Nos. 21-376, 21-377, 21-378, 21-380

In the Supreme Court of the United States

DEBRA HAALAND, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, ET AL.,
PETITIONERS, CROSS-RESPONDENTS

v.

CHAD EVERET BRACKEEN, ET AL.
RESPONDENTS, CROSS-PETITIONERS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR ROBYN BRADSHAW, GRANDMOTHER AND ADOPTIVE PARENT OF P.S. ("CHILD P.") AS *AMICUS CURIAE* IN SUPPORT OF TRIBAL AND FEDERAL DEFENDANTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Robyn Bradshaw is the grandmother and adoptive parent of P.S.—the minor referred to below as "Child P." She raised P.S. from birth, but was separated and (later) actively kept away from her granddaughter. After years of persistence, Ms. Bradshaw eventually adopted P.S. Cross-Respondents Jason and Danielle Clifford sought to defeat that adoption by contesting it in the Minnesota courts. They lost—entirely, and at every level—on the merits of their claims. They did not seek review of those losses in this Court. Ms. Bradshaw's adoption of P.S. has been final since May 2020.

Adopting a child is a selfless, lifelong commitment—full of private trials and triumphs. But while P.S.'s adoption has become national news, Ms. Bradshaw has largely been denied a voice in her own narrative. Others have twisted the facts concerning the adoption of her granddaughter to their own ends—in national media, judicial proceedings, and filings before this Court. But now, Ms. Bradshaw is sharing her story—and it is one of grace and perseverance in the face of long odds.

Ms. Bradshaw has never been a party to this litigation. She files this brief to explain that her adoption of P.S. is final. Longstanding principles of collateral estoppel preclude the Cliffords from pressing here the same claims they fully litigated—and lost—in Minnesota. Further, the Minnesota litigation

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[1] This brief was not authored, in whole or in part, by counsel for any party. No person other than *amicus* and her counsel contributed monetarily to its preparation or submission. All parties consent to its filing.

illustrates why Article III bars the claims of the Individual Plaintiffs—including the Cliffords—in this Court: their future injury is too speculative and the Cliffords' claims are not redressable.

INTRODUCTION AND SUMMARY OF ARGUMENT

These consolidated cases, which arose in Texas, involve the adoption of three children. One of those children is P.S., whom the Cliffords fostered and unsuccessfully tried to adopt. P.S. was instead adopted by her grandmother, *amicus* Robyn Bradshaw.

Applying Minnesota's eleven-factor best-interests-of-the-child test, the Minnesota court presiding over P.S.'s adoption found that "Ms. Bradshaw deeply loves [P.S.]," that she "consistently puts [P.S.]'s needs first," that "they share a strong bond and a secure attachment," and that "[i]t is in [P.S.]'s best interests to be placed for adoption with Ms. Bradshaw." App. 100a, 107a-108a. The Cliffords had a full and fair opportunity to challenge that adoption in the Minnesota courts. And they made every attempt to defeat that adoption except one: they did not seek this Court's review of their losses in Minnesota, which are now final. The factual and legal record from the Minnesota proceedings disposes of the Cliffords' claims here, and it may not be ignored.

Principles of issue preclusion bar the Cliffords' claims. As participants in P.S.'s custody proceedings, they had a full and fair opportunity to litigate P.S.'s preadoptive and adoptive placement. They and their counsel aggressively litigated those issues, including whether the Indian Child Welfare Act (ICWA) "violates equal protection," "exceeds Congress's Article I authority," or "violates the anticommandeering

doctrine." They appeared at two evidentiary hearings, filed two appeals, and twice unsuccessfully sought the Minnesota Supreme Court's review. They also had two opportunities to seek certiorari in this Court—and twice declined to do so.

Yet the Cliffords now seek another bite at the apple, despite the fact that Ms. Bradshaw's adoption of P.S. has been final since May 2020. The Fifth Circuit addressed the Cliffords' declaratory judgment claims without acknowledging—much less giving deference to—the final determinations of the Minnesota courts, which directly conflict with those of the Fifth Circuit.

Most notably, both en banc opinions declared that Ms. Bradshaw's adoption of P.S. was not final—that she "has not yet been adopted, [so] the Cliffords may still petition for custody" (Pet. App. 63a (Dennis, J.)), and that her adoption "has not been finally approved[,]" and "until it is, the Cliffords remain eligible to adopt her" (*id*. at 211a (Duncan, J.)).[2] Those statements are demonstrably incorrect: The adoption of P.S. had been final for nearly a year when the court below erroneously concluded otherwise.

The Fifth Circuit's error is highly consequential. "Disposition of th[is] federal action, once the [concurrent] state-court adjudication [was] complete," is "governed by preclusion law." *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005). The final Minnesota court "findings bind [this Court] under the doctrine of collateral estoppel." *Washington State Dep't of Licensing* v. *Cougar Den, Inc.*, 139 S. Ct. 1000, 1019 (2019) (Gorsuch, J., concurring). In short, black-letter preclusion principles bar the Cliffords from

[2] "Pet. App." is the Petition Appendix in No. 21-378.

continuing to maintain their claims in this Court—an issue which the Court can (and should) address sua sponte. Cf. *Arizona* v. *California*, 530 U.S. 392, 412 (2000).

The final Minnesota adoption proceedings also confirm that the Individual Plaintiffs lack Article III standing. Minnesota law—not ICWA—defeated the Cliffords' claims. Any allegation that ICWA would hamper a future adoption by the Individual Plaintiffs is too speculative to support Article III standing. This fact is further borne out by the Brackeens' child-custody litigation regarding Y.J.R. in Texas. Also, the Cliffords lack any "relationship between the judicial relief requested and the injury suffered"—and therefore lack standing. *California* v. *Texas*, 141 S. Ct. 2104, 2115 (2021) (citation and quotations omitted). The Minnesota judgment is final and no resolution of the questions presented can change that fact. Independently, the Cliffords' litigation strategy has excluded any Minnesota decision-maker capable of redressing their alleged injury from this case. The Cliffords' constitutional claims are thus not redressable and the Court's resolution of them would be advisory.

The Court should reject the Cliffords' claims.

RELATED PROCEEDINGS

In July 2016, by virtue of their role as P.S.'s foster parents, the Cliffords became participants in P.S.'s child custody case. Under Minnesota law, they enjoyed extensive rights in those proceedings, including notice and the right to participate and present evidence. Minn. Stat. § 260C.607 subd. 2, 3.

For the convenience of the Court, *amicus* has appended to this brief the opinions of Minnesota courts bearing on the merits of the Cliffords' motion for adoptive placement (hereinafter "App."). Those opinions are listed in the table of contents. Except as otherwise noted, the opinions are neither reported nor on Westlaw or Lexis. Pursuant to Rule 34.6, P.S.'s name has been redacted throughout.

The Cliffords did not seek review in this Court of any Minnesota court decision.

Ms. Bradshaw has further collected, in a Supplemental Appendix, copies of the original opinions of the Minnesota courts (also redacted to remove P.S.'s name) post-dating the Cliffords' participation in P.S.'s child custody case. A bookmarked PDF version of the Supplemental Appendix is available at: https://perma.cc/EW2Y-5USZ

STATEMENT

The Cliffords blame their inability to adopt P.S. on ICWA, a longstanding federal statute. According to them, ICWA violates equal protection, exceeds Congress's Article I powers, and unconstitutionally commandeers the States.

Remarkably, however, neither the hundreds of pages of opinions below, nor the Individual Plaintiffs' briefs here, acknowledge the Minnesota courts' determination that P.S.'s grandmother—*amicus* Robyn Bradshaw—is, under any standard, the best person to care for P.S. That final judgment precludes the Cliffords from relitigating here the same facts and issues that they litigated in Minnesota and failed to appeal to this Court. What follows is a comprehensive summary of P.S.'s Minnesota adoption case.

A. Ms. Bradshaw raised P.S. from birth until tragedy struck her family.

P.S. was born on a warm, clear, and breezy day in July 2011. Ms. Bradshaw had bonded with P.S. in the womb and saw P.S.'s face for the first time moments after her birth—in the delivery room. But the delivery was difficult: P.S. was not breathing and had to be immediately treated for hypothermia. Ms. Bradshaw was present throughout P.S.'s treatment. When P.S. stabilized, she and her mother came to live with Ms. Bradshaw.

For the next three years, P.S. was raised in a loving and stable home with Ms. Bradshaw and P.S.'s mother as active, full-time caregivers. Ms. Bradshaw fed P.S., bathed her, dressed her, changed her diapers, played with her, sang to her, comforted her, cared for her, tucked her into bed, and woke up the next morning to do it all again. As one might expect from a caregiver present from the beginning of P.S.'s life, Ms. Bradshaw has always had a close bond with P.S. The Minnesota trial court presiding over P.S.'s adoption found both that "Ms. Bradshaw deeply loves [P.S.]" and that "they share a strong bond and a secure attachment." App. 107a-108a.

In 2014, however, Ms. Bradshaw's daughter fell into drug addiction and became unable to care for P.S. or to contribute to the household finances. Ms. Bradshaw thus took full responsibility for P.S., providing all her needs while supporting her daughter's efforts at recovery. Unfortunately, the household's unexpected reduction in income led to eviction. Ms. Bradshaw and P.S. temporarily lodged with friends while Ms. Bradshaw arranged for a new place to live.

In July 2014, Ms. Bradshaw asked P.S.'s father to care for P.S. for two days so she could finalize permanent housing. He agreed, but two days later could not be reached to return P.S. Separated from P.S. for the first time in P.S.'s life, and concerned for P.S.'s well-being, Ms. Bradshaw called the police and filed a child protection report with Hennepin County.

Then, on August 7, 2014, Ms. Bradshaw's daughter called from jail, explaining that both she and P.S.'s father had been arrested. P.S. had been with them and placed in emergency custody. Ms. Bradshaw immediately called Hennepin County and asked when she could pick up P.S. The County told her she could not do so and gave her no further information.

B. Hennepin County's errors traumatized P.S., Ms. Bradshaw, and the Cliffords.

Ms. Bradshaw, having been forced from her own home into a residential boarding school and running away as a child, resolved that she would never abandon her granddaughter. So when the court set a hearing regarding P.S. for August 12, 2014, Ms. Bradshaw attended. From that hearing onward—until the hearing granting adoption in 2020—Ms. Bradshaw attended every hearing regarding P.S. to assure P.S. that her grandmother would *always* be there. She was the only person to attend every hearing.

At that first hearing, the court ordered P.S. to remain in emergency care. Ms. Bradshaw met with P.S.'s social worker to explain her role as life-long caregiver for P.S. and provide whatever information the social worker needed. Ms. Bradshaw asked that P.S. be placed with her. The social workers informed Ms. Bradshaw that her criminal record disqualified her for foster placement. Hennepin County did not

then inform Ms. Bradshaw—as it should have—that she had both the right and ability to clear that record, which included a fifteen-year-old felony conviction for receipt of stolen property. Ms. Bradshaw ultimately cleared all disqualifiers by court order or waiver by the state licensing agency.

Hennepin County's error led to considerable unnecessary trauma. As the Minnesota trial court later held, this was a critical "decision point[]": "if [Hennepin County] had seriously considered Ms. Bradshaw and/or [P.S.]'s other relatives for placement, none of this [litigation] would have happened." App. 107a. After all, "Minnesota law requires local social services agencies to consider placement with relatives first." *Ibid.* Yet social workers assigned to P.S.'s case erroneously "made no attempt to work with Ms. Bradshaw to have her disqualifiers set aside"—"something [Hennepin County] routinely does in cases" such as this. App. 74a. "[T]hey also failed to inform [Ms. Bradshaw] that she could attempt to have her disqualifiers set aside." *Ibid.* Instead, the "social workers made these decisions despite the fact that Ms. Bradshaw had been [P.S.]'s primary caregiver since birth and knowing that Ms. Bradshaw was not the cause of the child protection proceedings regarding [P.S.]." App. 74a-75a.

Had Hennepin County, in August 2014, followed its routine practice and helped Ms. Bradshaw set aside her disqualifiers, this Summary would end here. Indeed, it never would have been written: P.S. would have remained with Ms. Bradshaw, her caregiver since birth. "Instead, [P.S.] has been traumatized by our system due to numerous failed placements, Ms. Bradshaw has been equally traumatized by the same system that for years ignored her as a placement

option for her granddaughter, and the Cliffords have lost a child whom they love and consider their own." App. 107a.

The Minnesota trial court would later characterize Hennepin County's actions during this period as "contrary to Minnesota law." App. 76a. Yet, in the face of Hennepin County's multiple errors, Ms. Bradshaw never stopped advocating for and protecting her granddaughter. For example, believing herself disqualified from foster care licensure, she worked with the County to identify alternative relative and kin placement for P.S. And she visited P.S. whenever she could and continued to offer herself as a placement option for P.S., to no avail.

In July 2016, the Minnesota courts terminated the parental rights of P.S.'s parents, and the County placed P.S. in foster care with the Cliffords.

C. After years of effort, P.S. returned to live with Ms. Bradshaw, a placement the Cliffords contested in Minnesota court.

Meanwhile, Ms. Bradshaw did everything in her power to get her granddaughter back. She persisted for three years—in the face of active opposition to her direct personal involvement in P.S.'s life—before a community non-profit helped her set aside her disqualifiers and obtain a foster-care license. With her disqualifications expunged or excused, Ms. Bradshaw applied for a foster license and completed a successful home study. Now that her home was eligible as a foster care placement, Ms. Bradshaw began the process of regaining custody of her granddaughter. She eventually succeeded, although it was anything but easy.

Some background on Minnesota adoption law is helpful in understanding what happened next. Under Minnesota law, counties have "exclusive authority to make an adoptive placement of a child." Minn. Stat. § 260C.613 subd. 1(a). When deciding on placement, counties must ensure that "the child's best interests are met" through an "individualized determination" based on an eleven-factor test. *Id.* § 260C.212 subd. 2(a), (b). Where possible, counties are first required to place children with family members. *Id.* § 260C.212 subd. 2(a)(1).

Minnesota has also codified ICWA's placement preferences into Minnesota law. *Id.* § 260C.212 subd. 2(a). When an "Indian child" is involved, counties must, in applying the eleven best-interest factors, consider the "best interests of an Indian child," including their connection to their family and tribe, as defined by the Minnesota Indian Family Preservation Act (MIFPA). *Id.* § 260C.212 subd. 2(b)(11). Once an adoptive placement is made, certain individuals, including "foster parent[s]" like the Cliffords, may contest that decision by motion. *Id.* § 260C.607 subd. 6.

1. The County decided to place P.S. with Ms. Bradshaw.

In late 2017, Hennepin County began signaling its intention to move P.S.'s placement from the Cliffords and to her grandmother. As P.S.'s family, Minnesota law entitled Ms. Bradshaw to the first placement preference. The White Earth Band of Ojibwa ("White

Earth")—which was now a party in P.S.'s case—supported placing P.S. with Ms. Bradshaw.[3]

The Cliffords had been kind and loving foster parents to P.S., and they wanted to adopt her. Initially, Barbara Reis, then P.S.'s guardian ad litem, and the County had informally supported them in that desire.[4] But when the County began seriously considering placement with Ms. Bradshaw, the Cliffords responded with litigation. On December 14, 2017, they filed a motion for P.S.'s adoptive placement in their home. P.S. remained in the Cliffords' care.

The Minnesota trial court held that the Cliffords' motion was not ripe. Under Minnesota law, they could not contest P.S.'s placement until an adoptive placement had been made by Hennepin County. App. 14a-16a. The court thus instructed the County to "immediately place [P.S.] for adoption pursuant to the mandates of Minnesota and federal law"—for

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[3] Around the same time that Ms. Bradshaw obtained her foster care licensure, White Earth learned of P.S.'s situation and that Bradshaw, another member of the tribe, was eligible for and seeking adoptive placement of P.S. They intervened. See Rebecca Nagle, THIS LAND, "Grandma Versus the Foster Parents" (Aug. 30, 2021) at 21:07, https://crooked.com/podcast/3-grandma-versus-the-foster-parents/.

[4] Indeed, Ms. Reis had reportedly all but promised adoption to the Cliffords when P.S. was placed in foster care in their home. See Nagle, *supra*, at 16:23 (discussing and reading courtroom testimony by Danielle Clifford). But that was an empty promise: adoptions in Minnesota are subject to a mandatory statutory framework that makes the best interests of the child the governing test. Minn. Stat. § 259.20 *et seq*. There is no right to adopt.

example, with Ms. Bradshaw. App. 24a. The court deferred ruling on the Cliffords' motion until that placement occurred. *Ibid.*

Pursuant to that order, the County provided notice that it would place P.S. with Ms. Bradshaw.

2. The Cliffords lost their challenge to P.S.'s preadoption placement with Ms. Bradshaw and did not seek certiorari.

The Cliffords moved to stay P.S.'s placement with Ms. Bradshaw. The trial court held that, under Minnesota law, they could not contest the County's preadoptive placement: the County had "*exclusive* authority to place the child for adoption," and the Cliffords had "no legal support for th[eir] argument" that "the Court can prevent the [County] from exercising this authority." App. 4a. The trial court also rejected the Cliffords' argument that it had impermissibly "retroactively appl[ied]" ICWA's pre-adoption placement preferences. *Ibid.* As the trial court noted, it had not "f[ound] that the child's placement with the Cliffords violated the ICWA." App. 5a. Rather, it simply analyzed whether "the Cliffords had made a legal showing warranting Court interference with the Department's exclusive authority to place" P.S. *Ibid.* As the Cliffords had not done so, the trial court denied the requested stay. App. 7a.

One year later, the trial court's holistic, eleven-factor best-interest-of-the-child analysis would confirm that the County's decision was unequivocally correct: "[I]t is in [P.S.]'s best interests to be placed for adoption with Ms. Bradshaw." See *infra* at 14-18. Until then, the Cliffords litigated aggressively to prevent that result.

Rather than immediately pursuing their motion for adoptive placement, the Cliffords decided to challenge the County's *pre*adoptive placement decision—including application of ICWA's preadoptive placement preferences. Six weeks after P.S. was placed with Ms. Bradshaw, the Cliffords appealed the trial court's refusal to stay the County's preadoptive placement determination.

The Minnesota Court of Appeals denied all relief, explaining that the trial court's refusal to disturb the County's preadoptive placement decision was not "unauthorized by law." App. 27a-28a. The County had followed ICWA's preadoptive placement preferences under 25 U.S.C. § 1915(b), and the Cliffords had "not established clear and convincing evidence of the good cause that is necessary to deviate from the preadoptive preferences." App. 29a-30a.

