal social services or judicial system. (*Id.* at § 23.118.)

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Additional resources:

CFCC Tribal/State Programs <http://www.courts.ca.gov/3067.htm>

Bureau of Indian Affairs

<http://www.bia.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm>

Assembly Bill No. 3176

CHAPTER 833

An act to amend Sections 212.5, 224, 224.1, 224.6, 290.1, 290.2, 291, 292, 293, 294, 295, 297, 305.5, 305.6, 306, 309, 315, 319, 332, 352, 354, 361, 361.2, 361.31, 361.7, 366, 366.26, 381, and 16507.4 of, to add Section 319.4 to, and to repeal and add Sections 224.2 and 224.3 of, the Welfare and Institutions Code, relating to Indian children.

[Approved by Governor September 27, 2018. Filed with
Secretary of State September 27, 2018.]

legislative counsel's digest

AB 3176, Waldron. Indian children.

(1) Existing federal law, the Indian Child Welfare Act of 1978 (ICWA), governs the proceedings for determining the placement of an Indian child when that child is removed from the custody of his or her parent or guardian. Existing law specifies that the state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices in accordance with ICWA. Existing law requires a court in all Indian child custody proceedings to, among other things, comply with ICWA. Under existing law, a determination by an Indian tribe that an unmarried person who is under 18 years of age, is either a member of an Indian tribe, or is eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe, constitutes a significant political affiliation with the tribe and requires application of ICWA to the proceedings.

Under existing law, a court, a county welfare department, and the probation department have an affirmative and continuing duty to inquire as to whether a child is or may be an Indian child in all dependency proceedings and in any juvenile wardship proceeding if the child is at risk of entering foster care or is in foster care. Under existing law, if a court, social worker, or probation officer knows or has reason to know that an Indian child is involved in a custody proceeding, a notice meeting specified requirements is required to be sent to the minor's parents or legal guardian, Indian custodian, and the minor's tribe. Existing law also requires the notice to be sent to all tribes of which the child may be a member or eligible for membership, as provided.

In accordance with federal law, this bill would revise and recast those provisions. Among other things, the bill would revise the specific steps a social worker, probation officer, or court is required to take in making an inquiry of a child's possible status as an Indian child. The bill would also revise the various notice requirements that are mandated during an Indian child custody proceeding, including a proceeding for an emergency removal of an Indian child from the custody of his or her parents or Indian custodian.

The bill would require the State Department of Social Services to adopt any regulations necessary to implement these provisions, and would require the Judicial Council to adopt any forms or rules of court necessary to implement these provisions. The bill would make other conforming changes.

(2) This bill would incorporate additional changes to Section 212.5 of the Welfare and Institutions Code proposed by AB 1930 to be operative only if this bill and AB 1930 are enacted and this bill is enacted last.

(3) This bill would incorporate additional changes to Section 361.2 of the Welfare and Institutions Code proposed by AB 1930 to be operative only if this bill and AB 1930 are enacted and this bill is enacted last.

(4) By increasing the duties on county welfare departments, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 212.5 of the Welfare and Institutions Code is amended to read:

212.5. Unless otherwise provided by law, a document in a juvenile court matter may be filed and served electronically as prescribed by Section 1010.6 of the Code of Civil Procedure, under the following conditions:

(a) Electronic service is authorized only if the county and the court permit electronic service.

(b) (1) On or before December 31, 2018, electronic service on a party or other person is permitted only if the party or other person has consented to accept electronic service in that specific action. A party or other person may subsequently withdraw its consent to electronic service.

(2) On or after January 1, 2019, electronic service on a party or other person is permitted only if the party or other person has expressly consented, as provided in Section 1010.6 of the Code of Civil Procedure. A party or other person may subsequently withdraw its consent to electronic service by completing the appropriate Judicial Council form.

(c) Consent, or the withdrawal of consent, to receive electronic service may be completed by a party or other person entitled to service, or that person's attorney.

(d) Electronic service shall be provided in the following manner:

(1) Electronic service is not permitted on any party or person who is under 10 years of age.

(2) Electronic service is not permitted on any party or person who is between 10 years of age and 15 years of age without the express consent of the minor and the minor's attorney.

(3) Electronic service shall be permitted on any party or person who is 16 to 18 years of age only if the minor, after consultation with his or her attorney, consents. By January 1, 2019, the Judicial Council shall develop a rule of court on the duties of the minor's attorney during the required consultation.

(4) Electronic service of psychological or medical documentation related to a minor shall not be permitted, other than the summary required pursuant to Section 16010 when included as part of a required report to the court.

(e) In the following matters, the party or other person shall be served by both electronic means and by other means specified by law if the document to be served is one of the following:

(1) A notice of hearing or an appellate advisement issued pursuant to subparagraph (A) of paragraph (3) of subdivision (l) of Section 366.26 for a hearing at which a social worker is recommending the termination of parental rights.

(2) A citation issued pursuant to Section 661.

(3) A notice of hearing pursuant to subdivision (d) of Section 777.

(f) If it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, and the hearing may culminate in an order for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement as described in paragraph (1) of subdivision (d) of Section 224.1, service shall be made pursuant to Section 224.3.

(g) Electronic service and electronic filing shall be conducted in a manner that preserves and ensures the confidentiality of records by encryption.

(h) The requirements of this section shall be consistent with Section 1010.6 of the Code of Civil Procedure and rules of court adopted by the Judicial Council pursuant to that section.

SEC. 1.5. Section 212.5 of the Welfare and Institutions Code is amended to read:

212.5. (a) Unless otherwise provided by law, a document in a juvenile court matter may be filed and served electronically, as prescribed by Section 1010.6 of the Code of Civil Procedure, under the following conditions:

(1) Electronic service is authorized only if the county and the court permit electronic service.

(2) (A) On or before December 31, 2018, electronic service on a party or other person is permitted only if the party or other person has consented to accept electronic service in that specific action. A party or other person may subsequently withdraw its consent to electronic service.

(B) On or after January 1, 2019, electronic service on a party or other person is permitted only if the party or other person has expressly consented, as provided in Section 1010.6 of the Code of Civil Procedure. A party or other person may subsequently withdraw its consent to electronic service by completing the appropriate Judicial Council form.

(3) Consent, or the withdrawal of consent, to receive electronic service may be completed by a party or other person entitled to service, or that person's attorney.

(4) Electronic service shall be provided in the following manner:

(A) Electronic service is not permitted on any party or person who is under 10 years of age.

(B) Electronic service is not permitted on any party or person who is between 10 years of age and 15 years of age without the express consent of the minor and the minor's attorney.

(C) Electronic service shall be permitted on any party or person who is 16 to 18 years of age, inclusive, only if the minor, after consultation with his or her attorney, consents. By January 1, 2019, the Judicial Council shall develop a rule of court on the duties of the minor's attorney during the required consultation.

(D) Electronic service of psychological or medical documentation related to a minor shall not be permitted, other than the summary required pursuant to Section 16010 when included as part of a required report to the court.

(5) In the following matters, the party or other person shall be served by both electronic means and by other means specified by law if the document to be served is one of the following:

(A) A notice of hearing or an appellate advisement issued pursuant to subparagraph (A) of paragraph (3) of subdivision (l) of Section 366.26 for a hearing at which a social worker is recommending the termination of parental rights.

(B) A citation issued pursuant to Section 661.

(C) A notice of hearing pursuant to subdivision (d) of Section 777.

(6) If it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, and the hearing may culminate in an order for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement as described in paragraph (1) of subdivision (d) of Section 224.1, service shall be made pursuant to Section 224.3.

(7) Electronic service and electronic filing shall be conducted in a manner that preserves and ensures the confidentiality of records by encryption.

(8) The requirements of this section shall be consistent with Section 1010.6 of the Code of Civil Procedure and rules of court adopted by the Judicial Council pursuant to that section.

(b) This section does not preclude the use of electronic means to send information regarding the date, time, and place of a juvenile court hearing, without the need to comply with paragraphs (1) to (4), inclusive, of subdivision (a), provided that the requirement of paragraph (7) of subdivision (a) is met. However, information shared, as described in this subdivision, shall only be in addition to, and not in lieu of, any required service or notification made in accordance with any other law governing how that service or notification is provided.

SEC. 2. Section 224 of the Welfare and Institutions Code is amended to read:

224. (a) The Legislature finds and declares the following:

(1) There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has

an interest in protecting Indian children who are members or citizens of, or are eligible for membership or citizenship in, an Indian tribe. The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.) and other applicable state and federal law, designed to prevent the child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.

(2) It is in the interest of an Indian child that the child's membership or citizenship in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of an Indian child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled.

(b) In all Indian child custody proceedings, as defined in the federal Indian Child Welfare Act the court shall consider all of the findings contained in subdivision (a), strive to promote the stability and security of Indian tribes and families, comply with the federal Indian Child Welfare Act of 1978 and other applicable federal law, and seek to protect the best interest of the child. Whenever an Indian child is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of further foster care, guardianship, or adoptive placement, placement of the child shall be in accordance with the federal Indian Child Welfare Act of 1978 and other applicable state and federal law.

(c) A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member or citizen of an Indian tribe or (2) eligible for membership or citizenship in an Indian tribe and a biological child of a member or citizen of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act of 1978 and other applicable state and federal law to the proceedings.

(d) In any case in which this code or other applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child, or the Indian child's tribe, than the rights provided under the federal Indian Child Welfare Act of 1978, the court shall apply the higher standard.

(e) Any Indian child, the Indian child's tribe, or the parent or Indian custodian from whose custody the child has been removed, may petition the court to invalidate an action in an Indian child custody proceeding for foster care or guardianship placement or termination of parental rights if the action violated Section 1911, 1912, or 1913 of the federal Indian Child Welfare Act of 1978.

SEC. 3. Section 224.1 of the Welfare and Institutions Code is amended to read:

224.1. (a) As used in this division, unless the context requires otherwise, the terms “Indian,” “Indian child,” “Indian custodian,” “Indian tribe,” “reservation,” and “tribal court” shall be defined as provided in Section 1903 of the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(b) As used in connection with an Indian child custody proceeding, the term “Indian child” also means an unmarried person who is 18 years of age or over, but under 21 years of age, who is a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, and who is under the jurisdiction of the dependency court, unless that person or his or her attorney elects not to be considered an Indian child for purposes of the Indian child custody proceeding. All Indian child custody proceedings involving persons 18 years of age and older shall be conducted in a manner that respects the person’s status as a legal adult.

(c) As used in connection with an Indian child custody proceeding, the terms “extended family member” and “parent” shall be defined as provided in Section 1903 of the federal Indian Child Welfare Act.

(d) (1) “Indian child custody proceeding” means a hearing during a juvenile court proceeding brought under this code, or a proceeding under the Probate Code or the Family Code, involving an Indian child, other than an emergency proceeding under Section 319, that may culminate in one of the following outcomes:

(A) Foster care placement, which includes removal of an Indian child from his or her parent, parents, or Indian custodian for placement in a foster home, institution, or the home of a guardian or conservator, in which the parent or Indian custodian may not have the child returned upon demand, but in which parental rights have not been terminated. Foster care placement does not include an emergency placement of an Indian child pursuant to Section 309 as long as the emergency proceeding requirements set forth in Section 319 are met.

(B) Termination of parental rights, which includes any action involving an Indian child resulting in the termination of the parent-child relationship.

(C) Preadoptive placement, which includes the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to, or in lieu of, adoptive placement.

(D) Adoptive placement, which includes the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

(E) If a child is placed in foster care or another out-of-home placement as a result of a status offense, that status offense proceeding is considered an Indian child custody proceeding.

(2) “Indian child custody proceeding” does not include a voluntary foster care or guardianship placement if the parent or Indian custodian retains the right to have the child returned upon demand.

(e) (1) “Indian child’s tribe” means the Indian tribe in which an Indian child is a member or citizen or eligible for membership or citizenship, or in the case of an Indian child who is a member or citizen of, or eligible for membership or citizenship in, more than one tribe, the Indian tribe with which the Indian child has the more significant contacts.

(2) In the case of an Indian child who meets the definition of “Indian child” through more than one tribe, deference should be given to the tribe of which the Indian child is already a member or citizen, unless otherwise agreed to by the tribes.

(3) If an Indian child meets the definition of “Indian child” through more than one tribe because the child is a member or citizen of more than one tribe or the child is not a member or citizen but is eligible for membership or citizenship in more than one tribe, the court shall provide the tribes the opportunity to determine which tribe shall be designated as the Indian child’s tribe.

(4) If the tribes are able to reach an agreement, the agreed-upon tribe shall be designated as the Indian child’s tribe.

(5) If the tribes are unable to reach an agreement, the court shall designate as the Indian child’s tribe, the tribe with which the Indian child has the more significant contacts, taking into consideration all of the following:

(A) Preference of the parents for membership of the child.

(B) Length of past domicile or residence on or near the reservation of each tribe.

(C) Tribal membership of the child’s custodial parent or Indian custodian.

(D) Interest asserted by each tribe in the child custody proceeding.

(E) Whether there has been a previous adjudication with respect to the child by a court of one of the tribes.

(F) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(6) If an Indian child becomes a member of a tribe other than the one designated by the court as the Indian child’s tribe under paragraph (5), actions taken based on the court’s determination prior to the child’s becoming a tribal member continue to be valid.

(7) A determination of the Indian child’s tribe for purposes of the federal Indian Child Welfare Act does not constitute a determination for any other purpose.

(f) “Active efforts” means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family. If an agency is involved in an Indian child custody proceeding, active efforts shall involve assisting the parent, parents, or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts shall be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child’s tribe and shall be conducted in partnership with the Indian child and the Indian child’s parents, extended family members, Indian custodians, and tribe. Active

efforts shall be tailored to the facts and circumstances of the case and may include, but are not limited to, any of the following:

(1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal.

(2) Identifying appropriate services and helping the parents overcome barriers, including actively assisting the parents in obtaining those services.

(3) Identifying, notifying, and inviting representatives of the Indian child's tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues.

(4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents.

(5) Offering and employing all available and culturally appropriate family preservation strategies and facilitating the use of remedial and rehabilitative services provided by the child's tribe.

(6) Taking steps to keep siblings together whenever possible.

(7) Supporting regular visits with parents or Indian custodians in the most natural setting possible, as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child.

(8) Identifying community resources, including housing, financial assistance, transportation, mental health and substance abuse services, and peer support services, and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources.

(9) Monitoring progress and participation in services.

(10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available.

(11) Providing postreunification services and monitoring.

(g) "Assistant Secretary" means the Assistant Secretary of the Bureau of Indian Affairs.

(h) "Bureau of Indian Affairs" means the Bureau of Indian Affairs of the Department of the Interior.

(i) "Continued custody" means physical custody or legal custody or both, under any applicable tribal law or tribal custom or state law, that a parent or Indian custodian already has or had at any time in the past. The biological mother of an Indian child is deemed to have had custody of the Indian child.

(j) "Custody" means physical custody or legal custody or both, under any applicable tribal law or tribal custom or state law.

(k) "Domicile" means either of the following:

(1) For a parent, Indian custodian, or legal guardian, the place that a person has been physically present and that the person regards as home. This includes a person's true, fixed, principal, and permanent home, to

which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.

(2) For an Indian child, the domicile of the Indian child’s parents, Indian custodian, or legal guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child means the domicile of the Indian child’s custodial parent.

(l) “Emergency proceeding” for purposes of juvenile dependency proceedings is the initial petition hearing held pursuant to Section 319.

(m) “Indian foster home” means a foster home where one or more of the licensed or approved foster parents is an Indian as defined in Section 3 of the federal Indian Child Welfare Act of 1978.

(n) “Involuntary proceeding” means an Indian child custody proceeding in which the parent does not consent of his or her free will to the foster care, preadoptive, or adoptive placement, or termination of parental rights. “Involuntary proceeding” also means an Indian child custody proceeding in which the parent consents to the foster care, preadoptive, or adoptive placement, under threat of removal of the child by a state court or agency.

(o) “Status offense” means an offense that would not be considered criminal if committed by an adult, including, but not limited to, school truancy and incorrigibility.

(p) “Upon demand” means, in the case of an Indian child, the parent or Indian custodian may regain physical custody during a voluntary proceeding simply upon verbal request, without any delay, formalities, or contingencies.

(q) “Voluntary proceeding” means an Indian child custody proceeding that is not an involuntary proceeding, including, but not limited to, a proceeding for foster care, preadoptive or adoptive placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a state agency, consented to for the Indian child, or a proceeding for voluntary termination of parental rights.

SEC. 4. Section 224.2 of the Welfare and Institutions Code is repealed.

SEC. 5. Section 224.2 is added to the Welfare and Institutions Code, to read:

224.2. (a) The court, county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300, 601, or 602 may be or has been filed, is or may be an Indian child. The duty to inquire begins with the initial contact, including, but not limited to, asking the party reporting child abuse or neglect whether he or she has any information that the child may be an Indian child.

(b) If a child is placed into the temporary custody of a county welfare department pursuant to Section 306 or county probation department pursuant to Section 307, the county welfare department or county probation department has a duty to inquire whether that child is an Indian child. Inquiry includes, but is not limited to, asking the child, parents, legal guardian, Indian custodian, extended family members, others who have an interest in the child, and the party reporting child abuse or neglect, whether the child

is, or may be, an Indian child and where the child, the parents, or Indian custodian is domiciled.

(c) At the first appearance in court of each party, the court shall ask each participant present in the hearing whether the participant knows or has reason to know that the child is an Indian child. The court shall instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(d) There is reason to know a child involved in a proceeding is an Indian child under any of the following circumstances:

(1) A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family informs the court that the child is an Indian child.

(2) The residence or domicile of the child, the child's parents, or Indian custodian is on a reservation or in an Alaska Native village.

(3) Any participant in the proceeding, officer of the court, Indian tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child.

(4) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child.

(5) The court is informed that the child is or has been a ward of a tribal court.

(6) The court is informed that either parent or the child possess an identification card indicating membership or citizenship in an Indian tribe.

(e) If the court, social worker, or probation officer has reason to believe that an Indian child is involved in a proceeding, the court, social worker, or probation officer shall make further inquiry regarding the possible Indian status of the child, and shall make that inquiry as soon as practicable. Further inquiry includes, but is not limited to, all of the following:

(1) Interviewing the parents, Indian custodian, and extended family members to gather the information required in paragraph (5) of subdivision (a) of Section 224.3.

(2) Contacting the Bureau of Indian Affairs and the State Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member, or eligible for membership in, and contacting the tribes and any other person that may reasonably be expected to have information regarding the child's membership status or eligibility.

(3) Contacting the tribe or tribes and any other person that may reasonably be expected to have information regarding the child's membership, citizenship status, or eligibility. Contact with a tribe shall, at a minimum, include telephone, facsimile, or electronic mail contact to each tribe's designated agent for receipt of notices under the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.). Contact with a tribe shall include sharing information identified by the tribe as necessary for the tribe to make a membership or eligibility determination, as well as information on the current status of the child and the case.

(f) If there is reason to know, as set forth in subdivision (d), that the child is an Indian child, the party seeking foster care placement shall provide notice in accordance with paragraph (5) of subdivision (a) of Section 224.3.

(g) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an Indian child, the court shall confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the tribes of which there is reason to know the child may be a member, or eligible for membership, to verify whether the child is in fact a member or whether a biological parent is a member and the child is eligible for membership.

(h) A determination by an Indian tribe that a child is or is not a member of, or eligible for membership in, that tribe, or testimony attesting to that status by a person authorized by the tribe to provide that determination, shall be conclusive. Information that the child is not enrolled, or is not eligible for enrollment in, the tribe is not determinative of the child's membership status unless the tribe also confirms in writing that enrollment is a prerequisite for membership under tribal law or custom.

(i) (1) When there is reason to know that the child is an Indian child, the court shall treat the child as an Indian child unless and until the court determines on the record and after review of the report of due diligence as described in subdivision (g), and a review of the copies of notice, return receipts, and tribal responses required pursuant to Section 224.3, that the child does not meet the definition of an Indian child as used in Section 224.1 and the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.).

(2) If the court makes a finding that proper and adequate further inquiry and due diligence as required in this section have been conducted and there is no reason to know whether the child is an Indian child, the court may make a finding that the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.) does not apply to the proceedings, subject to reversal based on sufficiency of the evidence. The court shall reverse its determination if it subsequently receives information providing reason to believe that the child is an Indian child and order the social worker or probation officer to conduct further inquiry pursuant to Section 224.3.

(j) Notwithstanding a determination that the federal Indian Child Welfare Act of 1978 does not apply to the proceedings, if the court, social worker, or probation officer subsequently receives any information required by Section 224.3 that was not previously available or included in the notice issued under Section 224.3, the party seeking placement shall provide the additional information to any tribes entitled to notice under Section 224.3 and to the Secretary of the Interior's designated agent.

SEC. 6. Section 224.3 of the Welfare and Institutions Code is repealed.

SEC. 7. Section 224.3 is added to the Welfare and Institutions Code, to read:

224.3. (a) If the court, a social worker, or probation officer knows or has reason to know, as described in subdivision (d) of Section 224.2, that

an Indian child is involved, notice pursuant to Section 1912 of the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.) shall be provided for hearings that may culminate in an order for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement, as described in paragraph (1) of subdivision (d) of Section 224.1. The notice shall be sent to the minor's parents or legal guardian, Indian custodian, if any, and the child's tribe. Copies of all notices sent shall be served on all parties to the dependency proceeding and their attorneys. Notice shall comply with all of the following requirements:

(1) Notice shall be sent by registered or certified mail with return receipt requested. Additional notice by first-class mail is recommended, but not required.

(2) Notice to the tribe shall be to the tribal chairperson, unless the tribe has designated another agent for service.

(3) Notice of all Indian child custody hearings shall be sent by the party seeking placement of the child to all of the following:

(A) All tribes of which the child may be a member or citizen, or eligible for membership or citizenship, unless either of the following occur:

(i) A tribe has made a determination that the child is not a member or citizen, or eligible for membership or citizenship.

(ii) The court makes a determination as to which tribe is the child's tribe in accordance with subdivision (e) of Section 224.1, after which notice need only be sent to the Indian child's tribe.

(B) The child's parents.

(C) The child's Indian custodian.

(4) Notice, to the extent required by federal law, shall be sent to the Secretary of the Interior's designated agent.

(5) In addition to the information specified in other sections of this article, notice shall include all of the following information:

(A) The name, birth date, and birthplace of the Indian child, if known.

(B) The name of the Indian tribe in which the child is a member, or may be eligible for membership, if known.

(C) All names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married, and former names or aliases, as well as their current and former addresses, birth dates, places of birth and death, tribal enrollment information of other direct lineal ancestors of the child, and any other identifying information, if known.

(D) A copy of the petition by which the proceeding was initiated.

(E) A copy of the child's birth certificate, if available.

(F) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

(G) The information regarding the time, date, and any location of any scheduled hearings.

(H) A statement of all of the following:

(i) The name of the petitioner and the name and address of the petitioner's attorney.

(ii) The absolute right of the child's parents, Indian custodians, and tribe to intervene in the proceeding.

(iii) The right of the child's parents, Indian custodians, and tribe to petition the court to transfer the proceeding to the tribal court of the Indian child's tribe, absent objection by either parent and subject to declination by the tribal court.

(iv) The right of the child's parents, Indian custodians, and tribe to, upon request, be granted up to an additional 20 days from the receipt of the notice to prepare for the proceeding.

(v) The potential legal consequences of the proceedings on the future custodial and parental rights of the child's parents or Indian custodians.

(vi) That if the parents or Indian custodians are unable to afford counsel, counsel will be appointed to represent the parents or Indian custodians pursuant to Section 1912 of the federal Indian Child Welfare Act of 1978.

(vii) In accordance with Section 827, the information contained in the notice, petition, pleading, and other court documents is confidential. Any person or entity notified shall maintain the confidentiality of the information contained in the notice concerning the particular proceeding and not reveal that information to anyone who does not need the information in order to exercise the tribe's rights under the federal Indian Child Welfare Act of 1978.

(b) Notice shall be sent whenever it is known or there is reason to know that an Indian child is involved, and for every hearing that may culminate in an order for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement, as described in paragraph (1) of subdivision (d) of Section 224.1, unless it is determined that the federal Indian Child Welfare Act of 1978 does not apply to the case in accordance with Section 224.2. After a tribe acknowledges that the child is a member of, or eligible for membership in, that tribe, or after a tribe intervenes in a proceeding, the information set out in subparagraphs (C), (D), (E), and (H) of paragraph (5) of subdivision (a) need not be included with the notice.

(c) Proof of the notice, including copies of notices sent and all return receipts and responses received, shall be filed with the court in advance of the hearing, except as permitted under subdivision (d).

(d) A proceeding shall not be held until at least 10 days after receipt of notice by the parent, Indian custodian, the tribe, or the Bureau of Indian Affairs, except for a hearing held pursuant to Section 319, provided that notice of the hearing held pursuant to Section 319 shall be given as soon as possible after the filing of the petition to declare the Indian child a dependent child. Notice to tribes of the hearing pursuant to Section 319 shall be consistent with the requirements for notice to parents set forth in Sections 290.1 and 290.2. With the exception of the hearing held pursuant to Section 319, the parent, Indian custodian, or tribe shall, upon request, be granted up to 20 additional days to prepare for that proceeding. This subdivision does not limit the rights of the parent, Indian custodian, or tribe to more than 10 days' notice when a lengthier notice period is required by law.

(e) With respect to giving notice to Indian tribes, a party is subject to court sanctions if that person knowingly and willfully falsifies or conceals a material fact concerning whether the child is an Indian child, or counsels a party to do so.

(f) The inclusion of contact information of any adult or child that would otherwise be required to be included in the notification pursuant to this section shall not be required if that person is at risk of harm as a result of domestic violence, child abuse, sexual abuse, or stalking.

(g) For any hearing that does not meet the definition of an Indian child custody proceeding set forth in Section 224.1, or is not an emergency proceeding, notice to the child's parents, Indian custodian, and tribe shall be sent in accordance with Sections 292, 293, and 295.

SEC. 8. Section 224.6 of the Welfare and Institutions Code is amended to read:

224.6. (a) When testimony of a "qualified expert witness" is required in an Indian child custody proceeding, a "qualified expert witness" shall be qualified to testify regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and shall be qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. A person may be designated by the child's tribe as qualified to testify to the prevailing social and cultural standards of the Indian child's tribe. The individual may not be an employee of the person or agency recommending foster care placement or termination of parental rights.

(b) In considering whether to remove an Indian child from the custody of a parent or Indian custodian or to terminate the parental rights of the parent of an Indian child, the court shall do both of the following:

(1) Require that a qualified expert witness testify regarding whether continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(2) Consider evidence concerning the prevailing social and cultural standards of the Indian child's tribe, including that tribe's family organization and child-rearing practices.

(c) Persons with the following characteristics are most likely to meet the requirements for a qualified expert witness for purposes of Indian child custody proceedings:

(1) A person designated by the Indian child's tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's tribe.

(2) A member or citizen of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.

(3) An expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the Indian child's tribe.

(d) The court or any party may request the assistance of the Indian child's tribe or Bureau of Indian Affairs agency serving the Indian child's tribe in locating persons qualified to serve as expert witnesses.

(e) The court may accept a declaration or affidavit from a qualified expert witness in lieu of testimony only if the parties have so stipulated in writing and the court is satisfied the stipulation is made knowingly, intelligently, and voluntarily.

SEC. 9. Section 290.1 of the Welfare and Institutions Code is amended to read:

290.1. If the probation officer or social worker determines that the child shall be retained in custody, he or she shall immediately file a petition pursuant to Section 332 with the clerk of the juvenile court, who shall set the matter for hearing on the detention hearing calendar. The probation officer or social worker shall serve notice as prescribed in this section.

(a) Notice shall be given to the following persons whose whereabouts are known or become known prior to the initial petition hearing:

(1) The mother.

(2) The father or fathers, presumed and alleged.

(3) The legal guardian or guardians.

(4) The Indian custodian, if it is known that the child is an Indian child, as defined by Section 224.1.

(5) The child, if the child is 10 years of age or older.

(6) The child's tribe, if it is known that the child is an Indian child, as defined by Section 224.1.

(7) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(8) If there is no parent or guardian residing in California, or if the residence is unknown, then to any adult relative residing within the county, or, if none, the adult relative residing nearest the court.

(9) The attorney for the parent or parents, legal guardian or guardians, or Indian custodian.

(10) The district attorney, if the district attorney has notified the clerk of the court that he or she wishes to receive the petition, containing the time, date, and place of the hearing.

(11) The probate department of the superior court that appointed the guardian, if the child is a ward of a guardian appointed pursuant to the Probate Code.

(b) No notice is required for a parent whose parental rights have been terminated.

(c) The notice shall be given as soon as possible after the filing of the petition.

(d) The notice of the initial petition hearing shall include all of the following:

- (1) The date, time, and place of the hearing.
- (2) The name of the child.
- (3) A copy of the petition.

(e) Service of the notice shall be written or oral. If the person being served cannot read, notice shall be given orally.

(f) Notice shall not be served electronically under this section.

SEC. 10. Section 290.2 of the Welfare and Institutions Code is amended to read:

290.2. Upon the filing of a petition by a probation officer or social worker, the clerk of the juvenile court shall issue notice, to which shall be attached a copy of the petition, and he or she shall cause the same to be served as prescribed in this section.

(a) Notice shall be given to the following persons whose address is known or becomes known prior to the initial petition hearing:

- (1) The mother.
- (2) The father or fathers, presumed and alleged.
- (3) The legal guardian or guardians.
- (4) The Indian custodian, if it is known that the child is an Indian child,

as defined by Section 224.1.

(5) The child, if the child is 10 years of age or older.

(6) The child's tribe, if it is known that the child is an Indian child, as defined by Section 224.1.

(7) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(8) If there is no parent or guardian residing in California, or, if the residence is unknown, to any adult relative residing within the county, or, if none, the adult relative residing nearest the court.

(9) Upon reasonable notification by counsel representing the child, parent, or guardian, the clerk of the court shall give notice to that counsel as soon as possible.

(10) The district attorney, if the district attorney has notified the clerk of the court that he or she wishes to receive the petition, containing the time, date, and place of the hearing.

(11) The probate department of the superior court that appointed the guardian, if the child is a ward of a guardian appointed pursuant to the Probate Code.

(b) Notice is not required for a parent whose parental rights have been terminated.

(c) Notice shall be served as follows:

(1) If the child is retained in custody, the notice shall be given to the persons required to be noticed as soon as possible, and at least five days before the hearing, unless the hearing is set to be heard in less than five days in which case notice shall be given at least 24 hours prior to the hearing.

(2) If the child is not retained in custody, the notice shall be given to those persons required to be noticed at least 10 days prior to the date of the hearing. If any person who is required to be given notice is known to reside outside of the county, the clerk of the juvenile court shall mail the notice and copy of the petition by first-class mail to that person as soon as possible after the filing of the petition and at least 10 days before the time set for hearing. Failure to respond to the notice is not cause for an arrest or detention. In the instance of a failure to appear after notice by first-class mail, the court shall direct that the notice and copy of the petition be personally served on all persons required to receive the notice and copy of the petition. For these purposes, personal service of the notice and copy of the petition outside of the county at least 10 days before the time set for hearing is equivalent to service by first-class mail. Service may be waived by any person by a voluntary appearance entered in the minutes of the court or by a written waiver of service filed with the clerk of the court at, or prior to, the hearing.

(3) Notice shall not be served electronically under this section.

(d) The notice of the initial petition hearing shall include all of the following:

- (1) The date, time, and place of the hearing.
- (2) The name of the child.
- (3) A copy of the petition.

SEC. 11. Section 291 of the Welfare and Institutions Code is amended to read:

291. After the initial petition hearing, the clerk of the court shall cause the notice to be served in the following manner:

(a) Notice of the hearing shall be given to the following persons:

- (1) The mother.
- (2) The father or fathers, presumed and alleged.
- (3) The legal guardian or guardians.
- (4) The Indian custodian, if it is known that the child is an Indian child, as defined by Section 224.1.
- (5) The child, if the child is 10 years of age or older.
- (6) The child's tribe, if known, and any tribe in which the child may be a member or eligible for membership if the specific tribe is not known, and it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1.

(7) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and

the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(8) Each attorney of record unless counsel of record is present in court when the hearing is scheduled, then no further notice need be given.

(9) If there is no parent or guardian residing in California, or if the residence is unknown, then to any adult relative residing within the county, or, if none, the adult relative residing nearest the court.

(10) If the hearing is a dispositional hearing that is also serving as a permanency hearing pursuant to subdivision (f) of Section 361.5, notice shall be given to the current caregiver for the child, including foster parents, relative caregivers, preadoptive parents, nonrelative extended family members, and resource family. Any person notified may attend all hearings and may submit any information he or she deems relevant to the court in writing.

(b) No notice is required for a parent whose parental rights have been terminated.

(c) Notice shall be served as follows:

(1) If the child is detained, the notice shall be given to the persons required to be noticed as soon as possible, and at least five days before the hearing, unless the hearing is set less than five days and then at least 24 hours before the hearing.

(2) If the child is not detained, the notice shall be given to those persons required to be noticed at least 10 days before the date of the hearing.

(d) The notice shall include all of the following:

(1) The name and address of the person notified.

(2) The nature of the hearing.

(3) Each section and subdivision under which the proceeding has been initiated.

(4) The date, time, and place of the hearing.

(5) The name of the child upon whose behalf the petition has been brought.

(6) A statement that:

(A) If they fail to appear, the court may proceed without them.

(B) The child, parent, guardian, Indian custodian, or adult relative to whom notice is required to be given pursuant to paragraph (1), (2), (3), (4), (5), or (9) of subdivision (a) is entitled to have an attorney present at the hearing.

(C) If the parent, guardian, Indian custodian, or adult relative noticed pursuant to paragraph (1), (2), (3), (4), or (9) of subdivision (a) is indigent and cannot afford an attorney, and desires to be represented by an attorney, the parent, guardian, Indian custodian, or adult relative shall promptly notify the clerk of the juvenile court.

(D) If an attorney is appointed to represent the parent, guardian, Indian custodian, or adult relative, the represented person shall be liable for all or a portion of the costs to the extent of his or her ability to pay.

(E) The parent, guardian, Indian custodian, or adult relative may be liable for the costs of support of the child in any out-of-home placement.

(7) A copy of the petition.

(e) Service of the notice of the hearing shall be given in the following manner:

(1) If the child is detained and the persons required to be noticed are not present at the initial petition hearing, they shall be noticed by personal service or by certified mail, return receipt requested.

(2) If the child is detained and the persons required to be noticed are present at the initial petition hearing, they shall be noticed by personal service, by first-class mail, or by electronic service pursuant to Section 212.5.

(3) If the child is not detained, the persons required to be noticed shall be noticed by personal service, by first-class mail, or by electronic service pursuant to Section 212.5, unless the person to be served is known to reside outside the county, in which case service shall be by first-class mail or by electronic service pursuant to Section 212.5.

(f) Any of the notices required to be given under this section or Sections 290.1 and 290.2 may be waived by a party in person or through his or her attorney, or by a signed written waiver filed on or before the date scheduled for the hearing.

(g) If it is known or there is reason to know that the child is an Indian child, as defined in Section 224.1, notice shall be given in accordance with Section 224.3.

SEC. 12. Section 292 of the Welfare and Institutions Code is amended to read:

292. The social worker or probation officer shall give notice of the review hearing held pursuant to Section 364 in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The presumed father or any father receiving services.

(3) The legal guardian or guardians.

(4) The Indian custodian, if it is known that the child is an Indian child, as defined by Section 224.1.

(5) The child, if the child is 10 years of age or older.

(6) The child's tribe, if known, and it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1.

(7) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(8) Each attorney of record, if that attorney was not present at the time that the hearing was set by the court.

(b) No notice is required for a parent whose parental rights have been terminated.

(c) The notice of the hearing shall be served not earlier than 30 days, nor later than 15 days, before the hearing.

(d) The notice shall contain a statement regarding the nature of the hearing to be held and any change in the custody or status of the child being recommended by the supervising agency. The notice shall also include a statement that the child and the parent or parents or legal guardian or guardians have a right to be present at the hearing, to be represented by counsel at the hearing and the procedure for obtaining appointed counsel, and to present evidence regarding the proper disposition of the case. The notice shall also state that if the parent or parents or legal guardian or guardians fail to appear, the court may proceed without them.

(e) Service of the notice shall be by personal service, by first-class mail, or by certified mail with return receipt requested, addressed to the last known address of the person to be noticed, or by electronic service pursuant to Section 212.5.

SEC. 13. Section 293 of the Welfare and Institutions Code is amended to read:

293. The social worker or probation officer shall give notice of the review hearings held pursuant to Section 366.21, 366.22, or 366.25 in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The presumed father or any father receiving services.

(3) The legal guardian or guardians.

(4) The Indian custodian, if it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1.

(5) The child, if the child is 10 years of age or older.

(6) The child's tribe, if known, and it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1.

(7) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(8) In the case of a child removed from the physical custody of his or her parent or legal guardian, the current caregiver of the child, including the foster parents, relative caregivers, preadoptive parents, nonrelative extended family members, resource family, community care facility, or foster family agency having custody of the child. In a case in which a foster family agency is notified of the hearing pursuant to this section, and the child resides in a foster home certified by the foster family agency, the foster family agency shall provide timely notice of the hearing to the child's caregivers.

(9) Each attorney of record if that attorney was not present at the time that the hearing was set by the court.

(b) No notice is required for a parent whose parental rights have been terminated. On and after January 1, 2012, in the case of a nonminor dependent, as described in subdivision (v) of Section 11400, no notice is required for a parent.

(c) The notice of hearing shall be served not earlier than 30 days, nor later than 15 days, before the hearing.

(d) The notice shall contain a statement regarding the nature of the hearing to be held and any change in the custody or status of the child being recommended by the supervising agency. If the notice is to the child, parent or parents, or legal guardian or guardians, the notice shall also advise them of the right to be present, the right to be represented by counsel, the right to request counsel, and the right to present evidence. The notice shall also state that if the parent or parents or legal guardian or guardians fail to appear, the court may proceed without them.

(e) Service of the notice shall be by first-class mail addressed to the last known address of the person to be noticed, by personal service, or by electronic service pursuant to Section 212.5.

(f) Notice to the current caregiver of the child, including a foster parent, a relative caregiver, a preadoptive parent, a nonrelative extended family member, a resource family, a certified foster parent who has been approved for adoption, or the State Department of Social Services when it is acting as an adoption agency or by a county adoption agency, shall indicate that the person notified may attend all hearings or may submit any information he or she deems relevant to the court in writing.

SEC. 14. Section 294 of the Welfare and Institutions Code is amended to read:

294. The social worker or probation officer shall give notice of a selection and implementation hearing held pursuant to Section 366.26 in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The fathers, presumed and alleged.

(3) The Indian custodian, if it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1.

(4) The child, if the child is 10 years of age or older.

(5) The child's tribe, if known, and any tribe in which the child may be a member or eligible for membership if the specific tribe is not known, and it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1.

(6) Any known sibling of the child who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(7) The grandparents of the child, if their address is known and if the parent's whereabouts are unknown.

(8) All counsel of record.

(9) To any unknown parent by publication, if ordered by the court pursuant to paragraph (2) of subdivision (g).

(10) The current caregiver of the child, including foster parents, relative caregivers, preadoptive parents, nonrelative extended family members, or resource family. Any person notified may attend all hearings and may submit any information he or she deems relevant to the court in writing.

(b) The following persons shall not be notified of the hearing:

(1) A parent who has relinquished the child to the State Department of Social Services, county adoption agency, or licensed adoption agency for adoption, and the relinquishment has been accepted and filed with notice as required under Section 8700 of the Family Code.

(2) An alleged father who has denied paternity and has executed a waiver of the right to notice of further proceedings.

(3) A parent whose parental rights have been terminated.

(c) (1) Service of the notice shall be completed at least 45 days before the hearing date. Service is deemed complete at the time the notice is personally delivered to the person named in the notice or 10 days after the notice has been placed in the mail or sent by electronic mail, or at the expiration of the time prescribed by the order for publication.

(2) Service of notice in cases where publication is ordered shall be completed at least 30 days before the date of the hearing.

(d) Regardless of the type of notice required, or the manner in which it is served, once the court has made the initial finding that notice has properly been given to the parent, or to any person entitled to receive notice pursuant to this section, subsequent notice for any continuation of a Section 366.26 hearing may be by first-class mail to any last known address, by an order made pursuant to Section 296, by electronic service pursuant to Section 212.5, or by any other means that the court determines is reasonably calculated, under any circumstance, to provide notice of the continued hearing. However, if the recommendation changes from the recommendation contained in the notice previously found to be proper, notice shall be provided to the parent, and to any person entitled to receive notice pursuant to this section, regarding that subsequent hearing.

(e) The notice shall contain the following information:

(1) The date, time, and place of the hearing.

(2) The right to appear.

(3) The parents' right to counsel.

(4) The nature of the proceedings.

(5) The recommendation of the supervising agency.

(6) A statement that, at the time of hearing, the court is required to select a permanent plan of adoption, legal guardianship, placement with a fit and willing relative, or another planned permanent living arrangement, as appropriate, for the child.

(f) Notice to the parents may be given in any one of the following manners:

(1) If the parent is present at the hearing at which the court schedules a hearing pursuant to Section 366.26, the court shall advise the parent of the date, time, and place of the proceedings, their right to counsel, the nature of the proceedings, and the requirement that at the proceedings the court shall select and implement a plan of adoption, legal guardianship, placement with a fit and willing relative, or another planned permanent living arrangement, as appropriate, for the child. The court shall direct the parent to appear for the proceedings and then direct that the parent be notified thereafter only by first-class mail to the parent's usual place of residence or business, or by electronic service pursuant to Section 212.5.

(2) Certified mail, return receipt requested, to the parent's last known mailing address. This notice shall be sufficient if the child welfare agency receives a return receipt signed by the parent.

(3) Personal service to the parent named in the notice.

(4) Delivery to a competent person who is at least 18 years of age at the parent's usual place of residence or business, and thereafter served on the parent named in the notice by first-class mail at the place where the notice was delivered or by electronic service pursuant to Section 212.5.

(5) If the residence of the parent is outside the state, service may be made as described in paragraph (1), (3), or (4) or by certified mail, return receipt requested.

(6) If the recommendation of the probation officer or social worker is legal guardianship, placement with a fit and willing relative, or another planned permanent living arrangement, as appropriate, service may be made by first-class mail to the parent's usual place of residence or business or by electronic service pursuant to Section 212.5. In the case of an Indian child, if the recommendation of the probation officer or social worker is tribal customary adoption, service may be made by first-class mail to the parent's usual place of residence or business.

(7) If a parent's identity is known but his or her whereabouts are unknown and the parent cannot, with reasonable diligence, be served in any manner specified in paragraphs (1) to (6), inclusive, the petitioner shall file an affidavit with the court at least 75 days before the hearing date, stating the name of the parent and describing the efforts made to locate and serve the parent.

(A) If the court determines that there has been due diligence in attempting to locate and serve the parent and the probation officer or social worker recommends adoption, service shall be to that parent's attorney of record, if any, by certified mail, return receipt requested. If the parent does not have an attorney of record, the court shall order that service be made by publication of citation requiring the parent to appear at the date, time, and place stated in the citation, and that the citation be published in a newspaper designated as most likely to give notice to the parent. Publication shall be made once a week for four consecutive weeks. Whether notice is to the attorney of record or by publication, the court shall also order that notice

be given to the grandparents of the child, if their identities and addresses are known, by first-class mail or by electronic service pursuant to Section 212.5.

(B) If the court determines that there has been due diligence in attempting to locate and serve the parent and the probation officer or social worker recommends legal guardianship, placement with a fit and willing relative, or another planned permanent living arrangement, as appropriate, no further notice is required to the parent, but the court shall order that notice be given to the grandparents of the child, if their identities and addresses are known, by first-class mail or by electronic service pursuant to Section 212.5.

(C) In any case where the residence of the parent becomes known, notice shall immediately be served upon the parent as provided for in either paragraph (2), (3), (4), (5), or (6).

(g) (1) If the identity of one or both of the parents, or alleged parents, of the child is unknown, or if the name of one or both parents is uncertain, then that fact shall be set forth in the affidavit filed with the court at least 75 days before the hearing date and the court, consistent with Sections 7665 and 7666 of the Family Code, shall issue an order dispensing with notice to a natural parent or possible natural parent under this section if, after inquiry and a determination that there has been due diligence in attempting to identify the unknown parent, the court is unable to identify the natural parent or possible natural parent and no person has appeared claiming to be the natural parent.

(2) After a determination that there has been due diligence in attempting to identify an unknown parent pursuant to paragraph (1) and the probation officer or social worker recommends adoption, the court shall consider whether publication notice would be likely to lead to actual notice to the unknown parent. The court may order publication notice if, on the basis of all information before the court, the court determines that notice by publication is likely to lead to actual notice to the parent. If publication notice to an unknown parent is ordered, the court shall order the published citation to be directed to either the father or mother, or both, of the child, and to all persons claiming to be the father or mother of the child, naming and otherwise describing the child. An order of publication pursuant to this paragraph shall be based on an affidavit describing efforts made to identify the unknown parent or parents. Service made by publication pursuant to this paragraph shall require the unknown parent or parents to appear at the date, time, and place stated in the citation. Publication shall be made once a week for four consecutive weeks.

(3) If the court determines that there has been due diligence in attempting to identify one or both of the parents, or alleged parents, of the child and the probation officer or social worker recommends legal guardianship, placement with a fit and willing relative, or another planned permanent living arrangement, as appropriate, no further notice to the parent shall be required.

(h) Notice to all counsel of record shall be by first-class mail or by electronic service pursuant to Section 212.5.

(i) If it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, notice shall be given in accordance with Section 224.3.

(j) Notwithstanding subdivision (a), if the attorney of record is present at the time the court schedules a hearing pursuant to Section 366.26, no further notice is required, except as required by subparagraph (A) of paragraph (7) of subdivision (f).

(k) This section shall also apply to children adjudged wards pursuant to Section 727.31.

(l) The court shall state the reasons on the record explaining why good cause exists for granting any continuance of a hearing held pursuant to Section 366.26 to fulfill the requirements of this section.

(m) Notice of any hearing at which the county welfare department is recommending the termination of parental rights may only be served electronically if notice is also given by another means of service provided for in this section.

SEC. 15. Section 295 of the Welfare and Institutions Code is amended to read:

295. The social worker or probation officer shall give notice of review hearings held pursuant to Sections 366.3 and 366.31 and for termination of jurisdiction hearings held pursuant to Section 391 in the following manner:

(a) Notice of the hearing shall be given to the following persons:

(1) The mother.

(2) The presumed father.

(3) The legal guardian or guardians.

(4) The Indian custodian, if it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1.

(5) The child, if the child is 10 years of age or older, or a nonminor dependent.

(6) The child's tribe, if it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1.

(7) Any known sibling of the child or nonminor dependent who is the subject of the hearing if that sibling either is the subject of a dependency proceeding or has been adjudged to be a dependent child of the juvenile court. If the sibling is 10 years of age or older, the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the sibling's caregiver and the sibling's attorney. However, notice is not required to be given to any sibling whose matter is calendared in the same court on the same day.

(8) The current caregiver of the child, including the foster parents, relative caregivers, preadoptive parents, nonrelative extended family members, resource family, community care facility, or foster family agency having physical custody of the child if a child is removed from the physical custody of the parents or legal guardian. The person notified may attend all hearings and may submit any information he or she deems relevant to the court in writing.

(9) The current caregiver of a nonminor dependent, as described in subdivision (v) of Section 11400. The person notified may attend all hearings and may submit for filing an original and eight copies of written information he or she deems relevant to the court. The court clerk shall provide the current parties and attorneys of record with a copy of the written information immediately upon receipt and complete, file, and distribute a proof of service.

(10) The attorney of record if that attorney of record was not present at the time that the hearing was set by the court.

(11) The alleged father or fathers, but only if the recommendation is to set a new hearing pursuant to Section 366.26.

(b) No notice shall be required for a parent whose parental rights have been terminated or for the parent of a nonminor dependent, as described in subdivision (v) of Section 11400, unless the parent is receiving court-ordered family reunification services pursuant to Section 361.6.

(c) The notice of the review hearing shall be served no earlier than 30 days, nor later than 15 days, before the hearing.

(d) The notice of the review hearing shall contain a statement regarding the nature of the hearing to be held, any recommended change in the custody or status of the child, and any recommendation that the court set a new hearing pursuant to Section 366.26 in order to select a more permanent plan.

(e) Service of notice shall be by first-class mail addressed to the last known address of the person to be provided notice or by electronic service pursuant to Section 212.5.

(f) If the child is ordered into a permanent plan of legal guardianship, and subsequently a petition to terminate or modify the guardianship is filed, the probation officer or social worker shall serve notice of the petition not less than 15 court days before the hearing on all persons listed in subdivision (a) and on the court that established legal guardianship if it is in another county.

SEC. 16. Section 297 of the Welfare and Institutions Code is amended to read:

297. (a) (1) A subsequent petition filed pursuant to Section 342 shall be noticed pursuant to Sections 290.1 and 290.2, except that service may be delivered by electronic service pursuant to Section 212.5.

(2) If it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, notice of the adjudication and disposition hearings on the subsequent petition shall be given in accordance with Section 224.3.

