IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

ERIN FISHER; RICHARD FISHER; AND ERIN FISHER,
AS NEXT FRIEND AND NATURAL MOTHER
OF MINOR CHILD, A.C. PLAINTIFFS

v. NO. 2:19-CV-02034-PKH

JASON COOK; TARA KATUK MAC LEAN SWEENEY,
IN HER OFFICIAL CAPACITY AS ACTING ASSISTANT
SECRETARY–INDIAN AFFAIRS; BUREAU OF INDIAN
AFFAIRS; DAVID BERNHARDT, IN HIS OFFICIAL
CAPACITY AS ACTING SECRETARY OF THE INTERIOR;
AND CHEROKEE NATION OF OKLAHOMA,
A FEDERALLY– RECOGNIZED INDIAN TRIBE DEFENDANTS

MOTION FOR TEMPORARY RESTRAINING ORDER

Erin Fisher, Richard Fisher, and Erin Fisher, as Next Friend and Natural Mother of Minor Child, A.C. (collectively "Plaintiffs"), for their motion for temporary restraining order state as follows:

1. Plaintiffs filed the instant lawsuit asking this Court to declare that ICWA §§ 1912(d), (f), 1914, 1915(a), and the 2016 Regulations implementing these provisions, do not apply in purely private actions for termination of parental rights and stepparent adoptions like this one.

2. Plaintiffs further requested a declaration that such an application of ICWA is unconstitutional under the Equal Protection and Due Process provisions of the Fifth and Fourteenth Amendments to the United States Constitution, and the Privileges or Immunities Clause of the Fourteenth Amendment.

3. Plaintiffs requested that this Court permanently enjoin Defendants from invoking ICWA §§ 1912(d), (f), 1914, 1915(a), and the 2016 Regulations, in response to any private termination and stepparent adoption matter that Plaintiffs should choose to file.

4. Defendant Jason Cook recently filed a motion in state court seeking – after more than two years without any contact – to reinstate visitation rights with A.C.

5. Plaintiffs move that the Court enter a temporary restraining order stating that ICWA does not require visitation to commence in such a private family dispute, or in the alternative, preventing Cook from seeking visitation until this Court determines the applicability or constitutionality of ICWA.

6. Allowing Cook to suddenly reappear in A.C.'s life will certainly cause severe emotional harm to a child, his mother, and the person he considers his dad.

7. The harm to the Fisher family is far greater than to Cook, who has made little effort over A.C.'s life to be involved.

8. The Fisher family will likely be successful on the merits of their claim that ICWA does not apply here, or is unconstitutional, and thus there will be no reason for Cook to have visitation.

9. The public interest of protecting a vulnerable child and his family is far more important than reinstating visitation rights for an unknown amount of time while the question of the applicability of ICWA weaves its way through the court system.

10. In support of this motion, Plaintiffs rely upon the affidavit of Erin Fisher, which is attached as an Exhibit hereto, and an accompanying memorandum of law, which are both incorporated by reference in their entirety herein.

WHEREFORE, Plaintiffs further pray that the Court enter a temporary restraining order stating that ICWA does not require visitation to commence in such a private family dispute, or in the alternative, preventing Cook from seeking visitation until this Court determines the

applicability or constitutionality of ICWA, and for such further and additional relief as this Court may deem appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF filing system, which shall send notification of such filing to the following counsel of record:

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I further certify that I have served a true and correct copy of the foregoing, *via* Certified Mail, Return Receipt Requested, on the following:

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BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

Erin Fisher, Richard Fisher, and Erin Fisher, as Next Friend and Natural Mother of Minor Child, A.C. (collectively "Plaintiffs"), filed the instant lawsuit asking this Court to declare that ICWA §§ 1912(d), (f), 1914, 1915(a), and the 2016 Regulations implementing these provisions, do not apply in purely private actions for termination of parental rights and stepparent adoptions like this one. Plaintiffs further requested a declaration that such an application of ICWA is unconstitutional under the Equal Protection and Due Process provisions of the Fifth and Fourteenth Amendments to the United States Constitution, and the Privileges or Immunities Clause of the Fourteenth Amendment. Plaintiffs requested that this Court permanently enjoin Defendants from invoking ICWA §§ 1912(d), (f), 1914, 1915(a), and the 2016 Regulations, in response to any private termination and stepparent adoption matter that Plaintiffs should choose to file.

In what can only be seen as a response to the instant lawsuit, Defendant Jason Cook recently filed a motion in state court seeking – after more than two years without any contact – to

reinstate visitation rights with A.C.[1] This motion is to request that the Court enter a temporary restraining order stating that ICWA does not require visitation to commence in such a private family dispute, or in the alternative, preventing Cook from seeking visitation until this Court determines the applicability or constitutionality of ICWA. Absent Defendants' prior unconstitutional attempt to assert ICWA in Plaintiffs' state-court action, Cook's parental rights would already be terminated, and he would have no standing to request visitation now. He should not be permitted to benefit from his prior unconstitutional actions, particularly in light of the irreparable harm to Plaintiffs – most particularly A.C. – that would occur if Cook is now allowed to reinstate visitation.

