IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; FRANK NICHOLAS LIBRETTI; HEATHER LYNN LIBRETTI; ALTAGRACIA SOCORRO HERNANDEZ; JASON CLIFFORD; and DANIELLE CLIFFORD,

and

STATE OF TEXAS; STATE OF LOUISIANA; and STATE OF INDIANA,

Plaintiffs,

v.

RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior; BRYAN RICE, in his official capacity as Director of the Bureau of Indian Affairs; JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary for Indian Affiars; the BUREAU OF INDIAN AFFAIRS; and the UNITED STATES DEPARTMENT OF INTERIOR.

Defendants.

Civil Action No.: 4:17-cv-868-O

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 7(b) of the Federal Rules of Civil Procedure and Local Rule 7.2(b), the Goldwater Institute ("GI") hereby respectfully moves for leave to appear as amicus curiae for the purpose of filing the attached brief in support of the Plaintiffs' motion for summary judgment. GI's legal and policy expertise with regard to the Indian Child Welfare Act ("ICWA") enables it

to contribute to this Court's consideration of the motion. Defendants have consented to the filing of this brief, and granting this motion would not prejudice any party. The accompanying brief complies with all applicable rules.

I. IDENTITY AND INTEREST OF AMICUS CURIAE

GI was founded in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government and individual rights through research papers, editorials, policy briefings and forums. Through its Scharf–Norton Center for Constitutional Litigation, the Institute represents clients and participates as amicus curiae in cases involving constitutional liberty.

GI is deeply familiar with ICWA, which is at the heart of this case. GI's Equal Protection for Indian Children project is devoted to addressing ICWA's many constitutional flaws and protecting the right of all Native Americans to equality before the law. Through that project, the Institute is currently litigating ICWA cases across the country, including in the United States Supreme Court (*Renteria v. Shingle Springs Band of Miwok Indians* (No. 17-789) (*cert. denied* Feb. 20, 2018)), the Ninth Circuit Court of Appeals (*Carter, et al. v. Tahsuda, et al.*, 9th Cir. No. 17-15839 (pending)), and several state courts. GI has also appeared as amicus curiae in ICWA cases in Texas (*In re A.L.M.*, Tex. Ct. App. Nos. 02-17-00298-CV & 02-17-00300-CV), Washington (*In re T.A.W.*, 383 P.3d 492 (Wash. 2016)), California (*In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (2016), *cert. denied sub nom. R.P. v. Los Angeles Cnty. Dept. of Children & Family Servs.*, 137 S. Ct. 713 (2017)), and elsewhere.

GI scholars have also published ground-breaking research on the well-intentioned but profoundly flawed workings of ICWA. *See, e.g.*, Mark Flatten, *Death on a Reservation*

(Goldwater Institute, 2015)[1]; Timothy Sandefur, *Escaping The ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1 (2017); Timothy Sandefur, *Suffer the Little Children*, REGULATION, Winter 2017-18.[2] GI believes its significant litigation and public policy experience in cases involving ICWA will aid this Court in consideration of the merits of this case.

II. GRANTING THE MOTION TO APPEAR AS AMICUS CURIAE WOULD PREJUDICE NO PARTY AND WOULD ASSIST THIS COURT'S CONSIDERATION OF THE MOTION

This motion is made well in advance of the hearing and of the close of briefing on this motion, so Defendants will have sufficient time to answer any points raised in the amicus brief. Defendants have consented to the filing of this motion.

Amicus curiae provides a helpful service in "advis[ing] a court upon questions of law or practice arising in a proceeding." *Flinn v. Krotz*, 293 S.W. 625, 626 (Tex. Civ. App.—San Antonio 1927), and when the amicus "has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide," the court should grant leave for an amicus to appear. *Community Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999).

The proposed amicus brief addresses in depth some of the constitutional problems caused by ICWA—and particularly the application of a different and less-protective set of laws to off-reservation child welfare and adoption cases due solely to a child's race. The brief argues that ICWA violates the rights of Native American children, and that they should be treated the same

[1] https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2015/8/14/Final%20Epic%20pamplet.pdf
[2] https://object.cato.org/sites/cato.org/files/serials/files/regulation/2017/12/regulation-v40n4-2.pdf

as children of other ethnicities. ICWA's separate treatment of Native American children cannot be justified on the theory of *Morton v. Mancari*, 417 U.S. 535 (1974). That is because ICWA, unlike the statute at issue in *Mancari*, is triggered exclusively by a child's genetics. Amicus also argues that ICWA exceeds federal authority under the Commerce Clause and intrudes on the constitutionally reserved authority of the plaintiff states. *Cf. Printz v. United States*, 521 U.S. 898 (1997).

CONCLUSION

The motion for leave to file should be granted.

RESPECTFULLY SUBMITTED this 25th day of April, 2018 by:

/s/ Matthew Miller
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CERTIFICATE OF SERVICE

Document Electronically Filed and Served by ECF this 25th day of April, 2018.

/s/ Kris Schlott
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