(b) (1) Upon the filing of a supplemental petition pursuant to Section 387, the clerk of the juvenile court shall immediately set the matter for hearing within 30 days of the date of the filing, and the social worker or probation officer shall cause notice thereof to be served upon the persons required by, and in the manner prescribed by, Sections 290.1, 290.2, and 291, except that service may be delivered by electronic service pursuant to Section 212.5.

(2) If it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, notice of the adjudication and disposition

hearings on the supplemental petition shall be given in accordance with Section 224.3.

(c) (1) If a petition for modification has been filed pursuant to Section 388, and it appears that the best interest of the child may be promoted by the proposed change of the order, the recognition of a sibling relationship, or the termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the social worker or probation officer and to the child's attorney of record, or if there is no attorney of record for the child, to the child, his or her parent or parents or legal guardian or guardians or Indian custodian, and the child's tribe in the manner prescribed by Section 291 unless a different manner is prescribed by the court.

(2) If it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, and the hearing on the petition for modification pursuant to Section 388 may culminate in an order for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement, notice shall be given in accordance with Section 224.3.

(d) On and after January 1, 2012, if a petition for modification has been filed pursuant to subdivision (e) of Section 388 by a nonminor dependent, as described in subdivision (v) of Section 11400, no notice is required for a parent.

SEC. 17. Section 305.5 of the Welfare and Institutions Code is amended to read:

305.5. (a) In any Indian child custody proceeding as defined by Section 224.1, the court shall determine the child's residence and domicile as defined in Section 224.1 and in the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.).

(b) If at any stage of an Indian child custody proceeding as defined in Section 224.1 and in Section 1903 of the federal Indian Child Welfare Act of 1978, the court receives information from the child welfare agency or any other source that suggests an Indian child is already a ward of a tribal court or resides or is domiciled within a reservation of an Indian tribe that has exclusive jurisdiction over child custody proceedings, as recognized in Section 1911 of Title 25 of the United States Code, or reassumed exclusive jurisdiction over Indian child custody proceedings pursuant to Section 1918 of Title 25 of the United States Code, the state court shall expeditiously notify the tribe and the tribal court of the pending dismissal based on the tribe's exclusive jurisdiction. The notification shall advise the tribe that the state court will dismiss the child custody proceeding upon receiving confirmation from the tribe that the child is a ward of a tribal court or subject to the tribe's exclusive jurisdiction.

(c) Unless otherwise agreed upon by the state and the tribe pursuant to Section 1919 of Title 25 of the United States Code, upon receipt of confirmation that the child is already a ward of a tribal court or is subject to the exclusive jurisdiction of an Indian tribe as described in subdivision (b), the state court shall dismiss the child custody proceeding and ensure that the tribal court is sent all information regarding the proceeding,

including, but not limited to, the pleadings and any state court record. If the local agency has not already transferred physical custody of the Indian child to the child's tribe, the state court shall order that the local agency do so forthwith and hold in abeyance any dismissal order pending confirmation that the Indian child is in the physical custody of the tribe. This subdivision does not preclude a state court from ordering an Indian child detained on an emergency basis pursuant to Section 319 if emergency removal is necessary to protect the child from imminent physical damage or harm and if more time is needed to facilitate the transfer of custody of the Indian child from the county welfare department to the tribe.

(d) In the case of an Indian child who is not a ward of a tribal court or subject to the exclusive jurisdiction of an Indian tribe, as described in subdivision (b), the state court shall transfer the proceeding to the jurisdiction of the child's tribe upon petition of either parent, the Indian custodian, or the child's tribe, unless the state court finds good cause not to transfer. The petition for transfer may be made orally on the record or in writing at any stage of the proceedings. Upon receipt of a petition for transfer, the state court shall terminate jurisdiction only after receiving confirmation that the tribal court has accepted the transfer. At the time that the state court terminates jurisdiction, the state court shall also do both of the following:

(1) Expeditiously provide the tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any state court record.

(2) Work with the tribal court to ensure that the transfer of the child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

(e) (1) If a petition to transfer proceedings as described in subdivision (d) is made orally on the record or in writing, the state court shall find good cause to deny the petition if either of the following circumstances are shown to exist:

(A) One or both of the child's parents object to the transfer.

(B) The tribal court of the child's tribe declines the transfer.

(2) In determining whether good cause exists to deny a transfer, the state court shall not consider any of the following:

(A) Socioeconomic conditions and the perceived adequacy of tribal social services or judicial systems.

(B) Whether the child custody proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or tribe did not receive notice of the child custody proceeding until an advanced stage. It shall not, in and of itself, be considered an unreasonable delay for a party to wait until reunification efforts have failed and reunification services have been terminated before filing a petition to transfer.

(C) Whether there have been prior proceedings involving the child for which no transfer petition was filed.

(D) Whether the transfer could affect the placement of the child.

(E) Whether the Indian child has cultural connections with the tribe or its reservation.

(3) The burden of establishing good cause not to transfer shall be on the party opposing the transfer. If the state court believes, or any party asserts, that good cause not to transfer exists, the reasons for that belief or assertion shall be stated orally on the record or in writing and made available to all parties who are petitioning for the transfer, and the petitioner shall have the opportunity to provide information or evidence in rebuttal of the belief or assertion.

(4) This section and Sections 1911 and 1918 of Title 25 of the United States Code shall not be construed as requiring a tribe to petition the Secretary of the Interior to reassume exclusive jurisdiction pursuant to Section 1918 of Title 25 of the United States Code prior to exercising jurisdiction over a proceeding transferred under subdivision (d).

(f) If any petitioner in an Indian child custody proceeding has improperly removed the child from the custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the state court shall decline jurisdiction over the petition and shall immediately return the child to his or her parent or Indian custodian, unless retaining the child outside the custody of his or her parent or Indian custodian is necessary to prevent imminent physical damage or harm.

(g) This section shall not be construed to prevent the emergency removal of an Indian child who is a ward of a tribal court or resides or is domiciled within a reservation of an Indian tribe that has exclusive jurisdiction over child custody proceedings, but is temporarily located off the reservation, from a parent or Indian custodian or the emergency placement of the child in a foster home or institution in order to prevent imminent physical damage or harm to the child. The state or local authority shall ensure that the emergency removal or placement terminates immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate an Indian child custody proceeding, transfer the child to the jurisdiction of the Indian child's tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

(h) When an Indian child is transferred from a state court to an Indian tribe pursuant to subdivision (c), (d), or (g), the county shall, pursuant to Section 827.15, release the child case file to the tribe having jurisdiction.

SEC. 18. Section 305.6 of the Welfare and Institutions Code is amended to read:

305.6. (a) Any peace officer may, without a warrant, take into temporary custody a child who is in a hospital if the release of the child to a prospective adoptive parent or a representative of a licensed adoption agency poses an immediate danger to the child's health or safety.

(b) Notwithstanding subdivision (a) and Section 305, a peace officer shall not, without a warrant, take into temporary custody a child who is in a hospital if all of the following conditions exist:

(1) The child is a newborn who tested positive for illegal drugs or whose birth mother tested positive for illegal drugs.

(2) The child is the subject of a proposed adoption and a Health Facility Minor Release Report, developed by the department, has been completed

by the hospital, including the marking of the boxes applicable to an independent adoption or agency adoption planning, and signed by the placing birth parent or birth parents, as well as either the prospective adoptive parent or parents or an authorized representative of a licensed adoption agency, prior to the discharge of the birth parent or the child from the hospital. The Health Facility Minor Release Report shall include a notice written in at least 14-point pica type, containing substantially all of the following statements:

(A) That the Health Facility Minor Release Report does not constitute consent to adoption of the child by the prospective adoptive parent or parents, or any other person.

(B) That the Health Facility Minor Release Report does not constitute a relinquishment of parental rights for the purposes of adoption.

(C) That the birth parent or parents or any person authorized by the birth parent or parents may reclaim the child at any time from the prospective adoptive parent or parents or any other person to whom the child was released by the hospital, as provided in Section 8700, 8814.5, or 8815 of the Family Code.

(3) The release of the child to a prospective adoptive parent or parents or an authorized representative of a licensed adoption agency does not pose an immediate danger to the child.

(4) An attorney or an adoption agency has provided documentation stating that he or she, or the agency, is representing the prospective adoptive parent or parents for purposes of the adoption. In the case of an independent adoption, as defined in Section 8524 of the Family Code, the attorney or adoption agency shall provide documentation stating that the prospective adoptive parent or parents have been informed that the child may be eligible for benefits provided pursuant to the Adoption Assistance Program, as set forth in Chapter 2.1 (commencing with Section 16115) of Part 4 of Division 9, only if, at the time the adoption request is filed, the child has met the requirements to receive federal supplemental security income benefits pursuant to Subchapter XVI (commencing with Section 1381) of Chapter 7 of Title 42 of the United States Code, as determined and documented by the federal Social Security Administration.

(5) The prospective adoptive parent or parents or their representative, or an authorized representative of a licensed adoption agency, provides all of the following to the peace officer:

(A) A fully executed copy of the Health Facility Minor Release Report.

(B) A written form signed by either the prospective adoptive parent or parents or a representative of the licensed adoption agency, which shall include all of the following:

(i) A statement that the child is the subject of a proposed adoption.

(ii) A declaration that the signer or signers will immediately notify the county child welfare agency pursuant to Section 11165.9 of the Penal Code if the adoption plan is terminated for any reason, and will not release the child to the birth parent or parents or any designee of the birth parent or parents until the county child welfare agency or local law enforcement

agency completes an investigation and determines that release of the child to the birth parent or parents or a designee of the birth parent or parents will not create an immediate risk to the health or safety of the child.

(iii) An agreement to provide a conformed copy of the adoption request or guardianship petition to the county child welfare agency within five business days after filing.

(iv) The names, identifying information, and contact information for the child, for each prospective adoptive parent, and for each birth parent, to the extent that information is known. In the case of an agency adoption where no prospective adoptive parent or parents are identified at the time of the child's release from the hospital, the licensed adoption agency may provide the information as it pertains to the licensed or certified foster home into which the agency intends to place the child.

(c) (1) In every independent adoption proceeding under this section, the prospective adoptive parent or parents shall file with the court either an adoption request within 10 working days after execution of an adoption placement agreement, or a guardianship petition within 30 calendar days after the child's discharge from the hospital, whichever is earlier.

(2) If the adoption plan for a child who was released from the hospital pursuant to subdivision (b) is terminated for any reason, the prospective adoptive parent or parents or licensed adoption agency shall immediately notify the county child welfare agency. The prospective adoptive parent or parents or licensed adoption agency may not release the child into the physical custody of the birth parent or parents, or any designee of the birth parent or parents, until the county child welfare agency or local law enforcement agency completes an investigation and determines that release of the child to the birth parent or parents or a designee of the birth parent or parents will not create an immediate risk to the health or safety of the child.

(d) Upon request by a birth parent or parents of the newborn child, the appropriate hospital personnel shall complete a Health Facility Minor Release Report and provide copies of the report to the birth parent or parents, and the person or persons who will receive physical custody of the child upon discharge pursuant to Section 1283 of the Health and Safety Code. Hospital personnel shall not refuse to complete a Health Facility Minor Release Report for any reason, even if the child is ineligible for release at that time. This section shall not be construed to require hospital personnel to release a child contrary to the directives of a child welfare agency.

(e) This section is not intended to create a duty that requires law enforcement to investigate the prospective adoptive parent or parents.

(f) This section does not suspend the requirements for voluntary adoptive placement under the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.).

SEC. 19. Section 306 of the Welfare and Institutions Code is amended to read:

306. (a) Any social worker in a county welfare department, or in an Indian tribe that has entered into an agreement pursuant to Section 10553.1

while acting within the scope of his or her regular duties under the direction of the juvenile court and pursuant to subdivision (b) of Section 272, may do all of the following:

(1) Receive and maintain, pending investigation, temporary custody of a child who is described in Section 300, and who has been delivered by a peace officer.

(2) Take into and maintain temporary custody of, without a warrant, a child who has been declared a dependent child of the juvenile court under Section 300 or who the social worker has reasonable cause to believe is a person described in subdivision (b) or (g) of Section 300, and the social worker has reasonable cause to believe that the child has an immediate need for medical care or is in immediate danger of physical or sexual abuse or the physical environment poses an immediate threat to the child's health or safety.

(b) Upon receiving temporary custody of a child, the county welfare department shall inquire pursuant to Section 224.2, whether the child is an Indian child.

(c) If it is known or if there is reason to know the child is an Indian child, any county social worker in a county welfare department may take into custody, and maintain temporary custody of, without a warrant, the Indian child if removing the child from the physical custody of his or her parent, parents, or Indian custodian is necessary to prevent imminent physical damage or harm to the Indian child. The temporary custody shall be considered an emergency removal under Section 1922 of the federal Indian Child Welfare Act (25 U.S.C. Sec. 1922).

(d) If a county social worker takes or maintains an Indian child into temporary custody under subdivision (a), and the social worker knows or has reason to believe the Indian child is already a ward of a tribal court, or resides or is domiciled within a reservation of an Indian tribe that has exclusive jurisdiction over child custody proceedings as recognized in Section 1911 of Title 25 of the United States Code, or reassumed exclusive jurisdiction over Indian child custody proceedings pursuant to Section 1918 of Title 25 of the United States Code, the county welfare agency shall notify the tribe that the child was taken into temporary custody no later than the next working day and shall provide all relevant documentation to the tribe regarding the temporary custody and the child's identity. If the tribe determines that the child is an Indian child who is already a ward of a tribal court or who is subject to the tribe's exclusive jurisdiction, the county welfare agency shall transfer custody of the child to the tribe within 24 hours after learning of the tribe's determination.

(e) If the social worker is unable to confirm that an Indian child is a ward of a tribal court or subject to the exclusive jurisdiction of an Indian tribe as described in subdivision (d), or is unable to transfer custody of the Indian child to the child's tribe, prior to the expiration of the period permitted by subdivision (a) of Section 313 for filing a petition to declare the Indian child a dependent of the juvenile court, the county welfare agency shall file the petition. The county welfare agency shall inform the state court in its report

for the hearing pursuant to Section 319, that the Indian child may be a ward of a tribal court or subject to the exclusive jurisdiction of the child's tribe. If the child welfare agency receives confirmation that an Indian child is a ward of a tribal court or subject to the exclusive jurisdiction of the Indian child's tribe between the time of filing a petition and the initial petition hearing, the agency shall inform the state court, provide a copy of the written confirmation, if any, and move to dismiss the petition. This subdivision does not prevent the court from authorizing a state or local agency to maintain temporary custody of the Indian child for a period not to exceed 30 days in order to arrange for the Indian child to be placed in the custody of the child's tribe.

(f) Before taking a child into custody, a social worker shall consider whether the child may remain safely in his or her residence. The consideration of whether the child may remain safely at home shall include, but not be limited to, the following factors:

(1) Whether there are any reasonable services available to the worker which, if provided to the child's parent, guardian, caretaker, or to the child would eliminate the need to remove the child from the custody of his or her parent, guardian, Indian custodian, or other caretaker.

(2) Whether a referral to public assistance pursuant to Chapter 2 (commencing with Section 11200) of Part 3, Chapter 7 (commencing with Section 14000) of Part 3, Chapter 1 (commencing with Section 17000) of Part 5, and Chapter 10 (commencing with Section 18900) of Part 6, of Division 9 would eliminate the need to take temporary custody of the child. If those services are available they shall be utilized.

(3) Whether a nonoffending caretaker can provide for and protect the child from abuse and neglect and whether the alleged perpetrator voluntarily agrees to withdraw from the residence, withdraws from the residence, and is likely to remain withdrawn from the residence.

(4) If it is known or there is reason to know the child is an Indian child, the county social worker shall make active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family prior to removal from the custody of a parent or parents or Indian custodian unless emergency removal is necessary to prevent imminent physical damage or harm to the Indian child.

SEC. 20. Section 309 of the Welfare and Institutions Code is amended to read:

309. (a) Upon delivery to the social worker of a child who has been taken into temporary custody under this article, the social worker shall immediately investigate the circumstances of the child and the facts surrounding the child's being taken into custody and attempt to maintain the child with the child's family through the provision of services. The social worker shall immediately release the child to the custody of the child's parent, guardian, Indian custodian, or relative, regardless of the parent's, guardian's, Indian custodian's, or relative's immigration status, unless one or more of the following conditions exist:

(1) The child has no parent, guardian, Indian custodian, or relative willing to provide care for the child.

(2) Continued detention of the child is a matter of immediate and urgent necessity for the protection of the child and there are no reasonable means by which the child can be protected in his or her home or the home of a relative.

(3) If it is known or there is reason to know the child is an Indian child, the child has been physically removed from the custody of a parent or parents or an Indian custodian, continued detention of the child continues to be necessary to prevent imminent physical damage or harm to the child, and there are no reasonable means by which the child can be protected if maintained in the physical custody of his or her parent or parents or Indian custodian.

(4) There is substantial evidence that a parent, guardian, or custodian of the child is likely to flee the jurisdiction of the court, and, in the case of an Indian child, fleeing the jurisdiction will place the child at risk of imminent physical damage or harm.

(5) The child has left a placement in which he or she was placed by the juvenile court.

(6) The parent or other person having lawful custody of the child voluntarily surrendered physical custody of the child pursuant to Section 1255.7 of the Health and Safety Code and did not reclaim the child within the 14-day period specified in subdivision (g) of that section.

(b) In any case in which there is reasonable cause for believing that a child who is under the care of a physician and surgeon or a hospital, clinic, or other medical facility, cannot be immediately moved, and is a person described in Section 300, the child shall be deemed to have been taken into temporary custody and delivered to the social worker for the purposes of this chapter while the child is at the office of the physician and surgeon or the medical facility.

(c) If the child is not released to his or her parent or guardian, the child shall be deemed detained for purposes of this chapter.

(d) (1) If a relative, as defined in Section 319, an extended family member of an Indian child, as defined in Section 224.1 and Section 1903 of the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.), or a nonrelative extended family member, as defined in Section 362.7, is available and requests emergency placement of the child pending the detention hearing, or after the detention hearing and pending the dispositional hearing conducted pursuant to Section 358, the county welfare department shall initiate an assessment of the relative's or nonrelative extended family member's suitability for emergency placement pursuant to Section 361.4.

(2) Upon completion of the assessment pursuant to Section 361.4, the child may be placed in the home on an emergency basis. Following the emergency placement of the child, the county welfare department shall evaluate and approve or deny the home pursuant to Section 16519.5. If the home in which the Indian child is placed is licensed or approved by the child's tribe, the provisions of Section 16519.5 do not apply for further

approval. The county shall require the relative or nonrelative extended family member to submit an application for approval as a resource family and initiate the home environment assessment no later than five business days after the placement.

(e) (1) If the child is removed, the social worker shall conduct, within 30 days, an investigation in order to identify and locate all grandparents, parents of a sibling of the child, if the parent has legal custody of the sibling, adult siblings, other adult relatives of the child, as defined in paragraph (2) of subdivision (f) of Section 319, including any other adult relatives suggested by the parents, and, if it is known or there is reason to know the child is an Indian child, any extended family members as defined in Section 224.1 and Section 1903 of the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.). As used in this section, “sibling” means a person related to the identified child by blood, adoption, or affinity through a common legal or biological parent. The social worker shall provide to all adult relatives who are located, except when that relative’s history of family or domestic violence makes notification inappropriate, within 30 days of removal of the child, written notification and shall also, whenever appropriate, provide oral notification, in person or by telephone, of all the following information:

(A) The child has been removed from the custody of his or her parent or parents, guardian or guardians, or Indian custodian.

(B) An explanation of the various options to participate in the care and placement of the child and support for the child’s family, including any options that may be lost by failing to respond. The notice shall provide information about providing care for the child while the family receives reunification services with the goal of returning the child to the parent or guardian, how to become a resource family, and additional services and support that are available in out-of-home placements, and, if it is known or there is reason to know the child is an Indian child, the option of obtaining approval for placement through the tribe’s license or approval procedure. The notice shall also include information regarding the Kin-GAP Program (Article 4.5 (commencing with Section 11360) of Chapter 2 of Part 3 of Division 9), the CalWORKs program for approved relative caregivers (Chapter 2 (commencing with Section 11200) of Part 3 of Division 9), adoption, and adoption assistance (Chapter 2.1 (commencing with Section 16115) of Part 4 of Division 9), as well as other options for contact with the child, including, but not limited to, visitation. The State Department of Social Services, in consultation with the County Welfare Directors Association of California and other interested stakeholders, shall develop the written notice.

(2) The social worker shall also provide the adult relatives notified pursuant to paragraph (1) with a relative information form to provide information to the social worker and the court regarding the needs of the child. The form shall include a provision whereby the relative may request the permission of the court to address the court, if the relative so chooses. The Judicial Council, in consultation with the State Department of Social

Services and the County Welfare Directors Association of California, shall develop the form.

(3) The social worker shall use due diligence in investigating the names and locations of the relatives pursuant to paragraph (1), including, but not limited to, asking the child in an age-appropriate manner about relatives important to the child, consistent with the child's best interest, and obtaining information regarding the location of the child's adult relatives. Each county welfare department shall create and make public a procedure by which relatives of a child who has been removed from his or her parents or guardians may identify themselves to the county welfare department and be provided with the notices required by paragraphs (1) and (2).

SEC. 21. Section 315 of the Welfare and Institutions Code is amended to read:

315. If a child has been taken into custody under this article and not released to a parent or guardian, the juvenile court shall hold a hearing (which shall be referred to as a "detention hearing") to determine whether the child shall be further detained. This hearing shall be held as soon as possible, but not later than the expiration of the next judicial day after a petition to declare the child a dependent child has been filed. If the hearing is not held within the period prescribed by this section, the child shall be released from custody. In the case of an Indian child, the hearing pursuant to Section 319 shall be considered an emergency removal under Section 1922 of the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1922).

SEC. 22. Section 319 of the Welfare and Institutions Code is amended to read:

319. (a) At the initial petition hearing, the court shall examine the child's parents, guardians, Indian custodian, or other persons having relevant knowledge and hear the relevant evidence as the child, the child's parents or guardians, the child's Indian custodian, the petitioner, the Indian child's tribe, or their counsel desires to present. The court may examine the child, as provided in Section 350.

(b) The social worker shall report to the court on the reasons why the child has been removed from the parent's, guardian's, or Indian custodian's, physical custody, the need, if any, for continued detention, the available services and the referral methods to those services that could facilitate the return of the child to the custody of the child's parents, guardians, or Indian custodian, and whether there are any relatives who are able and willing to take temporary physical custody of the child. If it is known or there is reason to know the child is an Indian child, the report shall also include all of the following:

(1) A statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent the imminent physical damage or harm to the child.

(2) The steps taken to provide notice to the child's parents, custodians, and tribe about the hearing pursuant to this section.

(3) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact with the appropriate Bureau of Indian Affairs regional director.

(4) The residence and the domicile of the Indian child.

(5) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the tribe affiliated with that reservation or village.

(6) The tribal affiliation of the child and of the parents or Indian custodians.

(7) A specific and detailed account of the circumstances that caused the Indian child to be taken into temporary custody.

(8) If the child is believed to reside or be domiciled on a reservation in which the tribe exercises exclusive jurisdiction over child custody matters, a statement of efforts that have been made and that are being made to contact the tribe and transfer the child to the tribe's jurisdiction.

(9) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

(c) The court shall order the release of the child from custody unless a prima facie showing has been made that the child comes within Section 300, the court finds that continuance in the parent's or guardian's home is contrary to the child's welfare, and any of the following circumstances exist:

(1) There is a substantial danger to the physical health of the child or the child is suffering severe emotional damage, and there are no reasonable means by which the child's physical or emotional health may be protected without removing the child from the parent's or guardian's physical custody.

(2) There is substantial evidence that a parent, guardian, or custodian of the child is likely to flee the jurisdiction of the court, and, in the case of an Indian child, fleeing the jurisdiction will place the child at risk of imminent physical damage or harm.

(3) The child has left a placement in which he or she was placed by the juvenile court.

(4) The child indicates an unwillingness to return home, if the child has been physically or sexually abused by a person residing in the home.

(d) If the court knows or there is reason to know the child is an Indian child, the court may only detain the Indian child if it also finds that detention is necessary to prevent imminent physical damage or harm. The court shall state on the record the facts supporting this finding.

(e) (1) If the hearing pursuant to this section is continued pursuant to Section 322 or for any other reason, the court shall find that the continuance of the child in the parent's or guardian's home is contrary to the child's welfare at the initial petition hearing or order the release of the child from custody.

(2) If the court knows or has reason to know the child is an Indian child, the hearing pursuant to this section may not be continued beyond 30 days unless the court finds all of the following:

(A) Restoring the child to the parent, parents, or Indian custodian would subject the child to imminent physical damage or harm.

(B) The court is unable to transfer the proceeding to the jurisdiction of the appropriate Indian tribe.

(C) It is not possible to initiate an Indian child custody proceeding as defined in Section 224.1.

(f) (1) The court shall also make a determination on the record, referencing the social worker's report or other evidence relied upon, as to whether reasonable efforts were made to prevent or eliminate the need for removal of the child from his or her home, pursuant to subdivision (b) of Section 306, and whether there are available services that would prevent the need for further detention. Services to be considered for purposes of making this determination are case management, counseling, emergency shelter care, emergency in-home caretakers, out-of-home respite care, teaching and demonstrating homemakers, parenting training, transportation, and any other child welfare services authorized by the State Department of Social Services pursuant to Chapter 5 (commencing with Section 16500) of Part 4 of Division 9. The court shall also review whether the social worker has considered whether a referral to public assistance services pursuant to Chapter 2 (commencing with Section 11200) and Chapter 7 (commencing with Section 14000) of Part 3, Chapter 1 (commencing with Section 17000) of Part 5, and Chapter 10 (commencing with Section 18900) of Part 6 of Division 9 would have eliminated the need to take temporary custody of the child or would prevent the need for further detention.

(2) If the court knows or has reason to know the child is an Indian child, the court shall also determine whether the county welfare department made active efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of the Indian family. The court shall order the county welfare department to initiate or continue services or programs pending disposition pursuant to Section 358.

(3) If the child can be returned to the custody of his or her parent, guardian, or Indian custodian through the provision of those services, the court shall place the child with his or her parent, guardian, or Indian custodian and order that the services shall be provided. If the child cannot be returned to the physical custody of his or her parent or guardian, the court shall determine if there is a relative who is able and willing to care for the child, and has been assessed pursuant to Section 361.4.

(4) In order to preserve the bond between the child and the parent and to facilitate family reunification, the court shall consider whether the child can be returned to the custody of his or her parent who is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent. The fact that the parent is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent shall not be, for that reason alone, prima facie evidence of substantial danger. The court shall specify the factual basis for its conclusion that the return of the child to the custody of his or her parent would pose a substantial danger or would not pose a substantial danger to

the physical health, safety, protection, or physical or emotional well-being of the child.

(g) If a court orders a child detained, the court shall state the facts on which the decision is based, specify why the initial removal was necessary, reference the social worker's report or other evidence relied upon to make its determination whether continuance in the home of the parent or legal guardian is contrary to the child's welfare, order temporary placement and care of the child to be vested with the county child welfare department pending the hearing held pursuant to Section 355 or further order of the court, and order services to be provided as soon as possible to reunify the child and his or her family if appropriate.

(h) (1) (A) If the child is not released from custody, the court may order the temporary placement of the child in any of the following for a period not to exceed 15 judicial days:

(i) The home of a relative, an extended family member as defined in Section 224.1 and Section 1903 of the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.), or a nonrelative extended family member, as defined in Section 362.7, that has been assessed pursuant to Section 361.4.

(ii) The approved home of a resource family, as defined in Section 16519.5, or a home licensed or approved by the Indian child's tribe.

(iii) An emergency shelter or other suitable licensed place.

(iv) A place exempt from licensure designated by the juvenile court.

(B) A runaway and homeless youth shelter licensed by the State Department of Social Services pursuant to Section 1502.35 of the Health and Safety Code shall not be a placement option pursuant to this section.

(C) If the court knows or has reason to know that the child is an Indian child, the Indian child shall be detained in a home that complies with the placement preferences set forth in Section 361.31 and in the federal Indian Child Welfare Act of 1978, unless the court finds good cause exists pursuant to Section 361.31 not to follow the placement preferences. If the court finds good cause not to follow the placement preferences for detention, this finding does not affect the requirement that a diligent search be made for a subsequent placement within the placement preferences.

(2) Relatives shall be given preferential consideration for placement of the child. As used in this section, "relative" means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand," or the spouse of any of these persons, even if the marriage was terminated by death or dissolution.

(3) When placing in the home of a relative, an extended family member as defined in Section 224.1 and Section 1903 of the federal Indian Child Welfare Act of 1978, or nonrelative extended family member, the court shall consider the recommendations of the social worker based on the assessment pursuant to Section 361.4 of the home of the relative, extended family member, or nonrelative extended family member, including the results of a criminal records check and prior child abuse allegations, if any, prior to ordering that the child be placed with a relative or nonrelative

extended family member. The court shall order the parent to disclose to the social worker the names, residences, and any known identifying information of any maternal or paternal relatives of the child. The social worker shall initiate the assessment pursuant to Section 361.3 of any relative to be considered for continuing placement.

(i) In the case of an Indian child, any order detaining the child pursuant to this section shall be considered an emergency removal within the meaning of Section 1922 of the federal Indian Child Welfare Act of 1978. The emergency proceeding shall terminate if the child is returned to the custody of the parent, parents, or Indian custodian, the child has been transferred to the custody and jurisdiction of the child's tribe, or the agency or another party to the proceeding recommends that the child be removed from the physical custody of his or her parent or parents or Indian custodian pursuant to Section 361 or 361.2.

(j) (1) At the initial hearing upon the petition filed in accordance with subdivision (c) of Rule 5.520 of the California Rules of Court or anytime thereafter up until the time that the minor is adjudged a dependent child of the court or a finding is made dismissing the petition, the court may temporarily limit the right of the parent or guardian to make educational or developmental services decisions for the child and temporarily appoint a responsible adult to make educational or developmental services decisions for the child if all of the following conditions are found:

(A) The parent or guardian is unavailable, unable, or unwilling to exercise educational or developmental services rights for the child.

(B) The county placing agency has made diligent efforts to locate and secure the participation of the parent or guardian in educational or developmental services decisionmaking.

(C) The child's educational and developmental services needs cannot be met without the temporary appointment of a responsible adult.

(2) If the court limits the parent's educational rights under this subdivision, the court shall determine whether there is a responsible adult who is a relative, nonrelative extended family member, or other adult known to the child and who is available and willing to serve as the child's educational representative before appointing an educational representative or surrogate who is not known to the child.

(3) If the court cannot identify a responsible adult to make educational decisions for the child and the appointment of a surrogate parent, as defined in subdivision (a) of Section 56050 of the Education Code, is not warranted, the court may, with the input of any interested person, make educational decisions for the child. If the child is receiving services from a regional center, the provision of any developmental services related to the court's decision shall be consistent with the child's individual program plan and pursuant to the provisions of the Lanterman Developmental Disabilities Services Act (Division 4.5 (commencing with Section 4500)). If the court cannot identify a responsible adult to make developmental services decisions for the child, the court may, with the input of any interested person, make developmental services decisions for the child. If the court makes educational

or developmental services decisions for the child, the court shall also issue appropriate orders to ensure that every effort is made to identify a responsible adult to make future educational or developmental services decisions for the child.

(4) A temporary appointment of a responsible adult and temporary limitation on the right of the parent or guardian to make educational or developmental services decisions for the child shall be specifically addressed in the court order. An order made under this section shall expire at the conclusion of the hearing held pursuant to Section 361 or upon dismissal of the petition. Upon the entering of disposition orders, additional needed limitation on the parent's or guardian's educational or developmental services rights shall be addressed pursuant to Section 361.

(5) This section does not remove the obligation to appoint surrogate parents for students with disabilities who are without parental representation in special education procedures as required by state and federal law, including Section 1415(b)(2) of Title 20 of the United States Code, Section 56050 of the Education Code, Section 7579.5 of the Government Code, and Rule 5.650 of the California Rules of Court.

(6) If the court appoints a developmental services decisionmaker pursuant to this section, he or she shall have the authority to access the child's information and records pursuant to subdivision (u) of Section 4514 and paragraph (23) of subdivision (a) of Section 5328, and to act on the child's behalf for the purposes of the individual program plan process pursuant to Sections 4646, 4646.5, and 4648 and the fair hearing process pursuant to Chapter 7 (commencing with Section 4700), and as set forth in the court order.

SEC. 23. Section 319.4 is added to the Welfare and Institutions Code, to read:

319.4. If it is known or if there is reason to know the child is an Indian child, and the child has been ordered detained pursuant to Section 319, any party may request an ex parte hearing prior to disposition to present evidence to the court that the emergency placement is no longer necessary to prevent imminent physical damage or harm to the child. If the court determines placement is no longer necessary, it shall order the child returned to the physical custody of the parent or parents or Indian custodian. The Judicial Council shall develop a rule of court and forms for implementation of this section.

SEC. 24. Section 332 of the Welfare and Institutions Code is amended to read:

332. A petition to commence proceedings in the juvenile court to declare a child a dependent child of the court shall be verified and shall contain all of the following:

- (a) The name of the court to which it is addressed.
- (b) The title of the proceeding.
- (c) The code section and the subdivision under which the proceedings are instituted. If it is alleged that the child is a person described by

subdivision (e) of Section 300, the petition shall include an allegation pursuant to that section.

(d) The name, age, and address, if any, of the child upon whose behalf the petition is brought. If it is known or there is reason to know the child is an Indian child, the petition shall also include the last known address of the child.

(e) The names and residence addresses, if known to the petitioner, of all parents, any guardian of the child, and any Indian custodian. If there is no parent, guardian, or Indian custodian residing within the state, or if his or her place of residence is not known to the petitioner, the petition shall also contain the name and residence address, if known, of any adult relative residing within the county, or, if there is none, the adult relative residing nearest to the location of the court. If it is known to the petitioner that one of the parents is a victim of domestic violence and that parent is currently living separately from the batterer-parent, the address of the victim-parent shall remain confidential.

(f) A concise statement of facts, separately stated, to support the conclusion that the child upon whose behalf the petition is being brought is a person within the definition of each of the sections and subdivisions under which the proceedings are being instituted.

(g) The fact that the child upon whose behalf the petition is brought is detained in custody or is not detained in custody, and if he or she is detained in custody, the date and the precise time the child was taken into custody.

(h) A notice to the father, mother, spouse, or other person liable for support of the child, of all of the following: (1) Section 903 makes that person, the estate of that person, and the estate of the child, liable for the cost of the care, support, and maintenance of the child in any county institution or any other place in which the child is placed, detained, or committed pursuant to an order of the juvenile court; (2) Section 903.1 makes that person, the estate of that person, and the estate of the child, liable for the cost to the county of legal services rendered to the child or the parent by a private attorney or a public defender appointed pursuant to the order of the juvenile court; (3) Section 903.2 makes that person, the estate of that person, and the estate of the child, liable for the cost to the county of the supervision of the child by the social worker pursuant to the order of the juvenile court; and (4) the liabilities established by these sections are joint and several.

SEC. 25. Section 352 of the Welfare and Institutions Code is amended to read:

352. (a) (1) Upon request of counsel for the parent, guardian, minor, or petitioner, the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that a continuance shall not be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements.

(2) Continuances shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause. Further, neither a pending criminal prosecution nor family law matter shall be considered in and of itself as good cause. Whenever any continuance is granted, the facts proven which require the continuance shall be entered upon the minutes of the court.

(3) In order to obtain a motion for a continuance of the hearing, written notice shall be filed at least two court days prior to the date set for hearing, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance.

(b) Notwithstanding any other law, if a minor has been removed from the parents' or guardians' custody, a continuance shall not be granted that would result in the dispositional hearing, held pursuant to Section 361, being completed longer than 60 days, or 30 days in the case of an Indian child, after the hearing at which the minor was ordered removed or detained, unless the court finds that there are exceptional circumstances requiring a continuance. If the court knows or has reason to know that the child is an Indian child, the absence of the opinion of a qualified expert witness shall not, in and of itself, support a finding that exceptional circumstances exist. The facts supporting a continuance shall be entered upon the minutes of the court. The court shall not grant continuances that would cause the hearing pursuant to Section 361 to be completed more than six months after the hearing pursuant to Section 319.

(c) In any case in which the parent, guardian, or minor is represented by counsel and no objection is made to an order continuing any such hearing beyond the time limit within which the hearing is otherwise required to be held, the absence of such an objection shall be deemed a consent to the continuance. The consent does not affect the requirements of subdivision (a).

SEC. 26. Section 354 of the Welfare and Institutions Code is amended to read:

354. Except where a minor is in custody, any hearing on a petition filed pursuant to Article 8 (commencing with Section 325) of this chapter may be continued by the court for not more than 10 days in addition to any other continuance authorized in this chapter whenever the court is satisfied that an unavailable and necessary witness will be available within such time. If the court knows or has reason to know that the child is an Indian child, the failure to retain in a timely manner the services of a qualified expert witness shall not, in and of itself, demonstrate that a necessary witness is unavailable.

SEC. 27. Section 361 of the Welfare and Institutions Code is amended to read:

361. (a) (1) In all cases in which a minor is adjudged a dependent child of the court on the ground that the minor is a person described by Section 300, the court may limit the control to be exercised over the dependent child

by any parent, guardian, or Indian custodian and shall by its order clearly and specifically set forth all those limitations. Any limitation on the right of the parent, guardian, or Indian custodian to make educational or developmental services decisions for the child shall be specifically addressed in the court order. The limitations may not exceed those necessary to protect the child. If the court specifically limits the right of the parent, guardian, or Indian custodian to make educational or developmental services decisions for the child, or, for the nonminor dependent, if the court finds the appointment of a developmental services decisionmaker to be in the best interests of the nonminor dependent, the court shall at the same time appoint a responsible adult to make educational or developmental services decisions for the child or nonminor dependent until one of the following occurs:

(A) The minor reaches 18 years of age, unless the child or nonminor dependent chooses not to make educational or developmental services decisions for himself or herself, or is deemed by the court to be incompetent.

(B) Another responsible adult is appointed to make educational or developmental services decisions for the minor pursuant to this section.

(C) The right of the parent, guardian, or Indian custodian to make educational or developmental services decisions for the minor is fully restored.

(D) A successor guardian or conservator is appointed.

(E) The child is placed into a planned permanent living arrangement pursuant to paragraph (5) of subdivision (g) of Section 366.21, Section 366.22, Section 366.26, or subdivision (i) of Section 366.3, at which time, for educational decisionmaking, the foster parent, relative caretaker, or nonrelative extended family member as defined in Section 362.7, has the right to represent the child in educational matters pursuant to Section 56055 of the Education Code, and for decisions relating to developmental services, unless the court specifies otherwise, the foster parent, relative caregiver, or nonrelative extended family member of the planned permanent living arrangement has the right to represent the child or nonminor dependent in matters related to developmental services.

(2) An individual who would have a conflict of interest in representing the child or nonminor dependent shall not be appointed to make educational or developmental services decisions. For purposes of this section, “an individual who would have a conflict of interest” means a person having any interests that might restrict or bias his or her ability to make educational or developmental services decisions, including, but not limited to, those conflicts of interest prohibited by Section 1126 of the Government Code, and the receipt of compensation or attorney’s fees for the provision of services pursuant to this section. A foster parent shall not be deemed to have a conflict of interest solely because he or she receives compensation for the provision of services pursuant to this section.

(3) Regardless of the person or persons currently holding the right to make educational decisions for the child, a foster parent, relative caregiver, nonrelated extended family member, or resource family shall retain rights and obligations regarding accessing and maintaining health and education

information pursuant to Sections 49069.3 and 49076 of the Education Code and Section 16010 of this code.

(4) (A) If the court limits the parent's, guardian's, or Indian custodian's educational rights pursuant to this subdivision, the court shall determine whether there is a responsible adult who is a relative, nonrelative extended family member, or other adult known to the child who is available and willing to serve as the child's educational representative before appointing an educational representative or surrogate who is not known to the child.

(B) If the court cannot identify a responsible adult who is known to the child and available to make educational decisions for the child, subparagraphs (A) to (E), inclusive, of paragraph (1) do not apply, and the child has either been referred to the local educational agency for special education and related services, or has a valid individualized education program, the court shall refer the child to the local educational agency for appointment of a surrogate parent pursuant to Section 7579.5 of the Government Code.

(C) If the court cannot identify a responsible adult to make educational decisions for the child, the appointment of a surrogate parent as defined in subdivision (a) of Section 56050 of the Education Code is not warranted, and there is no foster parent to exercise the authority granted by Section 56055 of the Education Code, the court may, with the input of any interested person, make educational decisions for the child.

(5) (A) If the court appoints a developmental services decisionmaker pursuant to this section, he or she shall have the authority to access the child's or nonminor dependent's information and records pursuant to subdivision (u) of Section 4514 and paragraph (23) of subdivision (a) of Section 5328, and to act on the child's or nonminor dependent's behalf for the purposes of the individual program plan process pursuant to Sections 4646, 4646.5, and 4648 and the fair hearing process pursuant to Chapter 7 (commencing with Section 4700) of Division 4.5, and as set forth in the court order.

(B) If the court cannot identify a responsible adult to make developmental services decisions for the child or nonminor dependent, the court may, with the input of any interested person, make developmental services decisions for the child or nonminor dependent. If the child is receiving services from a regional center, the provision of any developmental services related to the court's decision must be consistent with the child's or nonminor dependent's individual program plan and pursuant to the provisions of the Lanterman Developmental Disabilities Services Act (Division 4.5 (commencing with Section 4500)).

(6) All educational and school placement decisions shall seek to ensure that the child is in the least restrictive educational programs and has access to the academic resources, services, and extracurricular and enrichment activities that are available to all pupils. In all instances, educational and school placement decisions shall be based on the best interests of the child. If an educational representative or surrogate is appointed for the child, the representative or surrogate shall meet with the child, shall investigate the

child's educational needs and whether those needs are being met, and shall, prior to each review hearing held under this article, provide information and recommendations concerning the child's educational needs to the child's social worker, make written recommendations to the court, or attend the hearing and participate in those portions of the hearing that concern the child's education.

(7) Nothing in this section in any way removes the obligation to appoint surrogate parents for students with disabilities who are without parental representation in special education procedures as required by state and federal law, including Section 1415(b)(2) of Title 20 of the United States Code, Section 56050 of the Education Code, Section 7579.5 of the Government Code, and Rule 5.650 of the California Rules of Court.

(b) (1) Subdivision (a) does not limit the ability of a parent to voluntarily relinquish his or her child to the State Department of Social Services, to a county adoption agency, or to a licensed private adoption agency at any time while the child is the subject of a petition to declare him or her, or is, a dependent child of the juvenile court, if the department, county adoption agency, or licensed private adoption agency is willing to accept the relinquishment.

(2) When accepting the relinquishment of a child described in paragraph (1), the department or a county adoption agency shall comply with Section 8700 of the Family Code and, within five court days of accepting the relinquishment, shall file written notice of that fact with the court and all parties to the case and their counsel.

(3) When accepting the relinquishment of a child described in paragraph (1), a licensed private adoption agency shall comply with Section 8700 of the Family Code and, within 10 court days of accepting the relinquishment, shall file or allow another party or that party's counsel to file with the court one original and five copies of a request to approve the relinquishment. The clerk of the court shall file the request under seal, subject to examination only by the parties and their counsel or by others upon court approval. If the request is accompanied by the written agreement of all parties, the court may issue an ex parte order approving the relinquishment. Unless approved pursuant to that agreement, the court shall set the matter for hearing no later than 10 court days after filing, and shall provide notice of the hearing to all parties and their counsel, and to the licensed private adoption agency and its counsel. The licensed private adoption agency and any prospective adoptive parent or parents named in the relinquishment shall be permitted to attend the hearing and participate as parties regarding the strictly limited issue of whether the court should approve the relinquishment. The court shall issue an order approving or denying the relinquishment within 10 court days after the hearing.

(4) Nothing in this subdivision suspends the requirements for voluntary adoptive placement under the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.).

(c) A dependent child shall not be taken from the physical custody of his or her parents, guardian or guardians, or Indian custodian with whom the

child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in paragraphs (1) to (5), inclusive, and, where it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, paragraph (6):

(1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's, guardian's, or Indian custodian's physical custody. The fact that a minor has been adjudicated a dependent child of the court pursuant to subdivision (e) of Section 300 shall constitute prima facie evidence that the minor cannot be safely left in the physical custody of the parent, guardian, or Indian custodian with whom the minor resided at the time of injury. The court shall consider, as a reasonable means to protect the minor, each of the following:

(A) The option of removing an offending parent, guardian, or Indian custodian from the home.

(B) Allowing a nonoffending parent, guardian, or Indian custodian to retain physical custody as long as that parent, guardian, or Indian custodian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm.

(2) The parent, guardian, or Indian custodian of the minor is unwilling to have physical custody of the minor, and the parent, guardian, or Indian custodian has been notified that if the minor remains out of their physical custody for the period specified in Section 366.26, the minor may be declared permanently free from their custody and control.

(3) The minor is suffering severe emotional damage, as indicated by extreme anxiety, depression, withdrawal, or untoward aggressive behavior toward himself or herself or others, and there are no reasonable means by which the minor's emotional health may be protected without removing the minor from the physical custody of his or her parent, guardian, or Indian custodian.

(4) The minor or a sibling of the minor has been sexually abused, or is deemed to be at substantial risk of being sexually abused, by a parent, guardian, Indian custodian, or member of his or her household, or other person known to his or her parent, and there are no reasonable means by which the minor can be protected from further sexual abuse or a substantial risk of sexual abuse without removing the minor from his or her parent, guardian, or Indian custodian, or the minor does not wish to return to his or her parent, guardian, or Indian custodian.

(5) The minor has been left without any provision for his or her support, or a parent, guardian, or Indian custodian who has been incarcerated or institutionalized cannot arrange for the care of the minor, or a relative or other adult custodian with whom the child has been left by the parent, guardian, or Indian custodian is unwilling or unable to provide care or support for the child and the whereabouts of the parent, guardian, or Indian

custodian is unknown and reasonable efforts to locate him or her have been unsuccessful.

(6) In an Indian child custody proceeding, continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and that finding is supported by testimony of a “qualified expert witness” as described in Section 224.6.

(A) For purposes of this paragraph, stipulation by the parent, Indian custodian, or the Indian child’s tribe, or failure to object, may waive the requirement of producing evidence of the likelihood of serious damage only if the court is satisfied that the party has been fully advised of the requirements of the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.), and has knowingly, intelligently, and voluntarily waived them.

(B) For purposes of this paragraph, failure to meet non-Indian family and child-rearing community standards, or the existence of other behavior or conditions that meet the removal standards of this section, will not support an order for placement in the absence of the finding in this paragraph.

(d) A dependent child shall not be taken from the physical custody of his or her parents, guardian, or Indian custodian with whom the child did not reside at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence that there would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child for the parent, guardian, or Indian custodian to live with the child or otherwise exercise the parent’s, guardian’s, or Indian custodian’s right to physical custody, and there are no reasonable means by which the child’s physical and emotional health can be protected without removing the child from the child’s parent’s, guardian’s, or Indian custodian’s physical custody.

(e) The court shall make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home or, if the minor is removed for one of the reasons stated in paragraph (5) of subdivision (c), whether it was reasonable under the circumstances not to make any of those efforts, or, where it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, whether active efforts, as defined by Section 224.1 and as required in Section 361.7 were made and that these efforts have proved unsuccessful. The court shall state the facts on which the decision to remove the minor is based.

(f) The court shall make all of the findings required by subdivision (a) of Section 366 in either of the following circumstances:

(1) The minor has been taken from the custody of his or her parent, guardian, or Indian custodian and has been living in an out-of-home placement pursuant to Section 319.

(2) The minor has been living in a voluntary out-of-home placement pursuant to Section 16507.4.

SEC. 28. Section 361.2 of the Welfare and Institutions Code is amended to read:

361.2. (a) When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child. The fact that the parent is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent shall not be, for that reason alone, prima facie evidence that placement with that parent would be detrimental.

(b) If the court places the child with that parent it may do any of the following:

(1) Order that the parent become legal and physical custodian of the child. The court may also provide reasonable visitation by the noncustodial parent. The court shall then terminate its jurisdiction over the child. The custody order shall continue unless modified by a subsequent order of the superior court. The order of the juvenile court shall be filed in any domestic relation proceeding between the parents.

(2) Order that the parent assume custody subject to the jurisdiction of the juvenile court and require that a home visit be conducted within three months. In determining whether to take the action described in this paragraph, the court shall consider any concerns that have been raised by the child's current caregiver regarding the parent. After the social worker conducts the home visit and files his or her report with the court, the court may then take the action described in paragraph (1), (3), or this paragraph. However, nothing in this paragraph shall be interpreted to imply that the court is required to take the action described in this paragraph as a prerequisite to the court taking the action described in either paragraph (1) or (3).

(3) Order that the parent assume custody subject to the supervision of the juvenile court. In that case the court may order that reunification services be provided to the parent or guardian from whom the child is being removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be provided to both parents, in which case the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the child.

(c) The court shall make a finding either in writing or on the record of the basis for its determination under subdivisions (a) and (b).

(d) Part 6 (commencing with Section 7950) of Division 12 of the Family Code shall apply to the placement of a child pursuant to paragraphs (1) and (2) of subdivision (e).