The Minnesota Court of Appeals also held that the Cliffords had an adequate remedy under state law—litigating their challenges to ICWA through a motion for adoptive placement. App. 30a. The court then affirmed the trial court's ruling that Minnesota law precluded addressing the Cliffords' motion for adoptive placement before the physical placement of P.S. with Ms. Bradshaw. App. 32a. Finally, because the Cliffords failed to address applicable Minnesota law—which, in any event, did not support relief—a stay was denied. App. 33a-34a.

The Cliffords unsuccessfully sought discretionary review in the Minnesota Supreme Court. App. 35a. The Cliffords did not seek certiorari to the Minnesota courts on ICWA's preadoptive placement preferences.

D. Considering P.S.'s "best interests" under Minnesota law, the Minnesota courts found that Ms. Bradshaw provided "the most suitable home" for P.S.

The litigation then turned to the merits of the Cliffords' motion for adoptive placement. App. 53a (holding that the Cliffords were entitled to an evidentiary hearing). Over five days in December 2018 and January 2019, the trial court held an evidentiary hearing on the Cliffords' motion at which 20 witnesses testified and 77 exhibits were introduced. App. 56a-62a.

Under Minnesota law, the Cliffords bore the burden of proving that the agency acted "unreasonabl[y] in failing to make the adoptive placement [with the Cliffords] *and* that the [Cliffords'] home is the most suitable home under the Minnesota Statutes § 260[C].[2]12, subdivision 2 factors." App. 66a. Minnesota law requires considering "the best interests of the child" in light of eleven factors. The trial court rejected the notion that, under Minnesota law, it could consider the best interest of an Indian child only under MIFPA (e.g., § 260.755 subd. 2a). Instead, it held that it was required to assess *all* the best interest factors under § 260C.212 subd. 2—meaning the best interest of the Indian child under MIFPA was only a single factor. App. 68a-69a.

The Cliffords lost, every which way, on the merits. First, they "failed to prove by a preponderance of the evidence" that the "decision not to place [P.S.] with them for adoption was unreasonable." App. 80a-81a. As the trial court explained, under Minnesota law, "whether or not the MIFPA and/or the ICWA applies to a particular case, [the County] is required by law to

first consider members of the child's family for placement." App. 74a. The court found that the County had erroneously ruled out Ms. Bradshaw and, "contrary to Minnesota law," had "never truly considered" the "numerous relatives and kin" that she had located for P.S.'s placement. App. 76a. Regardless of MIFPA or ICWA, therefore, Ms. Bradshaw—P.S.'s family—was a reasonable placement under Minnesota law.

Then the trial court carefully explained why, if it reached the Cliffords' various good cause arguments under MIFPA and ICWA, they did not warrant upsetting the placement with Ms. Bradshaw. App. 80a-86a. For example, the Cliffords argued that P.S.'s separation anxiety justified placement in their home. But the court found that P.S.'s separation anxiety occurred "in the first place due to her separation from Ms. Bradshaw." App. 81a. The Cliffords also introduced expert testimony that P.S. had extraordinary mental or emotional needs, but the court found their expert "inexperience[d]" and it "d[id] not find [her testimony] credible." App. 83a-84a. Finally, the court rejected the Cliffords' invitation to find that P.S.'s weight or Ms. Bradshaw's age made the County's placement decision unreasonable. App. 85a-86a.

Leaving no stone unturned, the court further held that, even assuming the Cliffords had succeeded in demonstrating good cause, the record independently supported placement with Ms. Bradshaw: "Ms. Bradshaw is still the most suitable adoptive home to meet [P.S.]'s needs." App. 87a. The court analyzed each of the eleven "best interest" factors under Minnesota law. That analysis included the following findings confirming that placement with Ms. Bradshaw was in P.S.'s best interests:

- Ms. Bradshaw provided a flexible environment which "has allowed [P.S.] to change and to grow as [P.S.] needs and has given [P.S.] a greater sense of independence" while "the Cliffords imposed a strict schedule to manage [P.S.]'s functioning and behaviors" that was "extremely specific and invariable." App. 88a-89a.
- P.S.'s medical, educational, and developmental needs and milestones were met. App. 89a-94a.
- Ms. Bradshaw "has been [P.S.]'s primary caregiver for four of the seven years [P.S.] has been alive." App. 94a.
- Ms. Bradshaw is "caring and nurturing about [P.S.]'s childhood traumas, including her separation from Ms. Bradshaw, her biological parents, and the death of her father," and that "Ms. Bradshaw and [P.S.] have a deep love and attachment to each other and share a strong bond." App. 94a-95a.
- Ms. Bradshaw is uniquely able to provide religious and cultural needs of P.S., including through connections to the White Earth Band, exposure to the Ojibwe language, practicing Christianity and regularly attending church with P.S. App. 95-96a.
- Ms. Bradshaw also "maintains regular contact" with P.S.'s family, including P.S.'s sister. App. 97a-98a.
- Ms. Bradshaw encourages P.S.'s participation in activities, including game nights, coloring, movie nights, and bike-riding. Ms. Bradshaw is also keeping P.S. connected with her culture: "[P.S.] loves to dance, and Ms. Bradshaw is

trying to obtain regalia for [P.S.] so she can dance at a Pow Wow." App. 98a-99a.

- Ms. Bradshaw has a "large family" and "while [P.S.] was living away from Ms. Bradshaw and [P.S.]'s other relatives, [P.S.] greatly missed them, especially Ms. Bradshaw." App. 99a-100a.
- "Ms. Bradshaw consistently puts [P.S.]'s needs first and has a genuine desire to act in [P.S.]'s best interests. * * * They are very attached." App. 100a.
- The court found P.S.'s guardian ad litem (Ms. Reis) "not * * * credible on the issue of [P.S.]'s best interests." She displayed a "palpable" "bias in favor of the Cliffords" and "fundamental misunderstanding[s]" of the cultural complexities of P.S.'s placement. App. 105a-107a. (This bias caused her to fail in her sole function as guardian ad litem, i.e. to represent P.S.'s best interests. See Minn. Stat. § 260C.163 subd. 5. Fittingly, days after these findings were made, Ms. Reis departed from P.S.'s case. Her replacement as guardian ad litem supported Ms. Bradshaw's adoption of P.S.)
- Additionally, the court rejected the Cliffords' expert testimony that good cause existed to depart from MIFPA's and ICWA's placement preferences. App. 101a-105a. But the court's resolution of that matter had nothing to do with ICWA. Rather, the court found that the Cliffords' expert did not comply with *Minnesota law* governing "Qualified Expert Witness[es]." App. 102a-103a (citing and quoting Minn. Stat. § 260.771 subd. 6, 7). And, even if considered,

the court "d[id] not find [the expert] credible." App. 103a-104a.

On this evidence, the court concluded "that the most suitable home for [P.S.] is with Ms. Bradshaw." App. 107a. "Ms. Bradshaw deeply loves [P.S.] and they share a strong bond and a secure attachment. Ms. Bradshaw had demonstrated an ability to meet all of [P.S.]'s needs. Ms. Bradshaw can nurture [P.S.]'s connection to her tribe, to her Ojibwe culture, to her sister, and to both sides of her family in a way that the Cliffords cannot. The Cliffords can provide love, attachment, an active two-family household and extended family, and ample financial resources for [P.S], but these considerations do not offset the family connections and connections to her culture that Ms. Bradshaw can provide [P.S.]. It is in [P.S.]'s best interests to be placed for adoption with Ms. Bradshaw." App. 107a-108a.

The Cliffords thus lost their motion for adoptive placement. The trial court found that they failed to meet their statutory burden under Minnesota law, that their proffered experts were not credible under Minnesota law, and that Ms. Bradshaw was the best placement for P.S. under Minnesota law's "best interests of the child" standard.

E. Ms. Bradshaw's adoption of P.S. became final after the Minnesota courts rejected the Cliffords' constitutional challenges to ICWA.

The Cliffords appealed, but they did not challenge any of the Minnesota trial court's factual findings or its application of Minnesota law. Instead, they raised only federal constitutional arguments—namely, that "ICWA is facially unconstitutional on three grounds:

(1) it violates equal protection; (2) it exceeds Congress's Article I authority; and (3) it violates the anti-commandeering doctrine." App. 110a.

The Minnesota Court of Appeals rejected each argument. First, applying *Morton* v. *Mancari*, 417 U.S. 535 (1974), it concluded that there was no equal protection violation. App. 118a-120a. In so doing, the court rejected the Cliffords' argument that *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637 (2013), and *Rice* v. *Cayetano*, 528 U.S. 495 (2000), superseded or undermined *Mancari*. App. 119a-120a.

Second, the court held that, "[b]ecause Congress's power to legislate in the field of Indian affairs is plenary, ICWA does not exceed Congress's legislative authority" under *United States* v. *Lara*, 541 U.S. 193 (2004), and *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163 (1989). App. 121a-122a.

Third, the court rejected the Cliffords' anticommandeering argument because Minnesota had enacted the placement preferences into its own law. App. 122a-123a.

The Cliffords again unsuccessfully sought discretionary review in the Minnesota Supreme Court. App. 124a. Once again, the Cliffords did not seek certiorari in this Court.

Ms. Bradshaw's adoption of P.S. was thus found to be in P.S.'s best interest and finalized on May 21, 2020. App. 125a-126a (recognizing May 21, 2020, order in dismissing case).

ARGUMENT

I. Collateral estoppel bars the Cliffords from maintaining here the claims they lost in Minnesota.

The Minnesota courts' final judgment confirming Ms. Bradshaw's adoption of P.S. factually and legally precludes the Cliffords from litigating their claims in this Court—or any other. It is black-letter law that "a losing litigant deserves no rematch after a defeat fairly suffered." *B&B Hardware, Inc.* v. *Hargis Indus., Inc.*, 575 U.S. 138, 147 (2015) (quoting *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 107 (1991)). Thus, this Court "has long recognized" that "'the determination of a question directly involved in one action is conclusive as to that question in a second suit.'" *Ibid.* (quoting *Cromwell* v. *County of Sac*, 94 U.S. 351, 354 (1877)). It is well settled that a party cannot avoid preclusion simply by switching defendants. *Blonder-Tongue Labs., Inc.* v. *Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971). Preclusion applies here.

The "general rule" of collateral estoppel "is that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" *B&B Hardware*, 575 U.S. at 148 (quoting Restatement (Second) of Judgments § 27 (1982)); see *ibid.* (the Court "regularly turns to the Restatement (Second) of Judgments for * * * the ordinary elements of issue preclusion"). Collateral estoppel bars relitigating both factual and legal issues (see Restatement (Second) of Judgments § 27; *Cougar*

Den, 139 S. Ct. at 1019), and thus serves the broader interest of judicial economy (see *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 327 (1979); *B&B Hardware*, 575 U.S. at 147; cf. *Vega* v. *Tekoh*, 142 S. Ct. 2095, 2107 (2022) (finding it "wasteful" to "requir[e] a federal judge or jury to adjudicate a factual question * * * that had already been decided by a state court")). The common sense of issue preclusion is that "it is appropriate and fair to impose an estoppel against a party who has already litigated an issue once and lost." *Blonder-Tongue*, 402 U.S. at 349.

The Minnesota courts' determinations regarding the issues of fact and law in those proceedings are embodied in valid and final judgments. Those courts' determinations on the issues here were also essential to the judgment: had the Minnesota courts reached different conclusions as to the pre-adoptive or adoptive placement of P.S., her custody determination would have come out the other way. Accordingly, under settled principles of collateral estoppel, the outcome in Minnesota binds the Cliffords.

A. The final determinations of the Minnesota courts are binding in this litigation.

The Fifth Circuit's decision in this case rests on factual submissions from the Cliffords that are foreclosed by the final determinations of the Minnesota courts. The decision below thus contravenes settled preclusion principles, and the Cliffords' claims must be rejected.

The principal opinions below both incorrectly stated that P.S.'s adoption was not final. As Judge Dennis's opinion put it, "Child P. has not yet been adopted, [so] the Cliffords may still petition for custody." Pet. App. 63a. Likewise, Judge Duncan

announced that "Child P.'s adoption * * * has not been finally approved[,]" and "until it is, the Cliffords remain eligible to adopt her." *Id.* at 211a. The problem is, the Minnesota Supreme Court denied discretionary review of the lower court decision denying the Cliffords' motion for adoptive placement more than a year earlier—on January 9, 2020 (App. 124a)—and the Minnesota trial court finalized Ms. Bradshaw's adoption of P.S. in May 2020 (App. 125a-126a).

The Fifth Circuit's factual statements that P.S.'s adoption was not final are thus untrue—and they were untrue in April 2021, when the Fifth Circuit decided this case. Since the Minnesota courts' adoption proceedings were final before the Fifth Circuit rendered its decision, they bound that court, and the Cliffords' claims should be rejected on the ground that they cannot relitigate issues that they fully litigated in earlier state court litigation. *Exxon Mobil*, 544 U.S. at 293; *Cougar Den*, 139 S. Ct. at 1019.

B. The Cliffords cannot again press here the exact constitutional challenges they lost in Minnesota.

Preclusion law bars the Cliffords from pressing here the exact constitutional issues they litigated—and lost—in Minnesota. *Blonder-Tongue*, 402 U.S. at 350; *B&B Hardware*, 575 U.S. at 147.

For example, the Cliffords maintain that "ICWA's placement preferences * * * discriminate on the basis of race in violation of the U.S. constitution," that "ICWA's placement preferences exceed Congress's Article I authority," and that ICWA "otherwise commandeer[s] state courts and state agencies." Individual Plaintiffs' Br. i. But the Cliffords raised and lost all of these arguments in Minnesota.

First, the Minnesota Court of Appeals "reject[ed] [the Cliffords'] equal-protection challenge to ICWA." App. 120a, see also App. 118a-120a. Second, citing this Court's long-standing "precedent that states that Congress's legislative authority under the Indian Commerce Clause is plenary," the Minnesota Court of Appeals rejected the Cliffords' Article I argument. App. 121a (citing *Lara*, 541 U.S. at 200; *Cotton Petroleum*, 490 U.S. at 192). Third, the Minnesota Court of Appeals explained that the Cliffords had "no basis to assert that the federal government has unconstitutionally directed state action when, by legislative enactment, the state has freely adopted the federal requirement." App. 123a; see also App. 122a-123a. When the Minnesota Supreme Court denied review, the Cliffords did not seek certiorari. Thus, the Minnesota Court of Appeals' decision is final.

It is no answer to say that collateral estoppel does not apply because the Cliffords litigated their claims in the Minnesota courts as foster parents seeking adoption rather than formal parties to the litigation. Although Minnesota law reserves party status to parents, guardians-ad-litem, counties, and intervening Tribes, foster parents have extensive participation rights in adoption proceedings. See Minn. Stat. § 260C.607 subd. 6. Moreover, both Minnesota and federal law recognize that either "control" of, or "substantial participation" in, litigation is sufficient to support applying collateral estoppel. Restatement (Second) of Judgments § 39; see *Taylor* v. *Sturgell*, 553 U.S. 880, 895 (2008) (recognizing Restatement § 39 principle); *Margo-Kraft Distributors Inc.* v. *Minneapolis Gas Co.*, 294 Minn. 274, 278 (1972).

As the Minnesota Supreme Court has explained, preclusion applies under Minnesota law where the

litigant is "controlling participation" and has an "active self-interest in litigating." *Margo-Kraft*, 294 Minn. at 278. Likewise, the Restatement states that whether litigants were formal parties to the prior litigation does not nullify preclusion where they had the "opportunity to present proofs and argument[s]" on the issues. Restatement (Second) of Judgments § 39, cmt. a. These standards are unquestionably satisfied here.

The Cliffords fully controlled the Minnesota litigation on the issue that they press again here—namely, whether the preadoptive and adoptive placements of P.S. are invalid because ICWA is unconstitutional. See App. 30a (motion for adoptive placement provided Cliffords adequate opportunity to litigate issues, including challenging constitutionality of ICWA placement preferences). Indeed, they exercised that control not only by litigating the issues in the trial court, but by appealing to the Minnesota Court of Appeals and, upon losing there, unsuccessfully seeking review in the Minnesota Supreme Court.[5]

The Cliffords thus controlled the Minnesota litigation of the same issue they raise here, fully exercising their rights on that score, and longstanding principles of issue preclusion bar the Cliffords from relitigating

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[5] As active participants in the litigation, Cliffords could have sought this Court's review of the Minnesota courts' rejection of their federal constitutional claims. See 28 U.S.C. § 1257. Even if they hadn't actively litigated the issues, they would have qualified to intervene at the certiorari stage as they were "vitally affected by the decision of the court of appeals." See, e.g., Stephen M. Shapiro et al., Supreme Court Practice, § 2.5, at 2-22 & n.44 (11th ed. 2019).

in this Court (or any other) the same factual and legal issues that they lost in Minnesota. *Blonder-Tongue,* 402 U.S. at 350; *Exxon Mobil*, 544 U.S. at 293; *Cougar Den*, 139 S. Ct. at 1019. The Cliffords should not be allowed to use this declaratory judgment action to collaterally attack a final decision they failed to appeal to this Court. That litigation strategy—and the timing of the conclusion of the Minnesota litigation—easily constitute "special circumstances" justifying this Court's application of issue preclusion sua sponte. Cf. *Arizona*, 530 U.S. at 412.

The Minnesota court decisions awarding custody to Ms. Bradshaw are thus final and binding on the Cliffords. To the extent it conflicts with those findings, the Fifth Circuit's decision should be reversed.

II. The record from the Minnesota litigation shows that Article III bars the claims of the Individual Plaintiffs, including the Cliffords.

The Minnesota litigation also illustrates why all of the Individual Plaintiffs lack standing to challenge hypothetical future applications of ICWA. The Minnesota courts' decisions rested, in the end, not on application of a challenged provision of ICWA but on a determination that Ms. Bradshaw was the best placement for P.S., *regardless* of which standard applied. Similarly, the Brackeens' litigation over the adoption of Y.J.R. involves application of Texas law. Thus, the Individual Plaintiffs cannot show that their "allegations of future injury" are sufficiently "particular and concrete." *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 109 (1998); see also *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 340 (2016) (quotations omitted) (injury must be "real and not abstract"). They lack standing.

Further, as the Tribal and Federal Defendants note, the Cliffords' claims are moot and—even if the threatened injury were repeated—it would not evade review. See Tribal Defendants Br. 48-49; U.S. Br. 51; see also Minn. Stat. §260C.607 subd. 6; App. 30a (Cliffords can litigate challenges to ICWA through motion for adoptive placement). In addition, however, the Cliffords' alleged injuries are not redressable for two independent reasons. Thus, they lack Article III standing, which requires a redressable, concrete injury that is fairly traceable to enforcement of the challenged provisions of ICWA. See *Carney* v. *Adams*, 141 S. Ct. 493, 498 (2020); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

A. The Individual Plaintiffs' hypothetical future injuries are speculative.

As the Federal Defendants explain, the Individual Plaintiffs also lack standing because whether ICWA's placement preferences "might play a role" in contemplated future proceedings "would be entirely speculative." U.S. Br. 52. Only "particular and concrete" threatened future injury supports standing. *Steel Co.*, 523 U.S. at 109. The Individual Plaintiffs cannot satisfy that test, and the litigation in Minnesota illustrates why.