FACTUAL BACKGROUND

Erin Fisher married Jason Cook in September 2004; their child A.C. was born on May 14, 2009. (Fisher Aff., Ex. 1.) During the pregnancy, Cook had little to no contact with Erin Fisher. He worked away from home and lived away from Erin. (Fisher Aff. ¶ 2.) He was absent from Erin's life and did not attend any doctor's appointments or checkups during the pregnancy. (Fisher Aff. ¶ 3.) Before the pregnancy, Cook commenced an extramarital affair that continued throughout the couple's marriage, which ended in a divorce in August 2011. (Fisher Aff. ¶¶ 1, 5.) Beginning with their separation in November 2010, Cook did not financially support A.C. or Erin. (Fisher Aff. ¶ 6.) Erin, who was then a full-time student in nursing school, supported herself and A.C. by exhausting her savings. (*Id.*)

Although Cook retained the right to visit A.C. for a number of years, he rarely exercised that right. (Fisher Aff. ¶ 7.) After A.C. was born, Cook was permitted to visit A.C. every third weekend, but he seldom exercised that right, until December 2013. (Fisher Aff., Ex. 1.) After

[1] Cook's motion to reinstate visitation with A.C. has not been served on Plaintiff.

December 2013, and until February 2016, contact between A.C. and Cook became even more sporadic. (Fisher Aff. ¶ 7.) As explained below, during that time, Cook was arrested and convicted of several drug-related crimes.

In February 2016, an Arkansas state court entered an order changing Cook's visits to exclusively supervised visits, with Cook's mother serving as the supervisor at her house. (Fisher Aff., Ex. 2.) That order also changed the visit schedule to every Wednesday evening for 4 hours, and every other Saturday for 5 hours. (*Id.*) The order designated Erin to provide transportation for A.C. to and from each such visit. (*Id.)* Cook cancelled six visits between March 23, 2016 and August 10, 2016. (Fisher Aff. ¶ 9.) On August 17, 2016, Cook attended his last scheduled supervised visit with A.C. Cook canceled all subsequent supervised visits. (Fisher Aff. ¶ 9.) No visits have occurred between August 17, 2016 and the present time—a period of more nearly three years.

A.C. has few, if any, fond memories from visitation with Cook. For example, during supervised visitation, Cook's mother left A.C. alone with Cook so that she and her husband could go out for dinner. When Erin arrived to pick up her son, A.C. was visibly upset. He told Erin that he was left alone with Cook and was upset because he knew that was against the rules. Later that evening, Cook's mother confirmed A.C.'s account of the day. (Fisher Aff. ¶ 10.) A.C.'s memories of Cook are mostly of times that he slept on the couch for the duration of the visit. If not asleep, Cook would leave A.C. to go outside and smoke cigarettes or play on his phone. (Fisher Aff. ¶ 11.)

Prior to the supervised visits, A.C. recalls a time that Cook locked him in a bedroom while his "friends" came over. His friends stayed and smoked inside the apartment while A.C. remained

locked in a back bedroom. A.C. still remembers the trauma from that day, the smell of the smoke, the noise, and commotion from that day. (Fisher Aff. ¶ 12.)

In February 2016, Erin and A.C. were visited by a state social worker from the Arkansas Department of Human Services. DHS was investigating Cook's relationship with his other known child, born out of wedlock to the same person he had an affair with during Erin's pregnancy with A.C. That child was ultimately found to be neglected by Cook. (Fisher Aff. ¶ 17.) Cook was incarcerated from March 2017 to October 2018, and Cook has made no attempt to visit A.C. after his release from jail in October 2018. (Fisher Aff. ¶ 13, Ex. 3, Ex. 4.)

Cook's recent incarceration is but the latest event in an extensive criminal history. Cook was arrested in Texas in December 2013 for possession of marijuana and paraphernalia and was convicted and sentenced in June 2014 to community service. He was later found in contempt of court for failing to complete the terms of his sentence and was resentenced in March 2015. In September 2015, Cook was arrested in Arkansas for possessing Schedule IV/V controlled substances and paraphernalia. (Fisher Aff., Ex. 3 at 6.) In January 2016, Cook was arrested for, among other charges, possessing Schedule I/II controlled substances, Schedule IV/V controlled substances, and possession of methamphetamine with intent to deliver. (*Id.* at 5-6.) In April 2016, Cook was arrested for contempt of court for failure to pay child support to Erin. (*Id.* at 5.) In May 2016, Cook was arrested for domestic battery of his then-girlfriend. She did not file any charges against him, but the state court entered an order of protection. In December 2016, Cook was arrested for theft of property, which he later pleaded guilty to. (*Id.* at 4.) On February 1, 2017, Cook was arrested for contempt of court for failure to pay child support. (*Id.)* On February 8, 2017, Cook was arrested on a petition to revoke probation. (*Id.* at 3.)

On March 21, 2017, Cook was arrested in Fort Smith, Arkansas on the following charges: non-payment of child support, possession of methamphetamine and cocaine with paraphernalia, possession of paraphernalia, obstructing governmental operations, and failure to appear. (*Id.* at 3.) He remained incarcerated until his sentencing in September 2017. Cook was released from custody on October 2, 2018. but was re-arrested on outstanding warrants for charges of non-payment of child support and sending harassing communications. (Fisher Aff., Ex. 4 at 2.) As noted above, on October 10, 2018, he was released from custody upon payment of a bond. Cook pleaded guilty to the harassing communications charge in December 2018 and received a one-year suspended sentence.