(e) When the court orders removal pursuant to Section 361, the court shall order the care, custody, control, and conduct of the child to be under the supervision of the social worker who may place the child in any of the following:

(1) The home of a noncustodial parent as described in subdivision (a), regardless of the parent's immigration status.

(2) The approved home of a relative, or the home of a relative who has been assessed pursuant to Section 361.4 and is pending approval pursuant to Section 16519.5, regardless of the relative's immigration status.

(3) The approved home of a nonrelative extended family member as defined in Section 362.7, or the home of a nonrelative extended family member who has been assessed pursuant to Section 361.4 and is pending approval pursuant to Section 16519.5.

(4) The approved home of a resource family as defined in Section 16519.5, or a home that is pending approval pursuant to paragraph (1) of subdivision (e) of Section 16519.5.

(5) A foster home considering first a foster home in which the child has been placed before an interruption in foster care, if that placement is in the best interest of the child and space is available.

(6) Where it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, a home or facility in accordance with the placement preferences contained in Section 361.31 and the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.).

(7) A suitable licensed community care facility, except a runaway and homeless youth shelter licensed by the State Department of Social Services pursuant to Section 1502.35 of the Health and Safety Code.

(8) With a foster family agency, as defined in subdivision (g) of Section 11400 and paragraph (4) of subdivision (a) of Section 1502 of the Health and Safety Code, to be placed in a suitable family home certified or approved by the agency, with prior approval of the county placing agency.

(9) A community care facility licensed as a group home for children or a short-term residential therapeutic program, as defined in subdivision (ad) of Section 11400 of this code and paragraph (18) of subdivision (a) of Section 1502 of the Health and Safety Code. A child of any age who is placed in a community care facility licensed as a group home for children or a short-term residential therapeutic program shall have a case plan that indicates that placement is for purposes of providing short-term, specialized, and intensive treatment for the child, the case plan specifies the need for, nature of, and anticipated duration of this treatment, pursuant to paragraph (2) of subdivision (d) of Section 16501.1, and the case plan includes transitioning the child to a less restrictive environment and the projected timeline by which the child will be transitioned to a less restrictive environment. Any placement longer than six months shall be documented consistent with paragraph (3) of subdivision (a) of Section 16501.1 and, unless subparagraph (A) or (B) applies to the child, shall be approved by the deputy director or director of the county child welfare department no less frequently than every six months.

(A) A child under six years of age shall not be placed in a community care facility licensed as a group home for children, or a short-term residential therapeutic program except under the following circumstances:

(i) When the facility meets the applicable regulations adopted under Section 1530.8 of the Health and Safety Code and standards developed pursuant to Section 11467.1 of this code, and the deputy director or director of the county child welfare department has approved the case plan.

(ii) The short-term, specialized, and intensive treatment period shall not exceed 120 days, unless the county has made progress toward or is actively working toward implementing the case plan that identifies the services or supports necessary to transition the child to a family setting, circumstances beyond the county's control have prevented the county from obtaining those services or supports within the timeline documented in the case plan, and the need for additional time pursuant to the case plan is documented by the caseworker and approved by a deputy director or director of the county child welfare department.

(iii) To the extent that placements pursuant to this paragraph are extended beyond an initial 120 days, the requirements of clauses (i) and (ii) shall apply to each extension. In addition, the deputy director or director of the county child welfare department shall approve the continued placement no less frequently than every 60 days.

(iv) In addition, when a case plan indicates that placement is for purposes of providing family reunification services, the facility shall offer family reunification services that meet the needs of the individual child and his or her family, permit parents, guardians, or Indian custodians to have reasonable access to their children 24 hours a day, encourage extensive parental involvement in meeting the daily needs of their children, and employ staff trained to provide family reunification services. In addition, one of the following conditions exists:

(I) The child's parent, guardian, or Indian custodian is also under the jurisdiction of the court and resides in the facility.

(II) The child's parent, guardian, or Indian custodian is participating in a treatment program affiliated with the facility and the child's placement in the facility facilitates the coordination and provision of reunification services.

(III) Placement in the facility is the only alternative that permits the parent, guardian, or Indian custodian to have daily 24-hour access to the child in accordance with the case plan, to participate fully in meeting all of the daily needs of the child, including feeding and personal hygiene, and to have access to necessary reunification services.

(B) A child who is 6 to 12 years of age, inclusive, may be placed in a community care facility licensed as a group home for children or a short-term residential therapeutic program under the following conditions:

(i) The deputy director of the county welfare department shall approve the case prior to initial placement.

(ii) The short-term, specialized, and intensive treatment period shall not exceed six months, unless the county has made progress or is actively working toward implementing the case plan that identifies the services or supports necessary to transition the child to a family setting, circumstances beyond the county's control have prevented the county from obtaining those services or supports within the timeline documented in the case plan, and

the need for additional time pursuant to the case plan is documented by the caseworker and approved by a deputy director or director of the county child welfare department.

(iii) To the extent that placements pursuant to this paragraph are extended beyond an initial six months, the requirements of this subparagraph shall apply to each extension. In addition, the deputy director or director of the county child welfare department shall approve the continued placement no less frequently than every 60 days.

(10) Any child placed in a short-term residential therapeutic program shall be either of the following:

(A) A child who has been assessed as meeting one of the placement requirements set forth in subdivisions (b) and (e) of Section 11462.01.

(B) A child under 6 years of age who is placed with his or her minor parent or for the purpose of reunification pursuant to clause (iv) of subparagraph (A) of paragraph (9).

(11) Nothing in this subdivision shall be construed to allow a social worker to place any dependent child outside the United States, except as specified in subdivision (f).

(f) (1) A child under the supervision of a social worker pursuant to subdivision (e) shall not be placed outside the United States prior to a judicial finding that the placement is in the best interest of the child, except as required by federal law or treaty.

(2) The party or agency requesting placement of the child outside the United States shall carry the burden of proof and shall show, by clear and convincing evidence, that placement outside the United States is in the best interest of the child.

(3) In determining the best interest of the child, the court shall consider, but not be limited to, the following factors:

(A) Placement with a relative.

(B) Placement of siblings in the same home.

(C) Amount and nature of any contact between the child and the potential guardian or caretaker.

(D) Physical and medical needs of the dependent child.

(E) Psychological and emotional needs of the dependent child.

(F) Social, cultural, and educational needs of the dependent child.

(G) Specific desires of any dependent child who is 12 years of age or older.

(4) If the court finds that a placement outside the United States is, by clear and convincing evidence, in the best interest of the child, the court may issue an order authorizing the social worker to make a placement outside the United States. A child subject to this subdivision shall not leave the United States prior to the issuance of the order described in this paragraph.

(5) For purposes of this subdivision, “outside the United States” shall not include the lands of any federally recognized American Indian tribe or Alaskan Natives.

(6) This subdivision shall not apply to the placement of a dependent child with a parent pursuant to subdivision (a).

(g) (1) If the child is taken from the physical custody of the child's parent, guardian, or Indian custodian and unless the child is placed with relatives, the child shall be placed in foster care in the county of residence of the child's parent, guardian, or Indian custodian in order to facilitate reunification of the family.

(2) In the event that there are no appropriate placements available in the parent's, guardian's, or Indian custodian's county of residence, a placement may be made in an appropriate place in another county, preferably a county located adjacent to the parent's, guardian's, or Indian custodian's community of residence.

(3) Nothing in this section shall be interpreted as requiring multiple disruptions of the child's placement corresponding to frequent changes of residence by the parent, guardian, or Indian custodian. In determining whether the child should be moved, the social worker shall take into consideration the potential harmful effects of disrupting the placement of the child and the parent's, guardian's, or Indian custodian's reason for the move.

(4) When it has been determined that it is necessary for a child to be placed in a county other than the child's parent's, guardian's, or Indian custodian's county of residence, the specific reason the out-of-county placement is necessary shall be documented in the child's case plan. If the reason the out-of-county placement is necessary is the lack of resources in the sending county to meet the specific needs of the child, those specific resource needs shall be documented in the case plan.

(5) When it has been determined that a child is to be placed out of county either in a group home or with a foster family agency for subsequent placement in a certified foster family home, and the sending county is to maintain responsibility for supervision and visitation of the child, the sending county shall develop a plan of supervision and visitation that specifies the supervision and visitation activities to be performed and specifies that the sending county is responsible for performing those activities. In addition to the plan of supervision and visitation, the sending county shall document information regarding any known or suspected dangerous behavior of the child that indicates the child may pose a safety concern in the receiving county. Upon implementation of the Child Welfare Services Case Management System, the plan of supervision and visitation, as well as information regarding any known or suspected dangerous behavior of the child, shall be made available to the receiving county upon placement of the child in the receiving county. If placement occurs on a weekend or holiday, the information shall be made available to the receiving county on or before the end of the next business day.

(6) When it has been determined that a child is to be placed out of county and the sending county plans that the receiving county shall be responsible for the supervision and visitation of the child, the sending county shall develop a formal agreement between the sending and receiving counties. The formal agreement shall specify the supervision and visitation to be provided the child, and shall specify that the receiving county is responsible

for providing the supervision and visitation. The formal agreement shall be approved and signed by the sending and receiving counties prior to placement of the child in the receiving county. In addition, upon completion of the case plan, the sending county shall provide a copy of the completed case plan to the receiving county. The case plan shall include information regarding any known or suspected dangerous behavior of the child that indicates the child may pose a safety concern to the receiving county.

(h) Whenever the social worker must change the placement of the child and is unable to find a suitable placement within the county and must place the child outside the county, the placement shall not be made until he or she has served written notice on the parent, guardian, Indian custodian, the child's tribe, the child's attorney, and, if the child is 10 years of age or older, on the child, at least 14 days prior to the placement, unless the child's health or well-being is endangered by delaying the action or would be endangered if prior notice were given. The notice shall state the reasons that require placement outside the county. The child or parent, guardian, Indian custodian, or the child's tribe may object to the placement not later than seven days after receipt of the notice and, upon objection, the court shall hold a hearing not later than five days after the objection and prior to the placement. The court shall order out-of-county placement if it finds that the child's particular needs require placement outside the county.

(i) If the court has ordered removal of the child from the physical custody of his or her parents pursuant to Section 361, the court shall consider whether the family ties and best interest of the child will be served by granting visitation rights to the child's grandparents. The court shall clearly specify those rights to the social worker.

(j) If the court has ordered removal of the child from the physical custody of his or her parents pursuant to Section 361, the court shall consider whether there are any siblings under the court's jurisdiction, or any nondependent siblings in the physical custody of a parent subject to the court's jurisdiction, the nature of the relationship between the child and his or her siblings, the appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002, and the impact of the sibling relationships on the child's placement and planning for legal permanence.

(k) (1) An agency shall ensure placement of a child in a home that, to the fullest extent possible, best meets the day-to-day needs of the child. A home that best meets the day-to-day needs of the child shall satisfy all of the following criteria:

(A) The child's caregiver is able to meet the day-to-day health, safety, and well-being needs of the child.

(B) The child's caregiver is permitted to maintain the least restrictive family setting that promotes normal childhood experiences and that serves the day-to-day needs of the child.

(C) The child is permitted to engage in reasonable, age-appropriate day-to-day activities that promote normal childhood experiences for the foster child.

(2) The foster child’s caregiver shall use a reasonable and prudent parent standard, as defined in paragraph (2) of subdivision (a) of Section 362.04, to determine day-to-day activities that are age appropriate to meet the needs of the child. Nothing in this section shall be construed to permit a child’s caregiver to permit the child to engage in day-to-day activities that carry an unreasonable risk of harm, or subject the child to abuse or neglect.

SEC. 28.5. Section 361.2 of the Welfare and Institutions Code is amended to read:

361.2. (a) When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child. The fact that the parent is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent shall not be, for that reason alone, prima facie evidence that placement with that parent would be detrimental.

(b) If the court places the child with that parent it may do any of the following:

(1) Order that the parent become legal and physical custodian of the child. The court may also provide reasonable visitation by the noncustodial parent. The court shall then terminate its jurisdiction over the child. The custody order shall continue unless modified by a subsequent order of the superior court. The order of the juvenile court shall be filed in any domestic relation proceeding between the parents.

(2) Order that the parent assume custody subject to the jurisdiction of the juvenile court and require that a home visit be conducted within three months. In determining whether to take the action described in this paragraph, the court shall consider any concerns that have been raised by the child’s current caregiver regarding the parent. After the social worker conducts the home visit and files his or her report with the court, the court may then take the action described in paragraph (1), (3), or this paragraph. However, nothing in this paragraph shall be interpreted to imply that the court is required to take the action described in this paragraph as a prerequisite to the court taking the action described in either paragraph (1) or (3).

(3) Order that the parent assume custody subject to the supervision of the juvenile court. In that case the court may order that reunification services be provided to the parent or guardian from whom the child is being removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be provided to both parents, in which case the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the child.

(c) The court shall make a finding either in writing or on the record of the basis for its determination under subdivisions (a) and (b).

(d) Part 6 (commencing with Section 7950) of Division 12 of the Family Code shall apply to the placement of a child pursuant to paragraphs (1) and (2) of subdivision (e).

(e) When the court orders removal pursuant to Section 361, the court shall order the care, custody, control, and conduct of the child to be under the supervision of the social worker who may place the child in any of the following:

(1) The home of a noncustodial parent as described in subdivision (a), regardless of the parent's immigration status.

(2) The approved home of a relative, or the home of a relative who has been assessed pursuant to Section 361.4 and is pending approval pursuant to Section 16519.5, regardless of the relative's immigration status.

(3) The approved home of a nonrelative extended family member as defined in Section 362.7, or the home of a nonrelative extended family member who has been assessed pursuant to Section 361.4 and is pending approval pursuant to Section 16519.5.

(4) The approved home of a resource family as defined in Section 16519.5, or a home that is pending approval pursuant to paragraph (1) of subdivision (e) of Section 16519.5.

(5) A foster home considering first a foster home in which the child has been placed before an interruption in foster care, if that placement is in the best interest of the child and space is available.

(6) Where it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, a home or facility in accordance with the placement preferences contained in Section 361.31 and the federal Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.).

(7) A suitable licensed community care facility, except a runaway and homeless youth shelter licensed by the State Department of Social Services pursuant to Section 1502.35 of the Health and Safety Code.

(8) With a foster family agency, as defined in subdivision (g) of Section 11400 and paragraph (4) of subdivision (a) of Section 1502 of the Health and Safety Code, to be placed in a suitable family home certified or approved by the agency, with prior approval of the county placing agency.

(9) A community care facility licensed as a group home for children or a short-term residential therapeutic program, as defined in subdivision (ad) of Section 11400 of this code and paragraph (18) of subdivision (a) of Section 1502 of the Health and Safety Code. A child of any age who is placed in a community care facility licensed as a group home for children or a short-term residential therapeutic program shall have a case plan that indicates that placement is for purposes of providing short-term, specialized, and intensive treatment for the child, the case plan specifies the need for, nature of, and anticipated duration of this treatment, pursuant to paragraph (2) of subdivision (d) of Section 16501.1, and the case plan includes transitioning the child to a less restrictive environment and the projected timeline by which the child will be transitioned to a less restrictive

environment. Any placement longer than six months shall be documented consistent with paragraph (3) of subdivision (a) of Section 16501.1 and, unless subparagraph (A) or (B) applies to the child, shall be approved by the deputy director or director of the county child welfare department no less frequently than every six months.

(A) A child under six years of age shall not be placed in a community care facility licensed as a group home for children, or a short-term residential therapeutic program except under the following circumstances:

(i) When the facility meets the applicable regulations adopted under Section 1530.8 of the Health and Safety Code and standards developed pursuant to Section 11467.1 of this code, and the deputy director or director of the county child welfare department has approved the case plan.

(ii) The short-term, specialized, and intensive treatment period shall not exceed 120 days, unless the county has made progress toward or is actively working toward implementing the case plan that identifies the services or supports necessary to transition the child to a family setting, circumstances beyond the county's control have prevented the county from obtaining those services or supports within the timeline documented in the case plan, and the need for additional time pursuant to the case plan is documented by the caseworker and approved by a deputy director or director of the county child welfare department.

(iii) To the extent that placements pursuant to this paragraph are extended beyond an initial 120 days, the requirements of clauses (i) and (ii) shall apply to each extension. In addition, the deputy director or director of the county child welfare department shall approve the continued placement no less frequently than every 60 days.

(iv) In addition, when a case plan indicates that placement is for purposes of providing family reunification services, the facility shall offer family reunification services that meet the needs of the individual child and his or her family, permit parents, guardians, or Indian custodians to have reasonable access to their children 24 hours a day, encourage extensive parental involvement in meeting the daily needs of their children, and employ staff trained to provide family reunification services. In addition, one of the following conditions exists:

(I) The child's parent, guardian, or Indian custodian is also under the jurisdiction of the court and resides in the facility.

(II) The child's parent, guardian, or Indian custodian is participating in a treatment program affiliated with the facility and the child's placement in the facility facilitates the coordination and provision of reunification services.

(III) Placement in the facility is the only alternative that permits the parent, guardian, or Indian custodian to have daily 24-hour access to the child in accordance with the case plan, to participate fully in meeting all of the daily needs of the child, including feeding and personal hygiene, and to have access to necessary reunification services.

(B) A child who is 6 to 12 years of age, inclusive, may be placed in a community care facility licensed as a group home for children or a short-term residential therapeutic program under the following conditions:

(i) The deputy director of the county welfare department shall approve the case prior to initial placement.

(ii) The short-term, specialized, and intensive treatment period shall not exceed six months, unless the county has made progress or is actively working toward implementing the case plan that identifies the services or supports necessary to transition the child to a family setting, circumstances beyond the county's control have prevented the county from obtaining those services or supports within the timeline documented in the case plan, and the need for additional time pursuant to the case plan is documented by the caseworker and approved by a deputy director or director of the county child welfare department.

(iii) To the extent that placements pursuant to this paragraph are extended beyond an initial six months, the requirements of this subparagraph shall apply to each extension. In addition, the deputy director or director of the county child welfare department shall approve the continued placement no less frequently than every 60 days.

(10) Any child placed in a short-term residential therapeutic program shall be either of the following:

(A) A child who has been assessed as meeting one of the placement requirements set forth in subdivisions (b) and (e) of Section 11462.01.

(B) A child under 6 years of age who is placed with his or her minor parent or for the purpose of reunification pursuant to clause (iv) of subparagraph (A) of paragraph (9).

(11) Nothing in this subdivision shall be construed to allow a social worker to place any dependent child outside the United States, except as specified in subdivision (f).

(f) (1) A child under the supervision of a social worker pursuant to subdivision (e) shall not be placed outside the United States prior to a judicial finding that the placement is in the best interest of the child, except as required by federal law or treaty.

(2) The party or agency requesting placement of the child outside the United States shall carry the burden of proof and shall show, by clear and convincing evidence, that placement outside the United States is in the best interest of the child.

(3) In determining the best interest of the child, the court shall consider, but not be limited to, the following factors:

(A) Placement with a relative.

(B) Placement of siblings in the same home.

(C) Amount and nature of any contact between the child and the potential guardian or caretaker.

(D) Physical and medical needs of the dependent child.

(E) Psychological and emotional needs of the dependent child.

(F) Social, cultural, and educational needs of the dependent child.

(G) Specific desires of any dependent child who is 12 years of age or older.

(4) If the court finds that a placement outside the United States is, by clear and convincing evidence, in the best interest of the child, the court

may issue an order authorizing the social worker to make a placement outside the United States. A child subject to this subdivision shall not leave the United States prior to the issuance of the order described in this paragraph.

(5) For purposes of this subdivision, “outside the United States” shall not include the lands of any federally recognized American Indian tribe or Alaskan Natives.

(6) This subdivision shall not apply to the placement of a dependent child with a parent pursuant to subdivision (a).

(g) (1) If the child is taken from the physical custody of the child’s parent, guardian, or Indian custodian and unless the child is placed with relatives, the child shall be placed in foster care in the county of residence of the child’s parent, guardian, or Indian custodian in order to facilitate reunification of the family.

(2) In the event that there are no appropriate placements available in the parent’s, guardian’s, or Indian custodian’s county of residence, a placement may be made in an appropriate place in another county, preferably a county located adjacent to the parent’s, guardian’s, or Indian custodian’s community of residence.

(3) Nothing in this section shall be interpreted as requiring multiple disruptions of the child’s placement corresponding to frequent changes of residence by the parent, guardian, or Indian custodian. In determining whether the child should be moved, the social worker shall take into consideration the potential harmful effects of disrupting the placement of the child and the parent’s, guardian’s, or Indian custodian’s reason for the move.

(4) When it has been determined that it is necessary for a child to be placed in a county other than the child’s parent’s, guardian’s, or Indian custodian’s county of residence, the specific reason the out-of-county placement is necessary shall be documented in the child’s case plan. If the reason the out-of-county placement is necessary is the lack of resources in the sending county to meet the specific needs of the child, those specific resource needs shall be documented in the case plan.

(5) When it has been determined that a child is to be placed out of county either in a group home or with a foster family agency for subsequent placement in a certified foster family home, and the sending county is to maintain responsibility for supervision and visitation of the child, the sending county shall develop a plan of supervision and visitation that specifies the supervision and visitation activities to be performed and specifies that the sending county is responsible for performing those activities. In addition to the plan of supervision and visitation, the sending county shall document information regarding any known or suspected dangerous behavior of the child that indicates the child may pose a safety concern in the receiving county. Upon implementation of the Child Welfare Services Case Management System, the plan of supervision and visitation, as well as information regarding any known or suspected dangerous behavior of the child, shall be made available to the receiving county upon placement of the child in the receiving county. If placement occurs on a weekend or

holiday, the information shall be made available to the receiving county on or before the end of the next business day.

(6) When it has been determined that a child is to be placed out of county and the sending county plans that the receiving county shall be responsible for the supervision and visitation of the child, the sending county shall develop a formal agreement between the sending and receiving counties. The formal agreement shall specify the supervision and visitation to be provided the child, and shall specify that the receiving county is responsible for providing the supervision and visitation. The formal agreement shall be approved and signed by the sending and receiving counties prior to placement of the child in the receiving county. In addition, upon completion of the case plan, the sending county shall provide a copy of the completed case plan to the receiving county. The case plan shall include information regarding any known or suspected dangerous behavior of the child that indicates the child may pose a safety concern to the receiving county.

(h) (1) Subject to paragraph (2), whenever the social worker must change the placement of the child and is unable to find a suitable placement within the county and must place the child outside the county, the placement shall not be made until he or she has served written notice on the parent, guardian, Indian custodian, the child's tribe, the child's attorney, and, if the child is 10 years of age or older, on the child, at least 14 days prior to the placement, unless the child's health or well-being is endangered by delaying the action or would be endangered if prior notice were given. The notice shall state the reasons that require placement outside the county. The child or parent, guardian, Indian custodian, or the child's tribe may object to the placement not later than seven days after receipt of the notice and, upon objection, the court shall hold a hearing not later than five days after the objection and prior to the placement. The court shall order out-of-county placement if it finds that the child's particular needs require placement outside the county.

(2) (A) The notice required prior to placement, as described in paragraph (1), may be waived if the child and family team has determined that the identified placement is in the best interest of the child, no member of the child and family team objects to the placement, and the child's attorney has been informed of the intended placement and has no objection.

(B) If the child is transitioning from a temporary shelter care facility, as described in Section 11462.022, and all of the circumstances set forth in subparagraph (A) do not exist, the county shall provide oral notice to the child's parents or guardian, the child's attorney, and, if the child is 10 years of age or older, to the child no later than one business day after the determination that out-of-county placement is necessary and the circumstances in subparagraph (A) do not exist. The oral notice shall state the reasons that require placement outside the county and shall be immediately followed by written notice stating the reasons. The child, parent, or guardian may object to the placement not later than seven days after oral notice is provided and, upon objection, the court shall hold a hearing not later than two judicial days after the objection is made. The court may authorize that the child remain in the temporary shelter care facility pending

the outcome of the hearing. The court shall order out-of-county placement if it finds that the child's particular needs require placement outside the county. This subparagraph does not preclude placement of the child without prior notice if the child's health or well-being is endangered by delaying the action or would be endangered if prior notice were given.

(i) If the court has ordered removal of the child from the physical custody of his or her parents pursuant to Section 361, the court shall consider whether the family ties and best interest of the child will be served by granting visitation rights to the child's grandparents. The court shall clearly specify those rights to the social worker.

(j) If the court has ordered removal of the child from the physical custody of his or her parents pursuant to Section 361, the court shall consider whether there are any siblings under the court's jurisdiction, or any nondependent siblings in the physical custody of a parent subject to the court's jurisdiction, the nature of the relationship between the child and his or her siblings, the appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002, and the impact of the sibling relationships on the child's placement and planning for legal permanence.

(k) (1) An agency shall ensure placement of a child in a home that, to the fullest extent possible, best meets the day-to-day needs of the child. A home that best meets the day-to-day needs of the child shall satisfy all of the following criteria:

(A) The child's caregiver is able to meet the day-to-day health, safety, and well-being needs of the child.

(B) The child's caregiver is permitted to maintain the least restrictive family setting that promotes normal childhood experiences and that serves the day-to-day needs of the child.

(C) The child is permitted to engage in reasonable, age-appropriate day-to-day activities that promote normal childhood experiences for the foster child.

(2) The foster child's caregiver shall use a reasonable and prudent parent standard, as defined in paragraph (2) of subdivision (a) of Section 362.04, to determine day-to-day activities that are age appropriate to meet the needs of the child. This section does not permit a child's caregiver to permit the child to engage in day-to-day activities that carry an unreasonable risk of harm, or subject the child to abuse or neglect.

SEC. 29. Section 361.31 of the Welfare and Institutions Code is amended to read:

361.31. (a) If an Indian child is removed from the physical custody of his or her parents or Indian custodian pursuant to Section 361, the child's placement shall comply with this section. The placement shall be analyzed each time there is a change in placement.

(b) Any foster care or guardianship placement of an Indian child, or any emergency removal of a child who is known to be, or if there is reason to know that the child is, an Indian child shall be in the least restrictive setting that most approximates a family situation and in which the child's special needs, if any, may be met. The child shall also be placed within reasonable

proximity to the child's home, taking into account any special needs of the child. Preference shall be given to the child's placement with one of the following, in descending priority order:

(1) A member of the child's extended family, as defined in Section 1903 of the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.).

(2) A foster home licensed, approved, or specified by the child's tribe.

(3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority.

(4) An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the Indian child's needs.

(c) In any adoptive placement of an Indian child, preference shall be given to a placement with one of the following, in descending priority order:

(1) A member of the child's extended family, as defined in Section 1903 of the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.).

(2) Other members or citizens of the child's tribe.

(3) Another Indian family.

(d) Notwithstanding the placement preferences listed in subdivisions (b) and (c), if a different order of placement preference is established by the child's tribe, the court or agency effecting the placement shall follow the order of preference established by the tribe, so long as the placement is the least restrictive setting appropriate to the particular needs of the child as provided in subdivision (b).

(e) Where appropriate, the placement preference of the Indian child, if of sufficient age, or parent shall be considered. In applying the preferences, a consenting parent's request for anonymity shall also be given weight by the court or agency effecting the placement.

(f) The prevailing social and cultural standards of the Indian community in which the parent or extended family members of an Indian child reside, or with which the parent or extended family members maintain social and cultural ties, or the prevailing social and cultural standards of the Indian child's tribe shall be applied in meeting the placement preferences under this section. A determination of the applicable prevailing social and cultural standards may be confirmed by the Indian child's tribe or by the testimony or other documented support of a qualified expert witness, as defined in subdivision (c) of Section 224.6, who is knowledgeable regarding the social and cultural standards of the Indian community.

(g) Any person or court involved in the placement of an Indian child shall use the services of the Indian child's tribe, whenever available through the tribe, in seeking to secure placement within the order of placement preference established in this section and in the supervision of the placement.

(h) If a party asserts that good cause not to follow the placement preferences exists, the reason for that assertion shall be stated orally on the record or provided in writing to the parties to the Indian child custody proceeding and the court.

(i) The party seeking departure from the placement preferences shall bear the burden of proving by clear and convincing evidence that there is good cause to depart from the placement preferences.

(j) A state court's determination of good cause to depart from the placement preferences shall be made on the record or in writing and shall be based on one or more of the following considerations:

(1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference.

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made.

(3) The presence of a sibling attachment that can be maintained only through a particular placement.

(4) The extraordinary physical, mental, or emotional needs of the Indian child, including specialized treatment services that may be unavailable in the community where families who meet the placement preferences live.

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted. For purposes of this paragraph, the standard for determining whether a placement is unavailable shall conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(k) A placement shall not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(l) A placement shall not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a nonpreferred placement that was made in violation of the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.).

(m) A record of each foster care placement or adoptive placement of an Indian child shall be maintained in perpetuity by the State Department of Social Services. The record shall document the active efforts to comply with the applicable order of preference specified in this section, and shall be made available within 14 days of a request by the child's tribe.

SEC. 30. Section 361.7 of the Welfare and Institutions Code is amended to read:

361.7. (a) Notwithstanding Section 361.5, a party seeking an involuntary foster care placement of, or termination of parental rights over, an Indian child shall provide evidence to the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. The active efforts shall be documented in detail in the record.

(b) What constitutes active efforts shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of

the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers.

(c) A foster care placement or guardianship shall not be ordered in the proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of a qualified expert witness, as defined in Section 224.6, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

SEC. 31. Section 366 of the Welfare and Institutions Code is amended to read:

366. (a) (1) The status of every dependent child in foster care shall be reviewed periodically as determined by the court but no less frequently than once every six months, as calculated from the date of the original dispositional hearing, until the hearing described in Section 366.26 is completed. The court shall consider the safety of the child and shall determine all of the following:

(A) The continuing necessity for and appropriateness of the placement.

(B) The extent of the agency's compliance with the case plan in making reasonable efforts, or, in the case of a child 16 years of age or older with another planned permanent living arrangement, the ongoing and intensive efforts, to return the child to a safe home and to complete any steps necessary to finalize the permanent placement of the child, including efforts to maintain relationships between a child who is 10 years of age or older and who has been in an out-of-home placement for six months or longer, and individuals other than the child's siblings who are important to the child, consistent with the child's best interests. Where it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, the court shall also determine whether the agency has made active efforts, as defined in Section 224.1 and as described in Section 361.7, to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.

(C) Whether there should be any limitation on the right of the parent, guardian, or Indian custodian to make educational decisions or developmental services decisions for the child. That limitation shall be specifically addressed in the court order and may not exceed those necessary to protect the child. Whenever the court specifically limits the right of the parent, guardian, or Indian custodian to make educational decisions or developmental services decisions for the child, the court shall at the same time appoint a responsible adult to make educational decisions or developmental services decisions for the child pursuant to Section 361.

(D) (i) Whether the child has other siblings under the court's jurisdiction, and, if any siblings exist, all of the following:

(I) The nature of the relationship between the child and his or her siblings.

(II) The appropriateness of developing or maintaining the sibling relationships pursuant to Section 16002.

(III) If the siblings are not placed together in the same home, why the siblings are not placed together and what efforts are being made to place the siblings together, or why those efforts are not appropriate.

(IV) If the siblings are not placed together, all of the following:

(ia) The frequency and nature of the visits between the siblings.

(ib) If there are visits between the siblings, whether the visits are supervised or unsupervised. If the visits are supervised, a discussion of the reasons why the visits are supervised, and what needs to be accomplished in order for the visits to be unsupervised.

(ic) If there are visits between the siblings, a description of the location and length of the visits.

(id) Any plan to increase visitation between the siblings.

(V) The impact of the sibling relationships on the child's placement and planning for legal permanence.

(VI) The continuing need to suspend sibling interaction, if applicable, pursuant to subdivision (c) of Section 16002.

(ii) The factors the court may consider in making a determination regarding the nature of the child's sibling relationships may include, but are not limited to, whether the siblings were raised together in the same home, whether the siblings have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, as applicable, and whether ongoing contact is in the child's best emotional interests.

(E) The extent of progress that has been made toward alleviating or mitigating the causes necessitating placement in foster care.

(F) If the review hearing is the last review hearing to be held before the child attains 18 years of age, the court shall conduct the hearing pursuant to Section 366.31 or 366.32.

(2) The court shall project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption, tribal customary adoption in the case of an Indian child, legal guardianship, placed with a fit and willing relative, or in another planned permanent living arrangement.

(b) Subsequent to the hearing, periodic reviews of each child in foster care shall be conducted pursuant to the requirements of Sections 366.3 and 16503.

(c) If the child has been placed out of state, each review described in subdivision (a) and any reviews conducted pursuant to Sections 366.3 and 16503 shall also address whether the out-of-state placement continues to be the most appropriate placement selection and in the best interests of the child.

(d) (1) A review described in subdivision (a) and any reviews conducted pursuant to Sections 366.3 and 16503 shall not result in a placement of a child outside the United States prior to a judicial finding that the placement is in the best interest of the child, except as required by federal law or treaty.

(2) The party or agency requesting placement of the child outside the United States shall carry the burden of proof and must show, by clear and

convincing evidence, that a placement outside the United States is in the best interest of the child.

(3) In determining the best interest of the child, the court shall consider, but not be limited to, the following factors:

- (A) Placement with a relative.
- (B) Placement of siblings in the same home.
- (C) Amount and nature of any contact between the child and the potential guardian or caretaker.
- (D) Physical and medical needs of the dependent child.
- (E) Psychological and emotional needs of the dependent child.
- (F) Social, cultural, and educational needs of the dependent child.
- (G) Specific desires of any dependent child who is 12 years of age or older.

(4) If the court finds that a placement outside the United States is, by clear and convincing evidence, in the best interest of the child, the court may issue an order authorizing the social worker or placing agency to make a placement outside the United States. A child subject to this subdivision shall not leave the United States prior to the issuance of the order described in this paragraph.

(5) For purposes of this subdivision, “outside the United States” shall not include the lands of any federally recognized American Indian tribe or Alaskan Natives.

(6) This section shall not apply to the placement of a dependent child with a parent.

(e) A child may not be placed in an out-of-state group home, or remain in an out-of-state group home, unless the group home is in compliance with Section 7911.1 of the Family Code.

(f) The status review of every nonminor dependent, as defined in subdivision (v) of Section 11400, shall be conducted pursuant to the requirements of Sections 366.3, 366.31, or 366.32, and 16503 until dependency jurisdiction is terminated pursuant to Section 391.

SEC. 32. Section 366.26 of the Welfare and Institutions Code is amended to read:

366.26. (a) This section applies to children who are adjudged dependent children of the juvenile court pursuant to subdivision (d) of Section 360. The procedures specified in this section are the exclusive procedures for conducting these hearings. The procedures in Part 2 (commencing with Section 3020) of Division 8 of the Family Code are not applicable to these proceedings. Section 8616.5 of the Family Code is applicable and available to all dependent children meeting the requirements of that section, if the postadoption contact agreement has been entered into voluntarily. For children who are adjudged dependent children of the juvenile court pursuant to subdivision (d) of Section 360, this section, and Sections 8604, 8605, 8606, and 8700 of the Family Code and Chapter 5 (commencing with Section 7660) of Part 3 of Division 12 of the Family Code specify the exclusive procedures for permanently terminating parental rights with regard to, or

establishing legal guardianship of, the child while the child is a dependent child of the juvenile court.

(b) At the hearing, which shall be held in juvenile court for all children who are dependents of the juvenile court, the court, in order to provide stable, permanent homes for these children, shall review the report as specified in Section 361.5, 366.21, 366.22, or 366.25, shall indicate that the court has read and considered it, shall receive other evidence that the parties may present, and then shall make findings and orders in the following order of preference:

(1) Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted.

(2) Order, without termination of parental rights, the plan of tribal customary adoption, as described in Section 366.24, through tribal custom, traditions, or law of the Indian child's tribe, and upon the court affording the tribal customary adoption order full faith and credit at the continued selection and implementation hearing, order that a hearing be set pursuant to paragraph (2) of subdivision (e).

(3) Appoint a relative or relatives with whom the child is currently residing as legal guardian or guardians for the child, and order that letters of guardianship issue.

(4) On making a finding under paragraph (3) of subdivision (c), identify adoption or tribal customary adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child within a period not to exceed 180 days.

(5) Appoint a nonrelative legal guardian for the child and order that letters of guardianship issue.

(6) Order that the child be permanently placed with a fit and willing relative, subject to the periodic review of the juvenile court under Section 366.3.

(7) Order that the child remain in foster care, subject to the conditions described in paragraph (4) of subdivision (c) and the periodic review of the juvenile court under Section 366.3.

In choosing among the alternatives in this subdivision, the court shall proceed pursuant to subdivision (c).

(c) (1) If the court determines, based on the assessment provided as ordered under subdivision (i) of Section 366.21, subdivision (b) of Section 366.22, or subdivision (b) of Section 366.25, and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted. A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 that reunification services shall not be offered, under subdivision (e) of Section 366.21 that the whereabouts of a parent have been

unknown for six months or that the parent has failed to visit or contact the child for six months, or that the parent has been convicted of a felony indicating parental unfitness, or, under Section 366.21 or 366.22, that the court has continued to remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights. Under these circumstances, the court shall terminate parental rights unless either of the following applies:

(A) The child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child. For purposes of an Indian child, “relative” shall include an “extended family member,” as defined in the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1903(2)).

(B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:

(i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.

(ii) A child 12 years of age or older objects to termination of parental rights.

(iii) The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is no longer needed.

(iv) The child is living with a foster parent or Indian custodian who is unable or unwilling to adopt the child because of exceptional circumstances, that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of his or her foster parent or Indian custodian would be detrimental to the emotional well-being of the child. This clause does not apply to any child who is either (I) under six years of age or (II) a member of a sibling group where at least one child is under six years of age and the siblings are, or should be, permanently placed together.

(v) There would be substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of legal permanence through adoption.

(vi) The child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to:

(I) Termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights.

(II) The child's tribe has identified guardianship, foster care with a fit and willing relative, tribal customary adoption, or another planned permanent living arrangement for the child.

(III) The child is a nonminor dependent, and the nonminor and the nonminor's tribe have identified tribal customary adoption for the nonminor.

(C) For purposes of subparagraph (B), in the case of tribal customary adoptions, Section 366.24 shall apply.

(D) If the court finds that termination of parental rights would be detrimental to the child pursuant to clause (i), (ii), (iii), (iv), (v), or (vi), it shall state its reasons in writing or on the record.

(2) The court shall not terminate parental rights if:

(A) At each hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable efforts were not made or that reasonable services were not offered or provided.

(B) In the case of an Indian child:

(i) At the hearing terminating parental rights, the court has found that active efforts were not made as required in Section 361.7.

(ii) The court does not make a determination at the hearing terminating parental rights, supported by evidence beyond a reasonable doubt, including testimony of one or more "qualified expert witnesses" as defined in Section 224.6, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child.

(iii) The court has ordered tribal customary adoption pursuant to Section 366.24.

(3) If the court finds that termination of parental rights would not be detrimental to the child pursuant to paragraph (1) and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and, without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child, within the state or out of the state, within a period not to exceed 180 days. During this 180-day period, the public agency responsible for seeking adoptive parents for each child shall, to the extent possible, ask each child who is 10 years of age or older to identify any individuals, other than the child's siblings, who are important to the child, in order to identify potential adoptive parents. The public agency may ask any other child to provide that information, as appropriate. During the 180-day period, the public agency shall, to the extent possible, contact other private and public adoption agencies regarding the availability of the child for adoption. During the 180-day period, the public agency shall conduct the search for adoptive parents in the same manner as prescribed for children in Sections 8708 and

8709 of the Family Code. At the expiration of this period, another hearing shall be held and the court shall proceed pursuant to paragraph (1), (2), (3), (5), or (6) of subdivision (b). For purposes of this section, a child may only be found to be difficult to place for adoption if there is no identified or available prospective adoptive parent for the child because of the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child is seven years of age or older.

(4) (A) If the court finds that adoption of the child or termination of parental rights is not in the best interest of the child, because one of the conditions in clause (i), (ii), (iii), (iv), (v), or (vi) of subparagraph (B) of paragraph (1) or in paragraph (2) applies, the court shall order that the present caretakers or other appropriate persons shall become legal guardians of the child, or, in the case of an Indian child, consider a tribal customary adoption pursuant to Section 366.24. Legal guardianship shall be considered before continuing the child in foster care under any other permanent plan, if it is in the best interests of the child and if a suitable guardian can be found. If the child continues in foster care, the court shall make factual findings identifying any barriers to achieving adoption, tribal customary adoption in the case of an Indian child, legal guardianship, or placement with a fit and willing relative as of the date of the hearing. A child who is 10 years of age or older, shall be asked to identify any individuals, other than the child's siblings, who are important to the child, in order to identify potential guardians or, in the case of an Indian child, prospective tribal customary adoptive parents. The agency may ask any other child to provide that information, as appropriate.

(B) (i) If the child is living with an approved relative who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian as of the hearing date, the court shall order a permanent plan of placement with a fit and willing relative, and the child shall not be removed from the home if the court finds the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the relative caretaker.

(ii) If the child is living with a nonrelative caregiver who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian as of the hearing date, the court shall order that the child remain in foster care with a permanent plan of return home, adoption, legal guardianship, or placement with a fit and willing relative, as appropriate. If the child is 16 years of age or older, or a nonminor dependent, and no other permanent plan is appropriate at the time of the hearing, the court may order another planned permanent living arrangement, as described in paragraph (2) of subdivision (i) of Section 16501. Regardless of the age of the child, the child shall not be removed from the home if the court finds the removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the caregiver.

(iii) If the child is living in a group home or, on or after January 1, 2017, a short-term residential therapeutic program, the court shall order that the

child remain in foster care with a permanent plan of return home, adoption, tribal customary adoption in the case of an Indian child, legal guardianship, or placement with a fit and willing relative, as appropriate. If the child is 16 years of age or older, or a nonminor dependent, and no other permanent plan is appropriate at the time of the hearing, the court may order another planned permanent living arrangement, as described in paragraph (2) of subdivision (i) of Section 16501.

(C) The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child.

(5) If the court finds that the child should not be placed for adoption, that legal guardianship shall not be established, that placement with a fit and willing relative is not appropriate as of the hearing date, and that there are no suitable foster parents except certified family homes or resource families of a foster family agency available to provide the child with a stable and permanent environment, the court may order the care, custody, and control of the child transferred from the county welfare department to a licensed foster family agency. The court shall consider the written recommendation of the county welfare director regarding the suitability of the transfer. The transfer shall be subject to further court orders.

The licensed foster family agency shall place the child in a suitable licensed or certified family home that has been certified by the agency as meeting licensing standards or with a resource family approved by the agency. The licensed foster family agency shall be responsible for supporting the child and providing appropriate services to the child, including those services ordered by the court. Responsibility for the support of the child shall not, in and of itself, create liability on the part of the foster family agency to third persons injured by the child. Those children whose care, custody, and control are transferred to a foster family agency shall not be eligible for foster care maintenance payments or child welfare services, except for emergency response services pursuant to Section 16504.

(d) The proceeding for the appointment of a guardian for a child who is a dependent of the juvenile court shall be conducted in the juvenile court. If the court finds pursuant to this section that legal guardianship is the appropriate permanent plan, it shall appoint the legal guardian and issue letters of guardianship. The assessment prepared pursuant to subdivision (g) of Section 361.5, subdivision (i) of Section 366.21, subdivision (c) of Section 366.22, and subdivision (b) of Section 366.25 shall be read and considered by the court prior to the appointment, and this shall be reflected in the minutes of the court. The assessment may also include the naming of a prospective successor guardian, if one is identified. In the event of the incapacity or death of the appointed guardian, the named successor guardian may be assessed and appointed pursuant to this section. The person preparing the assessment may be called and examined by any party to the proceeding.

(e) (1) The proceeding for the adoption of a child who is a dependent of the juvenile court shall be conducted in the juvenile court if the court

finds pursuant to this section that adoption is the appropriate permanent plan and the petition for adoption is filed in the juvenile court. Upon the filing of a petition for adoption, the juvenile court shall order that an adoption hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted. The full report required by Section 8715 of the Family Code shall be read and considered by the court prior to the adoption and this shall be reflected in the minutes of the court. The person preparing the report may be called and examined by any party to the proceeding. It is the intent of the Legislature, pursuant to this subdivision, to give potential adoptive parents the option of filing in the juvenile court the petition for the adoption of a child who is a dependent of the juvenile court. Nothing in this section is intended to prevent the filing of a petition for adoption in any other court as permitted by law, instead of in the juvenile court.

(2) In the case of an Indian child, if the Indian child's tribe has elected a permanent plan of tribal customary adoption, the court, upon receiving the tribal customary adoption order will afford the tribal customary adoption order full faith and credit to the same extent that the court would afford full faith and credit to the public acts, records, judicial proceedings, and judgments of any other entity. Upon a determination that the tribal customary adoption order may be afforded full faith and credit, consistent with Section 224.5, the court shall thereafter order a hearing to finalize the adoption be set upon the filing of the adoption petition. The prospective tribal customary adoptive parents and the child who is the subject of the tribal customary adoption petition shall appear before the court for the finalization hearing. The court shall thereafter issue an order of adoption pursuant to Section 366.24.

(3) If a child who is the subject of a finalized tribal customary adoption shows evidence of a developmental disability or mental illness as a result of conditions existing before the tribal customary adoption to the extent that the child cannot be relinquished to a licensed adoption agency on the grounds that the child is considered unadoptable, and of which condition the tribal customary adoptive parent or parents had no knowledge or notice before the entry of the tribal customary adoption order, a petition setting forth those facts may be filed by the tribal customary adoptive parent or parents with the juvenile court that granted the tribal customary adoption petition. If these facts are proved to the satisfaction of the juvenile court, it may make an order setting aside the tribal customary adoption order. The set-aside petition shall be filed within five years of the issuance of the tribal customary adoption order. The court clerk shall immediately notify the child's tribe and the department in Sacramento of the petition within 60 days after the notice of filing of the petition. The department shall file a full report with the court and shall appear before the court for the purpose of representing the child. Whenever a final decree of tribal customary adoption has been vacated or set aside, the child shall be returned to the custody of the county in which the proceeding for tribal customary adoption was finalized. The biological parent or parents of the child may petition for return of custody.

The disposition of the child after the court has entered an order to set aside a tribal customary adoption shall include consultation with the child's tribe.

(f) At the beginning of any proceeding pursuant to this section, if the child or the parents are not being represented by previously retained or appointed counsel, the court shall proceed as follows:

(1) In accordance with subdivision (c) of Section 317, if a child before the court is without counsel, the court shall appoint counsel unless the court finds that the child would not benefit from the appointment of counsel. The court shall state on the record its reasons for that finding.

(2) If a parent appears without counsel and is unable to afford counsel, the court shall appoint counsel for the parent, unless this representation is knowingly and intelligently waived. The same counsel shall not be appointed to represent both the child and his or her parent. The public defender or private counsel may be appointed as counsel for the parent.

(3) Private counsel appointed under this section shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. The amount shall be paid by the real parties in interest, other than the child, in any proportions the court deems just. However, if the court finds that any of the real parties in interest are unable to afford counsel, the amount shall be paid out of the general fund of the county.

(g) The court may continue the proceeding for a period of time not to exceed 30 days as necessary to appoint counsel, and to enable counsel to become acquainted with the case.

(h) (1) At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child.

(2) In accordance with Section 349, the child shall be present in court if the child or the child's counsel so requests or the court so orders. If the child is 10 years of age or older and is not present at a hearing held pursuant to this section, the court shall determine whether the minor was properly notified of his or her right to attend the hearing and inquire as to the reason why the child is not present.

(3) (A) The testimony of the child may be taken in chambers and outside the presence of the child's parent or parents, if the child's parent or parents are represented by counsel, the counsel is present, and any of the following circumstances exist:

(i) The court determines that testimony in chambers is necessary to ensure truthful testimony.

(ii) The child is likely to be intimidated by a formal courtroom setting.

(iii) The child is afraid to testify in front of his or her parent or parents.

(B) After testimony in chambers, the parent or parents of the child may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents.

(C) The testimony of a child also may be taken in chambers and outside the presence of the guardian or guardians of a child under the circumstances specified in this subdivision.

(i) (1) Any order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child, upon the parent or parents and, upon all other persons who have been served with citation by publication or otherwise as provided in this chapter. After making the order, the juvenile court shall have no power to set aside, change, or modify it, except as provided in paragraph (2), but nothing in this section shall be construed to limit the right to appeal the order.

(2) A tribal customary adoption order evidencing that the Indian child has been the subject of a tribal customary adoption shall be afforded full faith and credit and shall have the same force and effect as an order of adoption authorized by this section. The rights and obligations of the parties as to the matters determined by the Indian child's tribe shall be binding on all parties. A court shall not order compliance with the order absent a finding that the party seeking the enforcement participated, or attempted to participate, in good faith, in family mediation services of the court or dispute resolution through the tribe regarding the conflict, prior to the filing of the enforcement action.