The Fifth Circuit concluded that the Cliffords faced "heightened legal barriers" under ICWA (Pet. App. 50a (Dennis, J.)) that "thwarted" or "hampered" their adoption of P.S. (*id.* at 219a (Duncan, J.)). But the record of the Minnesota proceedings does not bear out the necessary connection between the Cliffords' inability to adopt P.S. and the challenged provisions of ICWA. Rather, it was *Minnesota* law that "thwarted" their motion for adoption and imposed

"heightened legal barriers": *Minnesota law* gave first placement preference to Ms. Bradshaw; *Minnesota law* provided the eleven-factor "best interest" test that (when applied) resulted in adoption by Ms. Bradshaw; *Minnesota law* established expert witness requirements excluding the Cliffords' expert witnesses; and a *Minnesota court* found the Cliffords' evidentiary showing insufficient, regardless of the applicability of any "good cause" requirement under ICWA.

It would be entirely speculative to permit the Individual Plaintiffs' mere desire to adopt another Indian child in the *future* to support standing. As the Tribal Defendants note, prospective adoptive parents cannot know if (or when) a child would need their care, if that child would qualify as an "Indian child," or if the proceeding would implicate ICWA's placement references. Tribal Defendants Br. 47-48. But the Individual Plaintiffs' alleged future harm is even more speculative than that. Ignoring, for simplicity, any permutations under state, territorial, or federal law, the Minnesota litigation illustrates further uncertainties: prospective adoptive parents cannot know whether a family member would receive preference under Minnesota law, whether they could proffer admissible expert testimony under Minnesota law, or whether they could produce evidence sufficient to prove that the child was best placed with them (but not rise to ICWA or MIFPA's "good cause" standard).

Nor is the litigation over P.S.'s adoption the only example of the uncertainty of the Individual Plaintiffs' future "injury." The Brackeens' Texas litigation involving Y.J.R. is another case in point. While that litigation does not confer standing (see Tribal Defendants Br. 48), it does demonstrate why allegations of future injury are at best speculative. Just as the

Cliffords' case turned on Minnesota law, many of the disputes regarding Y.J.R.'s adoption turn on *Texas* family law. For example, the Texas Court of Appeals noted that "[a]ccording to [Y.R.J.'s] caseworker, the Department would have recommended [the placement supported by the Navajo Nation] even if ICWA did not apply because [that person] is a family member." *In re Interest of Y.J.*, 2019 WL 6904728, *10 (Tex. Ct. App. Dec. 19, 2019). The Texas court went on to "hold—without reference to ICWA—that the trial court abused its discretion" in its conservatorship decision by disregarding Texas' "compelling state interest" in "establishing a stable, permanent home." *Id.* at *15.

Further, Texas law—like Minnesota law—favors placement with relatives. *Ibid.* Y.R.J.'s placement with a Navajo relative would allow her to live near four of her half-siblings and "access to her Navajo culture and extended family" (*ibid.*), which might be more in her best interest than living with the Brackeens and only one of her half-siblings. Indeed, the Texas Court of Appeals indicated that it would "have no quarrel" with such a placement, as it "could be a proper best-interest consideration under Texas law, regardless of ICWA's application." *Id.* at *15 & n.30. Thus, application of ICWA's placement preferences at some unspecified future date in the Brackeens' litigation appears uncertain.

Family law cases are complicated, and the best interest of any particular child is multifaceted. But that is no excuse to relieve the Individual Plaintiffs of their burden to prove that a threatened future injury is "real and not abstract." Cf. *Spokeo*, 578 U.S. at 340 (quotations omitted). Hypothetical application of ICWA's placement preferences in some possible

future proceeding amounts to little more than "some day" injuries that "do not support a finding of the 'actual or imminent' injury that our cases require." *Carney*, 141 S. Ct, at 501 (quoting *Lujan*, 504 U.S. at 564). The Court should reject the Individual Plaintiffs' theories of standing that "rel[y] on a highly attenuated chain of possibilities." See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 410 (2013).

Further, to affirm the decision below could create an unwarranted "Declaratory Judgment Act" exception to Article III standing. The principal opinions below erred in finding standing based on the Individual Plaintiffs' desires to "adopt additional children in need" (Pet. App. 49a (Dennis, J.)), or "to foster and adopt other Indian children" (*id*. at 218a & n.14 (Duncan, J.)). Affirming the Fifth Circuit on such grounds would allow litigants to maintain parallel declaratory judgment actions simply to challenge statutes that might, some day, apply against their interests.

Two Terms ago, this Court rejected an exception that "threaten[ed] to grant unelected judges a general authority to conduct oversight of decisions of the elected branches of Government." *California*, 141 S. Ct. at 2116. For the same reasons, the Court should hold that the Individual Plaintiffs lack standing to challenge ICWA here.

B. The Cliffords' alleged injury cannot be redressed by this Court.

The Cliffords alleged injury also is not redressable—and for two independent reasons.

First, the Minnesota decision is final. No matter how this Court resolves the questions presented, that decision will not change. "Relief that does not remedy

the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107. The Cliffords "have no concrete stake in this dispute and therefore lack Article III standing." *Thole* v. *U.S. Bank N.A.*, 140 S. Ct. 1615, 1622 (2020). Indeed, a ruling for the Cliffords would amount to little more than "a law review article." Pet. App. 373a-374a.

Second, the Cliffords' litigation strategy begets an independent redressability problem: the absence of any Minnesota decision-maker (whether the County or the courts) in this case. This Court has long held that standing "requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon* v. *E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); see *Lujan*, 504 U.S. at 559-61. Yet neither Hennepin County (which made the preadoption and adoption placement decisions) nor the Minnesota courts (which denied the Cliffords' requested relief) nor the Minnesota law and statutes (which the Cliffords challenged in seeking placement of P.S.) are before this Court. And the Federal Defendants (who are before the Court) cannot grant the Cliffords relief: they did not make the adoption decisions that the Cliffords (collaterally) challenge, and they would not be parties to any state child-custody proceeding. See U.S. Br. 53-54.

The Cliffords' strategic decision not to seek this Court's review of the Minnesota litigation in favor of pressing this declaratory judgment action thus came at a cost—it deprived the Court of any ability to redress their alleged injury. The plurality opinion in *Lujan* is instructive. There, as here, the litigants

decided to abandon "the separate decisions * * * allegedly causing them harm" in order to "challenge a more generalized level of Government action." 504 U.S. at 568. But standing is "rarely if ever appropriate" in such instances (*ibid.* (quoting *Allen* v. *Wright*, 468 U.S. 737, 759-60 (1984)), and this case is no exception.

As Justice Scalia noted decades ago, standing requires redressability by the "*exercise of* * * * the Court's *judgment*," not simply its "excurses." *Franklin* v. *Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part). Without the Minnesota parties, the Court cannot order effective relief for the Cliffords—which means they lack standing. *Steel Co.*, 523 U.S. at 109-10; *Lujan*, 504 U.S.at 571.

* * *

As a child, Ms. Bradshaw was forced from her own home into a residential boarding school—from which she ran away. Thus when she was separated from P.S., she resolved to persist until her granddaughter was returned to her care. When the County erroneously refused to place P.S. with Ms. Bradshaw, she pressed on, attending every hearing in P.S.'s case. Ms. Bradshaw persisted in investigating placements with family and kin; she persisted by finding a nonprofit to provide legal support to her efforts; she persisted in overcoming disqualifiers to her foster care license; she persisted through home studies, administrative corrections, hurtful media coverage, hearings, and appeals.

She persisted until her granddaughter came home.

The Cliffords litigated their claims in Minnesota —and lost. After careful and exhaustive analysis, the Minnesota courts found that Ms. Bradshaw's adoption

of P.S. is in P.S.'s best interests. That decision is final, and the Cliffords are precluded—by settled principles of collateral estoppel and Article III justiciability—from relitigating P.S.'s best interests here. This Court should reject the Cliffords' claims.

CONCLUSION

For the foregoing reasons, the Cliffords' claims should be rejected.

Respectfully submitted,

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AUGUST 2022

APPENDIX

APPENDIX A

STATE OF MINNESOTA	DISTRICT COURT FOURTH JUDICIAL DISTRICT JUVENILE COURT DIVISION
COUNTY OF HENNEPIN	

In the Matter of the Welfare of the Child of: **The Commissioner of Human Services** Child: [P.S.] [P.S. Birthday] (2011)	Case Number.: 27-JV-15-483 Family Number: 349034 **AMENDED ORDER DENYING MOTION FOR STAY AND PROHIBITING COMMUNICATION**

[Filed: Jan. 29, 2018]

The above-entitled matter came before the Honorable Angela Willms, Referee of District Court, Juvenile Division, on January 25, 2018 at the Hennepin County Juvenile Justice Center in Minneapolis, Minnesota. CMR recorded the proceedings.

Upon all the records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. On January 22, 2018, the Court ordered the Department to immediately place the child for adoption as required by Minnesota and federal law. (Order, filed 1/22/18, p. 7, ¶ 2). On January 25, 2018, the Department notified the parties by email that it intended to make the adoptive placement of the child with Ms. Bradshaw tomorrow, January 26, 2018.[1] The Cliffords immediately filed a Notice of Motion and Motion for Stay, requesting that the Court stay the Department's proposed change of placement until the Court has determined whether the Cliffords made a prima facie case for adoptive placement under §260C.607.

2. White Earth objected to the Cliffords' motion for a stay, arguing the Cliffords are not parties and therefore lack standing to bring this motion. White Earth advocated for the immediate placement of the child with Ms. Bradshaw.

3. Mr. Walters replied by email, recognizing the Department's exclusive authority to place the child for adoption and arguing that the Cliffords have not cited any legal authority allowing the Court to prevent the Department's chosen placement.

4. The Department also objected to the Cliffords' motion for a stay, arguing that placing the child for adoption requires an adoptive placement

[1] The Department sent an email in lieu of a filed court notification because "the Department's system is down."

per Minnesota Statutes §260C.603 and that a placement involves physically moving the child into Ms. Bradshaw's home. The Department also disputed that the child's move to Ms. Bradshaw's home is abrupt, arguing that the regular and extended visits the child has had with Ms. Bradshaw have prepared her for this move.

5. The Court did not receive a response to the Cliffords' motion from the Guardian ad Litem; however, the Guardian ad Litem filed a Court Notification earlier that day requesting a court order prohibiting anyone from discussing with the child a potential move to Ms. Bradshaw's home. (See G.A.L. Proposed Order, filed 1/25/18).

CONCLUSIONS OF LAW

1. The Cliffords are not parties to this proceeding; therefore, they lack standing to bring this motion, See Minn. R. Juv. Prot. P. 21.02, 22.02. Although Minnesota law sometimes allows participants to file motions with the court (i.e. §260C.607), the Cliffords have not cited, nor is the Court aware of, any legal authority giving them standing to make this motion. On those grounds alone, the Cliffords' motion is denied.

2. Even if the Cliffords had standing, however, they have not cited any legal authority permitting the Court to grant the relief they request. The Court's January 22, 2018 Order explains that the Court cannot rule on the Cliffords' motion for adoptive placement as they argued it because it is not ripe for the Court's consideration until the Department has

placed the child for adoption. In their memorandum filed prior to the January 16, 2018 hearing, as well as at the hearing itself, the Cliffords asserted that the Department has the *exclusive* authority to place the child for adoption. Yet now the Cliffords claim the Court can prevent the Department from exercising this authority. There is no legal support for this argument. The Cliffords have suggested a way for the Department to simultaneously adhere to the Court's January 22, 2018 Order while also maintaining the child's current placement with the Cliffords. However, the Cliffords fail to cite any law by which the Court can compel the Department to change its stated course and follow the Cliffords' plan.

3. Lastly, the Cliffords argue that the Court retroactively applied the 25 U.S.C. §1915(b) preferences to this child to invalidate her placement with the Cliffords. This is incorrect; the Cliffords misunderstand the Court's January 22, 2018 Order. Despite the Cliffords' continuous arguments to the contrary, this child is an Indian child to whom the ICWA applies. The Court recognized that the Department has the exclusive authority to place this child for adoption, that the Department is bound by the §1915(b) ICWA placement preferences because the child is currently in a preadoptive placement, and that the Cliffords did not make any legal showing that would allow the Court to interfere with the Department's exclusive authority to place the child for adoption. The Court's discussion of the §1915(b) preferences and related law was to

evaluate whether the Cliffords had made a legal showing warranting Court interference with the Department's exclusive authority to place the child. The Court determined that the Cliffords had not made this showing. The Court did not retroactively apply the §1915(b) placement preferences or specifically find that the child's placement with the Cliffords violated the ICWA. Furthermore, the legal authority cited by the Cliffords to support their argument on this issue is not on point and/or binding.[2]

4. The Cliffords claim they have a right to notice and an opportunity to be heard before the child is removed from their home. They have provided no legal authority for this assertion. Nevertheless, the Court notes that their concerns about removing the child from their home and placing the child with Ms. Bradshaw have been communicated to the Court at almost every hearing for the past year and a half. The Court is extremely familiar with the Cliffords' concerns. The Court has presided over this case as visits with Ms. Bradshaw began and while they have continued into this year. The Court is acutely aware that this adoptive placement will be a significant transition for this child and has not made this decision lightly. These considerations,

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[2] 25 U.S.C. §1914 gives Indian children, parents, custodians, and tribes the right to petition the court to invalidate an action in violation of the ICWA. This statute does not speak to whether the ICWA is retroactive. Furthermore, the cases cited by the Cliffords, while persuasive, are not binding in Minnesota.

however, do not change the fact that the Cliffords have failed to provide any legal authority compelling a different conclusion.

5. As noted above, the Guardian ad Litem has requested a court order prohibiting anyone from speaking to the child about any potential move to Ms. Bradshaw's home. The Guardian submitted this request before learning of the Department's intent to place the child for adoption on January 26, 2018 and before the Court ruled on the Cliffords' motion for a stay. The Court's decision today means the child will move to Ms. Bradshaw's home. While the Court agrees it certainly is in the child's best interest to limit the information she receives about this move until the Court has made a final decision about her adoption, the Court also does not want to hinder the Department's ability to assist the child during this transition. The Court does not believe it is appropriate to prohibit a therapist from discussing with the child her move to Ms. Bradshaw's in the event the child has questions about this move.[3]

[3] The Court understands the child's current therapist has declined to participate in the disclosure to the child of the move and that an alternative will need to be arranged. (See N. Jones Letter, filed 1/25/18).

IT IS HEREBY ORDERED

1. The Cliffords' motion for stay is denied.

2. The parties and participants to this case are hereby prohibited from discussing with the child her move to Ms. Bradshaw's home, these proceedings, and/or the status of her adoption until further order of the Court. However, the Department and its designees are authorized to assist the child with this transition in a therapeutic setting.

BY THE COURT:

/s/ Angela Willms
Angela Willms
January 26, 2018 Referee of District Court
Juvenile Court Division

/s/ David L. Piper
Judge of District Court
Juvenile Court Division

APPENDIX B

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT JUVENILE COURT DIVISION

In the Matter of the Welfare of the Child of: **The Commissioner of Human Services** Child: [P.S.] [P.S. Birthday] (2011)	Case Number.: 27-JV-15-483 Family Number: 349034 **AMENDED FINDINGS AND ORDER REGARDING MOTIONS FOR ADOPTIVE PLACEMENT**

[Filed: Feb. 5, 2018]

The above-entitled matter came before the Honorable Angela Willms, Referee of District Court, Juvenile Division, on January 16, 2018 at the Hennepin County Juvenile Justice Center in Minneapolis, Minnesota. CMR recorded the proceedings.

PARTIES AND PARTICIPANTS

Nancy Jones, Assistant Hennepin County Attorney, appeared on behalf of the Hennepin County Human

Services and Public Health Department ("Department"), which was represented by Hannah Epstein, Adoption Resource Worker, and Joseph Thompson, Child Services Worker, who were present.

Eric Rehm, Attorney at Law, appeared on behalf of Barbara Reis, Guardian ad Litem, who was present.

Rebecca McConkey-Greene, Attorney at Law, appeared on behalf of the White Earth Band of Chippewa ("White Earth"), which was represented by Lee Goodman, Social Worker, who was present.

Mark Fiddler, Attorney at Law, appeared on behalf of Danielle and Jason Clifford, Foster Parents, who were present.

Ronald Walters, Attorney at Law, appeared on behalf of Robyn Bradshaw, Maternal Grandmother, who was present,

Upon all the records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. The parties and participants last appeared on December 4, 2017 for a post-permanency review hearing. The Court's December 5, 2017 Order from that hearing required the parties and participants to comply with certain filing deadlines regarding any motions for adoptive placement. On December 14, 2017, Mr. Walters filed a letter indicating that his client, Robyn Bradshaw, would not file a motion for adoptive placement because the Department and White Earth currently support her as the child's adoptive placement. In this letter, Mr. Walters indicated: "My client, of course, continues in

her desire to adopt [P.S.]." (R. Walters Letter, filed 12/14/17, p. 1).

2. The same day, the Cliffords filed a motion for adoptive placement pursuant to Minnesota Statutes §260C.607, subdivision 6, asking the Court for an evidentiary hearing on the issue of whether the Department is unreasonable for failing to place the child with them for adoption. On December 27, 2017, Mr. Rehm submitted a letter on behalf of the Guardian ad Litem, supporting the Cliffords' motion and opposing adoptive placement with Ms. Bradshaw.

3. On December 29, 2017, the Department filed a memorandum opposing the Cliffords' motion. The Department argues it was reasonable not to place the child with the Cliffords for adoption because Minnesota and federal law require the Department to place the child according to Indian Child Welfare Act ("ICWA") and Minnesota Indian Family Preservation Act ("MIFPA") preferences, which the Cliffords do not satisfy. The Department also filed a motion requesting court authorization to immediately place the child with Ms. Bradshaw and to enter into an adoptive placement agreement with her.

4. The same day, White Earth filed a response opposing the Cliffords' motion and supporting the Department's motion for immediate placement with Ms. Bradshaw.

5. Mr. Walters filed a memorandum on December 29, 2017 supporting the child's placement with his client and arguing that the Cliffords are

legally unable to adopt the child due to the ICWA placement preferences and the Cliffords' inability to obtain a Qualified Expert Witness from White Earth to support their adoption of the child. On January 5, 2018, the Cliffords filed a reply memorandum arguing that the child cannot legally be placed with Ms. Bradshaw for adoption because she does not have an approved adoption home study.