Fortunately for A.C., Richard Fisher entered his life in June 2012, when Richard began dating Erin. (Fisher Aff. ¶ 18.) Their relationship has flourished over the years since the Fishers were married in 2013. Richard and A.C. have a steadfast father–child bond as Richard is the only father A.C. has ever known. A.C. began referring to Richard as "daddy" in 2014, while A.C. only refers to Cook by his first name. (Fisher Aff. ¶ 19.) Richard has been a father to A.C. through every major milestone in A.C.'s life, as far back as seeing him off for his first day of 3-year-old preschool at Christ the King School in August 2012. (Fisher Aff. ¶ 20.) Richard, Erin, and A.C. celebrate all holidays together and take vacations together as any family would. Richard helped coach A.C.'s Little League baseball team and taught A.C. how to swim. A.C. has since competed in multiple swim meets in Arkansas. (Fisher Aff. ¶ 21.) In 2015, Richard taught A.C. how to ride a horse. (*Id.*) Richard takes an active interest in A.C.'s education and helps him with school projects and homework. (Fisher Aff. ¶ 22.) In June 2016, Richard and Erin had a son, with whom A.C. shares a strong sibling bond. (Fisher Aff. ¶ 23.) Of course, there are many more examples, but the summary is that Richard is who A.C. considers to be his dad.

There is no relationship to reestablish or reunify between Cook and A.C. (Fisher Aff. ¶ 24.) Visitation would be psychologically damaging, as A.C. is terrified of seeing Cook. (*Id.*) When Erin informed A.C. that Cook had been released from prison he became very upset and started crying. (*Id.*) A.C. is genuinely scared that Cook will go to the Fishers' home or to his school in an effort to see him. (*Id.*)

ARGUMENT

Cook is asking the state court to apply the Indian Child Welfare Act and reinstate his visitation rights with A.C. Although ICWA is not directly applicable to visitation, whether Cook is exercising visitation could have a direct impact on proving ICWA's active-efforts and termination-burden provisions in future litigation. But because ICWA should never have applied in the first place to Plaintiff's private proceedings, it is necessary for this Court to issue a preliminary injunction or temporary restraining order in order to preserve the *status quo ante* until such time as this Court issues a final ruling on whether ICWA applies in such cases.

STANDARD FOR INJUNCTIVE RELIEF

Federal Rule of Civil Procedure 65 governs the Court's issuance of temporary restraining orders and preliminary injunctions. Whether to issue injunctive relief is a matter addressed to the sound discretion of the trial court. *Benson Hotel Corp. v. Woods,* 168 F.2d 694, 696-97 (8th Cir. 1948). "The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated." *Dataphase Sys., Inc. v. CL Sys., Inc.,* 640 F.2d 109, 113 n. 5 (8th Cir. 1981) (en banc). Specifically,

> The application for a preliminary injunction does not involve a final determination on the merits; in fact, the purpose of an injunction

> pendente lite is not to determine any controverted right, but to prevent a threatened wrong or any further perpetration of injury, or the doing of any act pending the final determination of the action whereby rights may be threatened or endangered, and to maintain things in the condition in which they are at the time and thus to protect property or rights from further complication or injury until the issues can be determined after a full hearing.

Benson Hotel Corp., 168 F.2d at 696-97.

In determining whether to grant a motion for preliminary injunction, a district court weighs the following four considerations: (1) the threat of irreparable harm to the moving party; (2) the movant's likelihood of success on the merits; (3) the balance between the harm to the movant if the injunction is denied and the harm to other party if the injunction is granted; and (4) the public interest. *Dataphase*, 640 F.2d at 114. As the Eighth Circuit explained:

> In balancing the equities no single factor is determinative. The likelihood that plaintiff ultimately will prevail is meaningless in isolation. ln every case, it must be examined in the context of the relative injuries to the parties and the public. If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties' litigant should the injunction be granted, the moving party faces a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less.

ld. at 113. In this case, however, the balancing test is simple, because the Fishers have clearly demonstrated all four considerations and therefore are entitled to injunctive relief.

I. THE FISHERS, ESPECIALLY A.C., WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT GRANTED.

After 10 years of being absent from A.C.'s life, Cook has requested to reinstate his visitation rights for no reason other than to thwart the efforts of this Court to rule on the applicability of ICWA. Though the federal court generally does not consider domestic relations, Cook's request in state court to grant visitation is an attempt to further his arguments on the active-

efforts and termination-burden provisions of ICWA. Because the visitation question has a direct impact on proving ICWA's active-efforts and termination-burden provisions, a failure to issue an injunction will cause irreparable harm to A.C. and the entire Fisher family.

Under ICWA, the party seeking termination of parental rights (Erin Fisher) must prove, in addition to meeting the state-law requirements, that the party has taken "active efforts" to prevent the breakup of the Indian family and that these were unsuccessful. The party must prove this by clear and convincing evidence, including testimony of qualified expert witnesses. 25 U.S.C. §§ 1912(d), (f). Further, the initiating party (Erin Fisher) must prove beyond a reasonable doubt that continued custody of A.C. by Cook is likely to result in serious emotional or physical damage to the child, also on the basis of testimony by expert witnesses. 25 U.S.C. § 1912(f).

Reinstating visitation under the active-efforts provision is the first, and for Cook, most critical step in forcing other active-efforts requirements onto A.C. and the Fisher family. The 2016 Regulations define "active efforts" as including "regular visits with parents." 25 C.F.R. § 23.2. Once Cook obtains such regular visits, he can then demand the other "affirmative, active, thorough, and timely efforts" upon request to the state court—and to require that *the Fishers* comply with and pay for these "active steps", such as bringing A.C. to visit Cook. These protracted "active efforts"—starting with visitation—will therefore undoubtedly result in irreparable financial and emotional harm for the Fisher family.