(3) A child who has not been adopted after the passage of at least three years from the date the court terminated parental rights and for whom the court has determined that adoption is no longer the permanent plan may petition the juvenile court to reinstate parental rights pursuant to the procedure prescribed by Section 388. The child may file the petition prior to the expiration of this three-year period if the State Department of Social Services, county adoption agency, or licensed adoption agency that is responsible for custody and supervision of the child as described in subdivision (j) and the child stipulate that the child is no longer likely to be adopted. A child over 12 years of age shall sign the petition in the absence of a showing of good cause as to why the child could not do so. If it appears that the best interests of the child may be promoted by reinstatement of parental rights, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the social worker or probation officer and to the child's attorney of record, or, if there is no attorney of record for the child, to the child, and the child's tribe, if applicable, by means prescribed by subdivision (c) of Section 297. The court shall order the child or the social worker or probation officer to give prior notice of the hearing to the child's former parent or parents whose parental rights were terminated in the manner prescribed by subdivision (f) of Section 294 where the recommendation is adoption. The juvenile court shall grant the petition if it finds by clear and convincing evidence that the child is no longer likely to be adopted and that reinstatement of parental rights is in the child's best interest. If the court reinstates parental rights over a child who is under 12 years of age and for whom the new permanent plan will not be reunification with a parent or legal guardian, the court shall specify the factual basis for its findings that it is in the best interest of the child to reinstate parental rights. This subdivision is intended to be retroactive and applies to any child who is under the jurisdiction of the juvenile court

at the time of the hearing regardless of the date parental rights were terminated.

(j) If the court, by order or judgment, declares the child free from the custody and control of both parents, or one parent if the other does not have custody and control, or declares the child eligible for tribal customary adoption, the court shall at the same time order the child referred to the State Department of Social Services, county adoption agency, or licensed adoption agency for adoptive placement by the agency. However, except in the case of a tribal customary adoption where there is no termination of parental rights, a petition for adoption may not be granted until the appellate rights of the natural parents have been exhausted. The State Department of Social Services, county adoption agency, or licensed adoption agency shall be responsible for the custody and supervision of the child and shall be entitled to the exclusive care and control of the child at all times until a petition for adoption or tribal customary adoption is granted, except as specified in subdivision (n). With the consent of the agency, the court may appoint a guardian of the child, who shall serve until the child is adopted.

(k) (1) Notwithstanding any other law, the application of any person who, as a relative caretaker or foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption, or who has been freed for adoption, shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the relative caretaker or foster parent and removal from the relative caretaker or foster parent would be seriously detrimental to the child's emotional well-being.

(2) As used in this subdivision, "preference" means that the application shall be processed and, if satisfactory, the family study shall be completed before the processing of the application of any other person for the adoptive placement of the child.

(l) (1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following apply:

(A) A petition for extraordinary writ review was filed in a timely manner.

(B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record.

(C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits.

(2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged, or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section.

(3) The Judicial Council shall adopt rules of court, effective January 1, 1995, to ensure all of the following:

(A) A trial court, after issuance of an order directing a hearing pursuant to this section be held, shall advise all parties of the requirement of filing a

petition for extraordinary writ review as set forth in this subdivision in order to preserve any right to appeal in these issues.

(i) If a party is present at the time of the making of the order, the notice shall be made orally to the party.

(ii) If the party is not present at the time of making the order, the notice shall be made by the clerk of the court by first-class mail to the last known address of a party or by electronic service pursuant to Section 212.5. If the notice is for a hearing at which the social worker will recommend the termination of parental rights, the notice may be electronically served pursuant to Section 212.5, but only in addition to service of the notice by first-class mail.

(B) The prompt transmittal of the records from the trial court to the appellate court.

(C) That adequate time requirements for counsel and court personnel exist to implement the objective of this subdivision.

(D) That the parent or guardian, or their trial counsel or other counsel, is charged with the responsibility of filing a petition for extraordinary writ relief pursuant to this subdivision.

(4) The intent of this subdivision is to do both of the following:

(A) Make every reasonable attempt to achieve a substantive and meritorious review by the appellate court within the time specified in Sections 366.21, 366.22, and 366.25 for holding a hearing pursuant to this section.

(B) Encourage the appellate court to determine all writ petitions filed pursuant to this subdivision on their merits.

(5) This subdivision shall only apply to cases in which an order to set a hearing pursuant to this section is issued on or after January 1, 1995.

(m) Except for subdivision (j), this section shall also apply to minors adjudged wards pursuant to Section 727.31.

(n) (1) Notwithstanding Section 8704 of the Family Code or any other law, the court, at a hearing held pursuant to this section or anytime thereafter, may designate a current caretaker as a prospective adoptive parent if the child has lived with the caretaker for at least six months, the caretaker currently expresses a commitment to adopt the child, and the caretaker has taken at least one step to facilitate the adoption process. In determining whether to make that designation, the court may take into consideration whether the caretaker is listed in the preliminary assessment prepared by the county department in accordance with subdivision (i) of Section 366.21 as an appropriate person to be considered as an adoptive parent for the child and the recommendation of the State Department of Social Services, county adoption agency, or licensed adoption agency.

(2) For purposes of this subdivision, steps to facilitate the adoption process include, but are not limited to, the following:

(A) Applying for an adoption homestudy.

(B) Cooperating with an adoption homestudy.

(C) Being designated by the court or the adoption agency as the adoptive family.

- (D) Requesting de facto parent status.
- (E) Signing an adoptive placement agreement.
- (F) Engaging in discussions regarding a postadoption contact agreement.
- (G) Working to overcome any impediments that have been identified by the State Department of Social Services, county adoption agency, or licensed adoption agency.
- (H) Attending classes required of prospective adoptive parents.

(3) Prior to a change in placement and as soon as possible after a decision is made to remove a child from the home of a designated prospective adoptive parent, the agency shall notify the court, the designated prospective adoptive parent or the current caretaker, if that caretaker would have met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1) on the date of service of this notice, the child's attorney, the child, if the child is 10 years of age or older, and, where it is known or there is reason to know that the child is an Indian child, as defined by Section 224.1, the child's tribe, of the proposal in the manner described in Section 16010.6.

(A) Within five court days or seven calendar days, whichever is longer, of the date of notification, the child, the child's attorney, the child's tribe, or the designated prospective adoptive parent may file a petition with the court objecting to the proposal to remove the child, or the court, upon its own motion, may set a hearing regarding the proposal. The court may, for good cause, extend the filing period. A caretaker who would have met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1) on the date of service of the notice of proposed removal of the child may file, together with the petition under this subparagraph, a petition for an order designating the caretaker as a prospective adoptive parent for purposes of this subdivision.

(B) A hearing ordered pursuant to this paragraph shall be held as soon as possible and not later than five court days after the petition is filed with the court or the court sets a hearing upon its own motion, unless the court for good cause is unable to set the matter for hearing five court days after the petition is filed, in which case the court shall set the matter for hearing as soon as possible. At the hearing, the court shall determine whether the caretaker has met the threshold criteria to be designated as a prospective adoptive parent pursuant to paragraph (1), and whether the proposed removal of the child from the home of the designated prospective adoptive parent is in the child's best interest, and the child may not be removed from the home of the designated prospective adoptive parent unless the court finds that removal is in the child's best interest. If the court determines that the caretaker did not meet the threshold criteria to be designated as a prospective adoptive parent on the date of service of the notice of proposed removal of the child, the petition objecting to the proposed removal filed by the caretaker shall be dismissed. If the caretaker was designated as a prospective adoptive parent prior to this hearing, the court shall inquire into any progress made by the caretaker towards the adoption of the child since the caretaker was designated as a prospective adoptive parent.

(C) A determination by the court that the caretaker is a designated prospective adoptive parent pursuant to paragraph (1) or subparagraph (B) does not make the caretaker a party to the dependency proceeding nor does it confer on the caretaker any standing to object to any other action of the department, county adoption agency, or licensed adoption agency, unless the caretaker has been declared a de facto parent by the court prior to the notice of removal served pursuant to paragraph (3).

(D) If a petition objecting to the proposal to remove the child is not filed, and the court, upon its own motion, does not set a hearing, the child may be removed from the home of the designated prospective adoptive parent without a hearing.

(4) Notwithstanding paragraph (3), if the State Department of Social Services, county adoption agency, or licensed adoption agency determines that the child must be removed from the home of the caretaker who is or may be a designated prospective adoptive parent immediately, due to a risk of physical or emotional harm, the agency may remove the child from that home and is not required to provide notice prior to the removal. However, as soon as possible and not longer than two court days after the removal, the agency shall notify the court, the caretaker who is or may be a designated prospective adoptive parent, the child's attorney, and the child, if the child is 10 years of age or older, of the removal. Within five court days or seven calendar days, whichever is longer, of the date of notification of the removal, the child, the child's attorney, or the caretaker who is or may be a designated prospective adoptive parent may petition for, or the court on its own motion may set, a noticed hearing pursuant to paragraph (3). The court may, for good cause, extend the filing period.

(5) Except as provided in subdivision (b) of Section 366.28, an order by the court issued after a hearing pursuant to this subdivision shall not be appealable.

(6) Nothing in this section shall preclude a county child protective services agency from fully investigating and responding to alleged abuse or neglect of a child pursuant to Section 11165.5 of the Penal Code.

(7) When an Indian child is removed from the home of a prospective adoptive parent pursuant to this section, the placement preferences contained in Section 361.31 and the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.) apply to the subsequent placement of the child.

(8) The Judicial Council shall prepare forms to facilitate the filing of the petitions described in this subdivision, which shall become effective on January 1, 2006.

SEC. 33. Section 381 of the Welfare and Institutions Code is amended to read:

381. (a) If a case is dismissed by a state court because the child is already a ward of a tribal court or the tribe has exclusive jurisdiction over Indian child custody proceedings pursuant to subdivisions (b) and (c) of Section 305.5, the state court shall ensure that all state court records are transmitted to the tribal court pursuant to subdivision (c) of Section 305.5. The state court and the tribe shall each document the finding of the facts supporting

jurisdiction over the minor. The state court and the county welfare department shall maintain a copy of the order of dismissal and the findings of fact.

(b) If a case is transferred from a state court to a tribal court pursuant to subdivisions (d) and (e) of Section 305.5, the state court shall issue an order of transfer of the case that states all of the findings, orders, or modification of orders that have been made in the case, and the name and address of the tribe having jurisdiction. All papers contained in the file shall be transferred to the tribe having jurisdiction. The transferring state court and county welfare department shall maintain a copy of the order of transfer and the findings of fact.

(c) If an order of transfer from a state court to a tribe is filed with the clerk of a juvenile court, the clerk shall place the transfer order on the calendar of the court, and, notwithstanding Section 378, that matter shall have precedence over all actions and civil proceedings not specifically given precedence by any other law and shall be heard by the court at the earliest possible moment after the order is filed.

SEC. 34. Section 16507.4 of the Welfare and Institutions Code is amended to read:

16507.4. (a) Notwithstanding any other provisions of this chapter, voluntary family reunification services shall be provided without fee to families who qualify, or would qualify if application had been made therefor, as recipients of public assistance under the Aid to Families with Dependent Children program as described in the State Plan in effect on July 1, 1996. If the family is not qualified for aid, voluntary family reunification services may be utilized, provided that the county seeks reimbursement from the parent or guardian on a statewide sliding scale according to income as determined by the State Department of Social Services and approved by the Department of Finance. The fee may be waived if the social worker determines that the payment of the fee may be a barrier to reunification. Section 17552 of the Family Code shall also apply.

(b) An out-of-home placement of a minor without adjudication by the juvenile court may occur only when all of the following conditions exist:

(1) There is a mutual decision between the child's parent, Indian custodian, or guardian and the county welfare department in accordance with regulations promulgated by the State Department of Social Services.

(2) There is a written agreement between the county welfare department and the parent or guardian specifying the terms of the voluntary placement. The State Department of Social Services shall develop a form for voluntary placement agreements that shall be used by all counties. The form shall indicate that foster care under the Aid to Families with Dependent Children program is available to those children.

(3) In the case of an Indian child, in accordance with Section 1913 of the federal Indian Child Welfare Act of 1978 (25 U.S.C. Sec. 1901 et seq.), the following criteria are met:

(A) The parent or Indian custodian's consent to the voluntary out-of-home placement is executed in writing at least 10 days after the child's birth and recorded before a judge.

(B) The judge certifies that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood.

(C) A parent of an Indian child may withdraw his or her consent to a voluntary foster care placement or voluntary termination of parental rights or relinquishment for any reason at any time and the child shall be returned to the parent.

(D) The placement complies with preferences set forth in Section 361.31.

(c) In the case of a voluntary placement pending relinquishment, a county welfare department shall have the option of delegating to a licensed private adoption agency the responsibility for placement by the county welfare department. If a delegation occurs, the voluntary placement agreement shall be signed by the county welfare department, the child's parent or guardian, and the licensed private adoption agency.

(d) The State Department of Social Services shall amend its plan pursuant to Part E (commencing with Section 670) of Subchapter IV of Chapter 7 of Title 42 of the United States Code in order to conform to mandates of Public Law 96-272 and Public Law 110-351 for federal financial participation in voluntary placements.

SEC. 35. (a) The State Department of Social Services shall adopt any regulations necessary to implement this act.

(b) Notwithstanding the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code), the State Department of Social Services may implement and administer the changes made by this act through all-county letters or similar written instructions until regulations are adopted.


SEC. 36. The Judicial Council shall adopt any forms or rules of court necessary to implement this act.

SEC. 37. Section 1.5 of this bill incorporates amendments to Section 212.5 of the Welfare and Institutions Code proposed by both this bill and Assembly Bill 1930. That section of this bill shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2019, (2) each bill amends Section 212.5 of the Welfare and Institutions Code, and (3) this bill is enacted after Assembly Bill 1930, in which case Section 1 of this bill shall not become operative.

SEC. 38. Section 28.5 of this bill incorporates amendments to Section 361.2 of the Welfare and Institutions Code proposed by both this bill and Assembly Bill 1930. That section of this bill shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2019, (2) each bill amends Section 361.2 of the Welfare and Institutions Code, and (3) this bill is enacted after Assembly Bill 1930, in which case Section 28 of this bill shall not become operative.

SEC. 39. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because this act implements a federal law or regulation and results only in costs mandated by the federal government, within the meaning of Section 17556 of the Government Code.

With regard to other costs, to the extent that this act has an overall effect of increasing the costs already borne by a local agency for programs or levels of service mandated by the 2011 Realignment Legislation within the meaning of Section 36 of Article XIII of the California Constitution, it shall apply to local agencies only to the extent that the state provides annual funding for the cost increase. Any new program or higher level of service provided by a local agency pursuant to this act above the level for which funding has been provided shall not require a subvention of funds by the state or otherwise be subject to Section 6 of Article XIII B of the California Constitution.

 KeyCite Red Flag - Severe Negative Treatment
Rehearing en Banc Granted by [Brackeen v. Bernhardt](#), 5th Cir.(Tex.),
November 7, 2019

937 F.3d 406
United States Court of Appeals, Fifth Circuit.

Chad Everet BRACKEEN; Jennifer Kay Brackeen;
State of Texas; Altagracia Socorro Hernandez;
State of Indiana; Jason Clifford; Frank Nicholas
Libretti; State of Louisiana; Heather Lynn Libretti;
Danielle Clifford, Plaintiffs - Appellees

v.

[David BERNHARDT](#), Secretary, U.S. Department
of the Interior; [Tara Sweeney](#), in her official
capacity as Acting Assistant Secretary for Indian
Affairs; Bureau of Indian Affairs; United States
Department of Interior; United States of America;
Alex Azar, In his official capacity as Secretary of
the United States Department of Health and
Human Services; United States Department of
Health and Human Services, Defendants -
Appellants


Cherokee Nation; [Oneida Nation](#); Quinalt Indian
Nation; Morongo Band of Mission Indians,
Intervenor Defendants - Appellants

No. 18-11479

FILED August 9, 2019

MODIFIED August 16, 2019

Synopsis

Background: Foster and adoptive parents and states of Texas, Louisiana, and Indiana brought action against United States, United States Department of the Interior and its Secretary, Bureau of Indian Affairs (BIA) and its Director, BIA Principal Assistant Secretary for Indian Affairs, Department of Health and Human Services (HHS) and its Secretary for declaration that Indian Child Welfare Act (ICWA) was unconstitutional. Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians intervened as defendants. The United States District Court for the Northern District of Texas, Reed [O'Connor](#), J.,  [338 F.Supp.3d 514](#), partially granted plaintiffs' motions for summary judgment. Defendants appealed.

Holdings: The Court of Appeals, [Dennis](#), Circuit Judge,

held that:

[1] parents had standing to challenge constitutionality of ICWA;

[2] states had standing;

[3] ICWA definition of "Indian child" was a political classification subject to rational basis review and did not violate equal protection;

[4] anticommandeering doctrine did not apply to obligation of state courts to enforce ICWA;

[5] ICWA obligations imposed on state agencies did not violate anticommandeering doctrine;

[6] ICWA preempted conflicting state law;

[7] ICWA provision allowing Indian tribes to establish through tribal resolution a different order of preferred placement of children is not an unconstitutional delegation of Congressional legislative power to tribes;

[8] Department of Interior rule's binding standards were valid; and

[9] Bureau of Indian Affairs' (BIA) non-binding standard on burden of proof to show good cause was valid.

Affirmed in part, reversed in part, and rendered.

[Owen](#), Circuit Judge, filed opinion concurring in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (50)

[1] [Federal Courts](#)  [Summary judgment](#)

Court of Appeals reviews a district court's grant of summary judgment de novo.

[2] **Federal Civil Procedure** → Materiality and genuineness of fact issue

A genuine dispute of material fact exists precluding summary judgment if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Fed. R. Civ. P. 56(a)*.

[3] **Federal Civil Procedure** → In general; injury or interest
Federal Courts → Case or Controversy Requirement

Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. *U.S. Const. art. 3, § 2, cl. 1*.

[4] **Federal Civil Procedure** → In general; injury or interest
Federal Civil Procedure → Causation; redressability

To meet the Article III standing requirement, plaintiffs must demonstrate (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief. *U.S. Const. art. 3, § 2, cl. 1*.

[5] **Declaratory Judgment** → Proper Parties
Injunction → Persons entitled to apply; standing

A plaintiff seeking equitable relief must demonstrate a likelihood of future injury in addition to past harm in order to have Article III standing. *U.S. Const. art. 3, § 2, cl. 1*.

[6] **Federal Civil Procedure** → In general; injury or interest

Injury necessary for Article III standing must be concrete and particularized and actual or imminent, not conjectural or hypothetical. *U.S. Const. art. 3, § 2, cl. 1*.

[7] **Federal Civil Procedure** → In general; injury or interest

Standing is not dispensed in gross, and a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.

[8] **Federal Civil Procedure** → In general; injury or interest
Federal Courts → Case or Controversy Requirement

The presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement. *U.S. Const. art. 3, § 2, cl. 1*.

1 Cases that cite this headnote

[9] **Federal Courts** → Standing

Court of Appeals reviews questions of standing de novo.

[10] **Constitutional Law** → Family law; marriage

States lacked standing to bring an equal

protection challenge in *parens patriae* on behalf of citizens challenging placement preferences of Indian Child Welfare Act (ICWA) and Department of Interior rule. [U.S. Const. Amend. 14](#); Indian Child Welfare Act of 1978, § 105, [25 U.S.C.A. § 1915\(a, b\)](#); [25 C.F.R. §§ 23.129](#), [23.130](#), [23.131](#), [23.132](#).

placement preferences of Indian Child Welfare Act (ICWA) and Department of Interior rule were justiciable as capable of repetition, yet evading review, and thus would not be dismissed as moot after adoption became final and tribe decided not to challenge adoption. [U.S. Const. Amend. 14](#); Indian Child Welfare Act of 1978, § 105, [25 U.S.C.A. § 1915\(a, b\)](#); [25 C.F.R. §§ 23.129](#), [23.130](#), [23.131](#), [23.132](#).

[11] **Indians** → Adoption of persons

Proffered injury to Indian child's adoptive parents from biological parent's statutory right to collaterally attack adoption decree for two years was too speculative to support standing to challenge constitutionality of statute allowing collateral attack; adoptive parents asserted no attempt to invalidate adoption. Indian Child Welfare Act of 1978, §§ 103, 104, [25 U.S.C.A. §§ 1913](#), [1914](#).

[14] **Federal Courts** → Nature of dispute; concreteness

A corollary to this case-or-controversy requirement is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. [U.S. Const. art. 3, § 2, cl. 1](#).

[12] **Constitutional Law** → Family law; marriage

Regulatory burdens that placement preferences of Indian Child Welfare Act (ICWA) and Department of Interior rule imposed on parents in proceedings to adopt Indian child were sufficient to demonstrate injury necessary for standing to challenge placement preferences as violation of equal protection clause, although alternative placement sought by tribe failed to materialize. [U.S. Const. Amend. 14](#); Indian Child Welfare Act of 1978, § 105, [25 U.S.C.A. § 1915\(a, b\)](#); [25 C.F.R. §§ 23.129](#), [23.130](#), [23.131](#), [23.132](#).

[15] **Federal Courts** → Rights and interests at stake

A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.

[13] **Federal Courts** → Particular cases

Adoptive parents' equal protection challenge to

[16] **Federal Courts** → Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

Mootness will not render a case non-justiciable where the dispute is one that is capable of repetition, yet evading review; that exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

controlling child custody proceedings caused by the rule. 5 U.S.C.A. §§ 551 et seq., 702; 25 C.F.R. §§ 23.129, 23.130, 23.131, 23.132.

[17] **Constitutional Law** → Family law; marriage

Adoptive parents' alleged injury from regulatory burdens imposed by placement preferences of Indian Child Welfare Act (ICWA) and Department of Interior rule were fairly traceable to actions of at least some federal defendants and would be redressed by favorable ruling on constitutionality of preferences, and, thus, parents had standing to bring equal protection challenge to preferences; state court indicated it would refrain from ruling on parents' claims in proceedings to adopt Indian child's sibling pending ruling from federal court. *U.S. Const. Amend. 14*; Indian Child Welfare Act of 1978, § 105, 25 U.S.C.A. § 1915(a, b); 25 C.F.R. §§ 23.129, 23.130, 23.131, 23.132.

[18] **Federal Courts** → Governments and political subdivisions

A state may be entitled to special solicitude in federal court's standing analysis if the state is vested by statute with a procedural right to file suit to protect an interest and the state has suffered an injury to its quasi-sovereign interests.

[19] **Indians** → Infants

States challenging Department of Interior rule on placement preferences of Indian Child Welfare Act (ICWA) were entitled to special solicitude in standing inquiry and had standing to challenge the rule under Administrative Procedure Act (APA); states had procedural right to challenge the rule, and if Secretary of Interior promulgated a rule binding on states without authority to do so, then states suffered concrete injury to sovereign interest in

[20] **Indians** → Child custody
States → Surrender of state sovereignty and coercion of state

States had standing to challenge placement preferences of Indian Child Welfare Act (ICWA) and Department of Interior rule as violating Tenth Amendment right to sovereign interest in creating and enforcing legal code to govern child custody proceedings in state courts; imposition of regulatory burdens on states was sufficient to demonstrate an injury, and causation and redressability requirements were satisfied as favorable ruling would likely redress states' injury by lifting the mandatory burdens ICWA and the rule imposed on states. *U.S. Const. Amend. 10*; Indian Child Welfare Act of 1978, § 105, 25 U.S.C.A. § 1915(a, b); 25 C.F.R. §§ 23.129, 23.130, 23.131, 23.132.

[21] **Indians** → Infants

States had standing to challenge statute allowing Native American tribes to establish child placement preferences different from Indian Child Welfare Act's (ICWA) preferences as an impermissible delegation of legislative power binding states; state's injury from one Texas tribe's decision to depart from the preferences was concrete and particularized and not speculative, and favorable ruling would redress the injury by making a state's compliance with a tribe's alternative order of preferences optional, rather than mandatory. Indian Child Welfare Act of 1978, § 105, 25 U.S.C.A. § 1915(a, c).

[22] **Indians** → Infants

The Indian Child Welfare Act (ICWA) is entitled to a presumption of constitutionality, so long as Congress enacted the statute based on one or more of its powers enumerated in the Constitution. Indian Child Welfare Act of 1978, § 2, [25 U.S.C.A. § 1901 et seq.](#)

[23] **Constitutional Law** → Invalidation, annulment, or repeal of statutes

Due respect for the decisions of a coordinate branch of government demands that courts invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.

[24] **Constitutional Law** → Relationship to equal protection guarantee

Equal protection clause is implicitly incorporated into the Fifth Amendment's guarantee of due process. [U.S. Const. Amends. 5, 14.](#)

[25] **Constitutional Law** → Race, national origin, or ethnicity

Strict scrutiny under equal protection clause applies to laws that rely on classifications of persons based on race. [U.S. Const. Amend. 14.](#)

[26] **Constitutional Law** → Elections, Voting, and Political Rights

Where the classification is political, rational basis review applies to equal protection claim. [U.S. Const. Amend. 14.](#)

1 Cases that cite this headnote

[27] **Federal Courts** → Statutes, regulations, and ordinances, questions concerning in general

Court of Appeals reviews the constitutionality of federal statutes de novo.

[28] **Constitutional Law** → Families and children
Constitutional Law → Families and Children
Indians → Infants

Indian Child Welfare Act's (ICWA) definition of "Indian child" was a political, rather than race-based, classification and was therefore subject to rational basis review in equal protection challenge; eligibility for tribal membership was not based solely on tribal ancestry or race under some tribal membership law, and conditioning child's eligibility for membership, in part, on whether biological parent was tribal member was therefore not a proxy for race. [U.S. Const. art. 1, § 8, cl. 3](#); [U.S. Const. Amend. 5](#); Indian Child Welfare Act of 1978, § 4, [25 U.S.C.A. § 1903\(4\).](#)

3 Cases that cite this headnote

[29] **Constitutional Law** → Families and children
Constitutional Law → Families and Children
Indians → Infants

Indian Child Welfare Act's (ICWA) definition of "Indian child" was a political classification

that did not violate equal protection, as special treatment ICWA afforded Indian children was rationally tied to Congress's fulfillment of its unique obligation toward Indian nations and its stated purpose of protecting the best interests of Indian children and promoting the stability and security of Indian tribes. *U.S. Const. art. 1, § 8, cl. 3*; *U.S. Const. Amend. 5*; Indian Child Welfare Act of 1978, §§ 2, 3, 4, 25 U.S.C.A. §§ 1901, 1902, 1903(4).

5 Cases that cite this headnote

[30] **United States** → Legislative Authority, Powers, and Functions

Congress's legislative powers are limited to those enumerated under the Constitution.

[31] **States** → Surrender of state sovereignty and coercion of state

The "anticommandeering doctrine," an expression of the lack of Congressional power to issue direct orders to the governments of the states, prohibits federal laws commanding the executive or legislative branch of a state government to act or refrain from acting. *U.S. Const. Amend. 10*.

[32] **States** → Surrender of state sovereignty and coercion of state

Though Congress is prohibited from commandeering states, it can encourage a state to regulate in a particular way, or hold out incentives to the states as a method of influencing a state's policy choices. *U.S. Const. Amend. 10*.

[33] **Indians** → Infants
States → Surrender of state sovereignty and coercion of state

Anticommandeering doctrine did not apply to obligation of state courts to enforce Indian Child Welfare Act (ICWA) and Department of Interior rule on ICWA as Supremacy Clause required state courts to enforce ICWA and the rule. *U.S. Const. art. 6, cl. 2*; *U.S. Const. Amend. 10*; Indian Child Welfare Act of 1978, § 2, 25 U.S.C.A. § 1901 et seq.; 25 C.F.R. § 23.101 et seq.

1 Cases that cite this headnote

[34] **Indians** → Dependent Children; Termination of Parental Rights
States → Surrender of state sovereignty and coercion of state

Obligations that Indian Child Welfare Act (ICWA) imposed on state agencies did not violate anticommandeering doctrine; ICWA's notice and "active efforts" requirements and burdens of proof for foster care placement and termination of parental rights evenhandedly regulated activity in which both states and private actors engaged, and provisions requiring states to respect tribe's order of placement preferences and maintain record of each placement regulated state activity and did not require states to enact any laws or regulations or to assist in the enforcement of federal statutes regulating private individuals. *U.S. Const. Amend. 10*; Indian Child Welfare Act of 1978, §§ 102, 105, 25 U.S.C.A. §§ 1912, 1915.

[35] **States** → Conflicting or conforming laws or regulations

Conflict preemption occurs when Congress enacts a law that imposes restrictions or confers

rights on private actors, a state law confers rights or imposes restrictions that conflict with the federal law, and therefore the federal law takes precedence, and the state law is preempted. U.S. Const. art. 6, cl. 2.

1 Cases that cite this headnote

[36] **States** → Conflicting or conforming laws or regulations

For a federal law to preempt conflicting state law, two requirements must be satisfied: the challenged provision of the federal law must represent the exercise of a power conferred on Congress by the Constitution and must be best read as one that regulates private actors by imposing restrictions or conferring rights. U.S. Const. art. 6, cl. 2.

[39] **Constitutional Law** → To Executive, in General

In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. U.S. Const. art. 1, § 1, cl. 1.

[37] **Federal Courts** → Preemption in general

Court of Appeals reviews de novo whether a federal law preempts a state statute or common law cause of action.

[40] **Constitutional Law** → Delegation of Powers

The limitations on Congress's ability to delegate its legislative power are less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. U.S. Const. art. 1, § 1, cl. 1.

[38] **Indians** → Infants
States → Domestic Relations

Indian Child Welfare Act (ICWA) provisions, even provisions requiring state agency or court to adhere to tribe's established order of placement preferences and requiring states to keep records and make them available, were best read as regulating private actors by conferring rights on Indian children and families and preempted conflicting state law. U.S. Const. art. 1, § 8, cl. 3; U.S. Const. art. 6, cl. 2; Indian Child Welfare Act of 1978, §§ 2, 3, 105, 25 U.S.C.A. §§ 1901(1), 1902, 1915(c, e).

[41] **Indians** → Infants

Indian Child Welfare Act (ICWA) provision allowing Indian tribes to establish through tribal resolution a different order of preferred placement of children is not an unconstitutional delegation of Congressional legislative power to tribes, but is an incorporation of inherent tribal authority by Congress. U.S. Const. art. 1, § 1, cl. 1; Indian Child Welfare Act of 1978, § 105, 25 U.S.C.A. § 1915(a-c).

[42] **Indians** → Status of Indian Nations or Tribes
Indians → Government of Indian Country, Reservations, and Tribes in General

Native American tribes have sovereignty over

both their members and their territory.

[43] **Administrative Law and Procedure** → Plain, literal, or clear meaning; ambiguity or silence

Court reviewing agency's construction of statute must first examine whether the statute is ambiguous; if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

[44] **Administrative Law and Procedure** → Plain, literal, or clear meaning; ambiguity or silence
Administrative Law and Procedure → Permissible or reasonable construction

Courts must uphold an agency's reasonable interpretation of an ambiguous statute.

[45] **Indians** → Child custody

Department of Interior rule's binding standards for Indian child custody proceedings reasonably related to Indian Child Welfare Act's (ICWA) purpose of establishing minimum federal standards in child custody proceedings involving Indian children and thus were a reasonable exercise of the broad authority granted to Bureau of Indian Affairs (BIA) by Congress.

Indian Child Welfare Act of 1978, § 302, 25 U.S.C.A. § 1952; 25 C.F.R. § 23.101 et seq.

4 Cases that cite this headnote

[46] **Indians** → Child custody

Bureau of Indian Affairs' (BIA) interpretation in Department of Interior rule stating binding standards for Indian child custody proceedings was not arbitrary, capricious, or an abuse of discretion because it was not sudden and unexplained. 25 U.S.C.A. § 706(2)(A).

[47] **Indians** → Infants

Bureau of Indian Affairs' (BIA) non-binding standard that party seeking departure from Indian Child Welfare Act's (ICWA) placement preferences should bear burden of proving good cause by clear and convincing evidence was reasonable interpretation of statute silent on issue and was entitled to *Chevron* deference. Indian Child Welfare Act of 1978, § 105, 25 U.S.C.A. § 1915; 25 C.F.R. § 23.132.

[48] **Administrative Law and Procedure** → Discretionary powers or acts

A congressional mandate in one section of statute governing agency action and silence in another often suggests not a prohibition but simply a decision not to mandate any solution in the second context, i.e., to leave the question to agency discretion.

[49] **Administrative Law and Procedure** → Plain, literal, or clear meaning; ambiguity or silence

Congress speaking in one place, but remaining silent in another, rarely if ever suffices for the direct answer that *Chevron* step one requires on whether statute interpreted by agency is ambiguous.

[50] **Indians** → **Infants**

Bureau of Indian Affairs’ (BIA) non-binding standard that party seeking departure from Indian Child Welfare Act’s (ICWA) placement preferences should bear burden of proving good cause by clear and convincing evidence was valid under the Administrative Procedure Act (APA); rule was consistent with 1979 Guidelines in allowing state courts flexibility to determine good cause. 5 U.S.C.A. § 706(2)(A); Indian Child Welfare Act of 1978, § 105, 25 U.S.C.A. § 1915; 25 C.F.R. § 23.132.

West Codenotes

Negative Treatment Reconsidered

25 U.S.C.A. §§ 1901, 1902, 1903, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1951, 1952; 25 C.F.R. §§ 23.106, 23.107, 23.108, 23.109, 23.110, 23.111, 23.112, 23.114, 23.115, 23.116, 23.117, 23.118, 23.119, 23.121, 23.122, 23.124, 23.125, 23.126, 23.127, 23.128, 23.129, 23.130, 23.131, 23.132, 23.140, 23.141.

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Before [WIENER](#), [DENNIS](#), and [OWEN](#), Circuit Judges.


Opinion


[JAMES L. DENNIS](#), Circuit Judge:

*416 This case presents facial constitutional challenges to the Indian Child Welfare Act of 1978 (ICWA) and statutory and constitutional challenges to the 2016 administrative rule (the Final Rule) that was promulgated by the Department of the Interior to clarify provisions of ICWA. Plaintiffs are the states of Texas, Indiana, and Louisiana, and seven individuals seeking to adopt Indian children. Defendants are the United States of America, several federal agencies and officials in their official capacities, and five intervening Indian tribes. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction, but the district court denied the motion, concluding, as relevant to this appeal, that Plaintiffs had Article III standing. The district court then granted summary judgment in favor of Plaintiffs, ruling that provisions of ICWA and the Final Rule violated equal protection, the Tenth Amendment, the nondelegation doctrine, and the Administrative Procedure Act. Defendants appealed. Although we AFFIRM the district court's ruling that Plaintiffs had standing, we REVERSE the district court's grant of summary judgment to Plaintiffs and RENDER judgment in favor of Defendants.


BACKGROUND


I. The Indian Child Welfare Act (ICWA)


Congress enacted the Indian Child Welfare Act of 1978 (ICWA),  25 U.S.C. §§ 1901 *et seq.*, to address rising concerns over “abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.”

 *Miss. Band Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). Recognizing

that a “special relationship” exists between the United States and Indian tribes, Congress made the following findings:

Congress has plenary power over Indian affairs.  25 U.S.C. § 1901(1) (citing U.S. CONST. art. I, section 8, cl. 3 (“The Congress shall have Power ... To regulate Commerce ... with the Indian Tribes.”)).

“[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children ...”  *Id.* at § 1901(3).

“[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”  *Id.* at § 1901(4).

“States exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” *Id.* at § 1901(5).

In light of these findings, Congress declared that it was the policy of the United States “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values *417 of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.” *Id.* at § 1902.

ICWA applies in state court child custody proceedings involving an “Indian child,” defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” *Id.* at § 1903(4). In proceedings for the foster care placement or termination of parental rights, ICWA provides “the Indian custodian of the child and the Indian child’s tribe [] a right to intervene at any point in the proceeding.” *Id.* at § 1911(c). Where such proceedings are involuntary, ICWA requires that the parent, the Indian custodian, the child’s tribe, or the Secretary of the United States Department of the Interior (Secretary or Secretary of the Interior) be notified of pending proceedings and of their right to intervene. *Id.*

at § 1912. In voluntary proceedings for the termination of parental rights or adoptive placement of an Indian child, the parent can withdraw consent for any reason prior to entry of a final decree of adoption or termination, and the child must be returned to the parent. *Id.* at § 1913(c). If consent was obtained through fraud or duress, a parent may petition to withdraw consent within two years after the final decree of adoption and, upon a showing of fraud or duress, the court must vacate the decree and return the child to the parent. *Id.* at § 1913(d). An Indian child, a parent or Indian custodian from whose custody the child was removed, or the child’s tribe may file a petition in any court of competent jurisdiction to invalidate an action in state court for foster care placement or termination of parental rights if the action violated any provision of ICWA §§ 1911–13. *Id.* at § 1914.

ICWA further sets forth placement preferences for foster care, preadoptive, and adoptive proceedings involving Indian children. Section 1915 requires that “[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with: (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” *Id.* at § 1915(a). Similar requirements are set for foster care or preadoptive placements. *Id.* at § 1915(b). If a tribe establishes by resolution a different order of preferences, the state court or agency effecting the placement “shall follow [the tribe’s] order so long as the placement is the least restrictive setting appropriate to the particular needs of the child.” *Id.* at § 1915(c).

The state in which an Indian child’s placement was made shall maintain records of the placement, which shall be made available at any time upon request by the Secretary or the child’s tribe. *Id.* at § 1915(e). A state court entering a final decree in an adoptive placement “shall provide the Secretary with a copy of the decree or order” and information as necessary regarding “(1) the name and tribal affiliation of the child; (2) the names and addresses of the biological parents; (3) the names and addresses of the adoptive parents; and (4) the identity of any agency having files or information relating to such adoptive placement.” *Id.* at § 1951(a). ICWA’s severability clause provides that “[i]f any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.” *Id.* at § 1963.

II. The Final Rule

ICWA provides that “the Secretary [of the Interior] shall promulgate such rules *418 and regulations as may be necessary to carry out [its] provisions.” 25 U.S.C. § 1952. In 1979, the Bureau of Indian Affairs (BIA) promulgated guidelines (the “1979 Guidelines”) intended to assist state courts in implementing ICWA but without “binding legislative effect.” *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584 (Nov. 26, 1979). The 1979 Guidelines left the “primary responsibility” of interpreting certain language in ICWA “with the [state] courts that decide Indian child custody cases.” *Id.* However, in June 2016, the BIA promulgated the Final Rule to “clarify the minimum Federal standards governing implementation of [ICWA]” and to ensure that it “is applied in all States consistent with the Act’s express language, Congress’s intent in enacting the statute, and to promote the stability and security of Indian tribes and families.” 25 C.F.R. § 23.101; *Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,778, 38,868 (June 14, 2016). The Final Rule explained that while the BIA “initially hoped that binding regulations would not be necessary to carry out [ICWA], a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law.” 81 Fed. Reg. at 38,782.

The Final Rule provides that states have the responsibility of determining whether a child is an “Indian child” subject to ICWA’s requirements. 25 C.F.R. §§ 23.107–22; 81 Fed. Reg. at 38,778, 38,869–73. The Final Rule also sets forth notice and recordkeeping requirements for states, *see* 25 C.F.R. §§ 23.140–41; 81 Fed. Reg. at 38,778, 38,875–76, and requirements for states and individuals regarding voluntary proceedings and parental withdrawal of consent, *see* 25 C.F.R. §§ 23.124–28; 81 Fed. Reg. at 38,778, 38,873–74. The Final Rule also restates ICWA’s placement preferences and clarifies when they apply and when states may depart from them. *See* 25 C.F.R. §§ 23.129–32; 81 Fed. Reg. at 38,778, 38,874–75.

III. The Instant Action

A. Parties

1. Plaintiffs

Plaintiffs in this action are the states of Texas, Louisiana, and Indiana,¹ (collectively, the “State Plaintiffs”), and seven individual Plaintiffs—Chad and Jennifer Brackeen (the “Brackeens”), Nick and Heather Libretti (the “Librettis”), Altagracia Socorro Hernandez (the “Hernandez”), and Jason and Danielle Clifford (the “Cliffords”) (collectively, “Individual Plaintiffs”) (together with State Plaintiffs, “Plaintiffs”).

a. *The Brackeens & A.L.M.*

At the time their initial complaint was filed in the district court, the Brackeens sought to adopt A.L.M., who falls within ICWA’s definition of an “Indian Child.” His biological mother is an enrolled member of the Navajo Nation and his biological father is an enrolled member of the Cherokee Nation. When A.L.M. was ten months old, Texas’s Child Protective Services (“CPS”) removed him from his paternal grandmother’s custody and placed him in foster care with the Brackeens. Both the Navajo Nation and the Cherokee Nation were notified pursuant to ICWA and the Final Rule. A.L.M. lived with the *419 Brackeens for more than sixteen months before they sought to adopt him with the support of his biological parents and paternal grandmother. In May 2017, a Texas court, in voluntary proceedings, terminated the parental rights of A.L.M.’s biological parents, making him eligible for adoption under Texas law. Shortly thereafter, the Navajo Nation notified the state court that it had located a potential alternative placement for A.L.M. with non-relatives in New Mexico, though this placement ultimately failed to materialize. In July 2017, the Brackeens filed an original petition for adoption, and the Cherokee Nation and Navajo Nation were notified in compliance with ICWA. The Navajo Nation and the Cherokee Nation reached an agreement whereby the Navajo Nation was designated as A.L.M.’s tribe for purposes of ICWA’s application in the state proceedings. No one intervened in the Texas adoption proceeding or otherwise formally sought to adopt A.L.M. The Brackeens entered into a settlement with the Texas state agency and A.L.M.’s guardian ad litem specifying that, because no one else sought to adopt A.L.M., ICWA’s placement preferences did not apply. In January 2018, the Brackeens successfully petitioned to adopt A.L.M. The Brackeens initially alleged in their complaint

that they would like to continue to provide foster care for and possibly adopt additional children in need, but their experience adopting A.L.M. made them reluctant to provide foster care for other Indian children in the future. Since their complaint was filed, the Brackeens have sought to adopt A.L.M.'s sister, Y.R.J. in Texas state court. Y.R.J., like her brother, is an Indian Child for purposes of ICWA. The Navajo Nation contests the adoption. On February 2, 2019, the Texas court granted the Brackeens' motion to declare ICWA inapplicable as a violation of the Texas constitution, but "conscientiously refrain[ed]" from ruling on the Brackeens' claims under the United States Constitution pending our resolution of the instant appeal.

b. The Librettis & Baby O.

The Librettis live in Nevada and sought to adopt Baby O. when she was born in March 2016. Baby O.'s biological mother, Hernandez, wished to place Baby O. for adoption at her birth, though Hernandez has continued to be a part of Baby O.'s life and she and the Librettis visit each other regularly. Baby O.'s biological father, E.R.G., descends from members of the Yselta del sur Pueblo Tribe (the "Pueblo Tribe"), located in El Paso, Texas, and was a registered member at the time Baby O. was born. The Pueblo Tribe intervened in the Nevada custody proceedings seeking to remove Baby O. from the Librettis. Once the Librettis joined the challenge to the constitutionality of the ICWA and the Final Rule, the Pueblo Tribe indicated that it was willing settle. The Librettis agreed to a settlement with the tribe that would permit them to petition for adoption of Baby O. The Pueblo Tribe agreed not to contest the Librettis' adoption of Baby O., and on December 19, 2018, the Nevada state court issued a decree of adoption, declaring that the Librettis were Baby O.'s lawful parents. Like the Brackeens, the Librettis alleged that they intend to provide foster care for and possibly adopt additional children in need but are reluctant to foster Indian children after this experience.

c. The Cliffords & Child P.

The Cliffords live in Minnesota and seek to adopt Child P., whose maternal grandmother is a registered member of

the White Earth Band of Ojibwe Tribe (the "White Earth Band"). Child P. is a member of the White Earth Band for purposes of ICWA's application in the Minnesota state court proceedings. Pursuant to ICWA section 1915's placement preferences, county officials removed Child P. from the Cliffords' custody and, in January 2018, placed her in the care of her maternal grandmother, whose foster license had been revoked. Child P.'s guardian ad litem supports the Cliffords' efforts to adopt her and agrees that the adoption is in Child P.'s best interest. The Cliffords and Child P. remain separated, and the Cliffords face heightened legal barriers to adopting her. On January 17, 2019, the Minnesota court denied the Cliffords' motion for adoptive placement.

2. Defendants

Defendants are the United States of America; the United States Department of the Interior and its Secretary Ryan Zinke, in his official capacity; the BIA and its Director Bryan Rice, in his official capacity; the BIA Principal Assistant Secretary for Indian Affairs John Tahsuda III, in his official capacity; and the Department of Health and Human Services ("HHS") and its Secretary Alex M. Azar II, in his official capacity (collectively the "Federal Defendants"). Shortly after this case was filed in the district court, the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morengo Band of Mission Indians (collectively, the "Tribal Defendants") moved to intervene, and the district court granted the motion. On appeal, we granted the Navajo Nation's motion to intervene as a defendant² (together with Federal and Tribal Defendants, "Defendants").

B. Procedural History

Plaintiffs filed the instant action against the Federal Defendants in October 2017, alleging that the Final Rule and certain provisions of ICWA are unconstitutional and seeking injunctive and declaratory relief. Plaintiffs argued that ICWA and the Final Rule violated equal protection and substantive due process under the Fifth Amendment and the anticommandeering doctrine that arises from the Tenth Amendment. Plaintiffs additionally sought a declaration that provisions of ICWA and the Final Rule violated the nondelegation doctrine and the

Administrative Procedure Act (APA). Defendants moved to dismiss, alleging that Plaintiffs lacked standing. The district court denied the motion. All parties filed cross-motions for summary judgment. The district court granted Plaintiffs' motion for summary judgment in part, concluding that ICWA and the Final Rule violated equal protection, the Tenth Amendment, and the nondelegation doctrine, and that the challenged portions of the Final Rule were invalid under the APA.³ Defendants appealed. A panel of this court subsequently stayed the district court's judgment pending further order of this court. In total, fourteen amicus briefs were filed in this court, including a brief in support of Plaintiffs and affirmation filed by the state of Ohio; and a brief in support of Defendants and reversal filed by the states of California, Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Oregon, *421 Rhode Island, Utah, Virginia, Washington, and Wisconsin.

STANDARD OF REVIEW

^[1] ^[2]We review a district court's grant of summary judgment de novo. See [Texas v. United States](#), 497 F.3d 491, 495 (5th Cir. 2007). Summary judgment is appropriate when the movant has demonstrated "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

DISCUSSION

I. Article III Standing

Defendants first contend that Plaintiffs lack standing to challenge ICWA and the Final Rule. The district court denied Defendants' motion to dismiss on this basis,

concluding that Individual Plaintiffs had standing to bring an equal protection claim; State Plaintiffs had standing to challenge provisions of ICWA and the Final Rule on the grounds that they violated the Tenth Amendment and the nondelegation doctrine; and all Plaintiffs had standing to bring an APA claim challenging the validity of the Final Rule.

^[3] ^[4] ^[5] ^[6] ^[7] ^[8] ^[9]Article III limits the power of federal courts to "Cases" and "Controversies." See [Spokeo, Inc. v. Robins](#), — U.S. —, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (citing U.S. CONST. art. III, § 2). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Id.* To meet the Article III standing requirement, plaintiffs must demonstrate "(1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief." [Lujan v. Defs. of Wildlife](#), 504 U.S. 555, 590, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotations omitted). A plaintiff seeking equitable relief must demonstrate a likelihood of future injury in addition to past harm. See [City of Los Angeles v. Lyons](#), 461 U.S. 95, 105, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). This injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." See [Lujan](#), 504 U.S. at 560, 112 S.Ct. 2130 (cleaned up). "[S]tanding is not dispensed in gross," and "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." [Town of Chester, N.Y. v. Laroe Estates, Inc.](#), — U.S. —, 137 S. Ct. 1645, 1650, 198 L.Ed.2d 64 (2017) (quoting [Davis v. Fed. Election Comm'n](#), 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008)). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." [Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.](#), 547 U.S. 47, 53 n.2, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). "This court reviews questions of standing de novo." [Nat'l Rifle Ass'n of Am., Inc. v. McCraw](#), 719 F.3d 338, 343 (5th Cir. 2013).

A. Standing to Bring Equal Protection Claim

^[10]Plaintiffs challenged ICWA sections 1915(a)–(b), 1913(d), and 1914 and Final Rule sections 23.129–32 on equal protection grounds, alleging that these provisions impose regulatory burdens on non-Indian families seeking

to adopt Indian children that are not similarly imposed on Indian families who seek to adopt Indian children. The district court concluded that Individual Plaintiffs suffered and continued to suffer injuries when their efforts *422 to adopt Indian children were burdened by ICWA and the Final Rule; that their injuries were fairly traceable to ICWA and the Final Rule because these authorities mandated state compliance; and that these injuries were redressable because if ICWA and the Final Rule were invalidated, then state courts would no longer be required to follow them. Defendants disagree, arguing that the Individual Plaintiffs cannot demonstrate an injury in fact or redressability and thus lack standing to bring an equal protection claim. For the reasons below, we conclude that the Brackeens have standing to assert an equal protection claim as to ICWA sections 1915(a)–(b) and Final Rule sections 23.129–32, but as discussed below, not as to ICWA sections 1913–14. Accordingly, because one Plaintiff has standing, the “case-or-controversy requirement” is satisfied as to this claim, and we do not analyze whether any other Individual Plaintiff has standing to raise it.⁴ See [Rumsfeld](#), 547 U.S. at 53 n.2, 126 S.Ct. 1297.