6. On January 8, 2018, Mr. Walters re-filed his December 29, 2017 memorandum in order to serve the Cliffords, who were inadvertently excluded from his initial service of the document. On January 9, 2018, the Cliffords responded to Mr. Walters's memorandum. The Cliffords' January 9, 2018 memorandum was filed in violation of the Court's December 5, 2017 Order but will nevertheless be considered under the circumstances.[1]

7. On. January 16, 2018, the parties and participants appeared on the Cliffords' motion for adoptive placement.

CONCLUSIONS OF LAW

1. Minnesota Statutes §260C.607 permits foster parents to file a motion for adoptive placement as long as those foster parents have an approved adoption home study and have resided in Minnesota for at least six months

[1] "Any motions or responses filed outside of the aforementioned timelines will be dismissed or excluded from consideration by the Court." (Order, filed 12/5/17, p. 3, ¶ 9).

prior to filing the motion. Minn. Stat. §260C.607, subd. 6(1) (2017). There is no dispute that Danielle and Jason Clifford are foster parents within the meaning of the statute, that they have an approved adoption home study, and that they resided in Minnesota for at least six months before filing their motion.

2. The issue before the Court is whether the Cliffords' motion and supporting documents make a prima facie showing that the Department has been unreasonable in failing to place the child with the Cliffords for adoption. See Id. If the Cliffords meet this burden, they are entitled to an evidentiary hearing where they must prove by a preponderance of the evidence that the Department was unreasonable in failing to make the requested adoptive placement. Minn. Stat. Id. at subd. 6(d). However, if the Cliffords fail to make a prima facie showing, they are not entitled to an evidentiary hearing, and Minnesota law requires the Court to dismiss their motion. Id. at subd. 6(c).

3. When determining whether the movant has made a prima facie showing, "the district court must accept facts in [the movant's] supporting documents as true, disregard contrary allegations, and consider the non-moving party's supporting documents only to the extent that they explain or provide context." In the Matter of the Welfare of the Children of L.L.P., A.J.H., and J.M.L., 836 N.W. 2d 563, 570 (Minn. Ct. App. 2013).

4. The district court shall not weigh the movant's allegations against the agency's conduct and the history of the proceedings. Id. However, conclusory allegations do not support a prima facie showing. Id. at 571. Minnesota Statutes Section 260C.607 is a relatively new statute, so there is almost no case law to guide the Court regarding what constitutes a prima facie showing in these cases. Additionally, the child in this case is an Indian child subject to the ICWA and the MIFPA. (See Order, filed 10/23/17, p. 11, ¶ 42). The Court is not aware of any case law regarding a §260C.607 motion for the adoptive placement of an Indian child and believes this may be an issue of first impression.

5. The Department, White Earth, and Robyn Bradshaw argue that the Department was reasonable in not placing the child with the Cliffords for adoption because the §1915(a) ICWA placement preferences apply to this child, the Cliffords cannot meet them, and the Cliffords cannot prove by clear and convincing evidence that there is good cause to deviate from the preferences. In response, the Cliffords argue that the §1915(a) placement preferences do not apply to this child, pursuant to the U.S. Supreme Court's rationale in Adoptive Couple v. Baby Girl. 133 S. Ct. 2552 (U.S.S.C. 2013). The Cliffords argue that the Department has been unreasonable in deferring its placement decision to White Earth instead of making an individualized determination of the child's best interests as required by Minnesota Statutes §260C.212, subdivision 2. The Cliffords argue

that even if the §1915(a) placement preferences apply, they have made a prima facie showing that there is good cause to deviate from the preferences and should therefore receive an evidentiary hearing to further prove good cause by clear and convincing evidence.[2]

6. Thus, as argued by the parties and participants to this case, central to the Court's determination of whether the Cliffords have made a prima facie showing under §260C.607 is the issue of whether the §1915(a) ICWA placement preferences apply to this child.

7. However, the §1915(a) placement preferences only apply to the *adoptive* placement of an Indian child, and this child has not yet been placed for adoption. See 25 U.S.C. §1915(a). The ICWA defines adoptive placement as, "the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption." 25 U.S.C. §1903(1)(iv). Under Minnesota law, "[t]he child shall be considered placed for adoption when the adopting parent, the agency, and the commissioner have fully executed an adoption placement agreement on the form prescribed by the commissioner." §260C.613, subd. 1(a). No adoption placement agreement has been executed for this child. For these reasons, the issue of whether the §1915(a) placement

[2] The letter filed and oral arguments made by Mr. Rehm on behalf of the Guardian ad Litem, while clearly supportive of the child's placement with the Cliffords, did not address the legal issues before the Court and are therefore given little weight in this decision.

preferences apply to this child (and by extension, whether the Cliffords have made a prima facie showing of unreasonableness) is not yet ripe for the Court's consideration.[3]

8. Normally under these circumstances, the Court would dismiss the Cliffords' motion without prejudice. However, the Court believes doing so in this case would only lead to the re-litigation of the same issues when the Department places the child for adoption. To avoid further delaying this child's permanency, the Court finds that it is in her best interests for the Court to defer ruling on the Cliffords' motion until the Department has placed the child for adoption and the Cliffords' motion becomes justiciable.

9. The Department says it has not placed the child for adoption as it desires, with Ms. Bradshaw, out of deference to the Court. While the Court understands this deference given the litigious nature of these proceedings, there is no legal basis for it. The law is clear: "The responsible social services agency has exclusive authority to make an adoptive placement of a child under the guardianship of the commissioner." Id. The Court may only compel the Department to make a different adoptive placement upon granting a §260C.607 motion for adoptive

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[3] "[I]ssues that exist only hypothetically in the future are not justiciable." Power Line Task Force, Inc, v, Northern States Power Co., 2004 WL 2659837, *2 (Minn. Ct. App. 2004) (citing State v. Murphy, 545 N.W.2d 909, 917 (Minn. 1996),

placement. See Minn. Stat. §260C.607, subd. 5(a), 6(e) (2017).

10. Since the Court has not granted the only §260C.607 motion before it, the Department retains exclusive authority to place this child for adoption, and the Department need not ask the Court's permission to do so.[4] Until the Department places the child for adoption, the child remains in a preadoptive placement. The ICWA defines preadoptive placement as, "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." 25 U.S.C. §1903(1)(iii); see also Minn. Stat. §260.755, subd. 3(c) (2017); Minn. Tribal/State Agreement, p. 9, ¶ 31). Preadoptive placements have their own placement preferences under the ICWA. Section 1915(b) requires:

> Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which [her] special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good

[4] Accordingly, the Court will not rule on the Department's motion for adoptive placement because the Court has no authority under the circumstances to place this child for adoption.

> cause to the contrary, to a placement with--
>
> > (i) a member of the Indian child's extended family;
> >
> > (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
> >
> > (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
> >
> > (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.
>
> 25 U.S.C. §1915(b).

11. The Court may deviate from these preferences upon a tribal resolution specifying a different order of preferences or for good cause shown. See Id. §1915(a), (b), (c). As far as the Court is aware, White Earth does not have a tribal resolution specifying a different order of preferences; therefore, the Court may only depart from the ICWA placement preferences in this case upon good cause shown. Under federal law:

> A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should 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, such as 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 to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must 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.
>
> 25 C.F.R. §23.132(c) (Effective 12/12/16). "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." 25 C.F.R. §23.132(b).

12. Minnesota law also permits departure from the §1915 placement preferences but has established slightly different requirements for good cause:

> (b) The court may place a child outside the order of placement preferences only if the court determines there is good cause based on:
>
> (1) the reasonable request of the Indian child's parents, if one or both parents attest that they have reviewed the placement options that comply with the order of placement preferences;
>
> (2) the reasonable request of the Indian child if the child is able to understand and comprehend the decision that is being made;
>
> (3) the testimony of a qualified expert designated by the child's

tribe and, if necessary, testimony from an expert witness who meets qualifications of subdivision 6, paragraph (d), clause (2), that supports placement outside the order of placement preferences due to extraordinary physical or emotional needs of the child that require highly specialized services; or

(4) the testimony by the local social services agency that a diligent search has been conducted that did not locate any available, suitable families for the child that meet the placement preference criteria.

(c) Testimony of the child's bonding or attachment to a foster family alone, without the existence of at least one of the factors in paragraph (b), shall not be considered good cause to keep an Indian child in a lower preference or nonpreference placement.

(d) A party who proposes that the required order of placement preferences not be followed bears the burden of establishing by clear and convincing evidence that good cause exists to modify the order of placement preferences.

Minn. Stat. §260.771, subd. 7(b) (2017).

13. These laws are clear that the Court may only deviate from the ICWA placement preferences

upon a showing of good cause by clear and convincing evidence. Although the Cliffords have arguably alleged facts that suggest there may be good cause to deviate from the §1915(a) preferences, they have not established good cause by clear and convincing evidence under either the federal or the Minnesota law. In the context of their motion for adoptive placement, the Cliffords argued that their current filings should prompt another hearing on the issue of good cause. While a prima facie showing is required to obtain an evidentiary hearing under §260C.607, the Court is not aware of any legal authority requiring the same two-step review under the §1915(b) preferences. Both Minnesota and federal law require a showing of good cause by clear and convincing evidence in order to depart from the §1915(b) placement preferences, and the Cliffords have not made that showing here.

14. This Court has previously held that this child is an Indian Child as defined by the ICWA (order, filed 2/27/17, p. 4, ¶ 3), that she is a member[5] in a federally recognized Indian tribe (id.; see also order, filed 10/23/17, p. 11, ¶ 42), and that the ICWA and the MIFPA apply to her. (See Id.). Accordingly, the §1915(b) preadoptive placement preferences apply to

[5] Amended on February 5, 2018. This sentence used to read: "This Court has previously held that this child is an Indian Child as defined by the ICWA (order, filed 2/27/17, p. 4, ¶ 3), that she is an enrolled member in a federally recognized Indian tribe (id.; see also order, filed 10/23/17, p. 11, ¶ 42), and that the ICWA and the MIFPA apply to her. (See Id.)."

her. The Cliffords do not dispute that they do not meet these preferences, and without a finding of good cause to deviate, the Department is bound by them. There is no dispute that Ms. Bradshaw meets the first placement preference as an extended member of the child's family. The record is clear that Ms. Bradshaw has an approved adoption home study. (See N. Jones Oral Argument, 1/16/18). Despite Ms. Bradshaw's lack of a foster care license, the Department confirms there are no legal barriers to the child's placement with Ms. Bradshaw. (Id.) Ms. Bradshaw is willing to have the child placed with her for adoption, and the Department and White Earth believe such placement is in the child's best interests. (See N. Jones Oral Argument, 1/16/18; R. McConkey-Greene Oral Argument, 1/16/18). The Court notes that the Guardian ad Litem does not support the child's placement with Ms. Bradshaw, but the Court is not aware of any legal authority requiring the Department to follow the Guardian ad Litem's placement recommendation instead of its own. Under the current posture of this case, the Department retains the exclusive authority to place the child for adoption, and there appear to be no legal barriers restricting their ability to do so.

15. The Department asserted that the child would have been placed with Ms. Bradshaw immediately had it not been for these proceedings and that it is ready to sign an adoption placement agreement with her. The Court is tasked with ensuring that the Department makes reasonable efforts (or in

this case, *active* efforts) toward finalizing the adoption of this child. See Minn. Stat. §260C.607, subd. 1(a); see also Minn. Stat. §260.762, subd. 3. The Court is also required to make sure that these efforts are "appropriate to the stage of the case." Id. at 4(a)(1). It is with this authority that the Court orders the Department to act expeditiously in its adoptive placement of this child so that the resolution of the Cliffords' motion, and more importantly, the child's permanency, are not further delayed.

IT IS HEREBY ORDERED

1. The Court reserves its ruling on Danielle and Jason Clifford's motion for adoptive placement until the Department has placed this child for adoption.

2. The Hennepin County Human Services and Public Health Department shall immediately place this child for adoption pursuant to the mandates of Minnesota and federal law.

3. The Department shall notify the parties and participants by court notification when the child has been placed for adoption, at which point, the Court will rule on whether the Cliffords have made a prima facie showing warranting an evidentiary hearing under §260C.607.

4. The parties shall appear for a review hearing on **Tuesday, February 13, 2018 at 11:00 a.m**.

BY THE COURT:

/s/ Angela Willms
Angela Willms
February 5, 2018 Referee of District Court
Juvenile Court Division

/s/ David L. Piper
Judge of District Court
Juvenile Court Division

APPENDIX C

STATE OF MINNESOTA

IN COURT OF APPEALS

In re J.C. and D.C., Petitioners In the Matter of the Welfare of the Child of: The Commissioner of Human Services	**ORDER** #A18-0393

[Filed: Apr. 20, 2018]

Considered and decided by Larkin, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:

The child who is the subject of this matter was born in 2011 and was initially placed in foster care in 2014. Parental rights to the child were terminated in July 2016. That month, the child was placed with the foster parents who are now bringing the issue of the child's placement before this court. Initially, the district court did not treat the child as an Indian child under

the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-63 (2012), based on representations to the district court by the White Earth Band of Chippewa. In January 2017, however, the tribe asserted for the first time that the child is an Indian child. In February 2017, the district court ruled that the child is an Indian child. Later, the tribe indicated support for placing the child with her maternal grandmother, and foster parents moved for an adoptive placement of the child in their home and a hearing on their motion.

By order filed on January 23, 2018, and amended on February 5, 2018, the district court noted that the prerequisites for an adoptive placement were not yet satisfied and that litigation regarding an adoptive placement would be premature. Pending adoption proceedings, the district court allowed the child to be placed with her maternal grandmother pursuant to preferences in ICWA § 1915(b) for preadoptive placements. The district court reserved foster parents' motion for an adoptive placement, and directed the Hennepin County Human Services and Public Health Department (the county) to "immediately" place the child for adoption pursuant to state and federal law. The child was placed with her maternal grandmother on January 26, 2018. On March 9, 2018 foster parents petitioned this court for a writ of prohibition and a writ of mandamus, challenging various rulings made by the district court. Foster parents also moved this court to stay the child's placement with her maternal grandmother. On March 13, 2018, foster parents filed an amended petition.

A writ of prohibition can be issued only if (1) an inferior court is about to exercise judicial or quasi-judicial power; (2) the exercise of that power is

unauthorized by law; and (3) the exercise of that power will result in injury for which there is no adequate remedy. *Leslie v. Emerson* (*In re Leslie*), 889 N.W.2d 13, 14 (Minn. 2017); *see Underdahl v. Comm'r of Pub. Safety* (*In re Comm'r of Pub. Safety*), 735 N.W.2d 706, 710 (Minn. 2007) (addressing prohibition). While prohibition may issue "to prevent an abuse of discretion where there is no other adequate remedy at law," *Wasmund v. Nunamaker*, 277 Minn. 52, 55, 151 N.W.2d 577, 579 (1967), "[a] writ [of prohibition] is a preventative, not a corrective, measure." *State v. Deal*, 740 N.W.2d 755, 769 (Minn. 2007).

Foster parents argue that the district court exceeded its authority by allowing the child to be placed with her maternal grandmother before ruling on foster parents' motion for an adoptive placement in their home. Because the child was placed with her maternal grandmother more than a month before foster parents sought relief in this court, foster parents' petition, contrary to *Deal*, seeks to correct rather than prevent the placement with her maternal grandmother. Because the challenged exercise of judicial power is not prospective, a writ of prohibition is improper. *See id.*

Moreover, the child's placement with her maternal grandmother is not unauthorized by law. "Minnesota courts have frequently looked to the guidelines published by the Bureau of Indian Affairs in construing ICWA provisions." *In re Best Interests of M.R.P.-C.*, 794 N.W.2d 373, 378 (Minn. App. 2011); *see* Bureau of Indian Affairs (BIA) *Guidelines for Implementing the Indian Child WelfareAct* (2016), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf (Guidelines). And

the Guidelines contemplate that a non-ICWA placement of a child can be reopened and supplanted by an ICWA-based placement if, after the placement, it is determined either that the child is an Indian child or that the district court has reason to believe the child is an Indian child. *See* Guidelines at 11 (stating that a failure to timely identify whether ICWA applies to a child "can generate unnecessary delays, as the court and the parties may need to redo certain processes or findings under the correct standard"), 12 (stating that "it makes sense to place a child that the court has reason to know is an Indian child in a placement that complies with ICWA's placement preferences from the start of a proceeding, rather than having to consider a change [in] a placement later in the proceeding once the court confirms that the child actually is an Indian child").

Once the tribe informed the district court that it had changed its position regarding the child's status as an Indian child, the district court, at a minimum, had reason to know the child was an Indian child. Therefore, the regulations associated with ICWA required the district court to treat the child as an Indian child. 25 C.F.R. § 23.107(b)(2) (2017); *see* 25 C.F.R. § 23.107(c) (2017) (identifying when a court has reason to know a child is an Indian child). Thus, "any" adoptive or preadoptive placement of this child was subject to the placement preferences recited in ICWA, unless the tribe set different preferences. *See* 25 U.S.C. § 1915(a) (adoptive placement preferences), (b) (preadoptive placement preferences), (c) (tribal preferences). Because the district court was not presented with any tribe-specific placement preferences, the ICWA preferences were the relevant preferences. Further, an adoption placement

agreement is a prerequisite for an adoptive placement. *See* Minn. Stat. § 260C.613, subd. 1(a) (2016) (stating that "[t]he child shall be considered placed for adoption when the adopting parent, the agency, and the commissioner have fully executed an adoption placement agreement on the form prescribed by the commissioner"). No adoption placement agreement has been executed in this case, however. Therefore, ICWA's preadoptive placement preferences were more relevant to the child's current placement with her maternal grandmother than ICWA's adoptive placement preferences.

Foster parents' focus on the *adoptive* placement preferences of section 1915(a) is misplaced because, absent an adoptive placement, it is premature to address foster parents' arguments about the applicability of the adoptive placement preferences and whether to deviate from those preferences. Foster parents' reliance on *Adoptive Couple v. Baby Girl*, is similarly misplaced because that case addresses the adoptive placement preferences of ICWA § 1915(a), rather than the preadoptive preferences of section 1915(b), which are more applicable here. 570 U.S. 637, 654-56, 133 S. Ct. 2552, 2564-65 (2013).