Lest this Court believe that Plaintiffs are exaggerating the gravity of this situation, one must consider that these "active efforts" are far more burdensome that what could ever be reasonably expected in a non-ICWA custodial situation. If not enjoined now, in addition to visitation, Cook could obtain "active [] assist[ance]" paid for by the Fishers, including access to "community resources including housing, financial, transportation, mental health, substance

abuse, and peer support services." 25 C.F.R. § 23.2. Consider what that means for the Fishers. For example, Erin and Richard Fisher will need to *pay for* Cook's housing (he either lives in his mother's house or is intermittently transient), or substance abuse services (Cook has a long history of substance abuse) for an indefinite period *before* they can prove by clear and convincing evidence that their "active efforts" were unsuccessful.

If the state court grants Cook visitation now, and this Court eventually rules that ICWA does in fact apply (which it does not), Cook will have a manufactured argument that he is making successful efforts to keep the family together and that there is no risk of serious emotional or physical damage to A.C. This argument will be based solely on the fact that he has visitation rights, because it is unlikely he will now make any active effort to be involved in A.C.'s life. Under ICWA, the Fishers have to prove efforts to keep the family together were unsuccessful by clear and convincing evidence and prove beyond a reasonable doubt that continued custody of A.C. by Cook is likely to result in serious emotional or physical damage to the child. To meet the active-efforts and termination-burden provisions, 25 U.S.C. §§ 1912(d), (f), Erin Fisher and A.C. would thus be forced to have an artificial relationship with Cook (which, if like their prior relationships, will consist of no more than broken promises and abandoned visitation sessions).

None of this would have happened had it not been for Defendants' unconstitutional use of ICWA to block Plaintiffs' prior state-court efforts at terminating Cook's relationship. Absent ICWA, Cook's parental rights would have already been terminated, and Richard would already be A.C.'s legal father. Similarly, if this Court ultimately rules that ICWA does not apply, the extreme emotional distress that will occur to Plaintiffs from having been forced to interact with Cook will have been for absolutely no reason. The risk of this type of irreparable harm is exactly the type of situation a preliminary injunction can prevent. A.C. has absolutely no relationship with Cook and

will be forced to suffer through supervised visits (or even worse, cancelled visits) for months or even years until the applicability of ICWA is determined. And given Cook's well-documented history of scheduling visits and cancelling them at the last minute, commencing visitation now forces the Fishers and A.C. to remain available for visits, reschedule their school, church, and cultural activities, and put their life as a family on hold, just so Cook can then cancel the visit at the last minute. A young child should not have to endure years of turmoil that other children of other races would not have to endure in similar circumstances. Absent a preliminary inunction, therefore, the Fishers' irreparable harm is obvious.

II. THE HARM TO THE FISHER FAMILY IS FAR GREATER THAN TO COOK IF THE INJUNCTION IS NOT GRANTED.

As explained above, the risk to the Fisher family is far greater than that to Cook. Cook has not been a stable or supportive parent since before A.C. was even born. He has not paid child support, has not attempted to see A.C. in nearly three years and rarely tried even when he had supervised visitation rights. If this injunction is not granted, A.C. and the Fisher family will suffer emotional distress over being forced to see Cook. On the other hand, if this injunction is granted, Cook will not suffer any harm because he currently does not see A.C. and would not have even requested visitation but for the hope of thwarting Plaintiffs' attempts to terminate his rights.

III. IT IS LIKELY THE FISHERS WILL SUCCEED ON THE MERITS.

Plaintiffs would like to terminate Cook's parental rights over A.C. and to have Richard legally adopt A.C. as his own son. Plaintiffs attempted to do this in an action in Arkansas state court. However, that action, if it proceeded would have been subject to a separate set of laws, due solely to the fact that A.C. qualifies as an "Indian child" under ICWA. The question this Court must determine is whether Sections 1912(d) and (f) (the active-efforts and termination-burden

provisions) of ICWA apply in a private severance action (as opposed to a case involving DHS removal), and if so, whether such an application would be constitutional.

Sections 1912(d) and (f) of ICWA were not designed to apply to a private termination case in which a birth parent seeks to protect the best interests of her child by severing the rights of an unfit birth parent. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655, 133 S. Ct. 2552, 2562-64, 186 L. Ed. 2d 729 (2013), (concluding that it made no sense to apply these and other provisions of ICWA in a case in which no Indian family was faced with "breakup"). In other words, whatever familial ties Cook had with Erin and could claim with A.C. were already broken when he abandoned them while Erin was pregnant with A.C. A.C.'s true family – the one that consists of Richard, Erin, and their other son – is unbroken and complete. In fact, granting relief to Plaintiffs will *enhance* that sound family bond, notwithstanding Cook's attempts to break that bond by seeking visitation with A.C.

Congress enacted ICWA specifically to address the problem of "removal, often unwarranted, of [Indian] children by *nontribal public and private agencies* and [their] place[ment] in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4) (emphasis added). That concern is absent in a privately-initiated severance proceeding like the one at issue here. There is no risk here of the sorts of abuses ICWA was meant to prevent and remediate. No existing Indian family is threatened with breakup in this case, and a mother is simply acting in the best interest of her child.

This Court can avoid the constitutional issue addressed below simply by holding that ICWA does not apply in a privately-initiated severance proceeding. Doing so will respect the equal protection and due process rights of the parties and will rationally interpret ICWA. *Adoptive Couple,* 133 S. Ct. at 2565 (interpreting ICWA narrowly because reading it broadly, in a way that

"put[s] certain vulnerable children at a great disadvantage solely because an ancestor - even a remote one - was an Indian," and "override[s] the mother's decision and the child's best interests" would "raise equal protection concerns."). If, however, the Court finds that those sections are applicable to this situation, it should also declare that such an application is unconstitutional.

a. ICWA is not applicable to private severance actions

Congress designed ICWA to address the problem of *"nontribal public and private agencies"* "remov[ing] ... children" and "plac [ing them] in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4) (emphasis added). ICWA was enacted in response to concerns that state officials and private agencies were removing children from the custody of their birth parents without sufficient justification or for reasons that were culturally biased. *See generally* Matthew L. M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship* (Apr. 28, 2016), available at http://ssrn.com/abstract=2772139.