¹¹¹The district court concluded that ICWA section 1913(d), which allows a parent to petition the court to vacate a final decree of adoption on the grounds that consent was obtained through fraud or duress, left the Brackeens’ adoption of A.L.M. vulnerable to collateral attack for two years. Defendants argue that section 1914,⁵ and not section 1913(d), applies to the Brackeens’ state court proceedings and that, in any event, an injury premised on potential future collateral attack under either provision is too speculative. We need not decide which provision applies here, as neither the Brackeens nor any of the Individual Plaintiffs have suffered an injury under either provision. Plaintiffs do not assert that A.L.M.’s biological parents, the Navajo Nation, or any other party seeks to invalidate the Brackeens’ adoption of A.L.M. under either provision. Plaintiffs’ proffered injury under section 1913 or section 1914 is therefore too speculative to support standing. See [Lujan](#), 504 U.S. at 560, 112 S.Ct. 2130; see also [Clapper v. Amnesty Int’l USA](#), 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (“[T]hreatened injury must be *certainly impending* to constitute injury in fact, and [] [a]llegations of *possible* future injury are not sufficient.” (cleaned up)). To the extent Plaintiffs argue that an injury arises from their attempts to avoid collateral attack under section 1914 by complying with sections 1911–13, “costs incurred to avoid injury are insufficient to create standing” where the injury is not certainly impending. See [Clapper](#), 568 U.S. at 417, 133 S.Ct. 1138.

¹¹²The district court also concluded that ICWA section 1915, and sections 23.129–32 of the Final Rule, which clarify section 1915, gave rise to an injury from an increased regulatory burden. We agree. Prior to the finalization of the Brackeens’ adoption of A.L.M., the Navajo Nation notified the state court that it had located a potential alternative placement for A.L.M. in New Mexico. Though that alternative *423 placement ultimately failed to materialize, the regulatory burdens ICWA section 1915 and Final Rule sections 23.129–32 imposed on the Brackeens in A.L.M.’s adoption proceedings, which were ongoing at the time the complaint was filed, are sufficient to demonstrate injury. See [Contender Farms, L.L.P. v. U.S. Dep’t of Agric.](#), 779 F.3d 258, 266 (5th Cir. 2015) (“An increased regulatory burden typically satisfies the injury in fact requirement.”); see also [Rockwell Int’l Corp. v. United States](#), 549 U.S. 457, 473–74, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007) (standing is assessed at the time the complaint was filed); [Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. \(TOC\), Inc.](#), 528 U.S. 167, 184, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (discussing [Lyons](#), 461 U.S. at 108, 103 S.Ct. 1660, and finding the injury requirement satisfied where the alleged harmful conduct was occurring when the complaint was filed).

¹¹³Defendants contend that the Brackeens’ challenge to section 1915 and sections 23.129–32 is moot. They argue that, because the Brackeens’ adoption of A.L.M. was finalized in January 2018 and the Navajo Nation will not seek to challenge the adoption, section 1915’s placement preferences no longer apply in A.L.M.’s adoption proceedings. Plaintiffs argue that section 1915’s placement preferences impose on them the ongoing injury of increased regulatory burdens in their proceedings to adopt A.L.M.’s sister, Y.R.J., which the Navajo Nation currently opposes in Texas state court.

¹¹⁴ ¹¹⁵ ¹¹⁶“A corollary to this case-or-controversy requirement is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” [Genesis Healthcare Corp. v. Symczyk](#), 569 U.S. 66, 71, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013). “[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” [Powell v. McCormack](#), 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) (internal quotation marks omitted). However, mootness will not render a case non-justiciable where the dispute is one that is “capable of repetition, yet evading review.” See [Murphy v. Hunt](#), 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353

(1982). “That exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” [Davis v. Fed. Election Comm’n](#), 554 U.S. 724, 735, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (internal citations and quotations omitted). Here, the Brackeens were unable to fully litigate a challenge to section 1915 before successfully adopting A.L.M. Additionally, they have demonstrated a reasonable expectation that they will be subject to section 1915’s regulatory burdens in their adoption proceedings involving A.L.M.’s sister, Y.R.J. Thus, the Brackeens’ challenge to section 1915 is justiciable on the grounds that it is capable of repetition, yet evading review. See [Hunt](#), 455 U.S. at 482, 102 S.Ct. 1181.

¹⁷Having thus found an injury with respect to ICWA section 1915 and Final Rule sections 23.129–32, we consider whether causation and redressability are met here. See [Lujan](#), 504 U.S. at 590, 112 S.Ct. 2130. The Brackeens’ alleged injury is fairly traceable to the actions of at least some of the Federal Defendants, who bear some responsibility for the regulatory burdens imposed by ICWA and the Final Rule. See [Contender Farms, L.L.P.](#), 779 F.3d at 266 (noting that causation “flow[ed] naturally from” a regulatory injury). Additionally, the Brackeens have demonstrated a likelihood that their injury will be redressed by a favorable ruling of this court. In the Brackeens’ ongoing proceedings [*424](#) to adopt Y.R.J., the Texas court has indicated that it will refrain from ruling on the Brackeens’ federal constitutional claims pending a ruling from this court. Accordingly, Plaintiffs have standing to bring an equal protection claim challenging ICWA section 1915(a)–(b) and Final Rule sections 23.129–32. See [Lujan](#), 504 U.S. at 590, 112 S.Ct. 2130; [Rumsfeld](#), 547 U.S. at 53 n.2, 126 S.Ct. 1297.

B. Standing to Bring Administrative Procedure Act Claim

¹⁸Plaintiffs first argue that ICWA does not authorize the Secretary of the Interior to promulgate binding rules and regulations, and the Final Rule is therefore invalid under the APA. The district court ruled that State Plaintiffs had standing to bring this claim, determining that the Final Rule injured State Plaintiffs by intruding upon their

interests as quasi-sovereigns to control the domestic affairs within their states.⁶ A state may be entitled to “special solicitude” in our standing analysis if the state is vested by statute with a procedural right to file suit to protect an interest and the state has suffered an injury to its “quasi-sovereign interests.” [Massachusetts v. EPA](#), 549 U.S. 497, 518–20, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (holding that the Clean Air Act provided Massachusetts a procedural right to challenge the EPA’s rulemaking, and Massachusetts suffered an injury in its capacity as a quasi-sovereign landowner due to rising sea levels associated with climate change). Applying [Massachusetts](#), this court in [Texas v. United States](#) held that Texas had standing to challenge the Department of Homeland Security’s implementation and expansion of the Deferred Action for Childhood Arrivals program (DACA) under the APA. See [809 F.3d 134, 152 \(5th Cir. 2015\)](#). This court reasoned that Texas was entitled to special solicitude on the grounds that the APA created a procedural right to challenge the DHS’s actions, and DHS’s actions affected states’ sovereign interest in creating and enforcing a legal code. See [id.](#) at 153 (internal quotations omitted).

¹⁹Likewise, here, the APA provides State Plaintiffs a procedural right to challenge the Final Rule. See [id.](#); [5 U.S.C. § 702](#). Moreover, State Plaintiffs allege that the Final Rule affects their sovereign interest in controlling child custody proceedings in state courts. See [Texas](#), [809 F.3d at 153](#) (recognizing that, pursuant to a sovereign interest in creating and enforcing a legal code, states may have standing based on, inter alia, federal preemption of state law). Thus, State Plaintiffs are entitled to special solicitude in our standing inquiry. With this in mind, we find that the elements of standing are satisfied. If, as State Plaintiffs alleged, the Secretary promulgated a rule binding on states without the authority to do so, then State Plaintiffs have suffered a concrete injury to their sovereign interest in controlling child custody proceedings that was caused by the Final Rule. Additionally, though state courts and agencies are not bound by this court’s precedent, a favorable ruling from this court would remedy the alleged injury to states by making their compliance with ICWA and the Final Rule optional rather than compulsory. See [Massachusetts](#), [549 U.S. at 521, 127 S.Ct. 1438](#) (finding redressability where the requested relief would prompt the agency to “reduce th[e] risk” of harm to the state).

*425 C. Standing to Bring Tenth Amendment Claim

^[20]For similar reasons, the district court found, and we agree, that State Plaintiffs have standing to challenge provisions of ICWA and the Final Rule under the Tenth Amendment. The imposition of regulatory burdens on State Plaintiffs is sufficient to demonstrate an injury to their sovereign interest in creating and enforcing a legal code to govern child custody proceedings in state courts.

See [Texas](#), 809 F.3d at 153. Additionally, the causation and redressability requirements are satisfied here, as a favorable ruling from this court would likely redress State Plaintiffs' injury by lifting the mandatory burdens ICWA and the Final Rule impose on states. See [Lujan](#), 504 U.S. at 590, 112 S.Ct. 2130.

D. Standing to Bring Nondelegation Claim

^[21]Finally, Plaintiffs contend that ICWA section 1915(c), which allows a tribe to establish a different order of section 1915(a)'s placement preferences, is an impermissible delegation of legislative power that binds State Plaintiffs. Defendants argue that State Plaintiffs cannot demonstrate an injury, given the lack of evidence that a tribe's reordering of section 1915(a)'s placement preferences has affected any children in Texas, Indiana, or Louisiana or that such impact is "certainly impending." State Plaintiffs respond that tribes can change ICWA's placement preferences at any time and that at least one tribe, the Alabama-Coushatta Tribe of Texas, has already done so. We conclude that State Plaintiffs have demonstrated injury and causation with respect to this claim, as State Plaintiffs' injury from the Alabama-Coushatta Tribe's decision to depart from ICWA section 1915's placement preferences is concrete and particularized and not speculative. See [Lujan](#), 504 U.S. at 560, 112 S.Ct. 2130. Moreover, a favorable ruling from this court would redress State Plaintiffs' injury by making a state's compliance with a tribe's alternative order of preferences under ICWA section 1915(c) optional rather than mandatory. See [id.](#)

^[22] ^[23]Accordingly, having found that State Plaintiffs have standing on the aforementioned claims, we proceed to the merits of these claims. We note at the outset that ICWA is entitled to a "presumption of constitutionality," so long as Congress enacted the statute "based on one or more of its powers enumerated in the Constitution." See [United States v. Morrison](#), 529 U.S. 598, 607, 120 S.Ct. 1740,

146 L.Ed.2d 658 (2000). "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." [Id.](#) (citing, among others, [United States v. Harris](#), 106 U.S. 629, 635, 1 S.Ct. 601, 27 L.Ed. 290 (1883)).

II. Equal Protection

^[24] ^[25] ^[26] ^[27]The Equal Protection Clause of the Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. 14, § 1. This clause is implicitly incorporated into the Fifth Amendment's guarantee of due process. See [Bolling v. Sharpe](#), 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954). We apply the same analysis with respect to equal protection claims under the Fifth and Fourteenth Amendments. See [Richard v. Hinson](#), 70 F.3d 415, 417 (5th Cir. 1995). In evaluating an equal protection claim, strict scrutiny applies to laws that rely on classifications of persons based on race. See [id.](#) But where the classification is political, rational basis review applies. See [*426 Morton v. Mancari](#), 417 U.S. 535, 555, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). The district court granted summary judgment on behalf of Plaintiffs, concluding that section 1903(4)—setting forth ICWA's definition of "Indian Child" for purposes of determining when ICWA applies in state child custody proceedings—was a race-based classification that could not withstand strict scrutiny.⁷ On appeal, the parties disagree as to whether section 1903(4)'s definition of "Indian Child" is a political or race-based classification and which level of scrutiny applies. "We review the constitutionality of federal statutes de novo." [Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives](#), 700 F.3d 185, 192 (5th Cir. 2012).

A. Level of Scrutiny

^[28]We begin by determining whether ICWA's definition of "Indian child" is a race-based or political classification and, consequently, which level of scrutiny applies. The

district court concluded that ICWA’s “Indian Child” definition was a race-based classification. We conclude that this was error. Congress has exercised plenary power “over the tribal relations of the Indians ... from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.” [Lone Wolf v. Hitchcock](#), 187 U.S. 553, 565, 23 S.Ct. 216, 47 L.Ed. 299 (1903). The Supreme Court’s decisions “leave no doubt that federal legislation with respect to Indian tribes ... is not based upon impermissible racial classifications.” [United States v. Antelope](#), 430 U.S. 641, 645, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977). “Literally every piece of legislation dealing with Indian tribes and reservations ... single[s] out for special treatment a constituency of tribal Indians living on or near reservations.” [Mancari](#), 417 U.S. at 552, 94 S.Ct. 2474. “If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.” [Id.](#)

In [Morton v. Mancari](#), the Supreme Court rejected a challenge to a law affording to qualified Indian applicants—those having one-fourth or more degree Indian blood with membership in a federally recognized tribe⁸—a hiring preference over non-Indians within the BIA. [Id.](#) at 555, 94 S.Ct. 2474. The Court recognized that central to the resolution of the issue was “the *427 unique legal status of Indian tribes under federal law and upon the plenary power of Congress ... to legislate on behalf of federally recognized Indian tribes.” [Id.](#) at 551, 94 S.Ct. 2474. It reasoned that the BIA’s hiring preference was “granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.” [Id.](#) at 554, 94 S.Ct. 2474. The preference was thus a non-racial “employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It [was] directed to participation by the governed in the governing agency.” [Id.](#) at 553–54, 94 S.Ct. 2474. The disadvantages to non-Indians resulting from the hiring preferences were an intentional and “desirable feature of the entire program for self-government.” [Id.](#) at 544, 94 S.Ct. 2474.

The district court construed [Mancari](#) narrowly and

distinguished it for two primary reasons: First, the district court found that the law in [Mancari](#) provided special treatment “only to Indians living on or near reservations.” Second, the district court concluded that ICWA’s membership eligibility standard for an Indian child does not rely on actual tribal membership as did the statute in [Mancari](#). The district court reasoned that, whereas the law in [Mancari](#) “applied ‘only to members of ‘federally recognized’ tribes which operated to exclude many individuals who are racially to be classified as Indians,’ ” ICWA’s definition of “Indian child” extended protection to children who were *eligible* for membership in a federally recognized tribe and had a biological parent who was a member of a tribe. The district court, citing the tribal membership laws of several tribes, including the Navajo Nation, concluded that “[t]his means one is an Indian child if the child is related to a tribal ancestor by blood.”

We disagree with the district court’s reasoning and conclude that [Mancari](#) controls here. As to the district court’s first distinction, [Mancari](#)’s holding does not rise or fall with the geographical location of the Indians receiving “special treatment.” See [Mancari](#), 417 U.S. at 552, 94 S.Ct. 2474. The Supreme Court has long recognized Congress’s broad power to regulate Indians and Indian tribes on and off the reservation. See e.g., [United States v. McGowan](#), 302 U.S. 535, 539, 58 S.Ct. 286, 82 L.Ed. 410 (1938) (“Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States.”); [Perrin v. United States](#), 232 U.S. 478, 482, 34 S.Ct. 387, 58 L.Ed. 691 (1914) (acknowledging Congress’s power to regulate *428 Indians “whether upon or off a reservation and whether within or without the limits of a state”).

Second, the district court concluded that, unlike the statute in [Mancari](#), ICWA’s definition of Indian child extends to children who are merely eligible for tribal membership because of their ancestry. However, ICWA’s definition of “Indian child” is not based solely on tribal ancestry or race. ICWA defines an “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\(4\)](#). As Defendants explain, under some tribal membership laws, eligibility extends to children without Indian blood, such as the descendants of former slaves of tribes who became members after they were freed, or the descendants of adopted white persons. Accordingly, a

child may fall under ICWA's membership eligibility standard because his or her biological parent became a member of a tribe, despite not being racially Indian. Additionally, many racially Indian children, such as those belonging to non-federally recognized tribes, do not fall within ICWA's definition of "Indian child." Conditioning a child's eligibility for membership, in part, on whether a biological parent is a member of the tribe is therefore not a proxy for race, as the district court concluded, but rather for not-yet-formalized tribal affiliation, particularly where the child is too young to formally apply for membership in a tribe.¹⁰

Our conclusion that ICWA's definition of Indian child is a political classification is consistent with both the Supreme Court's holding in *Mancari* and this court's holding in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1212 (5th Cir. 1991). In *Mancari*, the hiring preference extended to individuals who were one-fourth or more degree Indian blood and a member of a federally recognized tribe. See 417 U.S. at 554, 94 S.Ct. 2474. Similarly, in *Peyote Way*, this court considered whether equal protection was violated by federal and state laws prohibiting the possession of peyote by all persons except members of the Native American Church of North America (NAC), who used peyote for religious purposes. See 922 F.2d at 1212. Applying *Mancari*'s reasoning, this court upheld the preference on the basis that membership in NAC "is limited to Native American members of federally recognized tribes who have at least 25% Native American ancestry, and therefore represents a political classification." *Id.* at 1216. ICWA's "Indian child" eligibility provision similarly turns, at least in part, on whether the child is eligible for membership in a federally recognized tribe. See *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (federal recognition "is a formal political act" that "institutionaliz[es] the government-to-government relationship between the tribe and the federal government."); 25 U.S.C. § 1903(4).

The district court concluded, and Plaintiffs now argue, that ICWA's definition "mirrors the impermissible racial classification *429 in *Rice* [*v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000)], and is legally and factually distinguishable from the political classification in *Mancari*." The Supreme Court in *Rice* concluded that a provision of the Hawaiian Constitution that permitted only "Hawaiian" people to vote in the statewide election for the trustees of the

Office of Hawaiian Affairs (OHA) violated the Fifteenth Amendment. 528 U.S. at 515, 120 S.Ct. 1044. "Hawaiian" was defined by statute as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.* The Court noted the state legislature's express purpose in using ancestry as a proxy for race and held that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

Id. at 514–17, 120 S.Ct. 1044 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)). Distinguishing *Mancari*, the Court noted that its precedent did not afford Hawaiians a protected status like that of Indian tribes; that the OHA elections were an affair of the state and not of a "separate quasi sovereign" like a tribe; and that extending "*Mancari* to this context would [] permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs." *Id.* at 522, 120 S.Ct. 1044.

Rice is distinguishable from the present case for several reasons. Unlike *Rice*, which involved voter eligibility in a state-wide election for a state agency, there is no similar concern here that applying *Mancari* would permit "by racial classification, [the fencing] out [of] whole classes of [a state's] citizens from decisionmaking in critical state affairs." See 528 U.S. at 518–22, 120 S.Ct. 1044. Additionally, as discussed above, ICWA's definition of "Indian child," unlike the challenged law in *Rice*, does not single out children "solely because of their ancestry or ethnic characteristics." See *id.* at 515, 120 S.Ct. 1044 (emphasis added). Further, unlike the law in *Rice*, ICWA is a federal law enacted by Congress for the protection of Indian children and tribes. See *Rice*, 528 U.S. at 518, 120 S.Ct. 1044 (noting that to sustain Hawaii's restriction under *Mancari*, it would have to "accept some beginning premises not yet established in [its] case law," such as that Congress "has determined that native Hawaiians have a status like that of Indians in organized tribes"); see also *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (rejecting an equal protection challenge brought by Native Hawaiians, who were excluded from the U.S. Department of the Interior's regulatory tribal acknowledgement process, and concluding that the recognition of Indian tribes was political). Additionally,

whereas the OHA elections in [Rice](#) were squarely state affairs, state court adoption proceedings involving Indian children are simultaneously affairs of states, tribes, and Congress. See [25 U.S.C. § 1901\(3\)](#) (“[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”). Because we find [Rice](#) inapplicable, and [Mancari](#) controlling here, we conclude, contrary to the district court’s determination, that ICWA’s definition of “Indian child” is a political classification subject to rational basis review. See [Mancari](#), 417 U.S. at 555, 94 S.Ct. 2474.

B. Rational Basis Review

^[29]Having so determined that rational basis review applies, we ask whether “the special treatment can be tied rationally to the fulfillment of Congress’s unique *430 obligation toward the Indians.” [Mancari](#), 417 U.S. at 555, 94 S.Ct. 2474. Given Congress’s explicit findings and stated objectives in enacting ICWA, we conclude that the special treatment ICWA affords Indian children is rationally tied to Congress’s fulfillment of its unique obligation toward Indian nations and its stated purpose of “protect[ing] the best interests of Indian children and [] promot[ing] the stability and security of Indian tribes.” See [25 U.S.C. §§ 1901–02](#); see also [Mancari](#), 417 U.S. at 555, 94 S.Ct. 2474. ICWA [section 1903\(4\)](#)’s definition of an “Indian child” is a political classification that does not violate equal protection.

III. Tenth Amendment

The district court concluded that ICWA sections 1901–23¹¹ and 1951–52¹² violated the anticommandeering doctrine by requiring state courts and executive agencies to apply federal standards to state-created claims. The district court also considered whether ICWA preempts conflicting state law under the Supremacy Clause and concluded that preemption did not apply because the law “directly regulated states.” Defendants argue that the anticommandeering doctrine does not prevent Congress from requiring state courts to enforce substantive and procedural standards and precepts, and that ICWA sets

minimum procedural standards that preempt conflicting state law. We examine the constitutionality of the challenged provisions of ICWA below and conclude that they preempt conflicting state law and do not violate the anticommandeering doctrine.

A. Anticommandeering Doctrine

^[30] ^[31] ^[32]The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X. Congress’s legislative powers are limited to those enumerated under the Constitution. [Murphy v. Nat’l Collegiate Athletic Ass’n](#), — U.S. —, 138 S. Ct. 1461, 1476, 200 L.Ed.2d 854 (2018). “[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.” [Id.](#) The anticommandeering doctrine, an expression of this limitation on Congress, prohibits federal laws commanding the executive or legislative branch of a state government to act or refrain from acting.¹³ [Id.](#) at 1478 (holding that a federal law prohibiting state authorization of sports gambling violated the anticommandeering rule by “unequivocally dictat[ing] what a state legislature may *431 and may not do”); [Printz v. United States](#), 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (holding that a federal law requiring state chief law enforcement officers to conduct background checks on handgun purchasers “conscript[ed] the State’s officers directly” and was invalid); [New York v. United States](#), 505 U.S. 144, 175–76, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (holding that a federal law impermissibly commandeered states to implement federal legislation when it gave states “[a] choice between two unconstitutionally coercive” alternatives: to either dispose of radioactive waste within their boundaries according to Congress’s instructions or “take title” to and assume liabilities for the waste).

1. State Courts

^[33]Defendants argue that because the Supremacy Clause

requires the enforcement of ICWA and the Final Rule by state courts, these provisions do not run afoul of the anticommandeering doctrine. We agree. The Supremacy Clause provides that “the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2. In setting forth the anticommandeering doctrine, the Supreme Court drew a distinction between a state’s courts and its political branches. The Court acknowledged that “[f]ederal statutes enforceable in state court do, in a sense, direct state judges to enforce them, but this sort of federal “direction” of state judges is mandated by the text of the Supremacy Clause.” *New York*, 505 U.S. at 178–79, 112 S.Ct. 2408 (internal quotation marks omitted). Early laws passed by the first Congresses requiring state court action “establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.” *Printz*, 521 U.S. at 907, 117 S.Ct. 2365. State courts were viewed as distinctive because, “unlike [state] legislatures and executives, they applied the law of other sovereigns all the time,” including as mandated by the Supremacy Clause. *Id.* Thus, to the extent provisions of ICWA and the Final Rule require state courts to enforce federal law, the anticommandeering doctrine does not apply. See *id.* at 928–29, 117 S.Ct. 2365 (citing *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947), “for the proposition that state courts cannot refuse to apply federal law a conclusion mandated by the terms of the Supremacy Clause”).

2. State Agencies

¹³⁴Plaintiffs next challenge several provisions of ICWA that they contend commandeer state executive agencies, including sections 1912(a) (imposing notice requirements on “the party seeking the foster care placement of, or termination of parental rights to, an Indian child”), 1912(d) (requiring that “any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”), 1915(c) (requiring “the agency or court effecting [a] placement” adhere to the

order of placement preferences established by the tribe), and 1915(e) (requiring that “the State” in which the placement was made keep a record of each placement, evidencing the efforts to comply with the order of preference, to be made available upon request of the Secretary or the *432 child’s tribe). See 25 U.S.C. §§ 1912, 1915. Plaintiffs argue that ICWA’s requirements on state agencies go further than the federal regulatory scheme invalidated in *Printz* and impermissibly impose costs that states must bear. Defendants contend that the challenged provisions of ICWA apply to private parties and state agencies alike and therefore do not violate the anticommandeering doctrine.

In *Printz*, the Supreme Court affirmed its prior holding that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program,” and “Congress cannot circumvent that prohibition by conscripting the State’s officers directly.” 521 U.S. at 925, 935, 117 S.Ct. 2365 (quoting *New York*, 505 U.S. at 188, 112 S.Ct. 2408). The *Printz* Court, rejecting as irrelevant the Government’s argument that the federal law imposed a minimal burden on state executive officers, explained that it was not “evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments,” but rather a law whose “whole object ... [was] to direct the functioning of the state executive.” *Id.* at 931–32, 117 S.Ct. 2365. Expanding upon this distinction, the Court in *Murphy* discussed *Reno v. Condon*, 528 U.S. 141, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000), and *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988), and held that “[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.” 138 S. Ct. at 1478.

In *Condon*, the Court upheld a federal regulatory scheme that restricted the ability of states to disclose a driver’s personal information without consent. 528 U.S. at 151, 120 S.Ct. 666. In determining that the anticommandeering doctrine did not apply, the Court distinguished the law from those invalidated in *New York* and *Printz*:

[This law] does not require the

States in their sovereign capacity to regulate their own citizens. The [law] regulates the States as the owners of [Department of Motor Vehicle] data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

Id. In *Baker*, the Court rejected a Tenth Amendment challenge to a provision of a federal statute that eliminated the federal income tax exemption for interest earned on certain bonds issued by state and local governments unless the bonds were registered, treating the provision “as if it directly regulated States by prohibiting outright the issuance of [unregistered] bearer bonds.” 485 U.S. at 507–08, 511, 108 S.Ct. 1355. The Court reasoned that the provision at issue merely “regulat[ed] a state activity” and did not “seek to control or influence the manner in which States regulate private parties.” *Id.* at 514, 108 S.Ct. 1355. “That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.” *Id.* at 514–15, 108 S.Ct. 1355. “[S]ubstantial effort[s]” to comply with federal regulations are “an inevitable consequence of regulating a state activity.” *Id.* at 514, 108 S.Ct. 1355.

In light of these cases, we conclude that the provisions of ICWA that Plaintiffs challenge do not commandeer state agencies. Sections 1912(a) and (d) impose notice and “active efforts” requirements on the “party” seeking the foster care placement of, or termination of parental rights to, an Indian child. Because both state agencies and private parties who engage in state § 433 child custody proceedings may fall under these provisions, 1912(a) and (d) “evenhandedly regulate[] an activity in which both States and private actors engage.”¹⁴ See *Murphy*, 138 S. Ct. at 1478. Moreover, sections 1915(c) and (e) impose an obligation on “the agency or court effecting the placement” of an Indian child to respect a tribe’s order of placement preferences and require that “the State” maintain a record of each placement to be made available to the Secretary or child’s tribe. These provisions regulate state activity and do not require states to enact any laws or

regulations, or to assist in the enforcement of federal statutes regulating private individuals. See *Condon*, 528 U.S. at 151, 120 S.Ct. 666; *Baker*, 485 U.S. at 514, 108 S.Ct. 1355; see also *Printz*, 521 U.S. at 918, 117 S.Ct. 2365 (distinguishing statutes that merely require states to provide information to the federal government from those that command state executive agencies to actually administer federal programs). To the contrary, they merely require states to “take administrative ... action to comply with federal standards regulating” child custody proceedings involving Indian children, which is permissible under the Tenth Amendment.¹⁵ See *Baker*, 485 U.S. at 514–15, 108 S.Ct. 1355.

*434 B. Preemption

^[35] ^[36] ^[37] Defendants argue that, to the extent there is a conflict between ICWA and applicable state laws in child custody proceedings, ICWA preempts state law. The Supremacy Clause provides that federal law is the “supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2. Conflict preemption occurs when “Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.” *Murphy*, 138 S. Ct. at 1480. For a federal law to preempt conflicting state law, two requirements must be satisfied: The challenged provision of the federal law “must represent the exercise of a power conferred on Congress by the Constitution” and “must be best read as one that regulates private actors” by imposing restrictions or conferring rights. *Id.* at 1479–80. The district court concluded that preemption does not apply here, as ICWA regulates states rather than private actors. We review de novo whether a federal law preempts a state statute or common law cause of action. See *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001).

^[38] Congress enacted ICWA to “establish[] minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.” 25 U.S.C. § 1902. Defendants contend that these minimum federal standards preempt conflicting state laws. Plaintiffs contend that preemption does not

apply here because ICWA regulates states and not individuals, and nothing in the Constitution gives Congress authority to regulate the adoption of Indian children under state jurisdiction.

ICWA specifies that Congress's authority to regulate the adoption of Indian children arises under the Indian Commerce Clause as well as "other constitutional authority." 25 U.S.C. § 1901(1). The Indian Commerce Clause provides that "[t]he Congress shall have Power To ... regulate Commerce ... with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has repeatedly held that the Indian Commerce Clause grants Congress plenary power over Indian affairs. See *U.S. v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) (noting that the Indian Commerce and Treaty Clauses are sources of Congress's "plenary and exclusive" "powers to legislate in respect to Indian tribes"); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982) (discussing Congress's "broad power ... to regulate tribal affairs under the Indian Commerce Clause"); *Mancari*, 417 U.S. at 551–52, 94 S.Ct. 2474 (noting that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from," *inter alia*, the Indian Commerce Clause). Plaintiffs do not provide authority to support a departure from that principle here.

Moreover, ICWA clearly regulates private individuals. See *Murphy*, 138 S. Ct. at 1479–80. In enacting the statute, Congress declared that it was the dual policy of the United States to protect the best interests of Indian children and promote the stability and security of Indian families and tribes. 25 U.S.C. § 1902. Each of the challenged provisions applies within the context of state court proceedings involving Indian children and is informed by and designed to promote Congress's goals by conferring rights upon Indian children and *435 families.¹⁶ See H.R. REP. No. 95-1386, at 18 (1978) ("We conclude that rights arising under [ICWA] may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion." (quoting *Second Employers' Liability Cases*, 223 U.S. 1, 59, 32 S.Ct. 169, 56 L.Ed. 327 (1912))). Thus, to the extent ICWA's minimum federal standards conflict with state law, "federal law takes precedence and the state law is preempted." See *Murphy*, 138 S. Ct. at 1480.

IV. Nondelegation Doctrine

^[39] ^[40] ^[41] Article I of the Constitution vests "[a]ll legislative Powers" in Congress. U.S. CONST. art. I, § 1, cl. 1. "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). The limitations on Congress's ability to delegate its legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." See *United States v. Mazurie*, 419 U.S. 544, 556–57, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). ICWA section 1915(c) allows Indian tribes to establish through tribal resolution a different order of preferred placement than that set forth in sections 1915(a) and (b).¹⁷ Section 23.130 of the Final Rule provides that a tribe's established placement preferences apply over those specified in ICWA.¹⁸ The district court determined that these provisions violated the nondelegation doctrine, reasoning that section 1915(c) grants Indian tribes the power to change legislative preferences with binding effect on the states, and Indian tribes, like private entities, are not part of the federal government of the United States and cannot exercise federal legislative or executive regulatory power over non-Indians on non-tribal lands.

Defendants argue that the district court's analysis of the constitutionality of these provisions ignores the inherent sovereign authority of tribes. They contend that section 1915 merely recognizes and incorporates a tribe's exercise of its inherent sovereignty over Indian children and therefore does not—indeed cannot—delegate this existing authority to Indian tribes.

*436 The Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine. See *Mazurie*, 419 U.S. at 557, 95 S.Ct. 710 ("[I]ndependent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce ... with the Indian tribes.'"); *United States v. Sharpnack*, 355 U.S. 286, 293–94, 78 S.Ct. 291, 2 L.Ed.2d 282 (1958) (holding that a statute that prospectively incorporated state criminal laws "in force at the time" of the alleged crime was a "deliberate continuing adoption by Congress" of state law as binding federal law in federal enclaves within state boundaries); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 80, 6 L.Ed. 23 (1824) ("Although Congress cannot enable a State to legislate,

Congress may adopt the provisions of a State on any subject.”). “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.” [Mazurie](#), 419 U.S. at 557, 95 S.Ct. 710. Though some exercises of tribal power require “express congressional delegation,” the “tribes retain their inherent power to determine tribal membership [and] to regulate domestic relations among members” See [Montana v. United States](#), 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); see also [Merrion v. Jicarilla Apache Tribe](#), 455 U.S. 130, 170, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982) (“tribes retain the power to create substantive law governing internal tribal affairs” like tribal citizenship and child custody).

In [Mazurie](#), a federal law allowed the tribal council of the Wind River Tribes, with the approval of the Secretary of the Interior, to adopt ordinances to control the introduction of alcoholic beverages by non-Indians on privately owned land within the boundaries of the reservation. See [Mazurie](#), 419 U.S. at 547, 557, 95 S.Ct. 710. The Supreme Court held that the law did not violate the nondelegation doctrine, focusing on the Tribes’ inherent power to regulate their internal and social relations by controlling the distribution and use of intoxicants within the reservation’s bounds. [Id.](#) [Mazurie](#) is instructive here. ICWA [section 1915\(c\)](#) provides that a tribe may pass, by its own legislative authority, a resolution reordering the three placement preferences set forth by Congress in [section 1915\(a\)](#). Pursuant to this section, a tribe may assess whether the most appropriate placement for an Indian child is with members of the child’s extended family, the child’s tribe, or other Indian families, and thereby exercise its “inherent power to determine tribal membership [and] regulate domestic relations among members” and Indian children eligible for membership. See [Montana](#), 450 U.S. at 564, 101 S.Ct. 1245.

¹⁴²State Plaintiffs contend that [Mazurie](#) is distinguishable because it involves the exercise of tribal authority on tribal lands, whereas ICWA permits the extension of tribal authority over states and persons on non-tribal lands. We find this argument unpersuasive. It is well established that tribes have “sovereignty over both their members and their territory.” See [Mazurie](#), 419 U.S. at 557, 95 S.Ct. 710 (emphasis added). For a tribe to exercise its authority to determine tribal membership and to regulate domestic relations among its members, it must necessarily be able to regulate all Indian children, irrespective of their location.¹⁹ See [Montana](#), 450 U.S.

at 564, 101 S.Ct. 1245 (tribes retain inherent power to regulate domestic relations and determine tribal membership); *437 [Merrion](#), 455 U.S. at 170, 102 S.Ct. 894 (tribes retain power to govern tribal citizenship and child custody). [Section 1915\(c\)](#), by recognizing the inherent powers of tribal sovereigns to determine by resolution the order of placement preferences applicable to an Indian child, is thus a “deliberate continuing adoption by Congress” of tribal law as binding federal law. See [Sharpnack](#), 355 U.S. at 293–94, 78 S.Ct. 291; see also [25 U.S.C. § 1915\(c\)](#); 81 Fed. Reg. at 38,784 (the BIA noting that “through numerous statutory provisions, ICWA helps ensure that State courts incorporate Indian social and cultural standards into decision-making that affects Indian children”). We therefore conclude that ICWA [section 1915\(c\)](#) is not an unconstitutional delegation of Congressional legislative power to tribes, but is an incorporation of inherent tribal authority by Congress. See [Mazurie](#), 419 U.S. at 544, 95 S.Ct. 710; [Sharpnack](#), 355 U.S. at 293–94, 78 S.Ct. 291.

V. The Final Rule

The district court held that, to the extent sections 23.106–22, 23.124–32, and 23.140–41 of the Final Rule were binding on State Plaintiffs, they violated the APA for three reasons: The provisions (1) purported to implement an unconstitutional statute; (2) exceeded the scope of the Interior Department’s statutory regulatory authority to enforce ICWA with binding regulations; and (3) reflected an impermissible construction of ICWA [section 1915](#). We examine each of these bases in turn.

A. The Constitutionality of ICWA

Because we concluded that the challenged provisions of ICWA are constitutional, for reasons discussed earlier in this opinion, the district court’s first conclusion that the Final Rule was invalid because it implemented an unconstitutional statute was erroneous. Thus, the statutory basis of the Final Rule is constitutionally valid.

B. The Scope of the BIA's Authority

Congress authorized the Secretary of the Interior to promulgate rules and regulations that may be necessary to carry out the provisions of ICWA. See 25 U.S.C. § 1952. Pursuant to this provision, the BIA, acting under authority delegated by the Interior Department, issued guidelines in 1979 for state courts in Indian child custody proceedings that were “not intended to have binding legislative effect.” 44 Fed. Reg. at 67,584. The BIA explained that, generally, “when the Department writes rules needed to carry out responsibilities Congress has explicitly imposed on the Department, those rules are binding.” *Id.* However, when “the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding.” *Id.* With respect to ICWA, the BIA concluded in 1979 that it was “not necessary” to issue binding regulations advising states how to carry out the responsibilities Congress assigned to them; state courts were “fully capable” of implementing the responsibilities Congress imposed on them, and nothing in the language or legislative history of 25 U.S.C. § 1952 indicated that Congress intended the BIA to exercise supervisory control over states. *Id.* However, in 2016, the BIA changed course and issued the Final Rule, which sets binding standards for state courts in Indian child-custody proceedings. See 25 C.F.R. §§ 23.101, 23.106; 81 Fed. Reg. at 38,779, 38,785. The BIA explained that its earlier, nonbinding guidelines were “insufficient to fully implement Congress’s goal of nationwide protections for Indian children, parents, and Tribes.” 81 Fed. Reg. at 38,782. Without the Final Rule, the BIA stated, state-specific determinations about how to implement ICWA would continue “with potentially devastating consequences” for those Congress intended ICWA to protect. See *id.*

^[43] ^[44]In reviewing “an agency’s construction of the statute which it administers,” we are “confronted with two questions.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). First, we must examine whether the statute is ambiguous. *Id.* at 842, 104 S.Ct. 2778. “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* But “if the statute is silent or

ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 842–43, 104 S.Ct. 2778. We must uphold an agency’s reasonable interpretation of an ambiguous statute. *Id.* at 844, 104 S.Ct. 2778.

Under *Chevron* step one, the question is whether Congress unambiguously intended to grant the Department authority to promulgate binding rules and regulations. ICWA provides that “the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.” 25 U.S.C. § 1952. The provision’s plain language confers broad authority on the Department to promulgate rules and regulations it deems necessary to carry out ICWA. This language can be construed to grant the authority to issue binding rules and regulations; however, because “Congress has not directly addressed the precise question at issue,” we conclude that section 1952 is ambiguous. See *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778.

^[45]Moving to the second *Chevron* step, we must determine whether the BIA’s current interpretation of its authority to issue binding regulations pursuant to section 1952 is reasonable. See 467 U.S. at 843–44, 104 S.Ct. 2778. Defendants argue that section 1952’s language is substantively identical to other statutes conferring broad delegations of rulemaking authority. Indeed, the Supreme Court has held that “[w]here the empowering provision of a statute states simply that the agency may make ... such rules and regulations as may be necessary to carry out the provisions of this Act ... the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation.” *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973) (internal quotation marks omitted); see also *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 306, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (noting a lack of “case[s] in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency’s substantive field”). Here, section 1952’s text is substantially similar to the language in *Mourning*, and the Final Rule’s binding standards for Indian child custody proceedings are reasonably related to ICWA’s purpose of establishing minimum federal standards in child custody

proceedings involving Indian children. See 25 U.S.C. § 1902. Thus, the Final Rule is a reasonable exercise of the broad authority granted to the BIA by Congress in ICWA section 1952.

Plaintiffs contend that the BIA reversed its position on the scope of its authority to issue binding regulations after thirty-seven years and without explanation and its interpretation was therefore not entitled to deference. We disagree. “The mere fact *439 that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion. But if these pitfalls are avoided, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996) (internal citations and quotation marks omitted). The agency must provide “reasoned explanation” for its new policy, though “it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). “[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.” *Id.*

The BIA directly addressed its reasons for departing from its earlier interpretation that it had no authority to promulgate binding regulations, explaining that, under Supreme Court precedent, the text of section 1952 conferred “a broad and general grant of rulemaking authority.” 81 Fed. Reg. at 38,785 (collecting Supreme Court cases). The BIA further discussed why it now considered binding regulations necessary to implement ICWA: In 1979, the BIA “had neither the benefit of the *Holyfield* Court’s carefully reasoned decision nor the opportunity to observe how a lack of uniformity in the interpretation of ICWA by State courts could undermine the statute’s underlying purposes.” 81 Fed. Reg. at 38,787 (citing *Holyfield*, 490 U.S. at 30, 109 S.Ct. 1597).

In *Holyfield*, the Supreme Court considered the meaning of the term “domicile,” which ICWA section 1911 left undefined and the BIA left open to state interpretation under its 1979 Guidelines. 490 U.S. at 43, 51, 109 S.Ct. 1597. The Court held that “it is most

improbable that Congress would have intended to leave the scope of the statute’s key jurisdictional provision subject to definition by state courts as a matter of state law,” given that “Congress was concerned with the rights of Indian families vis-à-vis state authorities” and considered “States and their courts as partly responsible for the problem it intended to correct” through ICWA. *Id.* at 45, 109 S.Ct. 1597. Because Congress intended for ICWA to address a nationwide problem, the Court determined that the lack of nationwide uniformity resulting from varied state-law definitions of this term frustrated Congress’s intent. *Id.* The *Holyfield* Court’s reasoning applies here. Congress’s concern with safeguarding the rights of Indian families and communities was not limited to section 1911 and extended to all provisions of ICWA, including those at issue here. Thus, as the BIA explained, all provisions of ICWA that it left open to state interpretation in 1979, including many that Plaintiffs now challenge, were subject to the lack of uniformity the Supreme Court identified in *Holyfield* and determined was contrary to Congress’s intent. 81 Fed. Reg. at 38,782. Thus, in light of *Holyfield*, the BIA has provided a “reasoned explanation” for departing from its earlier interpretation of its authority under section 1952 and for the need of binding regulations with respect to ICWA. See *Fox Television Stations*, 556 U.S. at 515, 129 S.Ct. 1800.

¹⁴⁶In addition to assessing whether an agency’s interpretation of a statute is reasonable under *Chevron*, the APA requires that we “hold unlawful and set aside *440 agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). Contrary to Plaintiffs’ contentions, the BIA explained that the Final Rule resulted from years of study and public outreach and participation. See 81 Fed. Reg. 38,778, 38,784–85. In promulgating the rule, the BIA relied on its own expertise in Indian affairs, its experience in administering ICWA and other Indian child-welfare programs, state interpretations and best practices,²⁰ public hearings, and tribal consultations. See *id.* Thus, the BIA’s current interpretation is not “arbitrary, capricious, [or] an abuse of discretion” because it was not sudden and unexplained. See *Smiley*, 517 U.S. at 742, 116 S.Ct. 1730; 5 U.S.C. § 706(2)(A). The district court’s contrary conclusion was error.

C. The BIA's Construction of ICWA § Section 1915

^{147]}ICWA § section 1915 sets forth three preferences for the placement of Indian children unless good cause can be shown to depart from them. § 25 U.S.C. § 1915(a)–(b). The 1979 Guidelines initially advised that the term “good cause” in ICWA § section 1915 “was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child.” 44 Fed. Reg. 67,584. However, section 23.132(b) of the Final Rule specifies that “[t]he party seeking departure from [§ section 1915’s] placement preferences should bear the burden of proving by clear and convincing evidence that there is ‘good cause’ to depart from the placement preferences.” 25 C.F.R. § 23.132(b). The district court determined that Congress unambiguously intended the ordinary preponderance-of-the-evidence standard to apply, and the BIA’s interpretation that a higher standard applied was therefore not entitled to Chevron deference.

Defendants contend that the Final Rule’s clear-and-convincing standard is merely suggestive and not binding. They further aver that the Final Rule’s clarification of the meaning of “good cause” and imposition of a clear-and-convincing-evidence standard are entitled to Chevron deference. Plaintiffs respond that state courts have interpreted the clear-and-convincing standard as more than just suggestive in practice, and the Final Rule’s fixed definition of “good cause” is contrary to ICWA’s intent to provide state courts with flexibility.

Though provisions of the Final Rule are generally binding on states, the BIA indicated that it did not intend for § section 23.132(b) to establish a binding standard. See 25 C.F.R. § 23.132 (“The party seeking departure from the placement preferences *should* bear the burden of proving by clear and convincing evidence that there is ‘good cause’ to depart from the placement preferences.” (emphasis added)). The BIA explained that “[w]hile the final rule advises that the application of the clear and convincing standard ‘should’ be followed, it does not categorically require that outcome ... [and] the Department declines to establish a uniform standard of proof on this issue.” See 81 Fed. Reg. at 38,843.

^{148]} ^{149]}The BIA’s interpretation of § section 1915 is also entitled to Chevron deference. For purposes of Chevron step one, the statute is silent with respect to which evidentiary standard applies. See § 25 U.S.C. §

1915; Chevron, 467 U.S. at 842, 104 S.Ct. 2778. The district court relied on *441 the canon of *expressio unius est exclusio alterius* (“the expression of one is the exclusion of others”) in finding that Congress unambiguously intended that a preponderance-of-the-evidence standard was necessary to show good cause under ICWA § section 1915. The court reasoned that because Congress specified a heightened evidentiary standard in other provisions of ICWA, but did not do so with respect to § section 1915, Congress did not intend for the heightened clear-and-convincing-evidence standard to apply. This was error. “When interpreting statutes that govern agency action, ... a congressional mandate in one section and silence in another often suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion.” Catawba Cty., N.C. v. E.P.A., 571 F.3d 20, 36 (D.C. Cir. 2009). “[T]hat Congress spoke in one place but remained silent in another ... rarely if ever suffices for the direct answer that Chevron step one requires.” Id. (cleaned up); see also Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 694 (D.C. Cir. 1991) (“Under Chevron, we normally withhold deference from an agency’s interpretation of a statute only when Congress has directly spoken to the precise question at issue, and the *expressio* canon is simply too thin a reed to support the conclusion that Congress has clearly resolved this issue.”) (internal citations and quotation marks omitted).

^{150]}Under Chevron step two, the BIA’s current interpretation of the applicable evidentiary standard is reasonable. See Chevron, 467 U.S. at 844, 104 S.Ct. 2778. The BIA’s suggestion that the clear-and-convincing standard should apply was derived from the best practices of state courts. 81 Fed. Reg. at 38,843. The Final Rule explains that, since ICWA’s passage, “courts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress’s intent in ICWA to maintain Indian families and Tribes intact.” Id. Because the BIA’s current interpretation of § section 1915, as set forth in Final Rule § section 23.132(b), was based on its analysis of state cases and geared toward furthering Congress’s intent, it is reasonable and entitled to Chevron deference. Moreover, the BIA’s current interpretation is nonbinding and therefore consistent with the 1979 Guidelines in allowing state courts flexibility to determine “good cause.” Section 23.132(b) of the Final Rule is thus

valid under the APA. See 5 U.S.C. § 706(2)(A).

For these reasons, we conclude that Plaintiffs had standing to bring all claims and that ICWA and the Final Rule are constitutional because they are based on a political classification that is rationally related to the fulfillment of Congress's unique obligation toward Indians; ICWA preempts conflicting state laws and does not violate the Tenth Amendment anticommandeering doctrine; and ICWA and the Final Rule do not violate the nondelegation doctrine. We also conclude that the Final Rule implementing the ICWA is valid because the ICWA is constitutional, the BIA did not exceed its authority when it issued the Final Rule, and the agency's interpretation of ICWA section 1915 is reasonable. Accordingly, we AFFIRM the district court's judgment that Plaintiffs had Article III standing. But we REVERSE the district court's grant of summary judgment for Plaintiffs and RENDER judgment in favor of Defendants on all claims.

PRISCILLA R. OWEN, Circuit Judge, concurring in part and dissenting in part:

I agree with much of the majority opinion. But I conclude that certain provisions *442 of the Indian Child Welfare Act (ICWA)¹ and related regulations violate the United States Constitution because they direct state officers or agents to administer federal law. I therefore dissent, in part.

The offending statutes include part of 25 U.S.C. § 1912(d) (requiring a State seeking to effect foster care placement of an Indian child to “satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful”), § 1912(e) (prohibiting foster care placement unless a State presents evidence from “qualified expert witnesses ... that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child”), and § 1915(e) (requiring that “[a] record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section” and that “[s]uch record[s] shall be made available at any time upon the

request of the Secretary or the Indian child's tribe”). Regulations requiring States to maintain related records also violate the Constitution.²

The Supreme Court has made clear that Congress cannot commandeer a State or its officers or agencies: “[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”³ “The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States.”⁴ “The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms.”⁵ The Supreme Court has recognized that “conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.”⁶

The defendants in the present case contend that the Indian Commerce Clause⁷ *443 empowers Congress to direct the States as it has done in the ICWA. They are mistaken. “Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.”⁸

The panel's majority opinion concludes that the ICWA does “not commandeer state agencies”⁹ because it “evenhandedly regulate[s] an activity in which both States and private actors engage.”¹⁰ This is incorrect with respect to the part of 25 U.S.C. § 1912(d) addressed to foster care placement, § 1912(e), § 1915(e), and 25 C.F.R. § 23.141.