Under ICWA, absent good cause to the contrary, in "any" preadoptive placement, preference "shall be given" to a placement with "a member of the Indian child's extended family[.]" 25 U.S.C. § 1915(b)(i). Grandmother is a member of the child's extended family, and foster parents are not. The district court acknowledged that foster parents "arguably alleged facts that suggest there may be good cause to deviate from the [adoptive] preferences," but noted that they had not established clear and convincing evidence of the good cause that is necessary to deviate from the

preadoptive preferences. We, like the district court, are sensitive to legitimate concerns about the best interests of this child, who was removed from her foster parents' home after approximately 18 months even though they are willing to adopt her. By themselves, however, a child's best interests are an inadequate basis to deviate from ICWA's preferences. *See In re Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994) (stating that "good cause [to deviate from ICWA's adoptive placement preferences] cannot be based simply on a determination that placement outside the preferences would be in the child's best interests"). Because we cannot conclude that the district court's allowance of the child's preadoptive placement with her maternal grandmother was unauthorized by law, a writ of prohibition is inappropriate.

Nor can we say that foster parents have shown an injury for which there is no adequate remedy. Foster parents do not clearly identify exactly which of their legal rights the district court allegedly prejudiced. Regardless, the district court ordered that the child be placed for adoption "immediately." When the prerequisites for that placement are satisfied and the placement is made, foster parents will have the opportunity to litigate the propriety of any refusal to make that adoptive placement in their home. Minn. Stat. § 260C.607, subd. 6 (2016). And because the applicability of ICWA's adoptive placement preferences will depend, in part, on whether the child is an Indian child, that litigation may address any challenge foster parents may have to the form of the tribe's submissions to support its assertion that this child is an Indian child. Moreover, to the extent foster parents believe that the county is not complying with

the district court's directive to "immediately" place the child for adoption, foster parents can seek relief in district court. Because foster parents have an adequate legal remedy, a writ of prohibition is not appropriate.

To support their request for a writ of prohibition, foster parents also argue that the definition of "Indian child" in the Minnesota Indian Family Preservation Act (MIFPA) includes, but is broader than and hence preempted by, ICWA's definition of "Indian child." Alternatively, foster parents argue that applying MIFPA based on its definition of "Indian child" will result in a violation of the Equal Protection Clause of the U.S. Constitution. Based on these arguments, foster parents seek a writ of prohibition ruling the relevant portions of MIFPA unconstitutional.

In its February 5, 2018 order, the district court noted that it had previously ruled the child to be an Indian child "as defined by [ICWA]." Because the district court used ICWA's definition of "Indian child" rather than MIFPA's definition, the district court is not about to exercise judicial power pursuant to MIFPA's definition. Thus, a writ of prohibition ruling MIFPA unconstitutional is not available.

Foster parents seek a writ of prohibition to preclude application of MIFPA until the child is ruled to be an Indian child under ICWA based on competent documentary evidence. Because this record shows that the district court, at a minimum, has reason to know that this child is an Indian child, the district court is required to treat the child as an Indian child until it is shown that she is not. 25 C.F.R. § 23.107(b)(2). Therefore, the district court's treatment of this child as an Indian child does not show that it

is about to exercise unauthorized judicial power. As a result, this argument does not merit the extraordinary remedy of a wit of prohibition.

Foster parents seek a writ of mandamus to compel the district court to address their motion seeking an adoptive placement of the child in their home. A writ of mandamus is "an extraordinary legal remedy," *State v. Pero*, 590 N.W.2d 319, 323 (Minn. 1999), the issuance of which is discretionary with the court, *State v. Hart*, 723 N.W.2d 254, 260 (Minn. 2006). Generally, a writ of mandamus will issue only to compel the performance of a duty with respect to which a district court has no discretion, and a writ of mandamus will not issue in any case where there is an adequate remedy in the ordinary course of law. *In re D.F. ex rel K.D.F.*, 828 N.W.2d 138, 140-41 (Minn. App. 2013). Because an adoption placement agreement has not been executed in this case, an adoptive placement of this child cannot be made at present. *See* Minn. Stat. § 260C.613, subd. 1(a). Therefore, granting a writ of mandamus to compel the district court to address foster parents' motion would compel the district court to deny or dismiss that motion. In these circumstances, foster parents are not prejudiced by the district court's reservation of their motion, and their argument is not a basis for a writ of mandamus. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

Citing *Clark v. Clark*, 543 N.W.2d 685 (Minn. App. 1996) and other authorities dealing with stays pending appeal, foster parents challenge the district court's denial of their request to stay the child's preadoptive placement with her maternal grandmother pending the district court's ruling on their motion for an adoptive placement of the child.

Because the current posture of this case involves a petition for extraordinary writs but not an actual appeal, we question the propriety of foster parents' motion to this court for a stay. We will, however, address the point.

Generally, a district court's decision regarding a stay pending appeal will not be altered by an appellate court absent an abuse of discretion. *State by Clark v. Robnan, Inc.*, 259 Minn. 88, 90, 107 N.W.2d 51, 53 (1960); *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 144 (Minn. App. 2007). Custody decisions generally take effect on the date specified by the district court. *Petersen v. Petersen*, 296 Minn. 147, 149, 206 N.W.2d 658, 659-60 (1973); *see* Minn. R. Civ. App. P. 108.01-.02 (addressing stays pending appeal, generally). An exception to *Petersen's* general rule regarding the effective date of custody decisions may be invoked if (1) the custody determination will result in major changes in the child's living arrangements, and (2) there are no exigent circumstances requiring an immediate change in the child's placement. *See Clark*, 543 N.W.2d at 687.

Foster parents' motion does not address *Petersen*'s general rule, and this case is factually distinguishable from *Clark*. *Clark* involved a change in the custody of a 12-year old child requiring that child, four days after the district court's order, to move from "stable, but unsatisfactory living circumstances" in Minnesota with mother to the island of Sardinia with father, despite father's lack of an established home on Sardinia, and his inability to tell the district court whether the child would attend school on Sardinia or 150 miles away, in Italy. *See id.* at 686-87. Here, unlike *Clark*, there is no uncertainty about where the child will live and where she will go to school. Further,

the child's placement and progress toward adoption is subject to statutorily-required periodic review by the district court. Minn. Stat. § 260C.607, subd. 1 (2016). Thus, whatever changes occur in this child's life due to the transfer, those changes will be much less dramatic than those in *Clark*, and much more amenable to monitoring, and prompt alteration if necessary, by the district court. Further, the exigent circumstances prong of *Clark* is also unsatisfied: Under ICWA and the Guidelines, this child currently must be treated as an Indian child subject to the preadoptive placement preferences, and the district court found foster parents did not refute those preferences. Foster parents have not shown that the district court abused its discretion by denying their motion for a stay.

IT IS HEREBY ORDERED:

1. The petition for prohibition is denied.

2. The petition for mandamus is denied.

3. The motion to stay the transfer of the child pending resolution of petitioners' motion for and adoptive placement of the child, is denied.

Dated: April 20, 2018

BY THE COURT

/s/ Michelle A. Larkin
Michelle A. Larkin
Presiding Judge

APPENDIX D

STATE OF MINNESOTA

IN SUPREME COURT

In re J.C. and D.C., Petitioners In the Matter of the Welfare of the Child of: The Commissioner of Human Services.	)	A18-0393

[Filed: June 11, 2018]

O R D E R

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of J.C. and D.C. for further review be, and the same is, denied.

Dated: June 11, 2018 **BY THE COURT**

/s/ Lorie S. Gildea
Lorie S. Gildea
Chief Justice

APPENDIX E

STATE OF MINNESOTA	DISTRICT COURT
	FOURTH JUDICIAL
COUNTY OF HENNEPIN	DISTRICT
	JUVENILE COURT
	DIVISION

In the Matter of the Welfare of the Child of:	Case Number: 27-JV-15-483
The Commissioner of Human Services.	Family Number: 349034
Child: [P.S.] [P.S. Birthday] (2011)	**ORDER FOR EVIDENTIARY HEARING**

[Filed: July 30, 2018]

The above-entitled matter came before the Honorable Angela Willms, Referee of District Court, Juvenile Division, on July 17, 2018 at the Hennepin County Juvenile Justice Center in Minneapolis, Minnesota. CMR recorded the proceedings.

PARTIES AND PARTICIPANTS

Nancy Jones, Assistant Hennepin County Attorney, appeared on behalf of the Hennepin County Human Services and Public Health Department

("Department"), which was represented by Hannah Epstein, Adoption Resource Worker, and Joseph Thompson, Child Services Worker, who were present.

Barbara Reis, Guardian ad Litem, was present. Attorney of Record for Ms. Reis, Eric Rehm, was not present.

Rebecca McConkey-Greene, Attorney at Law, appeared on behalf of the White Earth Band of Chippewa ("White Earth"), which was represented by Lee Goodman, Social Worker, who was present.

Rachel Osband, Attorney at Law, appeared on behalf of Danielle and Jason Clifford, Foster Parents, who were not present. Attorney of Record for Mr. and Mrs. Clifford, Mark Fiddler, was not present.

Ronald Walters, Attorney at Law, appeared on behalf of Robyn Bradshaw, Maternal Grandmother, who was present.

Upon all the records and proceedings herein, the Court makes the following findings:

PROCEDURAL HISTORY

1. The parties last appeared for a post-permanency review hearing on May 10, 2018.

2. The Department, Ms. Bradshaw, and the Commissioner of Human Services executed an Adoption Placement Agreement for the child on May 14, 2018. The Department filed a Notice of Adoptive Placement with the court on May 16, 2018.

3. Less than a week later, on May 21, 2018, the Cliffords filed a Petition for Review with the Minnesota Supreme Court, requesting review of the April 20, 2018 Minnesota Court of

Appeals decision denying the Cliffords' requests for relief. On June 11, 2018, the Supreme Court denied the Cliffords' Petition. At that time, the parties had a post-permanency review hearing scheduled for July 17, 2018.

4. On July 17, 2018, the parties and participants appeared for the post-permanency review hearing and reported that the child, [P.S.], is doing well. White Earth reported that efforts to obtain culturally specific therapeutic services for the child are ongoing and that the parties are currently waiting on a referral that has been made to the Indian Health Board. In the meantime, the child continues to see her current therapist. The parties reported that the child has requested longer visits with the Cliffords; the Court granted this request and expanded visits to two hours per visit. Ms. Reis and Ms. Osband requested that the Court allow unsupervised visits between the child and the Cliffords; the Court denied this request to prevent further disruption to the child's routine. Ms. Reis requested that the Court order Robyn Bradshaw to participate in the therapy with which she is currently engaged; the Court denied this request as unnecessary.

5. The parties requested that the Court rule on whether the Cliffords have made a prima facie showing requiring an evidentiary hearing, pursuant to Minnesota Statutes §260C.607, subdivision 6(c). The Cliffords filed a motion for adoptive placement per this statute on December 14, 2017.

6. On December 27, 2017, Mr. Rehm submitted a letter on behalf of the Guardian ad Litem, supporting the Cliffords' motion and opposing adoptive placement with Ms. Bradshaw.

7. On December 29, 2017, the Department filed a memorandum opposing the Cliffords' motion. The Department argues it was reasonable not to place the child with the Cliffords for adoption because Minnesota and federal law require the Department to place the child according to Indian Child Welfare Act (ICWA) and Minnesota Indian Family Preservation Act (MIFPA) preferences, which the Cliffords do not satisfy. The Department also filed a motion requesting court authorization to immediately place the child with Ms. Bradshaw and to enter into an adoptive placement agreement with her.

8. The same day, White Earth filed a response opposing the Cliffords' motion and supporting the Department's motion for immediate placement with Ms. Bradshaw.

9. Mr. Walters filed a memorandum on December 29, 2017 supporting the child's placement with his client and arguing that the Cliffords are legally unable to adopt the child due to the ICWA placement preferences and the Cliffords' inability to obtain a Qualified Expert Witness from White Earth to support their adoption of the child. On January 5, 2018, the Cliffords filed a reply memorandum arguing that the child cannot legally be placed with Ms. Bradshaw for adoption because she does not have an approved adoption home study.

10. On January 8, 2018, Mr. Walters re-filed his December 29, 2017 memorandum in order to serve the Cliffords, who were inadvertently excluded from his initial service of the document. On January 9, 2018, the Cliffords responded to Mr. Walters's memorandum. The Cliffords' January 9, 2018 memorandum was filed in violation of the Court's December 5, 2017 Order but was nevertheless considered under the circumstances.[1]

11. On January 16, 2018, the parties and participants appeared on the Cliffords' motion for adoptive placement, and the Court took the matter under advisement. On January 22, 2018, the Court issued its Findings and Order Regarding Motions for Adoptive Placement. In this Order, the Court reserved its ruling on whether the Cliffords' made a prima facie showing until the Department placed the child for adoption. (Findings and Order Re: Mot. for Adoptive Placement, filed 01/22/18, p. 7, ¶ 1). The Court also ordered the Department to immediately place the child for adoption pursuant to state and federal law. (Id. at ¶ 2).

12. On January 25, 2018, the Cliffords filed a Notice of Motion and Motion for Stay, requesting that the Court stay its January 22, 2018 Order removing the child from their home. The Department and White Earth immediately filed responses objecting to the Cliffords' motion for a stay. The Court denied

[1] "Any motions or responses filed outside of the aforementioned timelines will be dismissed or excluded from consideration by the Court." (Order, filed 12/5/17, p. 3, ¶ 9).

the Cliffords' motion on January 25, 2018. The child was placed with Ms. Bradshaw on or about January 26, 2018.

13. On January 26, 2018, White Earth filed a motion to amend the Court's January 22, 2018 Order to clarify language the Court used regarding the child's tribal membership. The Court granted this motion and issued an amended Order on February 5, 2018.[2]

14. On March 9, 2018, the Cliffords petitioned the Minnesota Court of Appeals, requesting a writ of prohibition, or in the alternative, a writ of mandamus, restraining this Court from enforcing its Order finding that the Indian Child Welfare Act applied to this child and its Order reserving its ruling on the Cliffords' motion for adoptive placement. As previously stated, the Court of Appeals denied the Cliffords' requests for relief on April 20, 2018.

15. On April 24, 2018, White Earth filed an Affidavit from Kevin Dupuis, President of the Minnesota Chippewa Tribe and Chairman of the Fond du Lac Band of Lake Superior Chippewa, explaining how each Band of the Minnesota Chippewa Tribe makes its own determinations of membership for the purposes of the Indian Child Welfare Act. On April 25, 2018, White Earth filed an Affidavit of ICWA Membership from Laurie York, Director of Indian Child Welfare, indicating that both Suzanne Bradshaw and [P.S.] are members of

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[2] See Amended Findings and Order Regarding Motions for Adoptive Placement, filed 02/05/18, p.7, ¶ 14.

the White Earth Band of Chippewa for the purposes of the Indian Child Welfare Act.

16. On May 7, 2018, the Cliffords filed a Notice of Motion and Motion to Vacate, requesting that the Court reverse its determination that the child is an Indian child and dismiss White Earth from this case. The Court dismissed the Cliffords motion at the May 10, 2018 post-permanency review hearing, due to the Cliffords' lack of standing as participants to file motions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Minnesota Statutes §260C.607 permits foster parents to file a motion for adoptive placement as long as those foster parents have an approved adoption home study and have resided in Minnesota for at least six months prior to filing the motion. Minn. Stat. §260C.607, subd. 6(1) (2017). There is no dispute that Danielle and Jason Clifford were foster parents within the meaning of the statute when they filed their motion, that they have an approved adoption home study, and that they resided in Minnesota for at least six months before filing their motion.

2. The issue before the Court is whether the Cliffords' motion and supporting documents make a prima facie showing that the Department has been unreasonable in failing to place the child with the Cliffords for adoption. See Id. If the Cliffords meet this burden, they are entitled to an evidentiary hearing where they must prove by a

preponderance of the evidence that the Department was unreasonable in failing to make the requested adoptive placement. Minn. Stat. Id. at subd. 6(d). However, if the Cliffords fail to make a prima facie showing, they are not entitled to an evidentiary hearing, and Minnesota law requires the Court to dismiss their motion. Id. at subd. 6(c).

3. When determining whether the movant has made a prima facie showing, "the district court must accept facts in [the movant's] supporting documents as true, disregard contrary allegations, and consider the non-moving party's supporting documents only to the extent that they explain or provide context." In the Matter of the Welfare of the Children of L.L.P., A.J.H., and J.M.L., 836 N.W. 2d 563, 570 (Minn. Ct. App. 2013).

4. The district court shall not weigh the movant's allegations against the agency's conduct and the history of the proceedings. Id. However, conclusory allegations do not support a prima facie showing. Id. at 571. Minnesota Statutes §260C.607 is a relatively new statute, so there is almost no case law to guide the Court regarding what constitutes a prima facie showing in these cases. Additionally, the child in this case is an Indian child and therefore subject to the Indian Child Welfare Act (ICWA) and the Minnesota Indian Family Preservation Act (MIFPA). (See Order, filed 10/23/17, p. 11, 42; see also Minn. Stat. §260.755, subd. 8(1) (2017)). The Court is not aware of any case law regarding a §260C.607 motion for the adoptive

placement of an Indian child and believes this may be an issue of first impression.

5. The Cliffords allege that the Department was unreasonable for failing to place the child with them for adoption on several grounds. These include:

   a. The Department was unreasonable for deferring to White Earth despite the Department's longstanding concerns about Ms. Bradshaw's suitability as an adoptive placement, (Notice of Mot. and Mot., filed 12/14/17, p. 3). The Department unreasonably supports Ms. Bradshaw despite many facts suggesting placement in her home is not in the child's best interests. (Id. at 11-12).

   b. The Department was unreasonable for applying the § 1915(a) ICWA placement preferences to this child because the Adoptive Couple v. Baby Girl case indicates the placement preferences do not apply. (Id. at 4-7).

   c. The Department was unreasonable because even if the § 1915(a) preferences do apply, the Department should have found good cause to deviate from the preferences due to the child's extraordinary needs. (Id. at 7-8).

   d. The Department was unreasonable for applying an outdated relative preference to the child's placement. (Id. at 8).

   e. The Department was unreasonable for failing to place the child based on an

individualized determination of her needs. (Id. at 8-11).

f. The Department was unreasonable for supporting a placement despite evidence that suggests removing the child from the Cliffords will cause her harm. (Id. at 13).

g. The Department is unreasonable for supporting an adoptive placement that is against public policy. (Id. at 14).