But ICWA was not designed to impose a federal family law on private custody decisions. Indeed, ICWA's "congressional findings reveal the intent that it apply only to situations involving attempts of public and private agencies to remove children from their Indian families, not to inter-family disputes." *Comanche Nation* v. *Fox,* 128 S.W.3d 745, 753 (Tex. App. 2004). For example, ICWA does not apply to divorce proceedings. 25 U.S.C. § 1903(1). Nor does it apply to cases in which a child is removed from the custody of one parent and placed with another, because such a proceeding "does not equate with removal of the child from its family, and placement in a foster or adoptive home," which is what ICWA was written to address. *In re M.R..*, 7 Cal. App. 5th 886, 904-05 (2017).

In *In re J.B.*, 178 Cal. App. 4th 751 (2009), the California Court of Appeal held that Section 1912(f) of ICWA, which requires a showing that "continued custody of the child by the parent or

Indian custodian is likely to result in serious emotional or physical damage to the child," *does not apply* in a dispute between two birth parents. In so holding, the Court noted that such a reading "comports with the remainder of the ICWA statutory scheme and the express purpose of ICWA." *Id.* at 758. As the Montana Supreme Court has more succinctly explained, ICWA was "not directed at disputes between Indian families regarding custody of Indian children; rather, its intent is to preserve Indian culture *[sic]* values under circumstances in which an Indian child is placed in a foster home or other protective institution." *In re Bertelson*, 617 P.2d 121, 125 (Mont. 1980).

Furthermore, in *Adoptive Couple*, the Supreme Court called Section 1912(d) "a sensible requirement when applied to *state social workers* who might otherwise be too quick to remove Indian children from their Indian families," but held that "[c]onsistent with the statutory text," it "applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights." 133 S. Ct. at 2563 (emphasis added). As in that case, no "breakup" of an Indian family is threatened here. If the petition is granted, A.C. will remain with his biological mother in the home of his mother and stepfather. Further, there is no breakup here because Cook currently does not have custody or even visitation with A.C. Such a ruling would allow Mr. Fisher, in compliance with Erin's wishes, to adopt a child, A.C., who considers him his dad.

Regulations promulgated by the Bureau of Indian Affairs (BIA) in 2016 for the application of ICWA also support the conclusion that ICWA does not apply to private termination cases. Those regulations say that the active-efforts provision only applies to "*agencies*" and "requires substantial and meaningful actions *by agencies* to reunite Indian children with their families" and is triggered when children are *"removed* from their homes." 81 Fed. Reg. 38,778, 38,790 (2016) (emphasis added). But in a *private* severance action such as this one, no *agency* is involved, and no *removal* is threatened. The 2016 Regulations recognize a consistent distinction between private

action and state action. *See, e.g.*, 81 Fed. Reg. at 38,814 ("Congress found that '*agencies* of government often fail to recognize immediate, practical means to reduce the incidence of neglect or separation.' ... ICWA's active-efforts requirement ... ensure[s] that *State actors* identify these 'means to reduce the incidence of neglect or separation,' and provide necessary services to parents.") (quoting H.R. Rep. No. 95-I386, at 12) (emphasis added); *id.* at 38,865 ("Where an *agency* is involved... active efforts must involve … and may include… *regular visits with parents*.") (codified at 25 C.F.R. § 23.2) (emphasis added).

This case is like *Adoptive Couple*, *supra*, in which the Indian birth father abandoned the child, 133 S. Ct. at 2557, or like *In re S.D.*, 599 N.W.2d 772 (Mich. App. 1999), in which 'the family" was "already broken up by the time the termination proceedings were initiated," and where the biological father did not "financially support" the child "for nearly two years before the termination proceedings," "did not take part in caring for" the child "or provide a place for them to live with him," and where the biological father "was also separated from his family by virtue of his imprisonment." *ld.* at 775. In such circumstances, the Michigan Court of Appeals refused to apply Section 1912(d) of ICWA. *Id.*

Paying attention to the context of ICWA makes plain that private disputes between birth parents, in which a mother initiates a severance action to promote the best interests of her child, are simply not what ICWA was designed to address. *Bertelson*, 617 P.2d at 125; *Fox*, 128 S.W.3d at 753; *In re J.B.*, 178 Cal. App. 4th at 757-58; *In re M.R.*, 7 Cal. App. 5th at 904-05; *contra*, *In re T.A.W.*, 186 Wash.2d 828 (2016). It is thus likely that Plaintiffs will be successful on the merits of their case because ICWA §§ 1912(d) and (f) do not apply in a privately-initiated severance action such as this one. Holding otherwise would make it harder for people like A.C., Erin, and Cook to move on with their lives and arrive at a sensible solution. Such a mechanistic application

of ICWA §§ 1912(d) and (f) is also unconstitutional because, as explained below, it violates the Equal Protection, Due Process, and Privileges or Immunities Clauses of the United States Constitution.