Though § 1912(d) nominally applies to “[a]ny party seeking to effect a foster care placement of ... an Indian child under State law,”¹¹ as a practical matter, it applies only to state officers or agents. Foster care placement is not undertaken by private individuals or private actors. That is a responsibility that falls upon state officers or agencies. Those officers or agencies are required by § 1912(d) to “satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”¹² That directive means that a State cannot place an Indian child in foster care, regardless of the exigencies of the

circumstances, unless it first provides the federally specified services and programs without success. Theoretically, a State could decline to protect Indian children in need of foster care. It could, theoretically, allow Indian children to remain in abusive or even potentially lethal circumstances. But that is not a realistic choice, even if state law did not apply across the board and include all children, regardless of their Indian heritage.

Certain of the ICWA's provisions are a transparent attempt to foist onto the States the obligation to execute a federal program and to bear the attendant costs. Though the requirements in 25 U.S.C. § 1912(d) are not as direct as those at issue in *Printz v. United States*,¹³ the federal imperatives improperly commandeer state officers or agents:

It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. See *Texas v. White*, 7 Wall. [700,] 725 [74 U.S. 700, 19 L.Ed. 227] [(1868)]. It is no more compatible with this independence and autonomy that their officers be "dragooned" (as Judge Fernandez put it in his dissent below, [*Mack v. United States*], 66 F.3d[1025,] 1035 [(9th Cir. 1995)]) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.¹⁴

Similarly, 25 U.S.C. § 1912(e) provides that "[n]o foster care placement may be ordered" unless there is "qualified expert witness[]" testimony "that the continued custody of *444 the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."¹⁵ This places the burden on a State, not a court, to present expert witness testimony in order to effectuate foster care for Indian children. If the federal government has concluded that such testimony is necessary in every case involving an Indian child's foster care placement, then the federal government should provide it. It cannot require the States to do so.

The requirements in 25 U.S.C. § 1912(d) apply to

termination of parental rights, not just foster care placement.¹⁶ The laws of Indiana, Louisiana, and Texas each permit certain individuals to petition for the termination of parental rights in some circumstances,¹⁷ and 25 U.S.C. § 1912(d) applies to all parties seeking termination, not just state actors.¹⁸ At least superficially, 25 U.S.C. § 1912(d) appears to be an evenhanded regulation of an activity in which both States and private actors engage.¹⁹ But it is far from clear based on the present record that 25 U.S.C. § 1912(d) applies in a meaningful way to private actors and if so, how many private actors, as compared to state actors, have actually met its requirements. Additionally, it appears that the State plaintiffs contend that "the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments."²⁰ I would remand for further factual development. It may be that in the vast majority of *involuntary* parental termination proceedings, the party seeking the termination is a state official or agency. It also seems highly unlikely that individuals or private actors seeking termination of parental rights (if and when permitted to do so under a State's laws) will have been in a position "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family."²¹ It seems much more likely that these requirements fall, *de facto*, on the shoulders of state actors and agencies.

The records-keeping requirements in 25 U.S.C. § 1915(e) and 25 C.F.R. § 23.141 are direct orders to the States.²² They do not apply to private parties in parental termination or foster care placement proceedings. They do not apply "evenhandedly [to] an activity in which both States and private actors engage."²³

The Supreme Court expressly left open in *Printz* whether federal laws "which require only the provision of information to the Federal Government" are an unconstitutional *445 commandeering of a State or its officers or agents.²⁴ But the principles set forth in *Printz* lead to the conclusion that Congress is without authority to order the States to provide the information required by 25 U.S.C. § 1915(e) and related regulations. Even were the burden on the States of creating, maintaining, and supplying the required information "minimal and only temporary," the Supreme Court has reasoned that "where ... it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate."²⁵ The Supreme Court stressed, "It is the very *principle* of separate state sovereignty that such a law offends, and no

comparative assessment of the various interests can overcome that fundamental defect.”²⁶

The panel’s majority opinion concludes that the requirements of 25 U.S.C. § 1915(e) and 25 C.F.R. § 23.141 do not commandeer state officers or agents because they “regulate state activity and do not require states to enact any laws or regulations, or to assist in the enforcement of federal statutes regulating private individuals.”²⁷ But the statute orders States to maintain records of each placement of an Indian child and requires those records to “evidenc[e] the efforts to comply with the order of preference specified in this section.”²⁸ That directs States to assist in the enforcement of the ICWA by requiring States to document efforts to comply with the ICWA’s preferences. The panel’s majority opinion also cites three Supreme Court decisions, none of which supports its holding regarding the creation and maintenance of records.²⁹ The statute at issue in *Condon* prohibited States from disclosing or selling personal information they obtained from drivers in the course of licensing drivers and vehicles, unless the driver consented to the disclosure or sale of that information.³⁰ The Court’s decision in *Condon* focused on that prohibition rather than the statute’s additional requirement that certain information be disclosed to carry out the purposes of federal statutes including the Clean Air Act and the Anti Car Theft Act of 1992.³¹ The *Baker* decision did not concern a requirement that States create and maintain records.³² The federal statute at issue in *Baker* allowed a tax exemption for registered, but not bearer, bonds, and the statute “cover[ed] not only state bonds but also bonds issued by the United States and private corporations.”³³ As already discussed above, the *Printz* decision expressly left open the question of whether federal statutes requiring States to provide information was constitutional,³⁴ but the rationale of *Printz* compels the conclusion that some of the ICWA’s commandments result in a commandeering of state officers and agents.

*446 I agree with the panel’s majority opinion that in some respects, the ICWA “merely require[s] states to ‘take administrative ... action to comply with federal standards regulating’ child custody proceedings involving Indian children, which is permissible under the Tenth Amendment.”³⁵ Unlike the congressional enactment at

issue in *Murphy*, the ICWA does “confer ... federal rights on private actors interested in”³⁶ foster care placement, the termination of parental rights to an Indian child, and adoption of Indian children. States cannot override or ignore those private actors’ federal rights by failing to give notice to interested or affected parties or by failing to follow the placement preferences expressed in the ICWA. If a State desires to place an Indian child with an individual or individuals other than the child’s birth parents, the State must respect the federal rights of those upon whom the ICWA confers an interest in the placement of the Indian child or Indian children more generally. But 25 U.S.C. § 1912(d) (to the extent it concerns foster care placement), § 1912(e), § 1915(e), and 25 C.F.R. § 23.141, require more than the accommodation of private actors’ federal rights regarding the placement of Indian children. Those statutes and regulations commandeer state officers or agents by requiring them “to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family” and to demonstrate that such “efforts have proved unsuccessful”;³⁷ to present “qualified expert witnesses” to demonstrate “that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child”;³⁸ and to create and maintain records of every placement of an Indian child as well as records “evidencing the efforts to comply with the order of preference specified in this section.”³⁹

That these statutes and regulations “serve[] very important purposes” and that they are “most efficiently administered” at the state level is of no moment in a commandeering analysis.⁴⁰ As JUSTICE O’CONNOR, writing for the Court in *New York v. United States*, so eloquently expressed, “the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”⁴¹

All Citations

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Footnotes

¹ There are three federally recognized tribes in Texas: the Yselta del Sur Pueblo, the Kickapoo Tribe, and the

Alabama-Coushatta Tribe. There are four federally recognized tribes in Louisiana: the Chitimacha Tribe, the Coushatta Tribe, the Tunica-Biloxi Tribe, and the Jena Band of Choctaw Indians. There is one federally recognized tribe in Indiana: the Pokagon Band of Potawatomi Indians.

² The Navajo Nation had previously moved to intervene twice in the district court. The first motion was for the limited purpose of seeking dismissal pursuant to Rule 19, which the district court denied. The Navajo Nation filed a second motion to intervene for purposes of appeal after the district court's summary judgment order. The district court deferred decision on the motion pending further action by this court, at which time the Navajo Nation filed the motion directly with this court.

³ The district court denied Plaintiffs' substantive Due Process claim, from which Plaintiffs do not appeal.

⁴ State Plaintiffs argue that they have standing to bring an equal protection challenge in *parens patriae* on behalf of their citizens. We disagree. See [South Carolina v. Katzenbach](#), 383 U.S. 301, 324, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) (“[A] State [does not] have standing as the parent of its citizens to invoke [the Fifth Amendment Due Process Clause] against the Federal Government, the ultimate *parens patriae* of every American citizen.”).

⁵ “Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.” [25 U.S.C. § 1914](#).



⁶ The district court also found an injury based on the Social Security Act's conditioning of funding on states' compliance with ICWA. However, because we find that Plaintiffs have standing on other grounds, we decline to decide whether they have demonstrated standing based on an alleged injury caused by the SSA.

⁷ As described above, we conclude that Plaintiffs have standing to challenge ICWA section 1915(a)–(b) and Final Rule sections 23.129–32 on equal protection grounds. The district court's analysis of whether the ICWA classification was political or race-based focused on ICWA section 1903(4), presumably because section 1903(4) provides a threshold definition of “Indian child” that must be met for any provision of ICWA to apply in child custody proceedings in state court. Because we are satisfied that our analysis would produce the same result with respect to section 1903(4) and the specific provisions Plaintiffs have standing to challenge, we similarly confine our discussion of whether ICWA presents a political or race-based classification to section 1903(4).

⁸ The United States currently recognizes 573 Tribal entities. See [84 Fed. Reg. 1,200 \(Feb. 1, 2019\)](#). Federal recognition “is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government.” See [California Valley Miwok Tribe v. United States](#), 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3], at 138 (2005 ed.) (internal quotation marks omitted)). It “[i]s a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify.” [25 C.F.R. § 83.2](#).

⁹ Plaintiffs argue that, unlike the law in [Mancari](#), ICWA is not a law promoting tribal self-governance. However, prior to enacting ICWA, Congress considered testimony from the Tribal Chief of the Mississippi Band of Choctaw Indians about the devastating impacts of removing Indian children from tribes and placing them for adoption and foster care in non-Indian homes:



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.










 [Holyfield](#), 490 U.S. at 34, 109 S.Ct. 1597. This testimony undoubtedly informed Congress’s finding that children are the most vital resource “to the continued existence and integrity of Indian tribes.”  [25 U.S.C. § 1901\(3\)](#). Thus, interpreting ICWA as related to tribal self-government and the survival of tribes makes the most sense in light of Congress’s explicit intent in enacting the statute. *See id.*




¹⁰ The Navajo Nation’s membership code is instructive on these points, despite the district court’s reliance on it to the contrary. The Navajo Nation explains that, under its laws, “blood alone is never determinative of membership.” The Navajo Nation will only grant an application for membership “if the individual has some tangible connection to the Tribe,” such as the ability to speak the Navajo language or time spent living among the Navajo people. “Having a biological parent who is an enrolled member is per se evidence of such a connection.” Additionally, individuals will not be granted membership in the Navajo Nation, regardless of their race or ancestry, if they are members of another tribe.

¹¹ ICWA sections 1901–03 set forth Congress’s findings, declaration of policy, and definitions. Sections 1911–23 govern child custody proceedings, including tribal court jurisdiction, notice requirements in involuntary and voluntary state proceedings, termination of parental rights, invalidation of state proceedings, placement preferences, and agreements between states and tribes.

¹² Section 1951 sets forth information-sharing requirements for state courts.  [Section 1952](#) authorizes the Secretary of the Interior to promulgate necessary rules and regulations.

¹³ Though Congress is prohibited from commandeering states, it can “encourage a State to regulate in a particular way, or ... hold out incentives to the States as a method of influencing a State’s policy choices.”  [New York](#), 505 U.S. at 166, 112 S.Ct. 2408. For example, Congress may also condition the receipt of federal funds under its spending power. *See*  *id.* at 167, 112 S.Ct. 2408. Defendants also contend that ICWA is authorized under Congress’s Spending Clause powers because Congress conditioned federal funding in Title IV-B and E of the Social Security Act on states’ compliance with ICWA. However, because we conclude that ICWA is constitutionally permissible on other bases, we need not reach this argument.

¹⁴ Similarly,  [section 1912\(e\)](#) provides that no foster care placement may be ordered in involuntary proceedings in state court absent “a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” *See*  [25 U.S.C. § 1912\(e\)](#).  [Section 1912\(f\)](#) requires that no termination of parental rights may be ordered in involuntary proceedings in state court absent evidence beyond a reasonable doubt of the same. *See id.* at 1912(f). Neither section expressly refers to state agencies and, in conjunction with  [section 1912\(d\)](#), both sections must be reasonably read to refer to “any party” seeking the foster care placement of, or the termination of parental rights to, an Indian child. Thus, like  [section 1912\(d\)](#),  [sections 1912\(e\)–](#) [\(f\)](#) “evenhandedly regulate[] an activity in which both States and private actors engage” and do not run afoul of the anticommandeering doctrine. *See*  [Murphy](#), 138 S. Ct. at 1478; *see also*  [Condon](#), 528 U.S. at 151, 120 S.Ct. 666.

¹⁵ In ruling otherwise, the district court discussed  [Murphy](#) and emphasized that adhering to the anticommandeering rule is necessary to protect constitutional principles of state sovereignty, promote political accountability, and prevent Congress from shifting the costs of regulation to states. *See*  [Murphy](#), 138 S. Ct. at 1477. These principles do not compel the result reached by the district court. *See*  *id.* First, the anticommandeering doctrine is not necessary here to protect constitutional principles of state sovereignty because ICWA regulates the actions of state executive agencies in their role as child advocates and custodians, and not in

their capacity as sovereigns enforcing ICWA. See [id.](#) at 1478; see also [Condon](#), 528 U.S. at 151, 120 S.Ct. 666 (concluding that the law in question there “does not require the States in their sovereign capacity to regulate their own citizens [but] regulates the States as the owners of data bases”). The need to promote political accountability is minimized here for similar reasons, as ICWA does not require states to regulate their own citizens. See [Murphy](#), 138 S. Ct. at 1477 (noting concern that, if states are required to impose a federal regulation on their voters, the voters will not know who to credit or blame and responsibility will be “blurred”). Finally, the need to prevent Congress from shifting the costs of regulation to states is also minimized here, where some of the requirements at issue, like those in [sections 1912\(d\)](#) and [1915\(c\)](#), simply regulate a state’s actions during proceedings that it would already be expending resources on. ICWA’s recordkeeping and notice requirements could impose costs on states, but we cannot conclude that these costs compel application of the anticommandeering doctrine. See [Condon](#), 528 U.S. at 150, 120 S.Ct. 666 (a federal law that “require[d] time and effort on the part of state employees” was constitutional); [Baker](#), 485 U.S. at 515, 108 S.Ct. 1355 (that states may have to raise funds necessary to comply with federal regulations “presents no constitutional defect”).

¹⁶ Arguably, two of the challenged provisions of ICWA could be construed to simultaneously “confer[] rights” on Indian children and families while “imposing restrictions” on state agencies. See [Murphy](#), 138 S. Ct. at 1479–80. [Section 1915\(c\)](#) requires “the agency or court effecting [a] placement” to adhere to a tribe’s established order of placement preferences, and [section 1915\(e\)](#) requires states to keep records and make them available to the Secretary and Indian tribes. [25 U.S.C. § 1915\(c\)](#), [\(e\)](#). However, [Murphy](#) instructs that for a provision of a federal statute to preempt state law, the provision must be “best read as one that regulates private actors.” See [138 S. Ct. at 1479](#) (emphasis added). In light of Congress’s express purpose in enacting ICWA, the legislative history of the statute, and [section 1915](#)’s scope in setting forth minimum standards for the “Placement of Indian children,” we conclude that these provisions are “best read” as regulating private actors by conferring rights on Indian children and families. See [id.](#)

¹⁷ The section provides: “In the case of a placement under subsection (a) or (b) of this section, if the Indian child’s tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section.” [25 U.S.C. § 1915\(c\)](#).

¹⁸ “If the Indian child’s Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe’s placement preferences apply.” [25 C.F.R. § 23.130](#).

¹⁹ Indeed, as the BIA noted in promulgating the Final Rule, at least 78% of Native Americans lived outside of Indian country as of 2016. See [81 Fed. Reg. at 38,778, 38,783](#).

²⁰ Since ICWA’s enactment in 1978, several states have incorporated the statute’s requirements into their own laws or have enacted detailed procedures for their state agencies to collaborate with tribes in child custody proceedings.

¹ [25 U.S.C. §§ 1901 et seq.](#)


² See [25 C.F.R. § 23.141](#):

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child’s Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker’s statement), and, if the placement departs from the placement

preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

3  [Printz v. United States](#), 521 U.S. 898, 925, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

4  [Murphy v. Nat'l Collegiate Athletic Ass'n](#), — U.S. —, 138 S. Ct. 1461, 1475, 200 L.Ed.2d 854 (2018).

5  *Id.* at 1476.

6  *Id.*

7 U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”). 48

8  [Murphy](#), 138 S. Ct. at 1477 (quoting  [New York v. United States](#), 505 U.S. 144, 178, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992)).

9 [Brackeen v. Bernhardt](#), — F.3d —, —, 2019 WL 3759491, at *14 (5th Cir. 2019).

10  *Id.* (quoting  [Murphy](#), 138 S. Ct. at 1478).

11  25 U.S.C. § 1912(d).


12  *Id.*

13  521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).


14  *Id.* at 928, 117 S.Ct. 2365.


15  25 U.S.C. § 1912(e).

16  *Id.* § 1912(d).

17 See, e.g.,  IND. CODE §§ 31-35-2-4, 31-35-3.5-3 (2018); IND. CODE § 31-35-3-4 (2013); LA. CHILD. CODE ANN. art. 1122 (2019); TEX. FAM. CODE ANN. § 102.005 (West 2019); TEX. FAM. CODE ANN. § 161.005 (West Supp. 2019).

18  25 U.S.C. § 1912(d).

19 See  [Murphy v. Nat'l Collegiate Athletic Ass'n](#), — U.S. —, 138 S. Ct. 1461, 1478, 200 L.Ed.2d 854 (2018) (“The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.”).

20  [Printz v. United States](#), 521 U.S. 898, 932, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

21  25 U.S.C. § 1912(d).

22  *Id.* at § 1915(e) (“A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made”); 25 C.F.R. § 23.141 (“The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child”).

23 *Brackeen v. Bernhardt*, — F.3d —, —, 2019 WL 3759491, at *14 (5th Cir. 2019) (quoting  *Murphy*, 138 S. Ct. at 1478).

24  521 U.S. at 918, 117 S.Ct. 2365.

25  *Id.* at 932, 117 S.Ct. 2365.

26  *Id.*

27 *Brackeen*, — F.3d at —, 2019 WL 3759491, at *14.

28  25 U.S.C. § 1915(e).

29 *Brackeen*, — F.3d at —, 2019 WL 3759491, at *14 (citing  *Reno v. Condon*, 528 U.S. 141, 151, 120 S.Ct. 666, 145 L.Ed.2d 587 (2000);  *Printz*, 521 U.S. at 918, 117 S.Ct. 2365;  *South Carolina v. Baker*, 485 U.S. 505, 514, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988)).

30  *Condon*, 528 U.S. at 143-44, 120 S.Ct. 666 (citing the Driver’s Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725).

31  *Id.* at 145, 148-51, 120 S.Ct. 666.

32 See  *Baker*, 485 U.S. at 508-10, 108 S.Ct. 1355.

33  *Id.* at 510, 108 S.Ct. 1355.

34  *Printz*, 521 U.S. at 918, 117 S.Ct. 2365.

35 *Brackeen*, — F.3d at —, 2019 WL 3759491, at *14 (quoting  *Baker*, 485 U.S. at 515, 108 S.Ct. 1355).

36  *Murphy v. Nat’l Collegiate Athletic Ass’n*, — U.S. —, 138 S. Ct. 1461, 1467, 200 L.Ed.2d 854 (2018).

37  25 U.S.C. § 1912(d).

38  *Id.* § 1912(e).

39 *Id.* § 1915(e).

40  *Printz v. United States*, 521 U.S. 898, 931-32, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

41  505 U.S. 144, 187, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

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196 Wash.2d 152
Supreme Court of Washington.

In the MATTER OF the **DEPENDENCY** OF
Z.J.G. and M.E.J.G., minor children.

No. 98003-9

Argued 06/25/2020

Filed September 3, 2020

Synopsis

Background: After minor children were removed from the care of their parents, Department of Children, Youth, and Families filed **dependency** petitions for children, which asserted Department knew or had reason to know children were Indian children under the Indian Child Welfare Act (ICWA) and the Washington State Indian Child Welfare Act (WICWA). Following shelter care hearing, the Superior Court, King County, [Patrick Oishi, J.](#), initially determined ICWA and WICWA did not apply and placed children in foster care, but after Indian tribe successfully intervened in the case and children were determined to be tribally enrolled members, subsequently entered **dependency** order as to father's parental rights and applied ICWA and WICWA. Father moved for discretionary review of shelter care order, which was granted. The Court of Appeals, [10 Wash.App.2d 446, 448 P.3d 175](#), affirmed. Father petitioned for review, which was granted.

Holdings: The Supreme Court, [Montoya-Lewis, J.](#), held that:

[1] court has reason to know child is an "Indian child" under ICWA and WICWA when any participant in the proceeding indicates that the child has tribal heritage;

[2] WICWA is an independent basis to find that a court has reason to know a child is or may be an Indian child when a participant in the proceeding indicates that the child has tribal heritage; and

[3] trial court had clear reason to know that children were Indian children under ICWA and WICWA at shelter care hearing.

Reversed and remanded.

Procedural Posture(s): Petition for Discretionary Review; On Appeal; Neglect and **Dependency** Petition.

West Headnotes (23)

[1] **Indians** → Actions and proceedings in general

Trial court's initial determination following shelter care hearing in **dependency** proceeding that ICWA and the Washington State Indian Child Welfare Act (WICWA) did not apply presented issues of continuing and substantial public interest, and thus review was appropriate even though court later applied ICWA and WICWA and initial determination was moot; the correct application of ICWA and WICWA were issues of a public nature, clarification of the "reason to know" standard under ICWA and WICWA would provide guidance to trial courts on how to proceed with ICWA cases, issues presented were likely to recur, case presented a scenario that would often escape review, and advocacy was genuinely adverse. Indian Child Welfare Act of 1978 §§ 4, 102, [25 U.S.C.A. §§ 1903\(4\), 1912\(a\)](#); [Wash. Rev. Code Ann. §§ 13.34.065\(1\)\(a\), 13.38.040, 13.38.070\(1\)](#); [25 C.F.R. § 23.107\(b\)\(2\)](#).

[2] **Action** → Moot, hypothetical or abstract questions

A case is "moot" if a court can no longer provide effective relief.

[3] **Appeal and Error** → Want of Actual Controversy

Generally, Supreme Court will not review a

moot case; but Court will review the case if it presents issues of continuing and substantial public interest.

regulations

Statutory and regulatory interpretation is a question of law that appellate court reviews de novo.

[4] **Appeal and Error** → Want of Actual Controversy

In deciding whether a moot case presents issues of continuing and substantial public interest, such that appellate review would be appropriate despite the case's mootness, appellate court considers whether the issues are of a public or private nature, whether an authoritative determination is desirable to provide future guidance to public officers, and whether the issues are likely to recur.

[8] **Administrative Law and Procedure** → Construction

Court interprets administrative regulations using rules of statutory construction.

[5] **Appeal and Error** → Want of Actual Controversy

When determining whether to review a moot case on appeal, appellate court considers the likelihood that the issue will escape review and the adverseness and quality of the advocacy.

[9] **Statutes** → Intent

Purpose of inquiry when interpreting a statute is to determine legislative intent and interpret the statutory provisions in a way that carries out that intent.

[6] **Indians** → Actions and proceedings in general

The applicability of ICWA and Washington State Indian Child Welfare Act (WICWA) is a question of law appellate court reviews de novo. Indian Child Welfare Act of 1978, § 2 et seq., 25 U.S.C.A. § 1901 et seq.; Wash. Rev. Code Ann. § 13.38.010 et seq.

[10] **Statutes** → Plain Language; Plain, Ordinary, or Common Meaning

When interpreting a statute, court first considers the statute's plain language.

[7] **Appeal and Error** → Statutory or legislative law
Appeal and Error → Administrative law;

[11] **Statutes** → Plain language; plain, ordinary, common, or literal meaning

When interpreting a statute, if the plain language is subject to only one interpretation, the inquiry ends because plain language does not require construction.

[12] **Statutes**—Construction based on multiple factors

Plain meaning of a statute, considered when interpreting a statute, is derived from the context of the entire act as well as any related statutes that disclose legislative intent about the provision in question.

[13] **Courts**—Previous Decisions as Controlling or as Precedents

Statutes—In general; factors considered

Statutes—Plain, literal, or clear meaning; ambiguity

When interpreting a statute, if the statute is subject to more than one reasonable interpretation, court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.

[14] **Indians**—Infants

ICWA and the Washington State Indian Child Welfare Act (WICWA) are interpreted coextensively, barring specific differences in their statutory language. Indian Child Welfare Act of 1978, § 2 et seq., 25 U.S.C.A. § 1901 et seq.; Wash. Rev. Code Ann. § 13.38.010 et seq.

[15] **Indians**—Purpose and construction

Statutes that deal with issues affecting Indian people and tribes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.

[16] **Indians**—Dependent Children; Termination of Parental Rights

Court has a “reason to know” that a child is an Indian child, and thus must apply ICWA and Washington State Indian Child Welfare Act (WICWA) standards in child custody proceedings, when any participant in the proceeding indicates that the child has tribal heritage; such an interpretation respects Indian tribe’s exclusive role in determining membership, comports with the canon of construction for interpreting statutes that deal with issues affecting Native people and tribes, is supported by the statutory language and implementing regulations, and serves the underlying purposes of ICWA and WICWA, including preventing states from removing Indian children based on stereotypical ideas and guaranteeing due process to tribes so they have the opportunity to protect their sovereign interests. U.S. Const. Amend. 14; Indian Child Welfare Act of 1978 §§ 4, 102, 25 U.S.C.A. §§ 1903(4), 1912(a); Wash. Rev. Code Ann. §§ 13.38.040, 13.38.070(1); 25 C.F.R. §§ 23.107(b)(2), 23.108(a), 23.108(b).

[17] **Indians**—Membership

Determining tribal membership is under the exclusive jurisdiction of an Indian tribe.

[18] **Indians**—Government of Indian Country, Reservations, and Tribes in General

Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government.

[19] **Indians**—Government of Indian Country, Reservations, and Tribes in General

As sovereign nations, Indian tribes make their own substantive law on internal matters.

[20] **Indians**—Purpose and construction

Courts are required to liberally construe, in favor of notice, the “reason to know” standard in ICWA and Washington State Indian Child Welfare Act (WICWA), providing that if a court has a “reason to know” that the child at issue in child custody proceeding is an Indian child, court must apply the protections of ICWA and WICWA, and any doubt about the “reason to know” standard should be resolved in favor of tribes. Indian Child Welfare Act of 1978 §§ 4, 102, 25 U.S.C.A. §§ 1903(4), 1912(a); Wash. Rev. Code Ann. §§ 13.38.040, 13.38.070(1); 25 C.F.R. § 23.107(b)(2).

[21] **Indians**—Purpose and construction

When there is a possibility of political affiliation with an Indian tribe due to heritage, courts interpret “reason to know” standard in ICWA and Washington State Indian Child Welfare Act (WICWA), requiring court to apply protections of ICWA and WICWA if a court has a “reason to know” that the child at issue in child custody proceeding is an Indian child, in favor of notice to tribes when tribal heritage is indicated. Indian Child Welfare Act of 1978 §§ 4, 102, 25 U.S.C.A. §§ 1903(4), 1912(a); Wash. Rev. Code Ann. §§ 13.38.040, 13.38.070(1); 25 C.F.R. § 23.107(b)(2).

[22] **Indians**—Dependent Children; Termination of Parental Rights

Washington State Indian Child Welfare Act (WICWA) is an independent basis, regardless of ICWA, to find that a court has “reason to know” a child is or may be an Indian child, and thus must apply WICWA standards, when a participant in the proceeding indicates that the child has tribal heritage; WICWA applies when a court has reason to know that a child may be eligible for membership in an Indian tribe, which suggests WICWA provides broad coverage of the “reason to know” standard. Wash. Rev. Code Ann. §§ 13.38.040(7), 13.38.040(12), 13.38.070(1).

[23] **Indians**—Dependent Children; Termination of Parental Rights

Trial court had a clear “reason to know” that children were Indian children under ICWA and Washington State Indian Child Welfare Act (WICWA) at shelter care hearing in **dependency** proceeding, and thus court was required to apply the protections of ICWA and WICWA until it was determined that children did not meet definition of an Indian child; at least three participants in the proceeding indicated that the children had tribal heritage, petition filed by Department of Children, Youth, and Families stated that there was a reason to know that children were Indian children, and mother and father testified that mother and children were eligible for tribal membership. Indian Child Welfare Act of 1978 §§ 4, 102, 112, 25 U.S.C.A. §§ 1903(4), 1912(a), 1922; Wash. Rev. Code Ann. §§ 13.38.040, 13.38.070(1), 13.38.140(2); 25 C.F.R. § 23.107(b)(2).

****855** Appeal from King County Superior Court, Docket No 18-7-02176-4, Honorable [Patrick H. Oishi](#), Judge

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Opinion

[MONTROYA-LEWIS, J.](#)

****856 *156 ¶ 1** In Native American communities across the country, many families tell stories of family members they have lost to the systems of child welfare, adoption, boarding schools, and other institutions that separated Native children from their families and tribes. ***157** This history is a living part of tribal communities, with scars that stretch from the earliest days of this country to its most recent ones. There are virtually no other statutes more central to rectifying these wrongs than the Indian Child Welfare Act (ICWA)¹ or state statutes like ICWA's Washington counterpart, the Washington State Indian Child Welfare Act (WICWA).²

¶ 2 ICWA and WICWA were enacted to remedy the historical and persistent state-sponsored destruction of Native families and communities. These are baseline protections, passed as a step toward rectifying the horrific wrongs of widespread removal of Native children from their families and states' consistent failure to provide due process to tribes. The acts provide specific protections for Native children in child welfare proceedings and are aimed at preserving the children's relationships with their families, Native communities, and identities. The acts also require states to send notice to tribes so that tribes may exercise their independent rights and interests to protect their children and, in turn, the continuing existence of tribes as thriving communities for generations to come.

¶ 3 During a child custody proceeding, if a court has a "reason to know" that the child at issue is an Indian³ child, it must apply the protections of ICWA and WICWA.

25 U.S.C. § 1912(a); RCW 13.38.070(1); 25 C.F.R. § 23.107(b)(2). The "reason to know" finding performs a critical gatekeeping function. It ensures that the court applies the heightened ICWA and WICWA standards early on in any proceeding and ensures that tribes receive adequate notice of the proceeding in order to protect their children and the tribes' sovereign interests. The purposes of ICWA and WICWA require their correct application to advance and realize their promises.

***158 ¶ 4** At issue in this case is whether the court had "reason to know" that M.G. and Z.G. were Indian children at a 72-hour shelter care hearing. We hold that a trial court has "reason to know" that a child is an Indian child when a participant in the proceeding indicates that the child has tribal heritage. We respect that tribes

determine membership exclusively, and state courts cannot establish who is or is not eligible for tribal membership on their own. Further, we follow the canon of construction for interpreting statutes that deal with issues affecting Native people and tribes, which requires that we construe these statutes in favor of the tribes. Finally, we are bound by the statutory language and implementing regulations of ICWA and WICWA, and we interpret these ****857** acts to serve their underlying purposes. Given these guiding principles, we hold that an indication of tribal heritage is sufficient to satisfy the “reason to know” standard.

¶ 5 Here, participants in a shelter care hearing indicated that M.G. and Z.G. had tribal heritage. The trial court had “reason to know” that M.G. and Z.G. were Indian children, and it erred by failing to apply ICWA and WICWA standards to the proceeding. We reverse.

I. FACTS AND PROCEDURAL HISTORY

A. Factual Background

¶ 6 On June 27, 2018, the Kent Police Department removed minor children, Z.G. and M.G., from the care of their parents, S.G. (father) and L.G. (mother). The police took the children into protective custody due to concerns of neglect and unsanitary living conditions. At the time, Z.G. was 21 months old, and M.G. was 2 years old. On June 29, 2018, the Department of Children, Youth, and Families (the Department) filed **dependency** petitions for Z.G. and M.G. In the petitions, the Department stated:

Based upon the following, the petitioner *knows or has reason to know the child is an Indian child* as defined in [RCW 13.38.040](#) ***159** and [25 U.S.C. § 1903\(4\)](#), and the Federal and Washington State Indian Child Welfare Acts do apply to this proceeding:

Mother has Tlingit-Haida⁽⁴⁾ heritage and is eligible for membership with Klawock Cooperative Association. She is also identified as having Cherokee heritage on her paternal side. Father states he may have native heritage with Confederated Tribes of the Umatilla in Oregon.

The petitioner has made the following preliminary efforts to provide notice of this proceeding to all tribes

to which the petitioner knows or has reason to know the child may be a member or eligible for membership if the biological parent is also a member:

Inquiry to tribes has been initiated. Worker has called Central Council Tlingit Haida regarding this family and petition. Further inquiry and notification to tribes ongoing.

Clerk’s Papers (CP) at 2 (emphasis added).

¶ 7 On July 2 and 3, 2018, a shelter care hearing took place to determine whether the children could be immediately and safely returned home while the adjudication of the **dependency** was pending. [RCW 13.34.065\(1\)\(a\)](#). Richard Summers—the social worker who submitted the **dependency** petition—the father, and the mother all testified at the hearing. Summers testified first. The court began the inquiry by asking if the contents of the **dependency** petitions Summers submitted were correct. Summers responded that they were and testified that he wished to incorporate the contents of the petitions as part of his testimony. However, when asked whether the children qualified under WICWA, Summers responded, “To my knowledge, not at this time.” 1 Verbatim Report of Proceedings (VRP) (July 2, 2018) at 11. The Department asked about Summers’ investigation up to that point, and Summers detailed the efforts he had made in the last few days: ***160** “I called the Tlingit and Haida Indian tribes of Alaska, and they gave me information that the maternal grandmother is an enrolled member, but the mother is not enrolled, and the children are not enrolled. And to my knowledge, the father is not enrolled in a federally recognized tribe either.” *Id.* at 11-12. During cross examination, Summers confirmed that in the **dependency** petition, he had indicated that the mother is eligible for tribal membership, and he also confirmed that it was possible the children were eligible for tribal membership.

¶ 8 The father, S.G., testified that it was his understanding that the children’s mother is of Central Council of the Tlingit and Haida Indian Tribes of Alaska (Tlingit & Haida) heritage and that she is eligible for tribal membership in the Klawock Cooperative Association of American Indians (KCA). He also testified that the mother has Cherokee heritage ****858** and that he has “native heritage with the confederated tribes of the Umatilla in Oregon.” 2 VRP (July 3, 2018) at 67. The father testified that it was his understanding that his children were eligible for tribal membership.

¶ 9 The mother testified that she was eligible for tribal membership in Tlingit & Haida and that her children were

also eligible for tribal membership in the same tribes. She also indicated that she was not an enrolled member of a federally recognized tribe at that time.

¶ 10 In its oral ruling, the court determined:

So just as a threshold issue, as far as the application of ICWA, based on testimony of the social workers, frankly, as well as the testimony of both the parents, I'm going to make a finding that ICWA does not apply to these cases at this point based on the evidence presented and the reasonable cause standard.

Id. at 118. The court went on to apply the non-ICWA emergency removal standard and found that the Department met its burden to show “that there’s a serious risk of substantial harm to the boys in this case.” *Id.* The court did *161 not utilize the placement preferences outlined in ICWA and, instead, placed Z.G. and M.G. in licensed foster care, despite the availability of placements that were culturally appropriate.⁵ In the court’s written shelter care order, the court found, “Based upon the following, there is not a reason to know the child is an Indian child ...: Mother and father are not enrolled members in a federally recognized tribe. Maternal grandmother is enrolled member, Department continuing to investigate. Mother believes she’s eligible for tribal membership.” CP at 10.

¶ 11 After the children had been in licensed foster care for close to a month, on July 30, 2018, Tlingit & Haida successfully intervened in the case on behalf of KCA. KCA determined that M.G. and Z.G. are tribally enrolled members. The court later entered a dependency order as to the father’s parental rights and, consistent with the tribal intervention, determined that there was “reason to know” Z.G. and M.G. were Indian children, and applied ICWA and WICWA. *Id.* at 19, 59.

B. Procedural History

[1] [2] [3] [4] [5] ¶ 12 The father moved for discretionary review of the shelter care order.⁶ The Court of Appeals commissioner granted review and found that although the father’s appeal of the shelter care order was technically moot, the issues were of continuing and substantial public

interest, so review was appropriate.⁷

**859 *162 ¶ 13 The Court of Appeals affirmed the trial court’s shelter care order, finding that the trial court had no “reason to know” the children were Indian children.

¶ *In re Dependency of Z.J.G.*, 10 Wash. App. 2d 446, 450, 448 P.3d 175 (2019). The Court of Appeals reasoned that a trial court has “reason to know” a child is an Indian child when the court “receives evidence that the child is a tribal member or the child is eligible for tribal membership and a biological parent is a tribal member.”

¶ *Id.* at 449, 448 P.3d 175. The court concluded that in this case, “at the time of the shelter care hearing, good faith investigation had not yet revealed evidence a parent or a child was a tribal member[.]” so the trial court “did not err in concluding there was no reason to know the children were Indian children.” ¶ *Id.* at 450, 448 P.3d 175.

¶ 14 The father sought review in this court, which we granted. 195 Wash.2d 1008, 460 P.3d 177 (2020) 195 Wash.2d 1008, 460 P.3d 177 (2020).

*163 II. ANALYSIS

A. Standard of Review

[6] [7] [8] [9] [10] [11] [12] [13] ¶ 15 The applicability of ICWA and WICWA is a question of law we review de novo.

¶ *In re Adoption of T.A.W.*, 186 Wash.2d 828, 840, 383 P.3d 492 (2016). Statutory and regulatory interpretation is also a question of law that we review de novo. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wash.2d 80, 90, 392 P.3d 1025 (2017). “We interpret administrative regulations using rules of statutory construction.” *Id.* The purpose of our inquiry is to determine legislative intent and interpret the statutory provisions in a way that carries out that intent. *Id.* at 91, 392 P.3d 1025. We first consider the statute’s plain language.

¶ *T.A.W.*, 186 Wash.2d at 840, 383 P.3d 492. “ ‘If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction.’ ” ¶ *Id.* (quoting

¶ *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wash.2d 444, 451, 210 P.3d 297 (2009)). Plain meaning “is derived from the context of the entire act as well as any ‘related statutes which disclose legislative intent about the

provision in question.’ ” *Jametsky v. Olsen*, 179 Wash.2d 756, 762, 317 P.3d 1003 (2014) (quoting *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 11, 43 P.3d 4 (2002)). However, if the statute is subject to more than one reasonable interpretation, we “ ‘may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.’ ” *Id.* (quoting *Christensen v. Ellsworth*, 162 Wash.2d 365, 373, 173 P.3d 228 (2007)).

[14] [15]¶ 16 ICWA and WICWA are interpreted coextensively, barring specific differences in their statutory language. *T.A.W.*, 186 Wash.2d at 844, 383 P.3d 492. If the federal and state protections differ, we apply the more protective provision. 25 U.S.C. § 1921. Moreover, statutes that deal with issues affecting Native people and tribes “are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted *164 to their benefit.” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985).

¶ 17 Our plain language analysis requires an understanding of the context in which the contested provision is found, and the purposes of each act must guide our interpretation, so we begin with the background to the passage of each act. *See T.A.W.*, 186 Wash.2d at 841, 383 P.3d 492.

B. Background of ICWA and WICWA⁸

¶ 18 Congress passed ICWA in 1978 in response to a lengthy and concerted effort by **860 tribal leaders who sought to end the wholesale removal of Indian children from their families by state and private agencies. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989); *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. (1974) <https://www.narf.org/nill/documents/icwa/federal/lh/hear040874/hear040874.pdf> [https://perma.cc/Z6HJ-TNGE] (hereinafter *1974 Senate Hearings*); *see also Indian Child Welfare Act of 1977: Hearing on S. 1214 before the U.S. S. Select Comm. on Indian Affairs*, 95th Cong. 76-84 (1977) <https://www.narf.org/nill/documents/icwa/federal/lh/hear080477/hear080477.pdf> [https://perma.cc/7CC7-DFWQ] (hereinafter *1977 Senate Hearings*). Congress acted after finding that an “alarmingly high percentage of Indian families are *165 broken up by the removal, often

unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.” 25 U.S.C. § 1901(4). The empirical data showed that Native children were separated from their families at significantly higher rates than non-Native children, and in “some States, between 25 and 35 percent of Indian children were living in foster care, adoptive care, or institutions.” ICWA Proceedings, 81 Fed. Reg. 38,778, 38,780 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23) (citing H.R. REP. NO. 95-1386, at 9 (1978)). This history of centuries of policies of removal and assimilation predates ICWA; the removal of children from their families and tribal communities and placement in foster care or adoption is but one of the many atrocious governmental policies intended to destabilize Native communities and ultimately end them.

¶ 19 The removal of Native children from their homes happened without due process or notice to the tribes. H.R. REP. NO. 95-1386, at 11 (1978); ICWA Proceedings, 81 Fed. Reg. at 38,780. Often, state officials—frequently supported by private, for-profit adoption agencies—would remove a Native child without notice to tribal authorities or an explanation to the parents, resulting in gross violations of due process, which were “quite commonplace when ... dealing with Indian parents and Indian children.” *1974 Senate Hearings* at 67 (testimony of Bertram Hirsch, Staff Attorney, Association of American Indian Affairs). Washington State also engaged in removals without due process, which left tribes and families without a way to find their children. The children themselves would often never learn of their true homes, and many were not raised with the knowledge that they were Native children or tribal members. In 1974, tribal leaders testified before Congress about the problems Native families and tribes faced under current state child welfare practices. Mel Sampson recounted a *166 statement of an adopted child who said, “My second grade teacher was the one that told me I was an Indian My adoptive parents told me when I was between the age of 9 and 10 ... not mentioning a tribe or where I was from.” *Id.* at 117 (statement of Mel Sampson, Northwest Affiliated Tribes, Washington State; accompanied by Louie Cloud, Vice Chairman, Yakima⁹ Tribal Council). Roger R. Jim Sr. explained multiple occasions of Native children being removed from their homes in Washington and taken across the country for adoptions without tribal notice. *Id.* at 119 (statement of **861 Roger R. Jim Sr., Yakima Tribal Councilman, President, Affiliated Tribes of Northwest Indians).

¶ 20 The states’ widespread removal of Indian children

without notice presented a serious threat not only to the family and children but also to the existence of tribes as self-governing communities. ICWA Proceedings, 81 Fed. Reg. at 38,781. This form of removal compounded the traumatic effect of a centuries-long practice of separating Native families and children from each other and their tribes of origin. Congress addressed this ongoing crisis of removal and adoption by incorporating robust notice provisions into ICWA to ensure that tribes have the opportunity to intervene in proceedings that separate tribal children from their families. *Id.*; 25 U.S.C. § 1912(a). Under ICWA, a tribe has the right to exercise tribal court jurisdiction over a child custody proceeding involving an Indian child. 25 U.S.C. § 1911(a), (b). A tribe also has a right to become a party to a suit in state court and protect its own rights and interests in the proceeding. 25 U.S.C. § 1911(c).

¶ 21 Without notice, tribes cannot exercise these rights. Congress sought to preserve the integrity of tribes as self-governing and sovereign entities by ensuring, through notice, that tribes can act to protect the future and integrity *167 of both the tribes themselves and their families. *See* ICWA Proceedings, 81 Fed. Reg. at 38,781. Congress’s passage of ICWA protected not only the sovereignty of tribes but their continued existence.

¶ 22 Removal caused—and continues to cause—lasting trauma for both individuals and tribes, as well as a disconnection between individuals and their tribal communities. Ramona Bennett, Chairwoman of the Puyallup Tribe of Indians, recounted to the Senate the long-lasting trauma that removals have on Native children and Native families:

[M]any of these adopted ones come back to me. Some are our tribal members. Many of them are from Indian nations all over the country. They tell horror stories about the things that have happened to them, including their lack of identity, their loss of self-esteem; it is a real tragedy.

These kids are in foster care or out of Indian communities, and they find themselves never being appreciated and never measuring up. They are accepted only if they compromise themselves as Indian human beings, compromise themselves and alter their values.

1977 Senate Hearings at 164 (statement of Ramona Bennett, Chairwoman, Puyallup Tribe). This trauma was particularly widespread in Washington. In a 1976 report, Washington was listed as one of the 10 worst states by rate of Indian placements, with 13 times more Indian children placed in foster and adoptive care compared to

non-Indian children. TASK FORCE FOUR: FED., STATE, & TRIBAL JURISDICTION, 94TH CONG., REP. ON FEDERAL, STATE, AND TRIBAL JURISDICTION 181, 238 (Comm. Print 1976), <https://www.narf.org/nill/documents/icwa/federal/lh/76rep/76rep.pdf> [<https://perma.cc/TJK2-Z76E>].¹⁰

¶ 23 The impacts of the removal of Native children on tribes has been studied fairly extensively, but the impact on *168 individual Native children has been studied less so. In 2017, the first study to compare the mental health outcomes of Native adoptees and White adoptees showed that Native adoptees have unique experiences. Based on its preliminary quantitative research, the study concluded,

It appears that AI [(American Indian)] adoptees are even more vulnerable to mental health problems within the adoptee population. AI adoptees compared to White adoptees were more likely to report alcohol addiction, alcohol recovery, drug addiction, drug recovery, self-assessed eating disorder, eating disorder diagnosis, self-injury, suicidal ideation, and suicide attempt.

Ashley L. Landers, Sharon M. Danes, Kate Ingalls-Maloney, Sandy White Hawk, *American Indian and White Adoptees: Are There Mental Health Differences?*, 24 AM. INDIAN & **862 ALASKA NATIVE MENTAL HEALTH RES., no. 2, 2017, at 54, 69.

¶ 24 As Landers et al. note, “storytelling is a major activity in AI culture, having adoptees seek the stories of their own ancestors begins to fill the ‘hole’ created by being torn from their families of origin. AI adoptees sharing their own stories gives relevance to their history and elicits more healing.” *Id.* at 70. One of the study’s authors, Sandy White Hawk, speaks nationally and tells her story of removal from her biological home. She recalls being pulled out from under a table where she had hidden from the White man and woman who came to her house to take her; at 18 months, she was removed from her family and adopted by this White couple, and she was raised in a town in which she was the only Native person. She endured abuse at home and abuse at school. It was not until her adult years that she learned where she had come from and began a decades-long process of returning

to her Sicangu Lakota homeland, where she reconnected with her brother and other relatives and learned the Lakota language. Her mother died young, mourning, as White Hawk says, “not having her baby with *169 her.”¹¹ White Hawk has become a national expert on the unique adoption trauma Native children, who are now adults, have suffered, and she is the leader of a movement toward the repatriation of Native adoptees, many of whom have no idea which tribes they come from or the circumstances of their removal. The storytelling and repatriation processes White Hawk describes are critical to healing the wounds created by these long-term policies of removal. ICWA is meant to prevent the trauma of removal in the first instance, whenever possible.

¶ 25 Yet, since the passage of ICWA, state courts have undermined ICWA protections and ignored tribes’ exclusive role in determining their own membership. For example, state courts created an exception to the application of ICWA by determining that ICWA should not apply when it finds that an Indian child is not part of an “existing Indian family.” [In re Adoption of Baby Boy L.](#), 231 Kan. 199, 205-07, 643 P.2d 168 (1982), overruled by [In re A.J.S.](#), 288 Kan. 429, 204 P.3d 543 (2009); accord [In re Adoption of T.R.M.](#), 525 N.E.2d 298, 303 (Ind. 1988); [Claymore v. Serr](#), 405 N.W.2d 650, 654 (S.D. 1987); [In re Adoption of Baby Boy D.](#), 1985 OK 93, 742 P.2d 1059, 1064, overruled in part by [Baby Boy L.](#), 2004 OK 93, 103 P.3d 1099. Before applying ICWA protections to a proceeding, state courts would examine the child and their family and unilaterally determine the “Indian-ness” of each. ICWA Proceedings, 81 Fed. Reg. at 38,782. Even if the court knew the child was a member of a tribe, if the state court deemed that the child was not from an “existing Indian family,” it would deny ICWA protections. [Baby Boy L.](#), 231 Kan. at 202-06, 643 P.2d 168. As a result, even children who met the statutory definition of “Indian child,” their families, and their tribes were denied the protections that Congress established. ICWA Proceedings, 81 Fed. Reg. at 38,782.

¶ 26 This court endorsed the “existing Indian family” exception in [*170 Adoption of Infant Boy Crews](#), 118 Wash.2d 561, 825 P.2d 305 (1992), overruled in part by [T.A.W.](#), 186 Wash.2d at 858, 383 P.3d 492. In [Crews](#), Tammy Crews attempted to vacate the order terminating her parental rights. [Id.](#) at 565, 825 P.2d 305. Crews grew up in Washington and was unaware of her specific tribal affiliation at the time her parental rights were terminated. [Id.](#) at 563, 565, 825 P.2d 305. On

appeal, the Choctaw Nation of Oklahoma intervened in the case and determined that both Crews and the child were members. [Id.](#) at 566, 825 P.2d 305.