6. To support these allegations, the Cliffords have provided an affidavit, seven exhibits, and a letter from the child's therapist discussing the child's Developmental Trauma Disorder. In their affidavit, the Cliffords explain the child's placement history (affidavit of Danielle Clifford and Jason Clifford, p. 8, ¶ 35), the information they received from the Department about the child's trauma history and her therapeutic needs (id. at 1, ¶¶ 2, 3), the child's therapeutic needs identified by her therapist (id. at 2, ¶ 5), the training the Cliffords attended to adequately support the child's emotional and mental health (id. at 2, ¶ 6), and the child's therapeutic progress and periodic regression in their home (id. at 2, ¶¶ 6, 8, 9; id. at 3, ¶¶ 10, 11; id. at 4, ¶¶ 16, 18; id. at 5, ¶¶ 20, 21). The Cliffords also discuss the child's marked academic progress while in their home. (Id. at 5-6, ¶¶ 25, 26). The Cliffords allege that the child considers them family, that she considers their extended family as her family, and that she wants to be adopted by the Cliffords and

not by Ms. Bradshaw. (Id. at 12, ¶ 56; id. at 12-13, ¶ 57; id. at 13, ¶ 60; id. at 14, ¶¶ 61, 62).

7. The Cliffords then describe the reasons the Department did not originally place the child with Ms. Bradshaw and how placement with Ms. Bradshaw is not in the child's best interests. The Cliffords allege that the child's previous foster home disrupted because Ms. Bradshaw harassed the foster parents (id. at 9, ¶ 39), that Ms. Bradshaw's foster care license was revoked due to her criminal record (id. at 14, ¶ 62; ex. 3, p. 024), that Ms. Bradshaw could not provide stable housing for the child (id. at 14, ¶ 64; ex. 4); that Ms. Bradshaw would allow contact between the child and her biological mother (id. at 17, ¶ 74), that the Department ruled out Ms. Bradshaw many times for placement (id. at 16, ¶ 73), and that the Department denied Ms. Bradshaw visits with the child prior to White Earth's intervention as a party to these proceedings, (Id.)

8. The Cliffords allege that adoptive placement with Ms. Bradshaw is not in the child's best interest because Ms. Bradshaw provides insufficient care for the child in many ways. Ms. Bradshaw fails to give the child proper nutrition and boundaries (id. at 7, ¶29; id. at 15, ¶¶ 67, 68), she is a smoker and exposes the child to dangerous secondhand smoke (id. at 14, ¶65), she put the child's life at risk and broke the law by failing to require the child to use a car seat (id. 14, ¶ 63), she does not have reliable transportation or stable housing (id. at 15, ¶ 66; id. at 14, ¶ 64, ex. 4), she does not support the child's therapeutic needs (id. at 16, ¶ 70), the

child was injured in her home and encouraged to lie about it (id. at 16, ¶ 71), Ms. Bradshaw is a disinterested relative who was absent from the first years of the child's life (id. at 17, ¶75), and she declined the full visitation time with the child awarded to her by the Court (id. at 15, ¶ 69).

9. The Department and White Earth argue that the Department was reasonable in not placing the child with the Cliffords for adoption because the §1915(a) ICWA placement preferences apply to this child, the Cliffords cannot meet them, and the Cliffords cannot prove by clear and convincing evidence that there is good cause to deviate from the preferences.[3] In response, the Cliffords argue that the § 1915(a) placement preferences do not apply to this child, pursuant to the U.S. Supreme Court's holding in Adoptive Couple v. Baby Girl. 133 S. Ct. 2552 (U.S.S.C. 2013). The Cliffords argue that the Department has been unreasonable in deferring its placement decision to White Earth instead of making an individualized determination of the child's best interests as required by Minnesota Statutes §260C.212, subdivision 2. The Cliffords argue that even if the § 1915(a) placement preferences apply, they have made a prima

[3] The Court notes that Robyn Bradshaw supports the arguments of the Department and of White Earth. (See generally, Mem. in Resp. to Mot. of Foster Parents, filed 12/29/17). As Ms. Bradshaw is not a party to these proceedings, the Court considers her Memorandum in accordance with Rule 22.02 of the Minnesota Rules of Juvenile Protection Procedure. See Minn. R. Juv. Prot. P. 22.02, subd. 2 (2017).

facie showing that there is good cause to deviate from the preferences and should therefore receive an evidentiary hearing to further prove good cause by clear and convincing evidence.[4]

10. Thus, as argued by the parties and participants to this case, central to the Court's determination of whether the Cliffords have made a prima facie showing under §260C.607 is the issue of whether the §1915(a) ICWA placement preferences apply to this child.

11. The §1915(a) placement preferences typically apply to the adoptive placement of an Indian child. 25 U.S.C. §1915(a). However, in Adoptive Couple v. Baby Girl, the United States Supreme Court held, "[section] 1915(a)'s adoption placement preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. This is because there is simply no 'preference' to apply if no alternative party that is eligible to be preferred under § 1915(a) has come forward." 133 S.Ct. 2552, 2564 (2013).

12. In cases where the §19159(a) preferences do apply, a court may deviate from these preferences upon a tribal resolution specifying a different order of preferences or for good cause shown, See Id. §1915(a), (b), (c). As far as

[4] The letter filed and oral arguments made by Mr. Rehm on behalf of the Guardian ad Litem, while clearly supportive of the child's placement with the Cliffords, did not address the legal issues before the Court and are therefore given little weight in this decision.

the Court is aware, White Earth does not have a tribal resolution specifying a different order of preferences. Thus, if the Court finds that the §1915(a) preferences apply to this child, the Court may only depart from those preferences upon good cause shown:

> A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should 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, such as 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 to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must 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.
>
> 25 C.F.R. §23.132(c) (Effective 12/12/16).

Good cause to deviate from the preferences must be proven by clear and convincing evidence. 25 C.F.R. §23.132(b).

13. Minnesota law also permits departure from the placement preferences but has established slightly different requirements for good cause;

> (b) The court may place a child outside the order of placement preferences only if the court determines there is good cause based on;
>
> (1) the reasonable request of the Indian child's parents, if one

or both parents attest that they have reviewed the placement options that comply with the order of placement preferences;

(2) the reasonable request of the Indian child if the child is able to understand and comprehend the decision that is being made;

(3) the testimony of a qualified expert designated by the child's tribe and, if necessary, testimony from an expert witness who meets qualifications of subdivision 6, paragraph (d), clause (2), that supports placement outside the order of placement preferences due to extraordinary physical or emotional needs of the child that require highly specialized services; or

(4) the testimony by the local social services agency that a diligent search has been conducted that did not locate any available, suitable families for the child that meet the placement preference criteria.

(c) Testimony of the child's bonding or attachment to a foster family alone, without the existence of at least one of the factors in paragraph (b), shall not be considered good cause to keep an Indian child in a lower preference or nonpreference placement.

> (d) A party who proposes that the required order of placement preferences not be followed bears the burden of establishing by clear and convincing evidence that good cause exists to modify the order of placement preferences.
>
> Minn. Stat. §260.771, subd. 7(b) (2017).

14. The Court finds that the Cliffords have made a prima facie showing that the Department was unreasonable in failing to place the child with them for adoption. Prima facie is Latin for "at first look" or "on its face." It is defined as, "sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue." Black's Law Dictionary (10th ed. 2014). Prima facie has been defined in case law as doing "nothing more than raising an inference." Kaster v. Independent School District No. 625, 284 N.W.2d 362, 365 (Minn. 1979).

15. The parties and participants dispute whether the §1915(a) placement preferences apply to this child and whether this child has extraordinary needs. For the purposes of this motion, the Court is required to accept the Cliffords' motion and supporting documents as true, disregard contrary allegations, and consider the Department's and White Earth's supporting documents only to the extent that they explain or provide context. See L.L.P., et al., 836 N.W. 2d at 570. At this stage, the Court

is not permitted to weigh the Cliffords' allegations against the Department's conduct and the history of the proceedings. See Id. at 570. The Court must only determine whether the Cliffords have supported their motion with more than conclusory statements. Id. at 571.

16. Although the Cliffords made some conclusory statements within their affidavit, they have supported their motion overall with more than conclusory statements and have therefore satisfied their prima facie burden. Accordingly, the Cliffords are entitled to an evidentiary hearing pursuant to Minnesota Statutes §260C.607. See §260C.607, subd. 6(c).

IT IS HEREBY ORDERED

1. This matter shall be set for an evidentiary hearing.

2. The parties shall, no later than August 7, 2018, select dates for an evidentiary hearing with Amanda Tosu, Senior Court Clerk. Once dates have been selected, the Court will issue a scheduling order.

July 30, 2018

BY THE COURT:

/s/ Angela Willms
Angela Willms
Referee of District Court
Juvenile Court Division

/s/ Hilary Lindell Caligiuri
Judge of District Court
Juvenile Court Division

APPENDIX F

STATE OF MINNESOTA FOURTH JUDICIAL DISTRICT	DISTRICT COURT JUVENILE DIVISION
In the Matter of the Welfare of the Child in the Custody of: **The Commissioner of Human Services.** Child: [P.S.] [P.S. Birthday] (2011; age 7)	Court File No. 27-JV-15-483 Family No: 349034 **FINDINGS AND ORDER DENYING MOTION FOR ADOPTIVE PLACEMENT**

[Filed: Jan. 17, 2019]

The above-entitled matter came on for an evidentiary hearing before the Honorable Angela Willms, Judicial Officer of District Court, Juvenile Division, on December 11, 17, 18, and 19, 2018 and January 3, 2019 at the Hennepin County Juvenile Justice Center in Minneapolis, Minnesota. CMR recorded the proceedings.

PARTIES

Nancy Jones, Assistant Hennepin County Attorney, appeared on behalf of the Hennepin County Human

Services and Public Health Department ("HSPHD"), which was represented by Joseph Thompson, Child Services Worker, and Hannah Epstein, Adoption Resource Worker, who were present.

Rachel Osband and Mark Fiddler, Attorneys at Law, appeared on behalf of Danielle and Jason Clifford, Movants and Former Foster Parents, who were present.

Rebecca McConkey-Greene, Attorney at Law, appeared on behalf of the White Earth Band of Chippewa, which was represented by Lee Goodman, Social Worker, who was present.

Eric Rehm, Attorney at Law, appeared on behalf of Barbara Reis, Guardian ad Litem, who was present.

PARTICIPANTS

Ron Walters, Attorney at Law, appeared on behalf of Robyn Bradshaw, Maternal Grandmother, who was present.

WITNESSES

The Court heard testimony from the following witnesses:

1. Joseph Thompson, HSPHD Child Services Worker
2. Gertrude Buckanaga, Executive Director Social Worker, Upper Midwest American Indian Center
3. Hannah Epstein, HSPHD Adoption Resource Worker
4. Jason Clifford, Child's Former Foster Parent

5. Megan Eastman (legally known as Megan Ness), MSW, LISW, Indian Health Board
6. Leonard Alan Roy, Minnesota Chippewa Tribe and White Earth Band of Chippewa
7. Faron Jackson, Sr., Minnesota Chippewa Tribe and Leech Lake Band of Ojibwe
8. Elaine Sullivan, HSPHD Program Manager
9. Jeffrey Thibert, Father of Danielle Clifford
10. Samantha Colai, MA LMFT RPT, Ascend Family Institute
11. Danielle Clifford, Child's Former Foster Parent
12. Robyn Bradshaw, Child's Maternal Grandmother
13. Bobbi Rodriguez, Foster Care Licensing Worker, Upper Midwest American Indian Center
14. Kelly Watson Ostroot, Social Worker, Waite Park Elementary
15. Lee Goodman, Social Worker, White Earth Band of Chippewa
16. Deena McMahon, LICSW, MSW, McMahon Counseling & Consultation
17. Dr. Priscilla Day, MSW, Ed.D, University of Minnesota Duluth
18. Laurie York, Director of Indian Child Welfare, White Earth Band of Chippewa
19. Barbara Reis, Guardian ad Litem

20. Rebuttal: Stephen Luzar, MA, LP, White Earth Behavioral Health

EXHIBITS

The Court received the following exhibits into evidence:

Exhibit 1	Bradshaw Home Study Assessment
Exhibit 2	Bradshaw Home Study Update
Exhibit 3	Bradshaw Background Study
Exhibit 4	Family Wise Visitation Summary
Exhibit 5	Upper Midwest American Indian Center Client Visitation Summaries
Exhibit 6	Child Social History
Exhibit 7	OHPP Start Date (07/23/2016)
Exhibit 8	OHPP Start Date (01/23/2017)
Exhibit 9	OHPP Start Date (07/23/2017)
Exhibit 10	OHPP Start Date (01/26/2018)
Exhibit 11	OHPP Start Date (07/26/2018)
Exhibit 12	David Hoy Records
Exhibit 13	Ascend Family Institute Intake Note (09/21/2017)
Exhibit 14	Indian Health Board ("IHB") Intake (09/28/2018)
Exhibit 15	IHB Update (11/28/2018)
Exhibit 16	ICWA Relative-Kinship Search
Exhibit 17	Certificate of Completion for Separation, Loss, and Grief Training (10/15/2018)
Exhibit 99	AG Case Management SSIS (10/29/2018)
Exhibit 121	Court Notification ("CN") (07/07/2017)
Exhibit 122	CN (10/05/2017)
Exhibit 123	CN (11/01/2017)

Exhibit 124	CN (01/10/2018)
Exhibit 125	CN (03/09/2018)
Exhibit 135	Samantha Colai Redacted Letter
Exhibit 136	Samantha Colai Letter (08/28/2017)
Exhibit 137	Samantha Colai Letter (10/30/2017)
Exhibit 156	Relative Kinship Search and Placement Considerations (08/26/2015)
Exhibit 158	Social Worker Chronology Summary (08/07/2014)
Exhibit 159	Social Worker Chronology Summary (08/12/2014)
Exhibit 160	Social Worker Chronology Summary (08/21/2014)
Exhibit 161	Social Worker Chronology Summary (08/11/2016)
Exhibit 203	Text to Robyn Bradshaw from the Cliffords re: Child's meals
Exhibit 206	Timeline of Child's Placement with the Cliffords
Exhibit 207C	Emails Between Joseph Thompson and the Cliffords (06/15-16/2017)
Exhibit 207I	Email from Danielle Clifford (08/21/2017)
Exhibit 209	Pictures of Child with the Cliffords and Cliffords' Extended Family
Exhibit 212	Note from Child to Cliffords
Exhibit 214	Deena McMahon CV
Exhibit 215A	Deena McMahon Assessment of Robyn Bradshaw
Exhibit 215B	Deena McMahon Assessment of Danielle and Jason Clifford
Exhibit 217	Samantha Colai Letter (01/05/2018)
Exhibit 218	Samantha Colai Letter (02/11/2018)
Exhibit 219	Samantha Colai Letter (03/08/2018)

Exhibit 220	Samantha Colai Letter (03/10/2018)
Exhibit 221	Samantha Colai Letter (05/08/2018)
Exhibit 222	Samantha Colai Final Summary
Exhibit 223	Email from Danielle Clifford to Lee Goodman (07/17/2017)
Exhibit 300	Family Wise Visitation Summaries (06/15/2017-10/20/2017)
Exhibit 301	Affidavit of ICWA Membership, Laurie York (04/25/2018)
Exhibit 302	Affidavit of Kevin Dupuis (04/04/2018)
Exhibit 303	The Revised Constitution and Bylaws of the Minnesota Chippewa Tribe
Exhibit 304	Minnesota Constitutional Interpretation (1-80)
Exhibit 305	Minnesota Constitutional Interpretation (8-94)
Exhibit 306	Minnesota Constitutional Interpretation (10-96)
Exhibit 307	Minnesota Chippewa Tribe Resolution (104-18)
Exhibit 308	White Earth Reservation Business Committee Resolution (057-19-001)
Exhibit 309	IHB Diagnostic Assessment (09/28/2018)
Exhibit 310	IHB Diagnosis and Plan (11/26/2018)
Exhibit 311	IHB Medical Record (11/27/2018)
Exhibit 312	Waite Park Elementary School Attendance Records (11/29/2018)
Exhibit 313	Minneapolis Public School Records (11/29/2018) and Various Certificates of Completion

Exhibit 314	Megan Eastman, MSW, LICSW, Resume
Exhibit 315	Laurie York Resume
Exhibit 316	**Jeri Jasken Resume***
Exhibit 317	**Kevin Dupuis Resume***
Exhibit 318	Leonard Alan Roy Resume
Exhibit 319	**Faron Jackson, Sr. Resume***
Exhibit 320	Stephan Luzar CV
Exhibit 321	**Joanna Woolman Resume***
Exhibit 322	Dr. Priscilla Day CV
Exhibit 323	Dr. Art Martinez CV
Exhibit 324	**Any exhibit disclosed or introduced by any party.***
Exhibit 325	**Any exhibit to rebut testimony or newly discovered evidence.***
Exhibit 326	Dr. Priscilla Day Observation Report (12/21/2018)
Exhibit 401	Guardian ad Litem ("GAL") Report with attachments (03/28/2017)
Exhibit 402	GAL Report with attachments (08/23/2017)
Exhibit 403	GAL Report with attachments (02/12/2018)
Exhibit 404	GAL Report with attachments (03/12/2018)
Exhibit 405	GAL Report with attachments (05/08/2018)
Exhibit 406	GAL Report with attachments (07/09/2018)
Exhibit 407	GAL Report with attachments (09/06/2018)
Exhibit 408	Letter with History from IHB (11/28/2018)
Exhibit 409	School Reports (08/27/2018-11/29/2018)

These exhibit numbers were admitted by stipulation at the beginning of the evidentiary hearing, but the actual exhibits were never received by the Court due to witnesses not being called, etc. As such, they are not part of the record in these proceedings despite their earlier admission by stipulation.

The Court also took judicial notice of the records contained in Hennepin County District Court File 27-JV-15-483 from the July 7, 2016 Termination of Parental Rights Order to the present.

Based on the sworn testimony and exhibits received, the arguments of counsel, and the files, records, and proceedings herein, the Court makes the following findings:

FINDINGS OF FACT

1. On July 7, 2016, Judge Lyonel Norris terminated the parental rights of Suzanne Bradshaw and Christopher Scott to the child at issue in these proceedings, [P.S.]. (Order Terminating Parental Rights and Appointing Guardian, 07/07/2016). [P.S.] is currently seven years old. From the start of this case on August 11, 2014 to date, [P.S.] has been placed in approximately seven different homes. (Ex. 6, pp. 8-9). She lived in a shelter home ("Julie") from August 7, 2014 to October 1, 2014 before moving to a kin foster home ("Sandra") where she remained until August 21, 2015. (Id. at 8). She then lived with a relative ("Teresa") from August 21, 2015 until December 19, 2015. (Id.) After that, she was briefly reunited with her mother on a trial home visit from December 19,

2015 to January 26, 2016. (Id.) [P.S.] then moved to a different shelter home ("Essie") and lived there until July 2016. (Id.) On July 23, 2016, [P.S.] moved in with Danielle and Jason Clifford, Movants. (Id.) [P.S.] lived with the Cliffords until January 26, 2018, when she was removed from their home pursuant to these proceedings and placed with her maternal grandmother, Robyn Bradshaw. (Id. at 8-9). [P.S.] has lived with Ms. Bradshaw ever since. (Id.)