IV. TO APPLY ICWA TO A PRIVATE SEVERANCE ACTION WOULD BE UNCONSTITUTIONAL.

If Sections 1912(d) and (f) *do* apply to private severance actions, then those sections are unconstitutional, and this Court should decline to apply them. These sections and the corresponding 2016 Regulations are unconstitutional under both the Equal Protection Clause and under the Due Process and Privileges or Immunities Clauses because they impermissibly intrude on fundamental rights of A.C., Erin, and Richard Fisher, individually and as a family unit.

a. If ICWA applies, it does so based on A.C.'s racial or national origin and is impermissible under the Equal Protection Clause.

If Sections 1912(d) and (f) apply here, they will impose a separate set of rules on the parties solely on the basis of their ethnic and/or national origin - a literal system of "separate but equal" that is plainly unconstitutional. *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954). Indeed, the Supreme Court has already declared that it "would raise equal protection concerns" to apply ICWA in a way that "override[s] the mother's decision and the child 's best interests" and imposes "a great disadvantage solely because an ancestor - even a remote one - was an Indian." *Adoptive Couple*, 133 S. Ct. at 2565. That is precisely what will happen if Sections 1912(d) and (f) apply to this case.

But for ICWA, termination of Cook's parental rights and adoption of A.C. by Richard Fisher would be governed by Arkansas state law. But because A.C. is classified as an "Indian child" under ICWA, such termination and/or adoption is potentially governed by ICWA, specifically, 25 U.S.C. §§ 1912(d), (f), 1914, 1915(a), and applicable federal regulations. Rules

& Regs., Dep't of the Interior, Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778 (2016) (codified at 25 C.F.R. pt. 23) ("2016 Regulations"). These federal-law provisions impose restrictions and burdens on Plaintiffs' attempts to terminate Cook's parental rights, and Richard Fisher's attempt to adopt A.C., in any state-court action. These restrictions and burdens are greater than those under Arkansas law and are imposed on Plaintiffs solely because A.C. is classified as an "Indian child." Plaintiff's private termination and stepparent adoption matter is treated differently based solely on A.C.'s race, color, national origin, or political affiliation.

Under Arkansas law, a biological parent (Erin Fisher) initiating a termination-of-parental-rights proceeding against the other biological parent (Cook) must prove statutory grounds for termination and that such termination is in the child's best interests. Ark. Code Ann. § 9-9-220. Both factors need only be demonstrated by clear and convincing evidence. ICWA and the 2016 Regulations, however, impose additional obligations in a termination-of-parental-rights proceeding for an "Indian child" beyond those created by Arkansas law. Under ICWA, the party seeking termination of parental rights (Erin Fisher) must prove, in addition to meeting the state-law requirements, that the party has taken "active efforts" to prevent the breakup of the Indian family and that these were unsuccessful. The party must prove this by clear and convincing evidence, including testimony of qualified expert witnesses. 25 U.S.C. §§ 1912(d), (f). Further, the initiating party (Erin Fisher) must prove beyond a reasonable doubt that continued custody of A.C. by Cook is likely to result in serious emotional or physical damage to the child, also on the basis of testimony by expert witnesses. 25 U.S.C. § 1912(f).

Under Arkansas law, no efforts to reunify Cook with A.C. are currently needed because Cook has met the normal standards imposed under Arkansas law to be held as having "abandoned" A.C. Cook has failed to support or maintain regular contact with A.C. for more than one year,

which is all that is required. Ark. Code Ann. §§ 9-9-220(c)(1), 9-27-341(b)(3)(B)(ix)(a). Because A.C. is an "Indian child," however, the usual standards of Arkansas law to terminate parental rights are not enough. Instead, under ICWA, Erin Fisher needs to prove she took "active efforts" to avoid such a termination over an indefinite period until it can be proved that such efforts have been unsuccessful. *See also* 25 C.F.R. § 23.2 (defining "active efforts" as "includ[ing] … regular visits with parents"). No exception from the ICWA active-efforts provision is available when aggravated circumstances such as abandonment are present.

Moreover, under Arkansas law, once a parent's rights are terminated, that termination is final. But because A.C. is an "Indian child," a termination of Cook's rights would not be final. For two years after such termination Defendants can seek to invalidate the termination of Cook's parental rights. 25 U.S.C. § 1914. Thus, even if a state court terminates Cook's parental rights under Arkansas law, ICWA allows Cook and/or the Tribe to seek to invalidate that termination "upon a showing that such action violated … sections 1912, [or] 1913," 25 U.S.C. § 1914, specifically, the active-efforts and termination-burden provisions, 25 U.S.C. §§ 1912(d) and (f).

If the normal standards of Arkansas law applied to Plaintiffs, furthermore, consent to adoption would also not be required from Cook because A.C. is in the custody of his mother, and because for a period of one year Cook "has failed significantly without justifiable cause (i) to communicate with [A.C.] or (ii) to provide for the care and support of [A.C.] as required by law or judicial decree." Ark. Code Ann. § 9-9-207(a)(2). The one-year period does not have to be immediately before the filing of the petition for adoption. But because Plaintiffs are subject to ICWA and the 2016 Regulations, they are required to satisfy ICWA §§ 1912(d) and (f) in state court before Richard can adopt A.C.

Finally, under Arkansas law, Richard's stepparent adoption would be routine and would require no further proof other than the consent of his wife, Erin. Ark. Code Ann. § 9-9-204(4)(i). But under ICWA, stepparent adoptions are governed by 25 U.S.C. § 1915(a), which requires Plaintiffs to show good cause exists to deviate from ICWA's statutory placement preferences.