¶ 27 We determined that since the child “has never been a part of an existing Indian family unit or any other Indian community,” ICWA did not apply. [Id.](#) at 569, 825 P.2d 305. In concluding that there was no “existing Indian family unit” to protect, we reasoned that “[n]either Crews nor her family has ever lived on the Choctaw reservation in Oklahoma and there are no plans to relocate the family from Seattle to Oklahoma.” [Id.](#) Further, “there is no allegation by Crews or the Choctaw Nation that, if custody were returned to Crews, [the child] would grow up in an Indian environment,” and “Crews has shown no substantive interest in her Indian **863 heritage in the past and has given no indication this will change in the future.” [Id.](#) Thus, we affirmed the decision not to apply ICWA, despite conclusive evidence that the child was an Indian child, based on the tribe’s determination.

¶ 28 This is precisely the type of reasoning a correct application of ICWA would prevent. One of ICWA’s main purposes was to interrupt state policies that contributed to the large scale and ongoing genocide of Native people, through the removal of children, which was part of assimilationist policies begun in the 1800s to “Kill the Indian and Save the Man.”¹² Yet we relied on the success of *171 those very policies to deny ICWA’s protections. [Id.](#) at 565, 825 P.2d 305. We commented that Crews “testified that her family does not regularly participate in any Indian practices or events,” relying on the family’s lack of connection with a tribal community in order to justify denying ICWA and WICWA protections that were clearly applicable. [Id.](#)

¶ 29 It was not until decades later, in 2016, in [In re Adoption of T.A.W.](#), that we overruled [Crews](#) and reconsidered our adoption of the “existing Indian family” exception. [186 Wash.2d at 858, 383 P.3d 492.](#) However, the Bureau of Indian Affairs’ (BIA) regulations confirm that [Crews](#) was wrong when it was decided; “there is not an ‘existing Indian family’ exception to ICWA.” ICWA Proceedings, 81 Fed. Reg. at 38,815. In fact, the first time the BIA exercised its authority to create binding regulations, it did so in response to decisions and policies of state courts that impermissibly lowered the protections of ICWA, such as the invalid “existing Indian family” exception. [Id.](#) at 38,782.

¶ 30 In 2011, Washington joined several other states in enacting its own version of ICWA. In general, these

statutes may clarify ICWA or add protections to child custody proceedings involving Indian children, but they may not lower ICWA protections. [25 U.S.C. § 1921](#). WICWA is meant to promote practices designed to prevent placing Indian children out of the home inconsistent with the rights of the parents; the health, safety, or welfare of the children; or the interests of their tribe(s). [RCW 13.38.030](#). Its express intent is to be a “step in clarifying existing laws and codifying existing policies and practices.” *Id.*; see also [T.A.W.](#), 186 Wash.2d at 843, 383 P.3d 492 (noting that while ICWA does not provide a definition of “active efforts,” WICWA does). WICWA also states that “[n]othing in this chapter shall affect, impair, or limit rights or remedies provided to any party under the federal Indian child welfare act.” [RCW 13.38.190\(2\)](#). WICWA is meant to strengthen Washington’s enforcement of the fundamental protections that ICWA guarantees to an Indian child, their parents, and their tribe(s).

*172 ¶ 31 Washington still has work to do. As of 2015, American Indian and Alaskan Native children in Washington were represented in foster care at a rate 3.6 times greater than they were in the general child population of the state. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE 6 (2015), https://www.ncjfcj.org/wp-content/uploads/2017/09/NCJF-CJ-Disproportionality-TAB-2015_0.pdf [<https://perma.cc/4BVH-G6PC>]. This was well above the national average. *Id.* Regrettably, the disproportionate rate of representation of Native children in the Washington state child welfare system has not changed significantly since 2008, when the Washington State Institute for Public Policy (WSIPP) published *Racial Disproportionality in Washington State’s Child Welfare System*. MARNA MILLER, WASH. STATE INST. FOR PUB. POLICY, RACIAL DISPROPORTIONALITY IN WASHINGTON STATE’S CHILD WELFARE SYSTEM (2008) https://www.wsipp.wa.gov/ReportFile/1018/wsipp_Racial-Disproportionality-in-Washington-States-Child-Welfare-System_Full-Report.pdf [<https://perma.cc/FV7M-D29Y>]. WSIPP found that Native children were almost five times more likely than White children to be removed **864 from their parents’ care and six times more likely to have open cases for two years or longer. *Id.* at 8. These statistics indicate that continued commitment to the robust application of ICWA and WICWA is needed to address ongoing harms of Indian child removals.

¶ 32 The history of removal and displacement of Native people from their communities, the important role notice

plays in a tribe’s ability to effectuate its rights under these acts, and our court’s history of ignoring ICWA protections all inform our understanding of the “reason to know” standard. To ignore that history and its impacts on today’s child welfare system in Washington and elsewhere undermines the purposes of ICWA (and WICWA).

C. “Reason To Know” under ICWA and WICWA

¶ 33 Law enforcement officers may take a child into custody without a court order if there is probable cause to *173 believe that the child is abused or neglected and if the child might be injured if it were necessary to first obtain a court order. [RCW 26.44.050](#). Within 72 hours of removal, the court must conduct a shelter care hearing to determine whether the child can be immediately and safely returned home while the adjudication of the **dependency** is pending. [RCW 13.34.065\(1\)\(a\)](#).

¶ 34 During a child custody proceeding, ICWA and WICWA provide mechanisms to protect tribal interests and prevent the improper removal of Indian children.¹³ Tribes have the right to exercise their jurisdiction over child custody proceedings involving Indian children or to intervene as a party in a state court proceeding. [25 U.S.C. § 1911 \(a\)](#) (describing when a tribe has exclusive jurisdiction), (b) (describing when a tribe has a right to have a proceeding transferred to tribal court), (c) (describing when a tribe may intervene). Tribes can also act in their sovereign capacity to determine whether a child is a member of their tribe. [25 C.F.R. § 23.108](#). These tribal interests are protected by the notice provision in ICWA and WICWA. [25 U.S.C. § 1912\(a\)](#); [RCW 13.38.070\(1\)](#). Without notice, tribes are at risk of not knowing that a child custody proceeding dealing with one of their children is occurring.

¶ 35 ICWA also provides increased protections for Indian children. These protections include identifying placement preferences within the child’s tribal community. [25 U.S.C. § 1915](#). ICWA also provides a higher standard for removing children from their home and for the termination of parental rights. Compare [25 U.S.C. § 1912\(e\)](#) (requiring clear and convincing evidence that the parent’s continued custody is likely to result in serious emotional or physical damage to the child in order to remove a child), and [25 U.S.C. § 1912\(f\)](#) (requiring evidence beyond a reasonable doubt that the continued

custody of the child by the parent is likely to *174 result in serious emotional or physical damage to the child in order to terminate parental rights), with RCW 13.34.130 (allowing removal based on a preponderance of the evidence that the child is dependent), and RCW 13.34.190(1)(a)(i) (allowing termination of parental rights when specific factors are established by clear, cogent, and convincing evidence). Termination and removal must also be supported by an expert qualified to testify as to the prevailing social and cultural standards of the Indian child's tribe. 25 U.S.C. § 1912(e), (f); 25 C.F.R. § 23.122. Importantly, ICWA provides a heightened standard for removal during emergency proceedings, only allowing emergency removal and placement "in order to prevent imminent physical damage or harm to the child." Compare 25 U.S.C. § 1922, with RCW 13.34.065(5)(a)(ii)(B) (allowing emergency removal and placement when there is reasonable cause to believe that the release of the child to the parent would present a serious threat of substantial harm to the child).

¶ 36 When a court has a "reason to know" a child is or may be an Indian child, it must apply ICWA and WICWA standards. At the commencement of a child custody proceeding, the court is obligated to inquire from each participant whether there is a "reason *865 to know" that the child is or may be an Indian child. 25 U.S.C. § 1912(a); RCW 13.38.070(1); 25 C.F.R. § 23.107(a).¹⁴ The increased protections of ICWA apply "where the court knows or has reason to know that an Indian child is involved." 25 U.S.C. § 1912(a); 25 C.F.R. § 23.107(b)(2). Similarly, the increased protections of WICWA apply when "the petitioning party or the court knows, or has reason to know, that the child is or may be an Indian child as defined in this chapter." RCW 13.38.070(1). An "Indian child" is defined as "any unmarried *175 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); see also RCW 13.38.040(7) (substantially similar definition). If the court has "reason to know" the child is or may be an Indian child, the court must treat the child as an Indian child until it is determined on the record that the child does not meet the definition. 25 C.F.R. § 23.107(b)(2). The "reason to know" finding triggers the requirement that the petitioning party provide legal notice to the tribe, which then has the opportunity to intervene and determine the legal status of the Indian child. 25 U.S.C. § 1912(a); RCW 13.38.070. In this case, the application of ICWA and WICWA turns on whether there

was a "reason to know" that Z.G. and M.G. are or may be Indian children.

1. We Adopt a Broad Interpretation of "Reason To Know"

¹⁶¶ 37 We hold that a court has a "reason to know" that a child is an Indian child when any participant in the proceeding indicates that the child has tribal heritage. We adopt this interpretation of the "reason to know" standard because it respects a tribe's exclusive role in determining membership, comports with the canon of construction for interpreting statutes that deal with issues affecting Native people and tribes, is supported by the statutory language and implementing regulations, and serves the underlying purposes of ICWA and WICWA. Further, tribal membership eligibility varies widely from tribe to tribe, and tribes can, and do, change those requirements frequently. State courts cannot and should not attempt to determine tribal membership or eligibility. This is the province of each tribe, and we respect it.

¹⁷ ¹⁸ ¹⁹¶ 38 First, our holding fully respects a tribe's sovereign role in determining its own membership. Determining tribal membership is under the exclusive jurisdiction of a *176 tribe. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Id.* "The determination of whether a child is an Indian child turns on Tribal citizenship or eligibility for citizenship. ... [T]hese determinations are ones that Tribes make in their sovereign capacity and [the rule] requires courts to defer to those determinations." ICWA Proceedings, 81 Fed. Reg. at 38,803. This is because tribes are " 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Santa Clara Pueblo*, 436 U.S. at 55, 98 S.Ct. 1670 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559, 8 L. Ed. 483 (1832)). As sovereign nations, tribes make their own substantive law on internal matters. *Id.* Tribal membership criteria, classifications of membership, and interpretation of membership laws are unique to each tribe and vary across tribal nations. See Tommy Miller, Comment, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L.J. 323, 323 (Dec. 15, 2014) (describing a

range of approaches to tribal citizenship, including lineal descent, matrilineal descent, and blood quantum), <https://digitalcommons.law.seattleu.edu/ailj/vol13/iss1/8> [<https://perma.cc/3FV6-VU9M>]; **866 *see also, e.g.,* [Crews](#), 118 Wash.2d at 566, 825 P.2d 305 (noting the Choctaw Nation’s contention that membership begins at birth for all lineal descendants of those whose names appear on the final rolls). Tribes are in the exclusive position to determine the membership of their own nations, and ICWA and WICWA recognize and respect the sovereign power of tribes to decide this highly internal matter. RCW 13.38.070(3)(a); [25 C.F.R. § 23.108\(b\)](#).

¶ 39 As the Department points out,

the trigger for treating the child as an “Indian child” is the reason to know that the child is an Indian child ... [which] is not based on the race of the child, but rather indications that *177 the child and her parent(s) may have a political affiliation with a Tribe.

ICWA Proceedings, [81 Fed. Reg. at 38,806](#); *see* BUREAU OF INDIAN AFFAIRS, DEP’T OF THE INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 10-11 (2016) (“ICWA does not apply simply based on a child or parent’s Indian ancestry. Instead, there must be a political relationship to the Tribe.”) <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/dc2-056831.pdf> [<https://perma.cc/GDN3-BXWT>]. This is true. The final determination of whether a child is an Indian child is not based on heritage or race. It is determined by the political affiliation of the child with a tribe. However, as stated above, *the tribe has the exclusive jurisdiction to determine that political affiliation*. People involved in child custody proceedings likely will not know tribal membership and eligibility rules; indeed, it is entirely possible that those who are tribal members themselves may not know. Tribal membership is unique to each tribe. We will not construe “reason to know” in a way that would require state agencies and parents to determine for themselves whether the child is a member or eligible for membership. To do so would undermine tribes’ exclusive authority to determine membership and would undermine the protections of the act. Instead, the “reason to know” standard covers situations where tribal membership is in question but is a possibility due to tribal heritage,

ancestry, or familial political affiliation. The final determination of whether the child is an Indian child must then be made by the tribe itself, after it has been formally notified of the proceeding. [25 U.S.C. § 1912\(a\)](#); RCW 13.38.070(1), (3)(a); [25 C.F.R. § 23.108](#).

[20] [21] ¶ 40 Second, finding a “reason to know” when a participant indicates a child has tribal heritage comports with the canons of construction applicable to statutes that deal with issues affecting Native people and tribes. The “‘canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and *178 the Indians.’ ” [Blackfeet Tribe of Indians](#), 471 U.S. at 766, 105 S.Ct. 2399 (quoting [Oneida County v. Oneida Indian Nation](#), 470 U.S. 226, 247, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985)). One canon is directly applicable in this case: “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” [Id.](#) (citing [McClanahan v. Ariz. State Tax Comm’n](#), 411 U.S. 164, 174, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); [Choate v. Trapp](#), 224 U.S. 665, 675, 32 S. Ct. 565, 56 L. Ed. 941 (1912)). We are required to construe the “reason to know” standard liberally in favor of notice, and any doubt about the “reason to know” standard should be resolved in favor of tribes. When there is a possibility of political affiliation due to heritage, we interpret “reason to know” in favor of notice to tribes when tribal heritage is indicated.

¶ 41 Moreover, this more expansive understanding of “reason to know” is also supported by the statutory provisions and implementing regulations that promote the early and expansive application of ICWA and WICWA. Federal regulations promote “compliance with ICWA from the earliest stages of a child-welfare proceeding.” ICWA Proceedings, [81 Fed. Reg. at 38,779](#). WICWA states that courts should apply its protections “as soon as practicable in order to serve the best interests of the Indian child and protect the interests of the child’s tribe.” *See* RCW 13.38.070(2). “Early compliance promotes the maintenance of Indian families, and the reunification of Indian children with their families whenever possible, and reduces the need for disruption in placements.” ICWA Proceedings, **867 [81 Fed. Reg. at 38,779](#). It also “conserves judicial resources by reducing the need for delays, duplication, and appeals.” *Id.* A broad understanding of “reason to know” promotes the early application of ICWA without causing harm to tribes, tribal families, and children. The early application of ICWA and WICWA—“which are designed to keep children, when possible, with their parents, family, or

Tribal community—should benefit children regardless of whether it turns out that they are Indian children.” *Id.* at 38,803.

*179 ¶ 42 Recently passed federal regulations list factors that indicate a “reason to know” that a child is an Indian child. 25 C.F.R. § 23.107(c). Upon conducting the required inquiry, a court has “reason to know” that an Indian child is involved when

- (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
- (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
- (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
- (4) The court is informed that the domicile or residence of the child, the child’s parent, or the child’s Indian custodian is on a reservation or in an Alaska Native village;
- (5) The court is informed that the child is or has been a ward of a Tribal court; or
- (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

Id. The BIA encourages courts to interpret these factors expansively. GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, *supra*, at 11.

¶ 43 Under both ICWA and WICWA, an “Indian child” is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4); *see also* RCW 13.38.040(7) (substantially similar definition). The Department argues, and the Court of Appeals found, that the combination of these provisions—the factors indicating a reason to know and the statutory Indian child definition—means that a court has “reason to know” *only* if there was evidence or testimony at the *180 proceeding that the child or parent is a member of a tribe. Suppl. Br. of Dep’t at 10; *Z.J.G.*, 10 Wash. App. 2d at 450. However, this narrow interpretation commits the error addressed above:

it assumes state agencies or participants will know and properly interpret tribal membership and eligibility rules. This interpretation diminishes the tribe’s exclusive role in determining membership and undermines the historical purpose of providing proper notification to tribes.

¶ 44 The purposes behind ICWA support a broad understanding of the “reason to know” standard. One animating principle behind the act is the recognition that “States ... have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” 25 U.S.C. § 1901(5). The act was meant to prevent states from removing children based on stereotypical ideas, without respect for social and cultural differences. Another underlying purpose of the act was to guarantee due process to tribes so they have the opportunity to protect their sovereign interests in a child custody proceeding. 25 U.S.C. § 1912(a); *see* 25 C.F.R. § 23.108(a)-(b) (“The Indian Tribe of which it is believed the child is a member ... determines whether the child is a member of the Tribe. The determination by a Tribe of whether a child is a member is solely within the jurisdiction and authority of the Tribe.”).

¶ 45 As discussed above, the history of abusive removals without notice to tribes and the historical failure of state courts to provide proper due process to Native families means that tribal members may not have knowledge of their political affiliation with a tribe. The BIA recognizes this reality in *868 25 C.F.R. § 23.111(e), where it anticipates and provides for the scenario when there is a reason to know the child is an Indian child, but the participants do not know which tribe or tribes the child has a political affiliation with. If the identity of “the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, *181 but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director.” 25 C.F.R. § 23.111(e). Even if the participants in a proceeding are unable to identify a specific tribe, the court may still have “reason to know” that a child is an Indian child, requiring notice to the regional BIA office. The BIA can then utilize its expertise and resources to identify which tribes may need notification. A broad understanding of “reason to know” supports the act’s underlying purposes of tribal notice, determination of membership by tribes, and keeping state courts out of that determination. 25 U.S.C. §§ 1901(5), 1912(a); 25 C.F.R. § 23.108(a)-(b).

¶ 46 While a broad interpretation serves the statute’s purposes, a narrow interpretation would undermine the protection of Indian children and tribes. The “reason to know” finding triggers the requirement of formal notification to tribes. 25 U.S.C. § 1912(a); RCW 13.38.070(1). Without formal notification, tribes are likely unaware of the child custody proceedings. Lack of notice repeats the historical harms that predicated the passage of ICWA and WICWA: Indian children are more likely to be taken and then lost in the system, often adopted when legally free, primarily to non-Native homes; tribes are denied the opportunity to make membership determinations; and tribes are unable to intervene in the case or exercise jurisdiction. 25 U.S.C. § 1911. Further, the failure to timely apply ICWA may unnecessarily deny ICWA protection to Indian children and their families, which could lead to unnecessary delays, as the court and parties may need to redo certain processes in order to comply with ICWA standards. ICWA Proceedings, 81 Fed. Reg. at 38,802; see also 25 U.S.C. § 1914 (noting that any Indian child, parent, or tribe may petition any court to invalidate a child custody action “upon a showing that such action violated any provisions of sections 1911, 1912, and 1913 of this title”). As those who practice in the area of child welfare and dependency know, *182 if a court determines that ICWA and WICWA should have been applied from the beginning of a case and was not, key decisions may have to be revisited because the burden of proof is higher at threshold stages of dependency cases.¹⁵

¶ 47 Finally, our interpretation is consistent with the way other states interpret the “reason to know” standard. For example, in *In re N.D.*, 46 Cal. App. 5th 620, 622-24, 259 Cal. Rptr. 3d 826 (2020), a California court of appeals found that when a father and mother indicated that they both had Native heritage, but “did not know the tribes in which that heritage existed,” the court had “reason to know” the children might be Indian children. The court found that the agency, at a minimum, was required to send notice to the BIA. *Id.* at 624, 259 Cal.Rptr.3d 826. In North Carolina, a court of appeals found that a record indicating that the child’s mother had “potential ‘Cherokee’ and ‘Bear foot’ Indian heritage was sufficient to put the trial court on notice and provided ‘reason to know that an “Indian child” [was] involved.’ ” *In re A.P.*, 260 N.C. App. 540, 546, 818 S.E.2d 396 (2018) (quoting 25 U.S.C. § 1912(a)), review denied, 372 N.C. 296, 827 S.E.2d 99 (2019) 372 N.C. 296, 827 S.E.2d 99 (2019). The court reasoned that since the “Indian child” status of the juvenile can be decided only by the tribe itself, a suggestion that the child may be of Indian heritage is

enough to invoke the notice requirements of ICWA. *Id.* at 544-46, 818 S.E.2d 396. Additionally, in Colorado, the court of appeals found that a trial court had “reason to know” a child was an Indian child when the grandfather indicated he was a member of a Choctaw tribe. *In re Interest of S.B.*, 2020 COA 5, ¶¶ 18-21, 459 P.3d 745, 748-49. The court reasoned that even though there was no indication of parent or child membership, the grandfather’s indication that he was affiliated with a tribe *869 was “ ‘reason to know’ the child may have Indian heritage.” *Id.* at ¶ 21.

¶ 48 We interpret the “reason to know” standard consistent with these cases. Doing so comports with ICWA’s policy *183 of establishing “minimum Federal standards” that apply consistently throughout the states. 25 U.S.C. § 1902; *Holyfield*, 490 U.S. at 46, 109 S.Ct. 1597 (“[A] statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind.”). A court has “reason to know” a child is an Indian child when a participant in the proceeding indicates the child has tribal heritage.

2. WICWA Provides an Equal and Alternative Basis for Reversal

¹²²¶ 49 Although we conclude that the language and legislative purposes of both ICWA and WICWA require the finding that a court has “reason to know” a child is an Indian child when a participant in the proceeding indicates that the child has tribal heritage, we also conclude that WICWA alone necessitates the same result. WICWA’s language and definitions require this reading. Thus, we hold that WICWA is an independent basis, regardless of ICWA, to find that a court has “reason to know” a child is or may be an Indian child when a participant in the proceeding indicates that the child has tribal heritage.

¶ 50 The statutory protections of WICWA apply when a court has reason to know “the child is or *may be* an Indian child.” RCW 13.38.070(1) (emphasis added). The language “may be” suggests that WICWA provides broad coverage of the “reason to know” standard. A court has a “reason to know” not just when there is an indication that the child *is* an Indian child but also when there is an indication that the child *may be* an Indian child. *Id.*

¶ 51 Under WICWA, an “Indian child” is defined as “an

unmarried and unemancipated Indian person who is under eighteen years of age and is either: (a) A member of an Indian tribe; or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” RCW 13.38.040(7). WICWA goes on to define “member” and “membership” as “a determination by an Indian *184 tribe that a person is a member *or eligible for membership* in that Indian tribe.” RCW 13.38.040(12) (emphasis added). A determination of eligibility is an express determination of membership under WICWA. Reading RCW 13.38.070(1), RCW 13.38.040(7), and RCW 13.38.040(12) together, WICWA applies when a court has reason to know that a child may be eligible for membership in an Indian tribe. Thus, a court has “reason to know” the child is or *may be* an Indian child, when something less than eligibility or membership is mentioned during the proceeding. As discussed above, tribal heritage can implicate the required political affiliation of eligibility or membership, so any indication of tribal heritage during a proceeding gives a court a “reason to know” that the child may be an Indian child. *See supra* pp. 865–66. We hold that under WICWA, a court has “reason to know” that a child is or may be an Indian child when a participant in the proceeding indicates that the child has tribal heritage.

3. The Trial Court Had “Reason To Know” M.G. and Z.G. Were Indian Children under Both ICWA and WICWA

¹²³¶ 52 In this case, the trial court had a clear “reason to know” that M.G. and Z.G. were Indian children. At least three participants in the proceeding indicated that the children had tribal heritage. The Department’s own petition stated that there was a reason to know that M.G. and Z.G. were Indian children, noting that the “[m]other has Tlingit-Haida heritage and is eligible for membership with Klawock Cooperative Association. She is also identified as having Cherokee heritage on her paternal side. Father states he may have native heritage with Confederated Tribes of the Umatilla in Oregon.” CP at 2. Social worker Summers incorporated the petition into his testimony. This testimony about the Department’s investigation into the children’s tribal heritage qualifies as a participant in the proceeding informing the court that it has “discovered information indicating that the child is an Indian child.” 25 C.F.R. § 23.107(c)(2).

**870 *185 ¶ 53 Moreover, the mother and the father testified that the mother was eligible for membership in

Tlingit & Haida and KCA, and that the children were eligible for membership. While testimony of eligibility is not necessary to establish a “reason to know,” it is *sufficient* for a court to make such a finding. The court also had “reason to know” the children were Indian children due to the mother and father’s testimony of their tribal heritage with the Cherokee tribes and the Confederated Tribes of the Umatilla Indian Reservation.

¶ 54 The trial court erred when it found there was no “reason to know” M.G. and Z.G. were Indian children and erred by applying the non-ICWA removal standard to the shelter care proceeding. CP at 12 (finding that “[t]he child is in need of shelter care because there is reasonable cause to believe ... [t]he release of the child would present a serious threat of substantial harm to the child”). Instead, the court should have applied the heightened ICWA and WICWA standards, which require that continued emergency removal be necessary “to prevent imminent physical damage or harm to the child.” 25 U.S.C. § 1922; RCW 13.38.140(2).

¶ 55 With the correct “reason to know” finding, ICWA and WICWA standards should have applied to this case “until it [was] determined on the record that the child[ren did] not meet the definition of an ‘Indian child.’ ” 25 C.F.R. § 23.107(b)(2). The “reason to know” finding would have triggered the formal notification process. 25 U.S.C. § 1912(a); RCW 13.38.070(1). After receiving formal notification, the tribes themselves make that determination. 25 C.F.R. § 23.108(a), (b); *see also* RCW 13.38.070(3)(a).

¶ 56 The trial court had reason to know that M.G. and Z.G. were Indian children under both ICWA and WICWA because participants in the proceeding indicated that they had tribal heritage. Accordingly, we reverse.

*186 III. CONCLUSION

¶ 57 Decisions to remove children from the care of their parents are some of the most consequential decisions judicial officers make. When those decisions impact a Native American tribe, those decisions reach beyond the individual family, affecting the continuation of a culture. We recognize that our rulings addressing **dependency** cases have far-reaching effects on children, their parents, the out-of-home placements in which dependent children reside, and the manner in which courts and judicial

officers manage these complex cases. But, as the United States Supreme Court stated recently, “[T]he magnitude of a legal wrong is no reason to perpetuate it.” [McGirt v. Oklahoma](#), — U.S. —, 140 S. Ct. 2452, 2480, 207 L. Ed. 2d 985 (2020). We will not perpetuate an understanding of “reason to know” that undermines the purposes of ICWA.

¶ 58 We hold that a trial court has “reason to know” that a child is an Indian child when a participant in the proceeding indicates that the child has tribal heritage. A broad interpretation of “reason to know” is necessary to respect a tribe’s exclusive role in determining membership, comport with the canon of construction for interpreting statutes that deal with issues affecting Native people and tribes, comply with the statutory language and implementing regulations, and serve the underlying purposes of ICWA and WICWA. We hold that here the trial court had “reason to know” Z.G. and M.G. were Indian children. Accordingly, we reverse the Court of Appeals and remand this case to the trial court for further proceedings in accordance with this opinion.

WE CONCUR:

[Stephens, C. J.](#)

[Johnson, J.](#)

[Madsen, J.](#)

[Owens, J.](#)

[González, J.](#)

[Gordon McCloud, J.](#)

[Yu, J.](#)

[Whitener, J.](#)

All Citations

196 Wash.2d 152, 471 P.3d 853

Footnotes

¹ [25 U.S.C. §§ 1901-1963.](#)

² Ch. 13.38 RCW.

³ In this opinion, we use the term “Indian children” or “Indian tribe” when referring to the statutory language that also uses that language. In all other areas, we use the more formal, less colloquial term “Native” or “Native American.”

⁴ The Central Council of the Tlingit and Haida Indian Tribes of Alaska shorten their name to Tlingit & Haida. The record, however, uses variations of “Tlingit-Haida” and “Tlingit and Haida.” We use the Tribes’ preferred shortening throughout, except when the wording is a direct quote from the record.

⁵ We recognize that there is limited availability of licensed tribal or Native foster care homes, but that does not excuse the Department’s duty to identify culturally appropriate placements for Native children. [25 U.S.C. § 1915.](#)

⁶ After oral argument on the motion for discretionary review, the Department supplemented the record with written responses from the Confederated Tribes of the Umatilla Indian Reservation, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians in Oklahoma, all confirming that Z.G. and M.G. are not enrolled or eligible to enroll in their tribes.

⁷ We agree that this case presents issues of continuing and substantial public interest, and conclude that review is appropriate despite its mootness. “ ‘A case is moot if a court can no longer provide effective relief.’ ” [In re Marriage of Horner](#), 151 Wash.2d 884, 891, 93 P.3d 124 (2004) (quoting [Orwick v. City of Seattle](#), 103 Wash.2d 249, 253, 692 P.2d 793 (1984)). Generally, this court will not review a moot case; but we will review the case if it

presents issues of continuing and substantial public interest. *Id.* In deciding whether a case presents issues of continuing and substantial public interest, we consider whether the issues are of a public or private nature, whether an authoritative determination is desirable to provide future guidance to public officers, and whether the issues are likely to recur. *Id.* at 892, 93 P.3d 124 (quoting *Westerman v. Cary*, 125 Wash.2d 277, 286-87, 892 P.2d 1067 (1994)). We also consider the likelihood that the issue will escape review and the adverseness and quality of the advocacy. *Id.* (quoting *Westerman*, 125 Wash.2d at 286-87, 892 P.2d 1067). The correct application of ICWA and WICWA are issues of a public nature, and clarification of the “reason to know” standard will provide guidance to trial courts on how to proceed with ICWA cases. These issues are also likely to recur. Child custody proceedings take place each day in our state courts, and the correct application of ICWA and WICWA is essential to the proper function of these proceedings. Due to the short-lived, but critical, nature of shelter care hearings, this case also presents an opportunity to address a scenario that would often escape review. Finally, the advocacy here has been genuinely adverse and includes amici briefs from Tlingit & Haida and the KCA, the Legal Counsel for Youth and Children, Northwest Justice Project, and Washington Defender Association, as well as a brief from American Indian Law Professors, Center for Indian Law and Policy, the Fred T. Korematsu Center for Law and Equality, and the American Civil Liberties Union of Washington. This case satisfies each consideration for establishing an issue of continuing and substantial public interest. Further, the Department did not argue that the case was moot during oral argument.

- ⁸ This opinion cannot summarize the full history of the egregious and widespread conduct that predicated the passage of ICWA and WICWA. Instead, it endeavors to contextualize the precise question presented. To appreciate the true scope of the federal and state actions, see Judge Tim Connors, *Our Children Are Sacred: Why the Indian Child Welfare Act Matters*, Judges’ J., Spring 2011, at 33 and Karen Gray Young, Comment, *Do We Have It Right This Time? An Analysis of the Accomplishments and Shortcomings of Washington’s Indian Child Welfare Act*, 11 Seattle J. for Soc. Just. 1229 (2013). See also Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885 (2017); Nick Estes & Alleen Brown, *Where Are the Indigenous Children Who Never Came Home?*, HIGH COUNTRY NEWS (Sept. 25, 2018), <https://www.hcn.org/articles/tribal-affairs-where-are-the-indigenous-children-that-never-came-home-carlisle-india-n-school-nations-want-answers> [<https://perma.cc/8YD6-4FE3>].
- ⁹ “In the mid-1990s the Yakima nation renamed itself to ‘YAKAMA’ more closely reflecting the proper pronunciation in their native tongue.” *Yakama Nation History*, YAKAMA NATION, <http://www.yakamanation-nsn.gov/history3.php> [<https://perma.cc/Z95V-2884>] (last visited Aug. 6, 2020). These hearings predated Yakama Nation’s name change, so the original source uses the antiquated spelling.
- ¹⁰ Notably, Native children continue to be far overrepresented in child welfare cases in Washington state courts. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE 6 (2015), https://www.ncjfcj.org/wp-content/uploads/2017/09/NCJFCJ-Disproportionality-TAB-2015_0.pdf [<https://perma.cc/4BVH-G6PC>].
- ¹¹ See BLOOD MEMORY: A STORY OF REMOVAL AND RETURN (Vision Maker Media 2019).
- ¹² Title of Captain Richard H. Pratt’s speech to George Mason University in which he laid out his plan for educating Native children in residential boarding schools, a policy the federal government adopted and carried out from the 1890s through the 1950s. “Kill the Indian, and Save the Man”: Capt. Richard H. Pratt on the Education of Native Americans, CARLISLE INDIAN SCH. DIGITAL RESOURCE CTR., <http://carlisleindian.dickinson.edu/teach/kill-indian-and-save-man-capt-richard-h-pratt-education-native-americans> (last visited July 28, 2020) [<https://perma.cc/3QTG-X3HZ>].
- ¹³ ICWA and WICWA apply in any involuntary child custody proceeding that involves an Indian child. 25 C.F.R. § 23.103; RCW 13.38.020, .040. There is no dispute that a shelter care hearing is an involuntary child custody proceeding.

- ¹⁴ The trial court in this case failed in its obligation to inquire from each participant whether there is “reason to know” the child is an Indian child at the commencement of the proceeding. The Court of Appeals noted this failure as well but held that the hearing substantially complied with the requirements of [25 C.F.R. § 23.107\(a\)](#). [Z.J.G., 10 Wash. App. 2d at 457-60](#). The father did not appeal the substantial compliance issue.
- ¹⁵ We note that tribal membership requirements may change during the pendency of a case, as tribes update and modify their membership ordinances. Nothing in ICWA or WICWA limits their application to the status of the parents and children at the beginning of the proceedings.



JUDICIAL COUNCIL OF CALIFORNIA

OPERATIONS AND PROGRAMS DIVISION
CENTER FOR FAMILIES, CHILDREN & THE COURTS

Social Work Practice Tips for Inquiry and Noticing *Reasons Why People Do Not Claim to Be American Indian*¹

There are many reasons why individuals do not claim their American Indian heritage. This has implications for ICWA compliance especially in the area of inquiry and noticing. If an Indian child is not known to be American Indian/Alaskan Native (AI/AN) how can social workers and service providers ensure culturally effective services and case plans?

Below is a brief list of responses that can be given by individuals that do not claim their American Indian heritage.

- *“I know we’re part Indian but not enough.”*
- *“I, my mom, or my dad was adopted.”*
- *“No one knows the real history anymore, that person passed a long time ago.”*
- *“No one talks about it.” And/or “We don’t talk about it with anyone.”*
- *“I heard our family was disenrolled.”*
- *“It was painful so we don’t talk about it.”*
- *“We heard different stories and are not sure if it’s true or not.”*
- *“Grandpa only talked about it late at night.”*
- *“It’s in the past now, you can’t go back.”*
- *“Someone lost the papers.”*
- *“I can’t prove it.”*
- *“I didn’t know until recently, so I don’t think we qualify.”*
- *“When dad came here to work we lost our history.”*
- *“I don’t know our history, but I heard something. We were told we didn’t need to know.”*
- *“No one speaks the language anymore, so we don’t talk about it.”*

Practice Tips to ensure effective inquiry:

1. It is important to ask every family and every child if they have American Indian/Alaska Native ancestry even though they may not “look” as though they have American Indian/Alaska Native ancestry. Remember that many American Indian families will have Spanish last-names as a result of the influence of Spanish Missions from 1769 – 1823.

¹ This document was developed as part of the American Indian Enhancement of the Annie E. Casey, Casey Family Programs, & Child and Family Policy Institute of the California Breakthrough Series (BSC) on addressing disproportionality 2009-2010 with support from the Bay Area Collaborative of American Indian Resources (BACAIR), Human Services Agency of San Francisco Family and Children Services, Alameda County Social Services, and in collaboration with the American Indian Caucus of the California ICWA Workgroup, Child and Family Policy Institute of California, Stuart Foundation, and Tribal STAR.

2. Encourage social workers/intake workers to *state (rather than ask)*, “if you are AI/AN or believe you may be affiliated with a tribe, there are additional services (ICWA) that are available to you.”
3. Talking to that family historian may yield a lot of information. Ask them “who are the keepers of the family history?” Usually there is one family member, or a few, who are gifted in this area.
4. Consider asking families about specific areas relatives may have lived or originated from. “Has anyone in your family ever lived on a reservation?”
5. Consider asking if they also have ever utilized Native American services, or if anyone has in the family?
6. Remember to continue to cultivate and build trust-based communication with children and families and continue to ask if they have AI/AN ancestry throughout the life of the case.
7. Document all your efforts of inquiry and document all you do to achieve proper inquiry and notice.

Background

It is a significant challenge for American Indians who have been removed from their tribe to claim tribal ties to a Native American community. This can be due to the complex process of identifying ancestors and being able to establish family blood lines. How an individual comes to know their heritage, and how much they know varies from region, to tribe, to family. With over 500 recognized tribes, over 100 terminated tribes, and countless unrecognized tribes across the United States each family has a unique history with their tribe. As a result of federal and state policies that promoted assimilation and relocation (1830s Removal Era through 1950s Termination Era), many individuals and their families lost connection to their relations, customs, and traditions. The effects of boarding schools, and religious proselytizing, left many with the perception that it was better to pass as non-Indian than to claim their tribal status. In 1952 the federal government initiated the Urban Indian Relocation Act designed to increase the American Indian workforce in eight cities (Los Angeles, San Francisco, San Jose, St. Louis, Cincinnati, Dallas, Chicago, and Denver,).

Historical and federal efforts to quantify and track the American Indian/Alaska Native populations through the census, and the establishment of “Indian Rolls” resulted in documentation of enrollment in a tribe, often verified by blood quantum (amount/percentage of documented American Indian/Alaska Native blood). Tribal nations are not uniform in determining who is a tribal member through this manner. Some tribes acknowledge descent and ancestry verified by proof of family lineage rather than „how much Indian blood“. Conversely, in some cases, tribal enrollment policies exclude many individuals from enrollment for political, historical, and reasons known only to their tribal membership. Enrollment in a tribe may only be open at certain times, which can also affect an individual’s eligibility for enrollment.

Many descendants have only bits and pieces of information, sometimes passed along with quiet dignity, often with a longing to know more. What information was passed along may have been

shrouded in shame or secrecy for unknown reasons resulting in reluctance to share the information. The number of families that are disconnected from their ancestral homeland grows exponentially each generation and many individuals find connection to Native American communities through intertribal, regional, and local cultural events. These community events enable a sense of belonging and kinship, and provide support for resilience through access to programs such as Title VII Indian Education, and Tribal TANF, that do not require proof of enrollment.

Research Article

Adverse Childhood Experiences among American Indian/Alaska Native Children: The 2011-2012 National Survey of Children's Health

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We examined parent-reported adverse childhood experiences (ACEs) and associated outcomes among American Indian and Alaska Native (AI/AN) children aged 0–17 years from the 2011-2012 National Survey of Children's Health. Bivariate and multivariable analyses of cross-sectional data on 1,453 AI/AN children and 61,381 non-Hispanic White (NHW) children assessed race-based differences in ACEs prevalence and differences in provider-diagnosed chronic emotional and developmental conditions, health characteristics, reported child behaviors, and health services received as a function of having multiple ACEs. AI/AN children were more likely to have experienced 2+ ACEs (40.3% versus 21%), 3+ ACEs (26.8% versus 11.5%), 4+ ACEs (16.8% versus 6.2%), and 5+ ACEs (9.9% versus 3.3%) compared to NHW children. Prevalence rates for depression, anxiety, and ADHD were higher among AI/AN children with 3+ ACEs (14.4%, 7.7%, and 12.5%) compared to AI/ANs with fewer than 2 ACEs (0.4%, 1.8%, and 5.5%). School problems, grade failures, and need for medication and counseling were 2-3 times higher among AI/ANs with 3+ ACEs versus the same comparison group. Adjusted odds ratio for emotional, developmental, and behavioral difficulties among AI/AN children with 2+ ACEs was 10.3 (95% CI = 3.6–29.3). Race-based differences were largely accounted for by social and economic-related factors.

1. Introduction

A variety of deleterious child health and well-being outcomes have connections with adverse or traumatic experiences in childhood. Multiple experiences of food insufficiency and hunger are associated with behavioral, emotional, and academic problems and children exposed to family substance abuse and domestic violence show higher levels of aggression, delinquency, hyperactivity, impulsivity, anxiety, negative affectivity, and posttraumatic stress disorder compared to children without such histories [1–5]. Children exposed to maltreatment, family dysfunction, or caregiver loss frequently meet criteria for attention deficit hyperactivity disorder (ADHD) as well as conduct, anxiety, communication, and reactive attachment disorders [6]. A connection between levels of adversity in childhood and comorbid

physical, mental, and substance abuse disorders in adulthood suggested that cumulative disadvantage is predictive of cumulative dysfunction [7, 8].

It has been stated that American Indians and Alaska Natives (AI/ANs) are disproportionately affected by childhood trauma, including abuse, neglect, and family violence, with pronounced disparities between White and AI/AN youth, sometimes attributed to cultural degradation resulting from multigenerational historical colonization and trauma [9]. One study of Native American adolescents and young adults from the Northern Plains states indicated that approximately half of the sample had been exposed to one or more severe traumatic events [10]. However, many AI/AN studies of outcomes for traumatized children have been conducted with nonrepresentative samples of adults or adolescents reporting on past experiences and examining narrowly defined health

outcomes [10–13]. None have examined difficulties across a range of developmental, emotional, and behavioral problems experienced by younger children of varying ages.

The purpose of this study was to examine the prevalence of parent-reported adverse childhood experiences (ACEs) in a population-based nationally representative sample of AI/AN children from the 2011-2012 National Survey of Children's Health (NSCH). We examine ACEs in AI/AN children across the entire pediatric age spectrum of 0–17 years and report on the associated emotional, developmental, and behavioral outcomes. Based on previous literature, it is hypothesized that (1) AI/AN race will be associated with greater accumulation of ACEs compared to a reference population of non-Hispanic White (NHW) children and (2) the increased accumulation of ACEs will be associated with an increasing gradient of parent-reported health problems and need for services among AI/AN children 0–17 years of age. Due to the high rates of mortality/morbidity among AI/ANs, including PTSD, suicide, and vehicular or violent injuries and death in adolescents and young adults, it is essential to find their roots in childhood to better prevent a self-perpetuating cycle of physical and behavioral health problems.

2. Methods

2.1. Population and Data. The NSCH is a quadrennial random-digit-dialing household survey that was designed to produce national and state-specific prevalence estimates of an array of variables concerning children and family (parental) health; children's physical, emotional, and behavioral development; family stress and coping behaviors; family activities; and parental concerns about their children. Of the original 95,677 cases in the survey, exclusions were made for cases with missing data for the adverse childhood experiences outcome measure, resulting in a sample of 94,520. The subpopulations of inference for the current analyses were 1,453 AI/AN 0–17-year-olds and a comparison group of 61,381 NHW children. The remaining sample was comprised of children of other races/ethnicities and was not included in this analysis. No oversampling of minority populations was conducted. Child-level household surveys were conducted with parents or guardians under the leadership of the Maternal and Child Health Bureau, Health Resources and Services Administration (HRSA), U.S. Department of Health and Human Services, and implemented through the National Center for Health Statistics, Centers for Disease Control and Prevention (CDC), U.S. Department of Health and Human Services.

All survey items/questions on the NSCH were developed under the direction of two technical expert working groups. The items were finalized after repeated rounds of cognitive testing as well as best practice language translation and pilot testing through the National Center for Health Statistics. All survey items used in this study have been documented previously and their properties are presented in publicly available manuals [14]. Data were weighted to represent the population of noninstitutionalized children aged 0–17 nationally and in each state. The National Center for Health

Statistics Research Ethics Review Board approved all data collection procedures for the survey.

2.2. Key Measures. The independent variables of interest included 9 different parent-reported ACEs calculated as individual rates and as accumulated rates from responses to the following survey questions: Has [child's name] ever (1) lived in a household with difficulty affording food or housing, (2) lived with a parent that had gotten divorced/separated, (3) lived with a parent who died, (4) lived with a parent who served time in jail, (5) seen parents hit, kick, slap, punch, or beat each other up, (6) been a victim of violence/witness to violence in [his/her] neighborhood, (7) lived with anyone who was mentally ill, suicidal, or severely depressed for more than a couple of weeks, (8) lived with anyone who had a problem with alcohol/drugs, and (9) been treated/judged unfairly based on race/ethnicity? The 9 NSCH adverse childhood experience survey items were based on items in the seminal work on adverse childhood experiences, with modifications overseen by a technical expert panel and evaluated through standard survey item testing through the National Center for Health Statistics [8]. Response alternatives were "yes/no" for most of the items with the exception of economic hardship and racial/ethnic discrimination experiences. Responses of "somewhat often" or "very often" (in contrast to "rarely" or "never") were coded as ever experiencing economic hardship and racial/ethnic discrimination.

Other key measures included the health, developmental, and service outcomes having possible associations with multiple ACEs. The survey questions and response alternatives on which these variables were based are listed in Table 1. These included (1) provider-diagnosed disorders (i.e., learning disability, depression, anxiety disorder, conduct disorder, autism spectrum disorder, attention deficit/hyperactivity disorder, developmental delay, and speech disorder) reported by the parent; (2) other parent-reported health characteristics (i.e., overall rate of special health care needs, prescription medication usage, elevated service use, functional limitations, special therapy usage, and emotional, developmental, or behavioral disorders requiring mental health treatment); (3) parent-reported behaviors in the 0–5-year-old population (i.e., acquiring independence, learning in preschool, and behaving/getting along with others); (4) parent-reported behaviors in the 6–17-year-old population (i.e., school problems, frequent arguing, acting cruel/mean to others, unhappy, sad, or depressed affect, lack of control, investment in schoolwork, and grade repetition); and (5) health/services received (i.e., insured adequately, received needed counseling, screened by a doctor for developmental problems, screened for parent-reported developmental concerns, and received an Individualized Family Services Plan (IFSP) or Individualized Education Program (IEP)).

Finally, an additional outcome measure for logistic regression analysis was the proportion of parent-reported emotional, developmental, or behavioral difficulties. This was derived from one of the previously mentioned 5 questions used in a screening battery for children with special health care needs (i.e., Does [child's name] have any kind of emotional, developmental, or behavioral problem for which

Table 1: Definitions of parent-reported problem areas: National Survey of Children's Health 2011-2012.

Indicator	Definition
Provider-diagnosed conditions	<p>These indicators are defined for children aged 2–17 years except for learning disability which was defined for children aged 3–17 years. <i>Questions:</i> Has a doctor or other health care provider ever told you that [child's name] had [insert disorder]? Does the child currently have [insert disorder]? (responses: 0 = no, 1 = yes)</p> <ul style="list-style-type: none"> (i) Learning disability (ii) Depression (iii) Anxiety problems (iv) Behavioral or conduct problems (v) Autism, Asperger's disorder, pervasive developmental disorder, or other autism spectrum disorders (vi) Attention deficit disorder or attention deficit hyperactivity disorder (vii) Any developmental delay (viii) Speech or other language problems
Other parent-reported health conditions (screening questions for all surveyed children)	<p>These indicators are defined for children aged 0–17 years. <i>Questions:</i></p> <ul style="list-style-type: none"> (i) Does [child's name] currently need or use medicine prescribed by a doctor, other than vitamins? (0 = no, 1 = yes) (ii) Does [child's name] need or use more medical care, mental health, or educational services than is usual for most children of the same age? (iii) Is [child's name] limited or prevented in any way in [his/her] ability to do the things most children of the same age can do? (iv) Does [child's name] need or get special therapy, such as physical, occupational, or speech therapy? (v) Does [child's name] have any kind of emotional, developmental, or behavioral problem for which [he/she] needs treatment or counseling?
Parent-reported child behaviors (0–5 years)	<p>These indicators are defined for children aged 0–5 years. <i>Questions:</i> Do you have any concerns about [child's name]'s learning, development, or behavior? (0 = a little/not at all, 1 = a lot) Are you concerned a lot, a little, or not at all about how [he/she]</p> <ul style="list-style-type: none"> (i) Is learning to do things for [himself/herself]? (ages 10 months to 5 years) (ii) Is learning preschool or school skills? (ages 18 months–5 years) (iii) Behaves? (ages 4 months–5 years) (iv) Gets along with others? (ages 4 months–5 years)
Parent-reported child behaviors (6–17 years)	<p>These indicators are defined for children aged 6–17 years. <i>Questions:</i> During the past 12 months, how many times has [child's name]'s school contacted you or another adult in your household about any problems [he/she] is having with school? (0 = 0 times, 1 = ≥1 time) The following is a list of items that sometimes describe children. For each item, please tell me how often this was true for [child's name] during the past month. Would you say never, rarely, sometimes, usually, or always true for [child's name] during the past month?</p> <ul style="list-style-type: none"> [He/she] argues too much (0 = never/rarely/sometimes, 1 = usually/always) [He/she] bullies or is cruel or mean to others (0 = never/rarely/sometimes, 1 = usually/always) [He/she] is unhappy, sad, or depressed (0 = never/rarely/sometimes, 1 = usually/always) [He/she] stays calm and in control when faced with a challenge (1 = never/rarely/sometimes, 0 = usually/always) [He/she] cares about doing well in school (1 = never/rarely/sometimes, 0 = usually/always) Since starting kindergarten, has [he/she] repeated any grades? (0 = no, 1 = yes)

Table 1: Continued.