2. Prior to the Termination of Parental Rights and for approximately six months afterward, [P.S.] was believed to be ineligible for enrollment in any American Indian Tribe. (See TPR Order 07/07/2016; Order Re: Mot. to Intervene, 02/27/17). [P.S.]'s maternal grandmother, Robyn Bradshaw, is a member of the White Earth Band of Chippewa ("White Earth"). (Robyn Bradshaw Testimony). White Earth was notified of [P.S.]'s case on or about April 8, 2015. (ICWA Not. for Permanency Petition, 04/08/2015). On or about April 23, 2015, the Hennepin County Attorney's Office received written notice from the White Earth Director of Indian Child Welfare that [P.S.] was not eligible for membership under the Indian Child Welfare Act with the White Earth Band of Chippewa. (Jeri Jasken Letter, 04/23/2015). Thus, the court did not apply the Indian Child Welfare Act ("ICWA") or the Minnesota Indian Family Preservation Act ("MIFPA") to these proceedings until approximately January 4, 2017. On that date, this Court received a letter from the new White Earth Director of Indian

Child Welfare stating that [P.S.] was in fact eligible for membership under the ICWA with the White Earth Band of Chippewa. (Laurie York Letter, 01/04/2017). Shortly thereafter, White Earth filed a motion to intervene into these proceedings, which the Court granted on February 27, 2017. (Order Re: Mot. to Intervene, 02/27/2017). Approximately seven months later, White Earth asserted that [P.S.] is a member of White Earth for purposes of the Indian Child Welfare Act. (White Earth Resp. to Mot., filed 9/27/2017, p. 16; see also Ex. 301). In accordance with applicable State and federal law, this Court acknowledged [P.S.]'s membership status with White Earth and applied the ICWA and the MIFPA to subsequent proceedings.

3. Before White Earth intervened in these proceedings, the Hennepin County Human Services and Public Health Department ("HSPHD") had informally supported the Cliffords as [P.S.]'s adoptive placement, but the parties had not signed an Adoptive Placement Agreement. (Ex. 7, p. 6; Ex. 8, p. 6; Ex. 99, p. 1). After White Earth's intervention, HSPHD withdrew its support from the Cliffords and began supporting Robyn Bradshaw as [P.S.]'s adoptive placement. (Ex. 10, p. 5-6; Ex. 11, pp. 5-6). The Cliffords filed a motion for adoptive placement on December 14, 2017. (Not. Motion and Motion, 12/14/2017). On January 22, 2018 for reasons explained in its Order, the Court deferred ruling on the Cliffords' motion until after the Commissioner of Human Services and HSPHD executed an Adoptive Placement

Agreement ("APA") with Ms. Bradshaw. (Findings and Order for Immediate Adoptive Placement, file 01/23/2018). Pursuant to its placement authority under Minnesota Statutes §260C.613, HSPHD removed [P.S.] from the Cliffords and placed her with Robyn Bradshaw on January 26, 2018. See Minn. Stat. §260C.613, subd. 1(a); (Findings and Order for Immediate Adoptive Placement, 01/22/2018, p. 4, ¶ 9); (Ex. 6, p. 9).

4. The Commissioner of Human Services, HSPHD, and Ms. Bradshaw executed an APA on May 14, 2018. (Not. of Adoptive Placement, 05/16/2018). On July 30, 2018, the Court found that the Cliffords made a prima facie showing that HSPHD had been unreasonable in failing to place [P.S.] with them for adoption and granted the Cliffords an evidentiary hearing pursuant to Minnesota Statutes §260C.607, subdivision 6(c). (Order for Ev. Hrg., 07/30/2018). This hearing was originally scheduled for the end of October 2018 but was then rescheduled at the request of Mr. Fiddler and Mr. Walters, who were subsequently unavailable for the previously selected dates. The parties appeared for a preliminary motions hearing on September 13, 2018 and for a pretrial hearing on December 4, 2018. An evidentiary hearing was held on December 11, 17, 18, and 19, 2018 and January 3, 2019. The Court heard testimony from 20 witnesses and admitted approximately 77 exhibits.

CONCLUSIONS OF LAW

1. At the evidentiary hearing for a motion for adoptive placement, "the responsible social services agency shall proceed first with evidence about the reason for not making the adoptive placement proposed by the moving party. The moving party then has the burden of proving by a preponderance of the evidence that the agency has been unreasonable in failing to make the adoptive placement." Minn. Stat. §260C.607, subd. 6(d) (2017). At the end of the evidentiary hearing, the court can order the responsible social services agency to make the adoptive placement in the movant's home if it finds the agency has been unreasonable in failing to make the adoptive placement and that the movant's home is the most suitable home under the Minnesota Statutes §260.012, subdivision 2 factors. Id. at 6(e) (emphasis added).

2. The §260.012, subdivision 2 factors include:

   a. the child's current functioning and behaviors;
   b. the medical needs of the child;
   c. the educational needs of the child;
   d. the developmental needs of the child;
   e. the child's history and past experience;
   f. the child's religious and cultural needs;
   g. the child's connection with a community, school, and faith community;
   h. the child's interests and talents;
   i. the child's relationship to current caretakers, parents, siblings, and relatives;

j. the reasonable preference of the child, if the court, or the child-placing agency in the case of a voluntary placement, deems the child to be of sufficient age to express preferences; and

k. for an Indian child, the best interests of an Indian child as defined in section 260.755, subdivision 2a.

Minn. Stat. §260.012, subdivision 2(b).

3. The best interests of an Indian child means, "[C]ompliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act to preserve and maintain an Indian child's family. The best interests of an Indian child support the child's sense of belonging to family, extended family, and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe." Minn. Stat. §260.755, subd. 2a (2017).

4. As a member of White Earth, the child in these proceedings is an Indian child as defined by both the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act. 25 U.S.C. §1903(4); Minn. Stat. §260.755, subd. 8 (2017). Although the Cliffords have continuously disputed the Court's finding that [P.S.] is an Indian child, she is a member of White Earth[1], and Minnesota law is clear that

[1] The Court acknowledges that [P.S.] is a member of White Earth for the purposes of the ICWA, that the Minnesota Chippewa Tribe has delegated ICWA membership determinations to its individual bands, and that White Earth is a band of the

this Court has no authority to review White Earth's membership determinations. See S.N.R., 617 N.W.2d at 81-83 (citing Smith v. Babbitt, 875 F. Supp. 1353, 1361 (D. Minn. 1995) which held that, "there is perhaps no greater intrusion upon tribal sovereignty than for a [non-tribal] court to interfere with a sovereign tribe's membership determinations.")

5. Under Minnesota law, "[t]he paramount consideration in all juvenile protection proceedings is the health, safety, and best interests of the child. In proceedings involving an American Indian child, as defined in section 260.755, subdivision 8, the best interests of the child must be determined consistent with sections 260.751 to 260.835 and the Indian Child Welfare Act, United States Code, title 25, sections 1901 to 1923." Minn. Stat. §260C.001, subd. 2(a) (emphasis added).

6. Throughout these proceedings, the parties have disputed whether an analysis of the 260C.212 best interest factors is required for the placement of Indian children or whether HSPHD is solely required to follow the best interests of an Indian child as defined by Minnesota Statutes §260.755, subdivision 2a. The Court believes the law is clear. Section 260C.212 sets forth the best interest factors to be applied in the placement of all children, and imposes an additional factor — factor (k) —

Minnesota Chippewa Tribe. (Aff. ICWA Membership, 04/25/2018; Aff. Kevin Dupuis, 04/24/2018).

that must also be considered in the placement of Indian children. See §260C.212, subd. 2(b).

7. It is with this law in mind that the Court reviews the reasonableness of HSPHD's decision not to place [P.S.] with the Cliffords for adoption. HSPHD made this decision for many reasons. These include:

   a. [P.S.] is an Indian child as defined by the ICWA and the MIFPA. See 25 U.S.C. §1903(4); Minn. Stat. §260.755, subd. 8 (2017). Robyn Bradshaw is a member of [P.S.]'s extended family and also a member of White Earth. (Robyn Bradshaw Testimony). As such, Ms. Bradshaw meets the ICWA and the MIFPA adoptive placement preferences, whereas the Cliffords do not. See 25 U.S.C. §1915(b)(i); see also Minn. Stat. §260.771, subd. 7 (2017).
   b. Ms. Bradshaw was [P.S.]'s primary caregiver from birth to three years old, and she and [P.S.] have a strong bond. (Ex. 1, p. 5; Joseph Thompson Testimony).
   c. Ms. Bradshaw is currently licensed for foster care and adoption. (Ex. 2, p. 2).
   d. Ms. Bradshaw has no barriers to being [P.S.]'s adoptive placement. (Hannah Epstein Testimony).
   e. Ms. Bradshaw is currently meeting all of [P.S.]'s needs. (Joseph Thompson Testimony).
   f. HSPHD believes it is in [P.S.]'s best interest to be adopted by Robyn Bradshaw. (Joseph Thompson

Testimony, Hannah Epstein Testimony, Elaine Sullivan Testimony).

8. HSPHD is required by law to place a child, "released by court order or by voluntary release by the parent or parents, in a family foster home selected by considering placement with relatives and important friends in the following order: (1) with an individual who is related to the child by blood, marriage, or adoption; or (2) with an individual who is an important friend with whom the child has resided or had significant contact." Minn. Stat. §260C.212, subd. 2(a) (emphasis added).

9. However, for an Indian child, HSPHD is required to follow the order of placement preferences in the Indian Child Welfare Act. (Id.) The ICWA states:

> In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--
> (i) a member of the Indian child's extended family;
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.
>
> 25 U.S.C. §1915(b) (emphasis added).

10. The 2016 Bureau of Indian Affairs Guidelines for Implementing the ICWA ("2016 BIA Guidelines") states that good cause to deviate from the ICWA placement preferences should be based on one or more of the following:

    (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) <u>The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live</u>;

    (5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must 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.
>
> 81 FR 38778-01 (emphasis added).

11. The previous BIA Guidelines established a good cause standard to deviate from the ICWA placement preferences. However, the 2016 BIA Guidelines state:

> While not mandatory, it is recommended that the documentation [provided to establish good cause] meet the 'clear and convincing' standard of proof. 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. Widespread application of this standard will promote uniformity of the application of ICWA. It will also prevent delays in permanency that would otherwise result from protracted litigation over what the correct burden of proof should be.
>
> 81 FR 38778-01; §23.132.

12. Consistent with this guidance, Minnesota law requires those seeking to depart from the ICWA placement preferences to demonstrate by clear and convincing evidence good cause to depart. Minn. Stat. §260.771, subd. 7(d) (2017). Minnesota has also modified the grounds for placement preference departures:

> (b) The court may place a child outside the order of placement preferences only if the court determines there is good cause based on:
>
> (1) the reasonable request of the Indian child's parents, if one or both parents attest that they have reviewed the placement options that comply with the order of placement preferences;
>
> (2) the reasonable request of the Indian child if the child is able to understand and comprehend the decision that is being made;
>
> (3) the testimony of a qualified expert designated by the child's tribe and, if necessary, testimony from an expert witness who meets qualifications of subdivision 6, paragraph (d), clause (2), that supports placement outside the order of placement preferences due to extraordinary physical or emotional needs of the child that require highly specialized services; or
>
> (4) the testimony by the local social services agency that a diligent search has been conducted that did not locate any available, suitable families for the child that meet the placement preference criteria.
>
> Id. at subd. 7(b) (emphasis added).

13. Under §260.771: "Testimony of the child's bonding or attachment to a foster family alone, without the existence of at least one of the

factors in paragraph (b), shall not be considered good cause to keep an Indian child in a lower preference or nonpreference placement." Id. at subd. 7(c).

14. Thus, whether or not the MIFPA and/or the ICWA applies to a particular case, HSPHD is required by law to first consider members of the child's family for placement. If the MIFPA and/or the ICWA applies, a court can only deviate from the ICWA placement preferences upon a showing of good cause. In Minnesota, the MIFPA requires that showing to be made by clear and convincing evidence.

15. Ms. Bradshaw was originally ruled out as a placement for [P.S.] in August 2014 due to her criminal history, which presented disqualifiers for foster care licensing. (Ex. 16, p. 3-4, 6). The social workers assigned to [P.S.]'s case at that time made no attempt to work with Ms. Bradshaw to have her disqualifiers set aside by the Minnesota Department of Human Services, something HSPHD routinely does in cases where extended family members have old criminal histories or criminal histories that do not pose a current safety risk to the child. (Robyn Bradshaw Testimony; Gertrude Buckanaga Testimony; Elaine Sullivan Testimony). Not only did the social workers rule out Ms. Bradshaw for placement, but they also failed to inform her that she could attempt to have her disqualifiers set aside. (Robyn Bradshaw Testimony). The social workers made these decisions despite the fact that Ms. Bradshaw had been [P.S.]'s primary caregiver since birth and knowing that Ms. Bradshaw

was not the cause of the child protection proceedings regarding [P.S.]. (Ex. 99).

16. Nevertheless, Ms. Bradshaw continued to work with HSPHD so it could locate family and kin where [P.S.] could be placed. (Ex. 99, p. 4). HSPHD considered Ms. Bradshaw's sister Marlene for placement but ruled her out due to medical issues and suspected criminality in her home. (Ex. 16, pp. 6-8). HSPHD also considered Ms. Bradshaw's friend and former building manager, Angela Johnson, whose granddaughter often played with [P.S.], but declined to place [P.S.] with Ms. Johnson in favor of [P.S.]'s relative, Teresa Rojas. (Id. at 8-10). Numerous other relatives were listed in the ICWA Relative-Kinship Search and Placement Considerations report, including [P.S.]'s paternal grandmother Patricia, who lives in Illinois and was willing to be a placement resource for [P.S.]. (Id. at 10-14). In 2016, [P.S.]'s paternal grandfather also requested to be a placement resource for [P.S.]. (Ex. 99, p.1) He was ruled out in August 2016 by [P.S.]'s Adoption Resource Worker at the time, Theresa Brinkhaus, and her supervisor, Lisa Berry, due to the amount of time that he had not had contact with [P.S.]. (Id. at 3). At that point, [P.S.] was living with the Cliffords, who were not relatives or kin, and who had been told by HSPHD not to allow [P.S.] to have any contact with her relatives, (Danielle Clifford and Jason Clifford Testimony). When Ms. Brinkhaus informed [P.S.]'s paternal grandfather of HSPHD's decision, he indicated that he would fight it. (Ex. 99, p. 4). Other than

Teresa Rojas, [P.S.] was not placed with any of the relatives or kin listed in the relative-kinship search. (See Ex. 6). HSPHD had numerous relatives and kin who were willing to be placement resources for [P.S.] that, contrary to Minnesota law, were never truly considered. (See Ex. 16). In fact, the relative-kinship search report appears incomplete regarding many of these relatives and kin. (See Id. at 10-14).

17. Between August 2014 and December 2017, Ms. Bradshaw was allowed periodic visits with [P.S.]. (Robyn Bradshaw Testimony). Ms. Bradshaw attended the visits that her daughter Suzanne had with [P.S.] during the child protection proceedings. (Id.) Robyn Bradshaw was also able to visit [P.S.] when she was placed with Sandra Ignatius. (Id.) There were long periods of time during those years when Ms. Bradshaw was not allowed to see [P.S.] at all. (Id.) Nevertheless, Ms. Bradshaw continued to attend every court hearing regarding her granddaughter and has been unwavering in her desire to adopt [P.S.]. (Id.)

18. Ms. Bradshaw sought help from the police, she called child protection, she tried to get a lawyer at the ICWA Law Center, she even went to family court, but no one would help her get custody of [P.S.]. (Id.) Finally in July 2016, she went to the Upper Midwest American Indian Center ("UMAIC"), where they helped her obtain a foster/adopt home study. (Id.; Gertrude Buckanaga Testimony; Bobbi Rodriguez Testimony). The UMAIC followed the Minnesota Department of Human Services procedures in completing this home study.

(Gertrude Buckanaga Testimony). On March 29, 2017, Ms. Bradshaw's home study assessment was complete, and she was approved for foster care and adoption. (Ex. 1). The UMAIC also assisted Ms. Bradshaw in the set-aside process. (Bobbi Rodriguez Testimony). On January 10, 2018, the Minnesota Department of Human Services set aside Ms. Bradshaw's felony conviction, allowing her to be licensed as a foster and/or adoptive placement. (Ex. 3). Ms. Bradshaw's current home study assessment for foster care and adoption was approved on March 23, 2018 and is good for two years. (Ex. 2).

19. In the summer of 2017, Ms. Bradshaw began having regular visits with [P.S.]. (Ex. 4; Ex. 5). She attended every visit except the first one, which she missed due to a miscommunication regarding the start time. (Id.; Robyn Bradshaw Testimony). Overall, these visits went very well. (Ex. 4; Ex. 5). Ms. Bradshaw brought numerous gifts to her first visit with [P.S.], including a note from [P.S.]'s mother. (Robyn Bradshaw Testimony). Ms. Bradshaw had collected these gifts for [P.S.] during the year she was not permitted visits with [P.S.]. (Id.) Ms. Bradshaw had never been told that she could not bring gifts or notes for [P.S.], and after Ms. Bradshaw was told not to do so in the future, she complied. (Id.)

20. Ms. Bradshaw was then given weekend visits and later, a two-week visit over [P.S.]'s winter break. (Id.) Ms. Reis and the Cliffords voiced several concerns regarding these visits, but the majority of their concerns were either minor or

resolved by Mr. Thompson, Mr. Goodman and/or Ms. Bradshaw. (See i.e. Ex. 402, p. 3; Joseph Thompson Testimony). Overall, these visits also went well; however, the Cliffords, Ms. Reis, and [P.S.]'s therapist at the time, Samantha Colai, expressed concern about [P.S.]'s regressive behaviors in between visits. (Ex. 207C; Ex. 207I; Ex. 135; Ex. 136; Ex. 137). They believed [P.S.]'s regression was recurring because of her visits with Ms. Bradshaw. (Id.; Danielle Clifford Testimony; Jason Clifford Testimony; Samantha Colai Testimony). Mr. Thompson and Mr. Goodman did not share these concerns. (Joseph Thompson Testimony; Lee Goodman Testimony). They believed [P.S.] could successfully transition to Ms. Bradshaw's home due to their strong bond. (Id.)