Arkansas law creates a meaningful and express difference between state-initiated termination-of-parental-rights and foster-parent-adoption proceedings, on the one hand, and private termination-of-parental-rights and stepparent-adoption proceedings on the other. *Compare* Ark. Code Ann. § 9-27-341 *with id.* §§ 9-9-204, 9-9-220. But ICWA §§ 1912(d), (f), 1915(a) do not provide the same meaningful and express distinction. Thus, A.C., Erin, and Richard, who would have obtained the protection of Arkansas state law's private-proceeding provisions but for A.C.'s "Indian child" designation, instead are subject to the provisions of ICWA and the 2016 Regulations. If ICWA and the 2016 Regulations govern Plaintiffs' private termination and stepparent adoption matter, they will be subject to and have to undergo a process that is more burdensome and less protective of their rights than corresponding Arkansas state law. Even if this Court were to decide that ICWA provisions are inapplicable to Plaintiffs (or even if Cook voluntarily relinquished his parental rights), Plaintiffs will remain subject to ICWA because the Tribe has standing to seek reversal of such termination under ICWA's invalidation provision, 25 U.S.C. § 1914, for *two years* after Cook's rights are terminated or relinquished. None of these burdens would exist except for A.C.'s classification as an "Indian child."

ICWA applies to cases involving "Indian child[ren]," which it defines as any unmarried minor who "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). The *sole* relevant criterion for tribal membership is *biology*. The Cherokee Nation Constitution makes

lineal descent from the Dawes Commission Rolls as the sole criterion for tribal membership. Cherokee Nation Const. art. III, § 1. DNA is *all* that matters-not cultural affiliation, political affiliation, residency, or even legal adoption. Thus, the application of Sections 1912(d) and (f) to this case would constitute a race-based classification.

In *Rice v. Cayetano*, 528 U.S. 495, 515 (2000) (citation omitted), the Court defined a racial classification as a law that "singles out identifiable classes of persons … solely because of their ancestry or ethnic characteristics." *Rice* involved a law that only allowed people who were direct descendants of aboriginal, pre-contact Hawaiians, and who had a certain minimum blood quantum, to vote. *Id.* at 515-16. The Court concluded that "[a]ncestral tracing of this sort" creates a legal category "which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." *Id.* at 517. Because Hawaii's law singled out a class of people solely based on their ancestral or ethnic characteristics, and accorded them different rights, that law "used ancestry as a racial definition and for a racial purpose." *Id.* at 515. It was therefore subject to strict scrutiny.

In *Morton v. Mancari*, 417 U.S. 535 (1974), the Court applied the rational basis test to a law that treated tribal members differently from non-members, on the grounds that that distinction was a political, rather than racial one. Yet the Court was careful to note that the law at issue was "not directed towards a 'racial' group consisting of 'Indians,'" *id.* at 554 n.24, unlike ICWA. *Rice* distinguished *Mancari*, noting that *Mancari* did not allow Congress to establish race-based classifications under the guise of political ones. 528 U.S. at 519-20. The Ninth Circuit has also repeatedly explained that *Mancari* does not mean that laws treating Indians differently from non-Indians are categorically subject to rational basis review. *See, e.g., Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("the notion that distinctions based on Indian or tribal status can

never be racial classifications subject to strict scrutiny" has been squarely rejected); *see also, Malabed v. North Slope Borough*, 335 F.3d 864, 868 n.5 (9th Cir. 2003*); Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. ,* 154 F.3d 1117, 1120 (9th Cir. 1998).

Unlike the law upheld in *Mancari*, ICWA is directed toward Indians generically, defined not by political membership in a tribe, but solely by their genetic "Indian" ancestry. As the California Court of Appeal has held, *Mancari* applies only where a classification involved "uniquely Native American concerns," but "child custody or dependency proceedings [do not] involve uniquely Native American concerns." *In re Santos Y.*, 92 Cal. App 4th 1274, 1320-21 (2001).

Even if ICWA does not establish a racial classification, it does establish a national-origin-based classification. *Dawavendewa,* 154 F.3d at 1120. Such classifications are also subject to the same strict scrutiny as racial classifications. *Jana-Rock Constr., Inc.* v. *New York Stale Dep't of Econ. Dev.*, 438 F.3d 195, 204-05 (2d Cir. 2006); *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440 (1985) ("when a statute classifies by race, alienage, or national origin ... these laws are subjected to strict scrutiny.").

Any law that establishes a race-or national-origin-based classification must satisfy the highest degree of judicial scrutiny because "[d]istinctions between citizens solely because of their ancestry" are "odious" in a nation "founded upon the doctrine of equality." *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943). Such classifications must be narrowly tailored to advance a compelling government interest. *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). Given that the government interest involved in ICWA is to remediate and prevent abusive practices "by nontribal public and private agencies," 25 U.S.C. § 1901(4), which is not at issue in this case- and that applying ICWA here would actually *contradict and override* Mrs. Fisher's fundamental right

to direct the upbringing of her child-applying ICWA here cannot satisfy strict scrutiny. *Cf. Troxel* v. *Granville*, 530 U.S. 57,66 (2000)

Even assuming this classification is subject to rational-basis scrutiny under *Morton*, there is no rational relationship between the purposes for which ICWA was enacted and the way in which these specific sections operate, and the private family dispute context that we have here. Congress designed ICWA to address the problem of *"nontribal public and private agencies"* "remov[ing] ... children" and "plac[ing them] in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4) (emphasis added). ICWA was enacted in response to concerns that state officials and private agencies were removing children from the custody of their birth parents without sufficient justification or for reasons that were culturally biased. *See generally* Matthew L. M. Fletcher & Wenona T. Singel, *Indian Children and the Federal- Tribal Trust Relationship* (Apr. 28, 2016). That concern is absent in a privately-initiated severance proceeding like the one at issue here. This Court does not have to decide what level of scrutiny applies at this time; but under either strict scrutiny or rational-basis review, Plaintiffs are likely to succeed on the merits.

b. Applying ICWA Sections 1912(d) and (f) would violate the Substantive Due Process rights of the parties, or alternatively the Fourteenth Amendment's Privileges or Immunities Clause.