Indicator	Definition
Health care services	<p>These indicators are defined for children aged 0–17 years.</p> <p><i>Questions (adequate insurance = usually/always for each of the 3 questions):</i></p> <p>Does [child’s name]’s health insurance offer benefits or cover services that meet [his/her] needs? (0 = never/rarely/sometimes, 1 = usually/always)</p> <p>Does [child’s name]’s health insurance allow [him/her] to see the health care providers [he/she] needs? (0 = never/rarely/sometimes, 1 = usually/always)</p> <p>How often are these costs reasonable? (0 = never/rarely/sometimes, 1 = usually/always)</p> <p><i>Questions (received needed counseling = yes to both questions):</i></p> <p>Does [child’s name] have any kind of emotional, developmental, or behavioral problem for which [he/she] needs treatment or counseling? (0 = no, 1 = yes)</p> <p>Mental health professionals include psychiatrists, psychologists, psychiatric nurses, and clinical social workers. During the past 12 months, has [child’s name] received any treatment or counseling from a mental health professional? (0 = no, 1 = yes)</p> <p><i>Questions (developmental screening = yes to all questions):</i></p> <p>During the past 12 months, did a doctor or other health care providers have you fill out a questionnaire about specific concerns or observations you may have about [child’s name]’s development, communication, or social behaviors?</p> <p>Did this questionnaire ask about your concerns or observations about</p> <p>How [child’s name] talks or makes speech sounds? (0 = no, 1 = yes, ages 10–23 months)</p> <p>How [child’s name] interacts with you and others? (0 = no, 1 = yes, ages 10–23 months)</p> <p>Words and phrases [child’s name] uses and understands? (0 = no, 1 = yes, ages 24–71 months)</p> <p>How [child’s name] behaves and gets along with you and others? (0 = no, 1 = yes, ages 24–71 months)</p> <p><i>Questions (developmental concerns = yes to one question):</i></p> <p>[During the past 12 months/since [child’s name]’s birth], did [child’s name]’s doctors or other health care providers ask if you have concerns about [his/her] learning, development, or behavior? (0 = no, 1 = yes)</p> <p><i>Questions (child has IFSP or IEP = yes to either question):</i></p> <p>Does [child’s name] have any developmental problems for which [he/she] has a written intervention plan called an [if age < 36 months, insert: Individualized Family Services Plan or an IFSP?; if age ≥ 36 months, insert: Individualized Education Program or IEP?]</p> <p>Does [child’s name] have a health problem, condition, or disability for which [he/she] has a written intervention plan called an Individualized Education Program or IEP?</p>

[he/she] needs treatment or counseling? Has [his/her] emotional, developmental, or behavioral problem lasted or is it expected to last 12 months or longer?). Response alternatives were “yes/no.”

2.3. Sample Demographic Characteristics. Sociodemographic characteristics of the sample (Table 2) selected for race-group comparison included birth weight (very low or <1500 grams, low or 1500–2500 grams, and not low); gestational age (within normal limits, ≥ 3 weeks premature); gender (male, female); age (0–5, 6–11, and 12–17 years); status of child with/without special health care needs which is a dichotomous variable based on a positive response to at least one of 5 survey items (i.e., child uses prescription medicine, needs special therapy, has elevated service use, has ongoing emotional, developmental, or behavioral conditions, or has limitations on activity); poverty status (<100%, 100%–199%, 200%–399%, and $\geq 400\%$ of the Federal Poverty level based on the U.S. Department of Health and Human Services Federal Poverty Guidelines for 2012); family structure (two parents, biological; two parents, step family; single mother, no father present; other); mother’s age (≤ 30 years, 31–45 years, or >45 years); highest household educational attainment (<high school, high school, and >high school); insurance coverage type (public, private, or none); medical home which is a dichotomous composite based on five component variables (i.e., having a personal doctor or nurse, having a usual source for sick and well care, having family-centered care, having no problems getting needed referrals, and receiving effective care coordination when needed) developed from 19 separate questions; neighborhood support, a dichotomous composite variable based on 4 survey items (i.e., people in the neighborhood help each other out, watch out for each other’s children, can be counted on, and can be trusted to help a neighbor child who was outside playing and got hurt or scared); metropolitan status (metropolitan/nonmetropolitan residence); and AI/AN region (Alaska, East, Northern Plains, Pacific Coast, or Southwest). Weighted frequencies and prevalence were determined for the above characteristics for the AI/AN and NHW subpopulations.

2.4. Data Analysis Plan. We conducted the analyses of AI/AN ACEs and their relationships with a variety of demographic, health, developmental, and service factors in several steps. First, we determined differences between AI/AN children and a reference population (NHW children) in individual and accumulated, crude, and adjusted rates for the 9 parent-reported ACEs (Table 3). The total number of ACEs (range: 0–9) was summed to create an overall crude ACE score per individual and then reported by the percentage of children with 0, 1, ≥ 2 , ≥ 3 , ≥ 4 , and ≥ 5 ACEs. Relatively small numbers of AI/AN necessitated using aggregate ACEs (e.g., ≥ 2 , ≥ 3 , ≥ 4 , and ≥ 5) rather than single integrals of ACEs (e.g., 2, 3, 4, and 5). Z scores for the comparison of two proportions were used to determine the race-based differences in single and aggregate ACEs prevalence. Use of the NSCH ACE score has been established previously [15].

Second, we determined crude rate differences between AI/AN children with <2 ACEs compared to those with

≥ 2 ACEs and ≥ 3 ACEs as a function of selected health, developmental, and health service outcomes reported by the parent/caregiver (Table 4). The health, developmental, and service outcomes included those listed in Table 1. We calculated rate ratios and tested rate differences using the Z test for the comparison of two proportions.

Finally, logistic regression was performed to assess factors associated with the cumulative ACEs within the AI/AN population while controlling for possible confounders (Table 5). Two different models were developed to explore associations between child, family, and environmental characteristics and the following outcomes: (1) 2 or more ACEs and (2) parent-reported emotional, developmental, or behavioral conditions. The models produced adjusted odds ratios (AOR) for the sociodemographic characteristics (covariates) previously listed in Table 2. Multicollinearity diagnostics results did not identify problems with the inclusion of any of the above independent variables in the final models. The statistical analysis was conducted using SAS 9.3 survey procedures, which account for a complex sample design involving stratification, clustering, and multistage sampling.

3. Results

3.1. Sample. The sample characteristics are shown in Table 2 and indicate that, except for a limited number of variables (child’s birth weight, gender, and CSHCN status), the AI/AN subsample was different in many ways compared to the NHW subsample. The AI/AN population had a higher percentage of children born ≥ 3 weeks prematurely (15.7% versus 11.0%) and a lower percentage of 12–17-year-olds (31.1% versus 36.6%). At the family level, the AI/AN population had a 3-fold higher proportion of incomes below 100% FPL (38.8% versus 11.3%) and a 3-fold lower proportion of incomes 400+% FPL (11.8% versus 36.5%). The AI/AN population was characterized by approximately 2.5 times higher proportion of households without a high school diploma (23.5% versus 9.2%) and a higher percentage of mothers <30 years of age (39.3% versus 22.9%). The household structure was more frequently reported to be a single mother with no father present (22.6% versus 12.5%) or some other arrangement such as living with grandparents, other close relatives, or foster parents (15.0% versus 5.9%). The child’s health care coverage was more frequently public (57.6% versus 23.5%) or nonexistent (9.5% versus 3.9%) and the child was less likely to have a medical home (43.5% versus 65.7%). AI/AN families were more concentrated in nonmetropolitan statistical areas (40.3% versus 20.1%) and more likely to live in Alaska, the Northern Plains, and the Southwest compared to their NHW counterparts.

3.2. Prevalence of Adverse Childhood Experiences. Table 3 displays the individual and accumulated ACEs among AI/AN children and the comparison group of NHW children. Having been treated or judged unfairly based on race/ethnicity was approximately 7 times more common among AI/AN children than NHW children (10% versus 1.4%). AI/AN children were 2–3 times more likely to have a parent who served time in jail (18% versus 6%), to have observed

Table 2: Sample characteristics of American Indian/Alaska Native and non-Hispanic White children 0–17 years of age: National Survey of Children’s Health 2011–2012.

Characteristic	American Indian/Alaska Native				Non-Hispanic White				P-value for prevalence rate difference*
	Unweighted N	Weighted N	Prevalence %	Standard error	Unweighted N	Weighted N	Prevalence %	Standard error	
Total	1,453	686,615			61,381	37,666,681			
Child’s birth weight									
Within normal limits	1,230	582,057	91.1	1.81	54,802	33,628,030	92.5	0.21	0.441
Low	97	49,637	7.8	1.79	3,842	2,361,119	6.5	0.20	0.472
Very low	27	7,176	1.1	0.32	680	356,910	1.0	0.08	0.764
Child’s gestation									
Within normal limits	1,229	575,906	84.3	2.07	54,511	33,390,165	89.0	0.26	0.024
3 or more weeks’ premature	206	107,150	15.7	2.07	6,592	4,122,349	11.0	0.26	0.024
Child’s gender									
Male	743	371,833	54.2	2.82	31,651	19,386,409	51.6	0.42	0.36
Female	709	314,306	45.8	2.82	29,660	18,215,698	48.4	0.42	0.36
Child’s age									
0–5 years	499	226,098	32.9	2.51	18,228	11,742,994	31.2	0.39	0.503
6–11 years	480	246,799	35.9	2.92	19,455	12,148,511	32.3	0.39	0.223
12–17 years	474	213,719	31.1	2.70	23,698	13,775,176	36.6	0.41	0.044
CSHCN status									
CSHCN	325	147,732	21.5	2.48	13,079	8,130,399	21.6	0.35	0.968
Non-CSHCN	1,128	538,883	78.5	2.48	48,302	29,536,282	78.4	0.35	0.968
Household income (FPL) [†]									
<100%	548	266,374	38.8	2.97	5,566	4,267,420	11.3	0.28	>0.0001
100–199%	371	203,958	29.7	2.99	9,558	7,034,578	18.7	0.35	0.0003
200–399%	335	135,545	19.7	2.09	20,532	12,633,812	33.5	0.41	>0.0001
400+%	200	80,738	11.8	1.68	25,724	13,730,871	36.5	0.40	>0.0001
Family structure									
Two parents, biological/adopted	735	344,177	50.6	2.91	46,578	27,202,154	72.5	0.40	>0.0001
Two parents, step family	149	80,469	11.8	1.64	4,111	3,424,912	9.1	0.27	0.105
Single mother, no father present	309	153,849	22.6	2.36	6,892	4,671,895	12.5	0.28	>0.0001
Other	247	102,095	15.0	2.36	3,550	2,222,396	5.9	0.22	0.0001
Mother’s age									
30 years or less	587	270,009	39.3	2.81	11,943	8,621,552	22.9	0.37	>0.0001
31–45 years	615	352,373	51.3	2.88	33,595	21,686,721	57.6	0.42	0.031
>45 years	251	64,233	9.4	1.21	15,843	7,358,407	19.5	0.31	>0.0001
Highest household education level									
Less than high school	284	147,493	23.5	2.78	4,926	3,355,530	9.2	0.26	>0.0001
High school	501	195,741	31.2	2.44	21,374	12,983,089	35.5	0.40	0.082
More than high school	543	284,028	45.3	3.11	33,522	20,256,886	55.4	0.42	0.001
Child’s insurance coverage									
Public	814	385,801	57.6	2.91	12,437	8,755,041	23.5	0.37	>0.0001
Private	480	220,824	32.9	2.80	46,452	27,088,341	72.6	0.40	>0.0001
No coverage	124	63,601	9.5	1.58	1,999	1,463,918	3.9	0.19	0.0004

Table 2: Continued.

Characteristic	American Indian/Alaska Native				Non-Hispanic White				P-value for prevalence rate difference*
	Unweighted <i>N</i>	Weighted <i>N</i>	Prevalence %	Standard error	Unweighted <i>N</i>	Weighted <i>N</i>	Prevalence %	Standard error	
Medical home									
Has a medical home	603	292,428	43.5	2.92	40,374	24,137,715	65.7	0.41	>0.0001
Does not have a medical home	808	379,495	56.5	2.92	19,433	12,581,727	34.3	0.41	>0.0001
Neighborhoods									
Supportive	1,146	530,325	77.5	2.15	54,832	33,042,224	88.0	0.28	>0.0001
Nonsupportive	296	153,605	22.5	2.15	6,283	4,490,565	12.0	0.28	>0.0001
Metropolitan status									
Within a MSA	605	401,320	59.7	2.65	43,437	29,818,692	79.9	0.30	>0.0001
Not within a MSA	836	271,470	40.3	2.65	17,545	7,522,853	20.1	0.30	>0.0001
AI/AN regions									
Alaska	261	28,292	4.1	0.41	1,021	99,662	0.3	0.01	>0.0001
East	457	318,387	46.4	2.95	37,310	26,108,226	69.3	0.34	>0.0001
Northern Plains	486	132,977	19.4	1.85	12,799	4,769,166	12.7	0.17	0.0003
Pacific Coast	70	56,799	8.3	1.50	4,993	4,327,345	11.5	0.33	0.0380
Southwest	179	150,160	21.9	2.14	5,258	2,362,282	6.3	0.11	>0.0001

*Probability for comparison of American Indian/Alaska Native compared to non-Hispanic White children based on the Z test for the comparison of two proportions.

†Federal poverty levels (FPL) are based on the Department of Health and Human Services 2012 poverty guidelines. Income below 100% of the poverty threshold was defined as less than \$15,130 for a family of two, \$19,090 for a family of three, and \$23,050 for a family of four.

Table 3: Unadjusted (crude) and adjusted rates of parent-reported adverse childhood experiences (ACEs) among American Indian/Alaska Native children compared to non-Hispanic white children: National Survey of Children's Health 2011-2012.

Adverse childhood experiences	Non-Hispanic American Indian/Alaska Native	Non-Hispanic White	<i>P</i> value for unadjusted prevalence rate difference*	Non-Hispanic American Indian/Alaska Native	Non-Hispanic White	<i>P</i> value for adjusted prevalence rate difference**
	Unadjusted prevalence % (SE)	Unadjusted prevalence % (SE)		Adjusted prevalence % (SE)	Adjusted prevalence % (SE)	
Child's family has difficulty getting by on the family's income, hard to cover basics like food or housing	35.7 (2.99)	22.8 (0.38)	>0.0001	18.3 (3.52)	21.9 (0.62)	0.313
Child lived with parent who got divorced/separated after he/she was born	33.0 (2.85)	21.4 (0.37)	0.0001	20.1 (3.01)	21.2 (0.57)	0.719
Child lived with anyone who had a problem with alcohol or drugs	23.6 (2.65)	11.6 (0.29)	>0.0001	8.1 (2.33)	10.0 (0.46)	0.424
Child lived with parent who served time in jail after he/she was born	18.0 (2.60)	6.0 (0.21)	>0.0001	7.5 (3.64)	5.4 (0.37)	0.569
Child was a victim of violence or witnessed violence in his/her neighborhood	15.9 (2.39)	6.7 (0.21)	0.0001	9.2 (2.69)	5.4 (0.35)	0.162
Child saw parents hit, kick, slap, punch, or beat each other up	15.5 (2.58)	6.3 (0.22)	0.0004	8.6 (2.43)	5.7 (0.38)	0.238
Child lived with anyone who was mentally ill or suicidal or severely depressed for more than a couple of weeks	13.2 (2.26)	9.7 (0.26)	0.124	5.7 (2.10)	8.7 (0.45)	0.162
Child was ever treated or judged unfairly because of his/her race or ethnic group	10.0 (1.45)	1.4 (0.10)	>0.0001	5.2 (2.07)	0.9 (0.14)	0.039
Child lived with parent who died	4.2 (0.73)	2.5 (0.14)	0.022	1.4 (0.59)	2.2 (0.19)	0.197
Number of ACEs among participating children, of 9 asked about						
0	35.2 (2.66)	55.7 (0.43)	>0.0001	56.2 (5.11)	58.1 (0.64)	0.711
1	24.5 (2.60)	23.3 (0.38)	0.646	43.8 (5.11)	41.9 (0.64)	0.711
≥2	40.3 (2.87)	21.0 (0.36)	>0.0001	22.0 (4.11)	19.0 (0.57)	0.472
≥3	26.8 (2.72)	11.5 (0.29)	>0.0001	12.9 (2.37)	10.3 (0.48)	0.280
≥4	16.8 (2.55)	6.2 (0.22)	>0.0001	3.6 (1.30)	5.4 (0.38)	0.184
≥5	9.9 (2.18)	3.3 (0.16)	0.003	2.3 (0.97)	2.7 (0.28)	0.689

*Probability for comparison of American Indian/Alaska Native compared to non-Hispanic White children unadjusted (crude) ACE prevalence rates based on the *Z* test for the comparison of two proportions.

**Probability for comparison of American Indian/Alaska Native compared to non-Hispanic White children adjusted ACE rates based on the *Z* test for the comparison of two proportions. Rates were adjusted for birth weight, prematurity, sex, age, special needs status, poverty, family structure, mother's age, highest household educational level, type of insurance coverage, medical home access, neighborhood support, region, and metropolitan status.

domestic violence (15.5% versus 6.3%), to have been a victim of violence/witnessed violence in their neighborhood (15.9% versus 6.7%), and to have lived with a substance abuser (23.6% versus 11.6%). Finally, AI/AN children were 1.5 times more likely to live in families with difficulty covering basics like food or housing (35.7% versus 22.8%), to have lived with a divorced/separated parent (33% versus 21.4%), and to have lived with a parent who died (4.2% versus 2.5%). AI/AN and NHW children were equally likely to have lived with a mentally ill/suicidal/severely depressed person for more than a couple of weeks (13.2% versus 9.7%). Differences in accumulated ACEs were also evident. AI/AN children were less likely to have none of the 9 adverse experiences queried (35.2% versus 55.7%) and equally likely to have had one experience (24.5% versus 23.3%) but 2–3 times more likely to have multiple (≥ 2 to ≥ 5) ACEs (9.9 to 40.3% versus 3.3 to 21.0%) compared to NHW children.

To control for the many sociodemographic differences (confounders) between the AI/AN and NHW children (Table 2), the prevalence rates for the individual and accumulated ACEs were adjusted for all sociodemographic variables. Adjusted rates are presented in Table 3 and indicate that all statistically significant differences between the two populations are eliminated after adjustment.

3.3. Health/Developmental Problems and Services among AI/AN Children with Multiple ACEs. Table 4 displays the prevalence rates, prevalence rate differences, and prevalence rate ratios (PRR) for various health, developmental, and service outcomes among AI/AN children with <2 ACEs, 2+ ACEs, and 3+ ACEs. Among the parent-reported provider-diagnosed conditions, depression and anxiety disorders were significantly more prevalent among AI/AN children with 2+ ACEs (10.7% and 6.3%, resp.) compared with AI/AN children with <2 ACEs (0.4% and 1.8%, resp.) while these same emotional problems plus ADHD were more prevalent among AI/AN children with 3+ ACEs (14.4%, 7.7%, and 12.5%, resp.) compared to AI/AN children experiencing fewer than 2 ACEs (0.4%, 1.8%, and 5.5%, resp.). Prevalence rate ratios (PRR) for these same comparisons were the highest for depression (PRR = 26.8–36.0) and the lowest for ADHD (PRR = 2.0–2.3). AI/AN children with <2 ACEs were identified as having special health care needs 2.4 times less frequently than children with 2+ ACEs (13.6% versus 33.3%) and 2.8 times less often than children with 3+ ACEs (13.6% versus 38.0%). The likelihood of using prescribed medications, having elevated service needs, and having functional limitations significantly increased by 2.2–3 times for children with 2+ ACEs (23.4%, 14.4%, and 5.7%, resp.) and 2.1–3.6 times for children with 3+ ACEs (27.2%, 17.1%, and 5.4%, resp.) compared to those with <2 ACEs. In contrast, the likelihood of having a parent-reported emotional, behavioral, and developmental problem was 11.2 times greater for children with 2+ ACEs (19.1%) and 15.4 times for children with 3+ ACEs (26.1%) compared to children with <2 ACEs (1.7%).

Differences in parent-reported behavioral concerns among 0–5-year-old AI/AN children with <2 ACEs were generally similar to the young children with 2+ and 3+ ACEs.

However, among AI/AN 6–17-year-olds, several parent-reported behavioral concerns showed increases in children with 2+ and 3+ ACEs compared to those with <2 ACEs: having problems in school (PRR = 2.1 and 2.0, resp.), arguing too much (PRR = 2.7 and 3.0, resp.), difficulty maintaining control in the face of challenges (PRR = 2.7 and 2.9, resp.), not caring about school performance (PRR = 2.8 and 2.8, resp.), and repeating grades (PRR = 2.5 and 2.9, resp.).

Regarding health care and service needs, receiving needed treatment or counseling was associated with higher likelihood values with accumulated numbers of ACEs from less than 2 to 2+ and 3+ ACEs. Children with 2+ (68.0%) and 3+ (66.7%) ACEs were approximately 3.5 times more likely to have received needed counseling than children with less than 2 ACEs (19.6%).

3.4. Associations with Multiple ACEs. The results of logistic regression to determine the relationship between individual, family, neighborhood, and residency factors and having 2+ ACEs are shown in Table 5. Adjusted odds ratios (AOR) indicating positive associations included age (AOR = 4.57 for 6–11-year-olds and AOR = 8.15 for 12–17-year-olds), family structure (AOR = 4.01 for single mothers, no father present; AOR = 4.85 for other family structures), public insurance (AOR = 2.23), neighborhood support (AOR = 1.74 for unsupportive neighborhoods), and region of the country (AOR = 2.18 for the Northern Plains states).

The results of an additional logistic regression analysis to determine the relationship between having emotional/developmental/behavioral problems as a function of individual, family, neighborhood, and residency factors and having 2+ ACEs are shown in Table 5. Results indicated that AI/AN children with 2+ ACEs had approximately 10 times greater odds of having parent-reported emotional/developmental/behavioral problems than AI/AN children with <2 ACEs. Independent effects were also noted for birth weight (AOR = 5.41 for low/very low birth weight) and family structure (AOR = 0.34 for single mother, no father present).

4. Discussion

The current analyses provide support, at least in part, for our hypotheses. First, we hypothesized that Native American children across the 0–17-year age range would be more likely to have greater accumulation of adverse experiences in childhood when compared to a reference population of NHW children in the same age range. Our results indicated that AI/AN children were more likely to have had 8 of 9 ACEs: income deprivation, witnessing or experiencing violent victimization, racial/ethnic discrimination, household substance abuse, domestic violence, parental incarceration, divorce, and death of a parent. Five of the 9 ACEs involved 2- to 7-fold crude rate increases in likelihood compared to the NHW population. AI/AN children were more likely to have multiple ACEs (≥ 2 , ≥ 3 , ≥ 4 , and ≥ 5) when compared to non-Hispanic White children. However, after adjusting for sociodemographic factors, rate differences were eliminated,

Table 4: Developmental, behavioral, and service-related outcomes of AI/AN children with fewer than 2 parent-reported ACEs compared to AI/AN children with 2 or more and 3 or more parent-reported ACEs: National Survey of Children's Health 2011-2012.

Developmental, behavioral, and service-related outcomes	Less than 2 ACEs among AI/AN children %	2 or more ACEs among AI/AN children %	P value for prevalence rate difference*	Prevalence rate ratio*	3 or more ACEs among AI/AN children %	P value for prevalence rate difference**	Prevalence rate ratio**
Provider-diagnosed conditions							
Learning disability	9.9 (3.21)	11.7 (2.42)	0.653	1.2	13.1 (3.22)	0.484	1.3
Depression	0.4 (0.35)	10.7 (4.82)	0.033	26.8	14.4 (6.87)	0.041	36.0
Anxiety disorder	1.8 (0.97)	6.3 (1.81)	0.029	3.5	7.7 (2.53)	0.029	4.3
Conduct disorder	1.4 (0.56)	3.6 (1.09)	0.072	2.6	4.6 (1.56)	0.054	3.3
Autism spectrum disorder	1.1 (0.44)	1.3 (0.43)	0.741	1.2	1.5 (0.56)	0.576	1.4
ADHD	5.5 (1.83)	10.8 (2.16)	0.062	2.0	12.5 (2.93)	0.042	2.3
Developmental delay	3.8 (0.96)	3.5 (0.81)	0.810	0.9	4.0 (1.07)	0.889	1.1
Speech disorder	5.0 (1.08)	7.3 (2.01)	0.313	1.5	7.4 (2.56)	0.390	1.5
Other parent-reported health conditions/needs							
Special health care needs	13.6 (2.24)	33.3 (4.72)	0.0002	2.4	38.0 (6.35)	0.0003	2.8
Prescribed medication	9.2 (1.95)	23.4 (4.70)	0.005	2.5	27.2 (6.51)	0.008	3.0
Elevated service use	4.8 (1.11)	14.4 (2.59)	0.0006	3.0	17.1 (3.60)	0.001	3.6
Functional limitations	2.6 (0.71)	5.7 (1.25)	0.031	2.2	5.4 (1.41)	0.077	2.1
Special therapies	3.2 (0.80)	5.0 (1.52)	0.294	1.6	5.9 (2.19)	0.246	1.8
Emotional, developmental, or behavioral problems	1.7 (0.40)	19.1 (4.78)	0.0003	11.2	26.1 (6.64)	0.0002	15.4
Parent-reported child behaviors (0 to 5 years of age)							
Parent is concerned a lot about the following							
How the child is learning to do things for him-/herself	4.8 (1.63)	2.3 (1.20)	0.215	0.5	5.0 (2.69)	0.952	1.0
How the child is learning in preschool	5.6 (1.95)	3.3 (1.41)	0.337	0.6	7.3 (3.19)	0.653	1.3
How the child behaves	8.5 (3.44)	6.5 (3.02)	0.66	0.8	7.8 (3.14)	0.881	0.9
How the child gets along with others	9.7 (3.48)	2.1 (1.07)	0.037	0.2	4.9 (2.53)	0.263	0.5
Parent-reported child behaviors (6 to 17 years of age)							
Child has been having problems with school	22.5 (3.41)	48.2 (5.45)	0.0001	2.1	45.4 (6.72)	0.002	2.0
Child argues too much	11.4 (2.23)	30.3 (5.37)	0.001	2.7	34.5 (6.98)	0.002	3.0
Child bullies or is cruel or mean to others	2.0 (1.11)	4.5 (2.29)	0.327	2.3	6.0 (3.20)	0.238	3.0
Child is unhappy, sad, or depressed	2.7 (1.41)	5.6 (3.46)	0.435	2.1	6.3 (4.73)	0.465	2.3
Child does not maintain self-control when faced with a challenge	3.6 (1.13)	9.7 (2.42)	0.023	2.7	10.5 (3.12)	0.038	2.9
Child does not care about doing well in school	11.1 (2.01)	31.0 (4.31)	>0.0001	2.8	31.6 (5.39)	0.0004	2.8
Child repeated grade	9.0 (2.27)	22.3 (5.52)	0.026	2.5	26.2 (7.28)	0.024	2.9
Health care/services							
Child has insurance adequate to cover needed services	78.6 (3.88)	76.5 (3.68)	0.697	1.0	75.3 (5.01)	0.603	1.0
Child received needed counseling	19.6 (6.55)	68.0 (9.69)	>0.0001	3.5	66.7 (10.8)	0.0002	3.4
Child was screened by a doctor for developmental problems	22.9 (4.13)	30.5 (9.43)	0.459	1.3	24.8 (10.0)	0.857	1.1
Doctor asked about parent concerns	50.2 (5.00)	52.9 (8.63)	0.787	1.1	46.5 (10.4)	0.749	0.9
Child has IEP or IFSP	9.2 (1.60)	13.1 (2.43)	0.18	1.4	13.1 (3.01)	0.254	1.4

*Probability for comparison of 2+ ACEs versus fewer than 2 ACEs based on the Z test for the comparison of two proportions. **Probability for comparison of 3+ ACEs versus fewer than 2 ACEs based on the Z test for the comparison of two proportions.

Table 5: Adjusted odds ratios for sociodemographic characteristics associated with (1) having 2 or more ACEs and (2) having parent-reported emotional/developmental/behavioral problems among AI/AN children 0–17 years of age: National Survey of Children’s Health 2011–2012.

Sociodemographic characteristics	Outcome: two or more adverse family experiences		Outcome: parent-reported emotional/developmental/behavioral problems	
	Adjusted odds ratio	95% confidence limit	Adjusted odds ratio	95% confidence limits
Adverse childhood events				
2 or more ACEs	na	na	10.3	3.64–29.3
Less than 2 ACEs	na	na	1.00	Reference
Birth weight				
Within normal limits	1.00	Reference	1.00	Reference
Low/very low birth weight	0.72	0.23–2.25	5.41	1.48–19.8
Child’s gestation				
Within normal limits	1.56	0.60–4.05	1.00	Reference
3 or more weeks’ premature	1.00	Reference	1.61	0.48–5.37
Child’s gender				
Male	0.84	0.50–1.41	1.30	0.60–2.81
Female	1.00	Reference	1.00	Reference
Child’s age				
0–5 years	1.00	Reference	1.00	Reference
6–11 years	4.57	2.23–9.36	1.04	0.42–2.60
12–17 years	8.15	3.55–18.7	1.89	0.66–5.43
Household income (FPL) [†]				
<100%	1.51	0.51–4.47	1.22	0.33–4.51
100–199%	1.31	0.43–3.94	1.71	0.49–5.94
200–399%	1.09	0.42–2.80	0.66	0.18–2.40
400+%	1.00	Reference	1.00	Reference
Family structure				
Two parents, biological/adopted	1.00	Reference	1.00	Reference
Two parents, step family	2.04	0.97–4.32	1.05	0.38–2.90
Single mother, no father present	4.01	2.00–8.03	0.34	0.12–0.94
Other	4.85	1.99–11.8	0.63	0.18–2.16
Mother’s age				
30 years or less	1.06	0.41–2.70	0.86	0.21–3.53
31–45 years	1.27	0.63–2.56	1.30	0.46–3.65
>45 years	1.00	Reference	1.00	Reference
Highest household education level				
Less than high school	0.73	0.37–1.47	0.88	0.38–2.90
High school	1.03	0.61–1.78	0.88	0.39–1.96
More than high school	1.00	Reference	1.00	Reference
Child’s insurance coverage				
Public	2.23	1.17–4.26	1.13	0.43–2.95
No coverage	1.89	0.64–5.59	0.91	0.21–3.95
Private	1.00	Reference	1.00	Reference
Medical home				
Has a medical home	1.00	Reference	1.00	Reference
Does not have a medical home	1.17	0.70–1.94	2.03	0.86–4.79

Table 5: Continued.

Sociodemographic characteristics	Outcome: two or more adverse family experiences		Outcome: parent-reported emotional/developmental/behavioral problems	
	Adjusted odds ratio	95% confidence limits	Adjusted odds ratio	95% confidence limits
Neighborhoods				
Supportive	1.00	Reference	1.00	Reference
Nonsupportive	1.74	1.01–3.00	0.70	0.29–1.68
Metropolitan status				
Within a MSA	1.00	Reference	1.00	Reference
Not within a MSA	0.92	0.56–1.52	0.58	0.26–1.32
AI/AN regions				
Alaska	1.06	0.56–2.00	1.69	0.68–4.21
East	1.00	Reference	1.00	Reference
Northern Plains	2.18	1.21–3.94	0.76	0.31–1.85
Pacific Coast	1.49	0.58–3.85	1.95	0.51–7.53
Southwest	1.26	0.63–2.53	0.69	0.24–1.98
Wald χ^2 statistic and <i>P</i> value	96.5	<0.0001	46.6	0.005
<i>R</i> ² (Nagelkerke max-rescaled <i>R</i> -square)	0.85		0.49	

[†]Federal poverty levels (FPL) are based on the Department of Health and Human Services 2012 poverty guidelines. Income below 100% of the poverty threshold was defined as less than \$15,130 for a family of two, \$19,090 for a family of three, and \$23,050 for a family of four.

suggesting that elevated risk among the AI/AN child population was substantially accounted for by a combination of child, family, neighborhood, and residency factors used to adjust the models.

The results of this investigation are difficult to compare to other studies due to methodological and procedural differences. A limited number of ACE studies have been conducted with the AI/AN population and those that have are often focused on nonrepresentative samples of mature adults or larger studies of adolescents reporting on their own, possibly distant, past experiences [10–13]. Furthermore, in most studies of AI/AN adolescents and older AI/AN populations, the presence of ACEs is related to long-term outcomes such as alcohol/drug addiction, suicide attempts, intimate partner violence, and incarceration in a previously ACE-exposed population, thus elucidating the cyclic nature of these experiences [10–12, 16–18]. In addition, these adverse experience studies typically reference a broader array of traumatic events than what is covered in the current survey (e.g., sexual and psychological abuse, as well as various forms of neglect and boarding school attendance).

Due to this and other methodological factors, the results reported here are somewhat at odds with findings of race-based differences in ACEs revealed by other studies with adolescents and older AI/AN populations. For example, heightened risk of multiple victimization was associated with Native American males in a nationally representative sample of adolescents [13]. In that study, AI/AN children 12 years of age or older in Indian Country experienced 2–3 times the victimization rate of Whites, Blacks, and Asians. Two-thirds of the victimization cases were across racial boundaries, indicating a considerable amount of racial discrimination.

Finally, rereferral rates to child protective services for abuse and neglect varied by racial and ethnic status with AI/AN families having the highest rates [19]. While some of these studies may have controlled for a variety of factors, none included the same extensive list of sociodemographic variables included here. As indicated by the differences outlined in Tables 2 and 3, the social and economic disparities between the AI/AN and the NHW children may contribute heavily to the crude rate differences in adverse events observed for the two racial/ethnic subgroups of children.

Our second hypothesis stated that the increasing accumulation of adverse events among AI/AN children would be associated with a gradient of health problems and need for services in the AI/AN population. This hypothesis was supported to some extent by our findings that accompanying the higher accumulation of adverse experiences among the AI/AN children was increasing prevalence of such problems reported by parents, particularly among children 6–17 years of age (e.g., arguing, lack of emotional control, and school problems) and more frequent provider-diagnosed behavioral disorders (depression, anxiety, and ADHD). AI/AN children with 2+ and 3+ ACEs received more medication and services such as counseling than AI/AN children with <2 ACEs.

The associated health and behavioral outcomes described here are reminiscent of those described by investigators of adolescents and older individuals. Similar to this investigation, one non-AI/AN study showed that, among younger (18–44 years), middle aged (45–64 years), and older (65–89 years) adults, increased ACE scores were associated with increased prescription medication dispensing rates for the treatment of depression and anxiety [20]. A study of 7 AI/AN tribes indicated a dose-response relationship with

accumulated ACEs among AI/AN men and women [16]. That is, the number of different types of ACEs progressively increased the odds of having a negative outcome, such as alcohol dependence. Accumulated ACEs have also been found to be associated with increasing odds of attempted suicide and acts of violence among AI/AN women [12]. The diagnosis of PTSD (posttraumatic stress disorder) among AI/AN adolescents is also related to the number of adverse experiences [11].

To overcome the trauma of ACE in AI/AN communities, it has been suggested that a continuum of prevention strategies addressing primary, secondary, and tertiary needs is strongly needed [11]. First, efforts must be made to prevent new ACE occurrences; secondly, where ACEs have already occurred, efforts must focus on the prevention of risky behaviors in response to those experiences. Finally, those who have already developed a health problem as a long-term consequence of ACEs will need help to change health risk behaviors in order to lower the potential for disease burden. Furthermore, prevention and treatment behavioral health efforts must be (1) addressed by individuals, families, and communities, (2) integrated into community health systems, and (3) founded on evidence-, culture-, and practice-based approaches [21].

A few recent approaches introduced into health and social systems in AI/AN communities reflect adherence to these principles. In some cases, this has been accomplished by adapting evidence-based programs to incorporate AI/AN cultural values. For example, the Indian Country Child Trauma Center developed AI/AN adaptation of the evidence-based treatment, trauma-focused cognitive-behavioral therapy. Honoring Children, Mending the Circle (HC-MC) guides the therapeutic process through blending of AI/AN traditional teachings with cognitive-behavioral methods [22]. In other cases, nonadapted treatment protocols have been shown experimentally to be equally effective for an AI/AN subpopulation as for the targeted populations as a whole [23]. Finally, some programs have been specifically formulated for implementation in the AI/AN community.

Family Spirit intervention is an evidence-based AI/AN teen mother tribal home visiting program designed to address behavioral health disparities among American Indians and evaluated by using measures of intervention fidelity and early childhood emotional/behavioral development [24]. The latter targets maternal health, child development, school readiness, and positive parenting practices which are areas of emphasis in the Patient Protection and Affordable Care Act, Section 2951, addressing maternal, infant, and early childhood home visiting programs [25]. It is anticipated that home visiting programs in particular will address some of the underlying early life contributors to poor health and developmental outcomes for children, as well as persistent inequalities in the health and well-being of children and families. As the findings of this study indicate, the social determinants, especially those operating at the neighborhood, community, and regional levels, should figure prominently into the design of interventions aimed at improving the health of children and families. For example, the heavy concentration of unemployed AI/AN families relative to White families

(15% versus 4.6% or 3.3 American Indian-to-White ratio) measured during the first half of 2013 in the Northern Plains region may have had some bearing on the doubling of the odds for ACEs compared to the East.

The findings presented here are subject to several limitations. The cross-sectional nature of the data imposes limits on the ability to discern any causal relationship between ACEs and the associated behaviors included here. In addition, due to the remote location and lower than average telephone service among many AI/AN families, sampling bias may reduce the representative nature of the AI/AN child sample from which estimates were drawn. Additional weaknesses include reliance on parent report for assigning children to diagnostic categories and evaluating functionality. These requirements may be difficult for parents in general but also may be fundamentally different for AI/AN parents compared to non-AI/AN parents based on cultural differences in the perception of disability that may lead to underreporting.

5. Conclusion

We have shown that significantly more AI/AN children 0–17 years of age are subject to adverse childhood experiences at a rate considerably higher and with greater complexity than a reference population of non-Hispanic White children. Increases in disease burden accompany those higher rates of adverse childhood experiences. Risks for some emotional, developmental, and behavioral problems in AI/AN children were increased relative to the reference group, though these were determined to be accounted for by social and economic factors. AI/AN children are more likely to experience multiple adverse events as they develop and their health behaviors are being shaped. Greater attention to the social determinants of health at the family, neighborhood, community, and higher levels of contextual influences such as those operating at the state, regional, or national levels is needed to address the marked health disparities shown here.

Disclosure

The views in this paper are those of the authors and not necessarily those of the Health Resources and Services Administration of the U.S. Department of Health and Human Services.

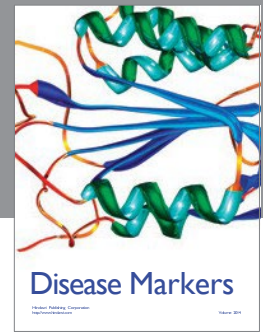
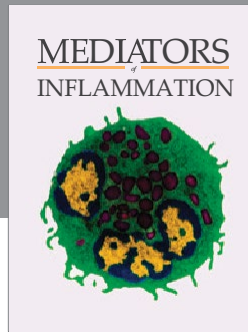
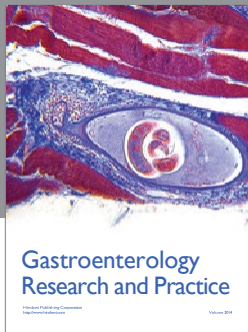
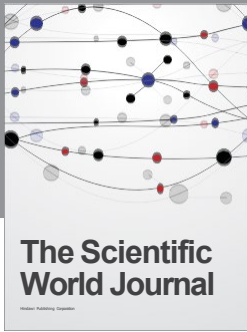
Competing Interests

The authors have no financial interests relevant to this paper to disclose.

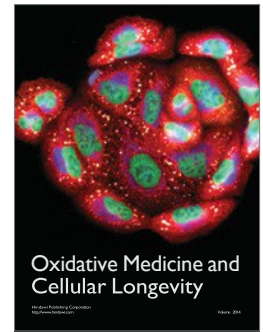
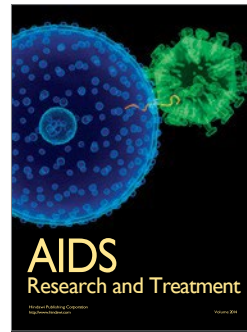
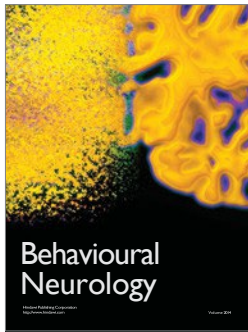
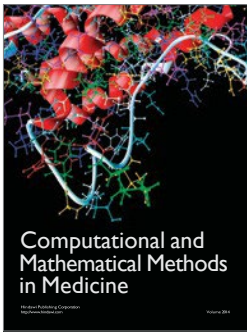
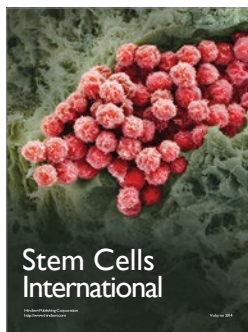
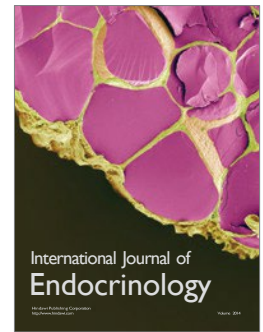
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Attachment and Bonding in Indian Child Welfare

Summary of Research

A publication of the National Indian Child Welfare Association

In the winter of 2016, NICWA research staff reviewed studies published in peer-reviewed journals regarding cultural identity, mental health and well-being benefits, as well as attachment and bonding literature to identify how current research in these fields is relevant to issues raised in child welfare decision making. This brief presents a summary of that literature review. Key research considerations are detailed below.

There are important long-term benefits to being raised with a distinct cultural identity as American Indian/Alaska Native (AI/AN).

These benefits cannot be compared to studies conducted on adoption with other ethnic groups because of the unique historical circumstances and cultural context of AI/AN communities with historical trauma, genocide, and forced assimilation policies. Recent epigenetic research shows this type of historical trauma is encoded in genes across generations (Yehuda et al., 2016), meaning that trauma happening to parents potentially impacts how genes are expressed in their children. The main way to ameliorate this historical or intergenerational trauma is through enculturation, or helping Native youth to identify with their cultural background and feel pride in it (see LaFromboise et al., 2006). Identification with a particular cultural background and a secure sense of cultural identity is associated with higher self-esteem, better educational attainment (grades and going to college), and is protective against mental health problems, substance use, and other issues for adolescents and adults (LaFromboise et al., 2006; Walls et al., 2016; Martinez and Dukes, 1997; Roberts et al., 1999; Schweigman et al., 2011). The primary acquisition of values and social

skills unique to a particular cultural group happen in adolescence, and the benefits of acquiring social skills rooted in culture should be highlighted.

Further, the formation of cultural identity occurs over the course of childhood and early adulthood—and the formation process is not completed by the time early childhood ends. Studies showing culture is a protective factor in mental health for Native adults and adolescents are numerous—there are at least 22 empirical studies looking at this issue, some with large sample sizes (hundreds of data points), over the last 30 years (LaFromboise et al., 2006; Walls et al., 2016; Martinez and Dukes, 1997; Roberts et al., 1999; Schweigman et al., 2011). There is also a large body of studies showing that forced acculturation (meaning being forced to be part of a culture group that is not one's own) has specific deleterious effects on mental health and psychological well-being for AI/AN people specifically, including increased risk of suicide, substance use, and depression (see LaFromboise et al., 1993 for a comprehensive review of these previous studies going back to the 1950s).

We must look at benefits to children over the course of their lives when considering what is in their best interest.

Arguments about best interest should not be limited to early childhood. We must consider the benefits of reunification with birth family, extended family members (tribal or non-tribal family members), versus the benefits of staying with a foster family or pre-adoptive placements for the child when they are an adolescent, young adult, and beyond to when they are a fully mature adult. Recent neuroscience studies have shown that the brain continues to mature into the early 20s and is not fully formed until approximately age 25 (see Johnson, Blum, and Giedd, 2009 for a review of relevant neuroimaging and neuroscience studies on the adolescent and young adult brain). Even after that, neuroplasticity (meaning the potential of the brain to develop)

continues, and brains continue to change and grow throughout the lifespan (Johnson, Blum, and Giedd, 2010). ICWA opponents do not fully account for nuanced research on brain development across the lifespan. Their allegations that early childhood traumas cause irreversible harm are applied out of context. Although the research shows that adolescents who suffer from numerous traumatic experiences or emotional stress are at risk of developing mental health issues and substance use disorders in adulthood, the research does not indicate that these harms are inevitable. In fact, recent studies emphasize the resilience of the adolescent brain (Johnson, Blum, and Giedd, 2009).

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Child development research has moved beyond traditional psychology bonding and attachment arguments to show that the entire psychosocial environment matters a great deal in psychological health promotion.

New studies in developmental psychology, family therapy, and anthropology over the last 10 years have developed an ecological model for child development. Experts in all of these fields write about human psychological development as being shaped by a “niche”—which is a developmental or ecological environment within which the person’s psychology is shaped (Super and Harkness, 2002; Albert and Trommsdorff, 2014; Falicov, 2003). This niche includes, but is not limited to, the entire context a child grows up in, including parents, caregivers, teachers, their school, and their community. Policymakers have noted the promise of this research and are promoting a holistic framework of child well-being into new and existing policy initiatives (Administration on Children, Youth and Families, 2012).

Studies looking at developmental niches emphasize the importance of consistency throughout different parts of the environment in cultural values, practices, and identity as being key determining factors for a sense of “groundedness”, meaning a strong sense of self and coherence in one’s self-identity (Super and Harkness, 2002; LaFromboise et al., 1993). For example, if school, parents, and other adults in an adolescent’s life give similar messages about what values are important, and what aspects of their identity are strength-giving, the adolescent will have less conflict with his/her parents/caregivers and a more coherent sense of his/her values. ICWA opponents may argue that a foster family could provide this sort of consistency in values and identity through sending a child to a school that shares the values taught at home. However, Native parents will have access to the very specific values, culture, beliefs, and customs held by their tribe that are not likely to be available to non-Native foster parents given that oral history remains a powerful way of passing down culture within tribes across generations. Developmental psychologists view the transmission of values and cultural knowledge across generations to be a key psychological developmental milestone that is achieved during adolescence (Albert and Trommsdorff, 2014), and is critical for a young person to have a clear sense of “groundedness”

and coherency in identity as part of his or her cultural community (LaFromboise et al., 1993). Mainstream sources on culture (e.g., readings on the internet or attending museum exhibits about Native people, as a non-Native foster family may do) are unlikely to provide this same sense of immersion in community and corresponding achievement of developmental milestones related to psychological internalization of values/cultural identity.

Furthermore, research studies done with AI/AN adults who were adopted by non-Native parents demonstrate that these adoptees may be at elevated risk for mental health problems in adulthood. Although the research on this topic is limited, a recent study provides compelling results (Landers, Danes, and White Hawk, 2015). This survey of AI/AN adults who were adopted by non-Native parents demonstrates much higher mental health problems than would be expected in the general AI/AN population. These adults provide direct qualitative narratives stating that for them, cultural connection to Native identity is the only way they have been able to heal from a sense of confusion and lack of coherence in their identity. The studies cited above demonstrate the significant value of a developmental niche/environment that provides AI/AN adolescents and young adults with consistent messages about cultural identity and values; it protects against the risk of mental health problems.

Finally, ICWA opponents interpret attachment theory in an ethnocentric framework that centralizes Western ways of raising children (Neckoway, Brownlee, and Castellan, 2007). Opponents assume (although do not explicitly say) that the best way to raise a child is with a strong attachment to one caregiver. They use rhetoric based in the Western psychological model of attachment, which places primary importance on a child’s relationship with his/her mother. However, attachment theory has now expanded beyond the infant-mother dyad that was central to earlier psychology literature (Falicov, 2003; Albert and Trommsdorff, 2014). ICWA opponents do not acknowledge studies

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showing that children can, and do, develop attachments to more than one caregiver. Many anthropological cross-cultural studies show that children are raised, and thrive, in many different family structures (see book edited by Lancy (2008) for review of cross-cultural studies on childhood). Traditional AI/AN family structures (before European contact) varied across tribes but one common element was the extended family group (Waldman, 2006). These extended family structures are still common today. Some tribes were organized around clan systems, which included several extended families and had specific relationships, responsibilities, and obligations. Children were raised within these extended family systems, and many people in addition to biological relatives were involved with raising AI/AN children. This kinship structure was key to instilling in children a sense of connection to, and responsibility for, the community as a whole (Waldman, 2006).

The key to mental health and psychological well-being is for children to be raised in a developmental niche that gives consistent messages about values and identities (Super and Harkness, 2002) as noted above. Mental health and well-being benefits from child-rearing that is centered in passing on cultural identity must be considered, and groundedness in cultural identity should not be overshadowed with research on attachment in dyadic relationships that does not account for cultural differences. Cultural identity and traditional AI/AN family structures support positive self-identify. Stability and permanency in sense of self (which is strengthened by coherent cultural identity for AI/AN peoples) and cultural values are increasingly important as children grow into adolescence and young adulthood per recent literature in diverse fields, including anthropology, developmental psychology, and family therapy.

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National Indian Child Welfare Association
Protecting Our Children • Preserving Our Culture

NICWA works to support the safety, health, and spiritual strength of Native children along the broad continuum of their lives. We promote building tribal capacity to prevent child abuse and neglect through positive systems change at the state, federal, and tribal level.

Our Vision Every Indian child must have access to community-based, culturally appropriate services that help them grow up safe, healthy, and spiritually strong—free from abuse, neglect, sexual exploitation, and the damaging effects of substance abuse.

Our Mission NICWA is dedicated to the well-being of American Indian and Alaska Native children and families.

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