If applied here, Sections 1912(d) and (f) would deprive the parties of their right to an individualized, race- and national-origin-neutral determination of their dispute. It is a fundamental requirement of due process[2] that a court take the specific circumstances and interests into account

[2] Because the "appropriate vehicle" for applying the federal Constitution to protect individual fundamental rights "may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause," *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch. J., concurring), the analysis under the Privileges or

in any case, rather than applying blanket rules in disregard of the specific facts. *See Santosky*, 455 U.S. at 759; *see also Arkansas Dept. of Human Servs. v. Cole*, 380 S.W.3d 429, 438 (Ark. 2011) (due process abhors presumptions and instead requires courts to "arrive at what is in the child's best interest" by "look[ing] at all the factors … and make the best-interest determination on a case-by-case basis"); *Dickason* v. *Sturdavan*, 50 Ariz. 382 (1937) (due process forbids application of blanket presumptions in child welfare cases); *Adoption of Kelsey S.*, 1 Cal. 4th 816, 823 P.2d 1216 (1992) (same). Instead of providing such a case-by-case determination, ICWA Sections 1912(d) and (f) and the corresponding 2016 Regulation, 25 C.F.R. § 23.2, create a blanket presumption that "regular visits with parents" is in A.C.'s best interest. The lack of individualized determination is impermissible under the Fourteenth Amendment.

Applying ICWA Sections 1912(d) and (f) in the private severance context would also deprive A.C., Erin Fisher, and Richard Fisher of another due process right: the right to establish familial associations without unreasonable interference by the government. Not only is a parent's right to direct the upbringing of her child fundamental, *Troxel*, *supra*, but the right to form families is fundamental. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015). Laws interfering with such choices must satisfy strict scrutiny. *Loving v. Virginia*, 87 S. Ct. 1817 (1967). Sections 1912(d) and (f), if applied here, would subject the parties to a separate and substandard set of substantive and procedural rules "on so unsupportable a basis as [their] racial classifications" and would therefore deprive them "of liberty without due process of law." *Loving*, 388 U.S. at 12.

Immunities Clause will essentially be identical to the one established as substantive due process jurisprudence. *See also McDonald v. Chicago*, 561 U.S. 742, 804–858 (2010) (Thomas, J., concurring in part and concurring in judgment) (documenting evidence that the "privileges or immunities of citizens of the United States" include, at minimum, the individual rights enumerated in the Bill of Rights). Therefore, Plaintiffs discuss relevant precedent that was developed under the Due Process Clause, and also make the same arguments under the Privileges or Immunities Clause.

In *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Supreme Court reversed a Florida court's ruling that denied a mother custody because she was living with a man of another race. It found that "the law cannot, directly or indirectly" interfere with family relationships for racial reasons. *Id.* at 433. To impose different, and more burdensome rules, on Plaintiffs based on A.C.'s race or national origin-rules that do not apply to similarly situated children of other races or national origins-is to inappropriately interfere with their fundamental rights, to apply a race-based blanket presumption, and to deny the parties their right to equal treatment under the law, contrary to *Palmore*. *See also In re Temos*, 450 A.2d 111, 120 (Pa. Super. 1982) ("[q]uestions about race are in no respect 'appropriate'" "[i]n a child custody case"). Because of the clear violation of substantive due process, it is likely the Fishers will be successful on the merits of their claims, and thus a preliminary injunction is appropriate.

V. THE PUBLIC INTEREST WILL BE PROMOTED IF THE INJUNCTION IS GRANTED.

American citizens have a fundamental right to family integrity and to establish familial associations without unreasonable interference by the government. Not only is a parent's right to direct the upbringing of her child fundamental, *Troxel*, *supra*, but the right to form families is fundamental. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015). Where, as here, there is a strong personal interest of the Fishers' to prevent emotionally distressing interactions between Cook, A.C., Erin, and Richard. There is certainly a strong public interest in preventing avoidable emotional trauma to a child. The public interest of not intruding the sanctity and dignity of the family unit—as here, the Fisher family—easily outweighs any interest in enforcing ICWA or the 2016 Regulations against Plaintiffs. If this Court grants the injunction, A.C. will not have to suffer through months or even years of awkward and distressing encounters with a person that has never been in his life while waiting for a determination of the applicability or constitutionality of ICWA.

CONCLUSION

Though the Court can grant a temporary restraining order or preliminary injunction when certain elements outweigh others, that is not an issue here. It is clear that allowing Cook to suddenly reappear in A.C.'s life will certainly cause severe emotional harm to a child, his mother, and the person he considers his dad. The harm to the Fisher family is far greater than to Cook, who has made little effort over A.C.'s life to be involved. Further, the Fisher family will likely be successful on the merits of their claim that ICWA does not apply here, or is unconstitutional, and thus there will be no reason for Cook to have visitation. Finally, the public interest of protecting a vulnerable child and his family is far more important than reinstating visitation rights for an unknown amount of time while the question of the applicability of ICWA weaves its way through the court system. Therefore, the Court should grant a preliminary injunction or temporary restraining order to prevent Cook from reinstating his visitation rights until the applicability of ICWA has been determined by this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF filing system, which shall send notification of such filing to the following counsel of record:

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