21. For six months, Mr. Thompson, Mr. Goodman, and Ms. Reis checked in on [P.S.] as she progressed through her visits with Ms. Bradshaw. (Joseph Thompson Testimony; Lee Goodman Testimony; Barbara Reis Testimony). Other than [P.S.]'s regressive behaviors between visits, [P.S.] was maintaining the life of a healthy seven year old. (Danielle Clifford Testimony; Jason Clifford Testimony). She enjoyed visits with her grandmother and, despite some reluctance about her first grade year, she continued to do well in school. (Ex. 4; Ex. 5, p. 3; Ex. 13, p. 3). It was with all of this information in mind that HSPHD, in consultation with White Earth, decided to support [P.S.]'s adoptive placement with Ms. Bradshaw. (Joseph Thompson Testimony).

22. HSPHD has a framework for managing child protection and post permanency cases involving Indian children. (Elaine Sullivan Testimony). Child Services Workers and Adoption Resource Workers with specialized training are assigned to cases that fall under the ICWA. (Elaine Sullivan Testimony; Joseph Thompson Testimony; Hannah Epstein Testimony). Part of this training teaches ICWA Social Workers the importance of working with the child's tribe during the pendency of the child's case. (Elaine Sullivan Testimony). Due to the high volume of cases involving Indian children, ICWA Social Workers often work closely with the tribes and develop strong working relationships. (Elaine Sullivan Testimony). It is very common, as occurred here, for the tribe's social worker and the HSPHD child services worker to agree on which placement is in the child's best interest. (Elaine Sullivan Testimony; Joseph Thompson Testimony). While HSPHD may in practice defer to the tribes, this does not mean HSPHD has not reviewed the case and made its own independent determination of what it believes is in the child's best interest. (Id.) HSPHD and White Earth follow similar social work practice models and both adhere to the requirements set forth by the Minnesota Department of Human Services in certain circumstances, which can often lead to similar placement recommendations. (See Elaine Sullivan Testimony; Laurie York Testimony).

23. When HSPHD learned that [P.S.] was an Indian child under the ICWA, it employed its

ICWA case management framework and assigned an ICWA child services worker and adoption resource worker. (Joseph Thompson Testimony; Hannah Epstein Testimony). Mr. Thompson and Ms. Epstein reviewed [P.S.]'s case file and visited [P.S.] at the Cliffords' home. (Id.) They also worked with White Earth via Mr. Goodman. (Id.) As visits began between [P.S.] and Ms. Bradshaw, Mr. Thompson was involved, and he addressed issues as they arose. (Joseph Thompson Testimony). The Court does not believe Mr. Thompson supported [P.S.]'s placement with Ms. Bradshaw solely out of deference to White Earth. The Court believes Mr. Thompson used his training, experience, and observations to arrive at a professional judgment that it was in [P.S.]'s best interests to be placed with Ms. Bradshaw. This decision was supported by the information he had at the time, and it was in accordance with Minnesota law requiring placement consideration of relatives and/or extended family first. It was also in accordance with the ICWA and the MIFPA requiring HSPHD to give first order preference, absent good cause, to a member of the Indian child's family. Mr. Thompson did not believe he had good cause to deviate from this preference because he believed Ms. Bradshaw was capable of meeting [P.S.]'s needs. (See Id.). His determination was reviewed and supported by his supervisors at HSPHD. (Joseph Thompson Testimony; Elaine Sullivan Testimony).

24. The Cliffords have failed to prove by a preponderance of the evidence that HSPHD's

decision not to place [P.S.] with them for adoption was unreasonable. The record is clear that from the beginning, HSPHD told Danielle Clifford there was no guarantee she and her husband would get to adopt [P.S.]. (Ex. 99, p. 1). Although it is undisputed that [P.S.] became attached to the Cliffords, it is also clear that [P.S.] shares a deep bond with Ms. Bradshaw. (Ex. 5; Gertrude Buckanaga Testimony; Megan Eastman Testimony; Lee Goodman Testimony). In fact, [P.S.]'s separation from Ms. Bradshaw during the pendency of the child protection proceedings was believed to be a cause of [P.S.]'s separation anxiety, extreme behaviors, and emotional outbursts. (Ex. 12, p. 5). The Cliffords have continually asserted that [P.S.]'s regressive behaviors were caused by contact with Ms. Bradshaw, but the Court does not find this credible. The severity of [P.S.]'s regressive behaviors has significantly declined since she was placed with Ms. Bradshaw. (Robyn Bradshaw Testimony; Megan Eastman Testimony). The Cliffords believe this is because Ms. Bradshaw is stifling [P.S.]'s regressive behaviors, but the Court finds credible Ms. Bradshaw's testimony that she allows [P.S.] these behaviors at home. Furthermore, the Court believes it is more likely that [P.S.] was exhibiting regressive behaviors in the first place due to her separation from Ms. Bradshaw and her family as well as the trauma [P.S.] experienced during her frequent moves in the child protection system.

25. The Cliffords have also asserted that [P.S.] has extraordinary mental or emotional needs, but the record does not support this assertion.

26. On February 11, 2015, [P.S.] was referred by her then Child Services Worker, Gina Hyun, to be assessed for medical necessity to receive CTSS Services. (Ex. 12, p. 5). [P.S.], who was three years old at the time, was diagnosed with Separation Anxiety Disorder. (Id.) She was also evaluated by Samantha Colai, MA, LMFT, on September 21, 2017, who diagnosed [P.S.] with Adjustment Disorder, With Mixed Disturbance of Emotion and Conduct. (Ex. 13, p. 8). Ms. Colai also discussed [P.S.]'s regression in the summer of 2017, including crawling, baby talk, wanting a pacifer or bottle, whining, and needing more attention. (Id.) Approximately one year later on September 28, 2018, Megan Eastman, MSW, LICSW, conducted a diagnostic assessment of [P.S.]. (Ex. 14). At that time, Ms. Bradshaw reported that [P.S.] was sometimes tearful and sad regarding missing her parents, and that at times, [P.S.] had difficulty separating from Ms. Bradshaw. (Id. at 2). After completing the assessment, Ms. Eastman determined that, "[t]herapeutic services are needed to help [P.S.] adjust to environmental changes, missing her parents and adjusting to change. To not continue services may lead to ongoing mental health issues, increased symptom severity, and attachment/interpersonal relationship problems." (Ex. 14, p. 5). Ms. Eastman diagnosed [P.S.] with Adjustment Disorder with Anxiety and recommended individual

therapy and work on emotional regulation and anxiety management. (Id.) [P.S.] has met with Ms. Eastman approximately weekly since the diagnostic assessment and has engaged in components of Trauma-Focused Cognitive Behavioral Therapy, non-directive play therapy, and culturally specific traditional medicines. (Ex. 15).

27. Thus, [P.S.] has been diagnosed with Adjustment Disorder (Mixed Disturbance of Emotion and Conduct) and Adjustment Disorder with Anxiety. Although Ms. Colai opined that [P.S.] could be diagnosed with Developmental Trauma Disorder if that diagnosis were a DSM diagnosis, the facts remain that it is not a DSM diagnosis, and [P.S.] has not been so diagnosed. (Ex. 217; Samantha Colai Testimony). The Court does not find credible the testimony equating Adjustment Disorder with a Severe Emotional Disturbance. (Samantha Colai Testimony; Deena McMahon Testimony). Furthermore, Ms. Colai does not provide culturally specific therapeutic services, so the lens through which she views [P.S.]'s behaviors does not take into account the majority of [P.S.]'s history and experiences. (Samantha Colai Testimony). This gap in Ms. Colai's perspective is amplified by the limited social history she was able to receive from Mrs. Clifford prior to beginning [P.S.]'s therapy. (Id.) Ms. Colai is also relatively new to her practice, having only graduated approximately five years ago, and only twenty percent of the kids she treats are from the foster care system. (Id.) The Court believes this

relative inexperience with children like [P.S.] may have contributed to Ms. Colai's tendency to make sweeping statements, such as her statement that [P.S.]'s sexualized behavior suggests that she's seen pornography and that [P.S.]'s behaviors are in the top 10% of her caseload in terms of needs. (Id.) The Court also questions Ms. Colai's objectivity based on the way she testified about Ms. Bradshaw. (Id.) For these reasons, the Court does not find Ms. Colai credible on the nature or the seriousness of [P.S.]'s behaviors.

28. The Court does not find Deena McMahon credible on this subject either because she did not perform a diagnostic assessment or any other mental health assessments specifically on [P.S.]. (Deena McMahon Testimony). Either way [P.S.]'s behaviors are successfully managed by weekly therapy and by the stability Ms. Bradshaw provides in her home. The fact that [P.S.] has to attend weekly therapy does not mean she has extraordinary mental or emotional needs. (See Joseph Thompson Testimony). Her mental health needs are similar to many other children whose early childhoods were impacted by the child protection system, as well as many children whose early childhoods were not. (See Id.) [P.S.]'s behaviors have not significantly impacted her ability to function at home, and she functions well at school and maintains social relationships. (Robyn Bradshaw Testimony; Kelly Watson Ostroot Testimony). She is doing well in Ms. Bradshaw's home. It was not unreasonable for HSPHD to think that

[P.S.]'s mental health needs do not rise to the level of "extraordinary physical, mental, or emotional needs such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live." 81 FR 38778-01. [P.S.]'s mental health needs do not require "specialized" treatment services, and the treatment services she needs are available in her community. (Megan Eastman Testimony). Furthermore, Ms. Bradshaw and the Cliffords live in approximately the same community, so the treatment services available in either placement would be similar.

29. The Cliffords and Ms. Reis also attempted to prove HSPHD was unreasonable by asserting placement with Ms. Bradshaw is negatively impacting [P.S.]'s grades and her weight. (Kelly Watson Ostroot Testimony; Jason Clifford Testimony). However, Kelly Watson Ostroot credibly testified that there are many factors which can affect a student's grades from year to year and that no concerns have been brought to her attention about [P.S.]'s grades this year. She also credibly testified that Ms. Bradshaw has been proactive about [P.S.]'s grades and academic performance. (See Kelly Watson Ostroot Testimony). Regarding [P.S.]'s weight, the Court does not find this argument persuasive. There is nothing in the record to suggest [P.S.]'s current weight is a legitimate health concern. [P.S.] may have been more "toned" when she lived with the Cliffords, but this fact does not mean HSPHD was unreasonable in failing to place [P.S.] with the

Cliffords for adoption. (See Jason Clifford Testimony).

30. The Cliffords and Ms. Reis have suggested that Ms. Bradshaw cannot keep up with an active seven year old and that Ms. Bradshaw does not have the financial resources to adequately support [P.S.]. Ms. Bradshaw is currently meeting all of [P.S.]'s basic needs. It was not unreasonable for HSPHD to support Ms. Bradshaw as [P.S.]'s adoptive placement even though Ms. Bradshaw cannot run around with [P.S.] as much as the Cliffords. As for Ms. Bradshaw's financial resources, she has been supporting [P.S.] for one year. She currently has public housing, she has sources of income, and various witnesses from White Earth credibly testified about services within the White Earth community to which Ms. Bradshaw would have access. (See i.e. Lee Goodman Testimony, Gertrude Buckanaga Testimony, Laurie York Testimony). Furthermore, the 2016 BIA Guidelines say courts may not depart from the ICWA placement preferences based on the socioeconomic status of one placement relative to another. (81 FR 38778-01; §23.132). It is illogical for the Court to find HSPHD unreasonable for not basing its placement decision on the same comparison. The fact that the Cliffords have more financial resources than Ms. Bradshaw does not make HSPHD unreasonable for choosing Ms. Bradshaw over the Cliffords. The fact that the Cliffords can financially provide for [P.S.] in a different way

does not mean HSPHD was unreasonable for supporting [P.S.]'s placement with her family.

31. The Cliffords have not met their burden of proving by a preponderance of the evidence that HSPHD was unreasonable in failing to place [P.S.] with them for adoption — especially in light of the Minnesota and federal law governing HSPHD's placement decisions.[2]

32. However, even if the Court were to find that HSPHD was unreasonable in failing to place [P.S.] with the Cliffords for adoption, Ms. Bradshaw is still the most suitable adoptive home to meet [P.S.]'s needs.

    a. the child's current functioning and behaviors;

       Overall, [P.S.]'s functioning and behaviors are that of a normal, healthy seven year old. She is well adjusted in school and maintains typical family and social relationships. (See Robyn Bradshaw Testimony; Kelly Watson Ostroot Testimony). Despite her traumatic early childhood, [P.S.]'s functioning and behaviors have been relatively normal throughout her young life. (Ex. 7, p. 2; Ex. 8, p. 2; Ex. 9, p. 2; Ex. 10, p. 2; Ex. 11, p. 2). Two months after [P.S.] was placed with the Cliffords, Mrs. Clifford reported to then Adoption

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[2] For reasons stated in the Court's December 5, 2018 Order, the Brackeen v. Zinke decision neither binds HSPHD or this Court. (Order Re: Pretrial Motions, 12/05/2018); see also Brackeen v. Zinke, 2018 WL 4927908 (October 4, 2018).

Resource Worker Teresa Brinkhaus that [P.S.] was a wonderful child with no behavior issues and that she was on track developmentally. (Ex. 99, p. 1). However, [P.S.]'s out of home placement plans up until January 26, 2018 indicated that [P.S.] displayed, "difficulty in coping with stress and emotions that [was] atypical for the youth's age." (Id.) This difficulty ultimately prompted the Cliffords to find a therapist for [P.S.] and to ensure that [P.S.] received approximately weekly therapy. (Danielle Clifford Testimony).

[P.S.] has been doing well in therapy and has not demonstrated any unusual needs or abnormally challenging behaviors since her placement with Ms. Bradshaw. (Robyn Bradshaw Testimony; Megan Eastman Testimony). Ms. Bradshaw has demonstrated an understanding of [P.S.]'s current functioning and behaviors and has a genuine desire to get [P.S.] whatever services and/or assistance she may need. (Robyn Bradshaw Testimony). The Court believes Ms. Bradshaw's testimony that she wants to do whatever is best for [P.S.]. Ms. Bradshaw has allowed [P.S.] to change and to grow as [P.S.] needs and has given [P.S.] a greater sense of independence. (Robyn Bradshaw Testimony; Lee Goodman Testimony). Ms. Bradshaw is able to

successfully parent [P.S.]'s current functioning and behaviors.

In contrast, the Cliffords imposed a strict schedule to manage [P.S.]'s functioning and behaviors. (Danielle and Jason Clifford Testimony) Their routine was extremely specific and invariable. (Jason Clifford Testimony; see i.e. Ex. 203, Ex. 206). They established this routine upon the advice of social workers and therapists in an effort to manage [P.S.]'s challenging behaviors, which they did, by working very closely with the school officials and professionals in [P.S.]'s life and by following their advice. (Danielle Clifford Testimony). [P.S.]'s functioning and behaviors were more challenging when she was placed with the Cliffords, but the Cliffords were able to successfully manage them. [P.S.]'s social workers and Ms. Reis told the Cliffords that their home was the best [P.S.] had ever done in placement. (Danielle Clifford Testimony).

b. the medical needs of the child;

[P.S.] has no significant or unusual medical needs or any known allergies. (Ex. 6, pp. 7-8, 10; Ex. 7, p. 3; Ex. 10, p. 2). Her physical health has generally been excellent. (Ex. 13, p. 5). She wears/wore glasses to correct an eye tracking issue. (Jason Clifford Testimony; See Ex. 209).

Ms. Bradshaw has identified a medical clinic, doctor, and dentist for [P.S.]. (Ex. 1, p. 5). She ensures that [P.S.] attends weekly therapy with Megan Eastman and has attended every session with [P.S.]. (Robyn Bradshaw Testimony; Megan Eastman Testimony). Ms. Bradshaw meets all of [P.S.]'s routine medical and mental health needs. (Ex. 11, p. 2). She has completed numerous trainings to maintain her foster care and adoption licensure, which have included mental health trainings so that she can support [P.S.]'s mental health needs. (Ex. 1, p. 5; Ex. 2, p. 2; Ex. 17). Even though Ms. Bradshaw is uncomfortable with aspects of [P.S.]'s prior mental health treatment (i.e. allowing regression), she has been open to learning about it and has allowed it in her home. (Robyn Bradshaw Testimony). Ms. Bradshaw also maintains an open relationship with [P.S.]'s current therapist and feels comfortable asking her questions as needed to meet [P.S.]'s mental health needs. (Id.; Megan Eastman Testimony.) Although Ms. Reis has routinely suggested that Ms. Bradshaw is unable to meet [P.S.]'s mental health needs, the Court sees no basis for this assertion. The Court finds credible Ms. Bradshaw's testimony that she did not feel comfortable working with Ms. Colai, but she is comfortable working with Ms. Eastman.

The Cliffords ensured that [P.S.] received routine medical and dental care, including immunizations. (Ex. 7, p. 3). Mrs. Clifford went to great lengths to locate a therapist for [P.S.] and ensured that [P.S.] received weekly therapy to address the trauma she experienced in the child protection system and the resulting challenging behaviors. (Danielle Clifford Testimony; Ex. 7, p. 3; Ex. 8, p. 3; Ex. 9, p. 2; Ex. 10, p. 2). The Cliffords were actively involved in [P.S.]'s mental health treatment and attended sessions with Ms. Colai to learn about what they could do to better support [P.S.]'s mental health needs. (Id.) They were very open to parenting guidance and made substantial changes based on what they learned. (Id.) They too attended numerous mental health trainings in order to be licensed for foster care, and Mrs. Clifford also read additional books and materials to better support [P.S.]'s mental health needs. (See Id.)

c. the educational needs of the child;

[P.S.]'s educational needs are age appropriate. (Testimony of Kelly Watson Ostroot). She does not have any known learning disabilities or an Individualized Education Plan. (Ex. 13, p 7; Ex. 6, p. 10; Ex. 14, p. 3).

Much was made of Ms. Bradshaw's ability to meet [P.S.]'s educational

needs. It was suggested on numerous occasions that [P.S.] is not doing as well in school this year (2018-2019), a fact which is allegedly caused somehow by Ms. Bradshaw. (See Ex. 313). The Court does not find this assertion credible. Ms. Bradshaw is meeting [P.S.]'s educational needs. She has long supported [P.S.]'s educational pursuits, and she is currently meeting [P.S.]'s educational needs. (See Ex. 5, p. 3; Robyn Bradshaw Testimony; Kelly Watson Ostroot Testimony). As noted above, the Court finds Ms. Watson Ostroot's testimony credible that there are many reasons a student's grades change from year to year, and no one has expressed concerns to her about [P.S.]'s grades this year. Ms. Bradshaw went to meet with Ms. Watson Ostroot to discuss [P.S.]'s academic performance, and the Court believes Ms. Bradshaw is capable of reaching out to other school professionals as needed to address any academic issues [P.S.] may have in the future. (See i.e. Robyn Bradshaw Testimony re: contacting the school about [P.S.]'s missing homework). The Court does not believe [P.S.]'s current grades are indicative of a larger trend. The Court notes that [P.S.] is still dealing with the recent death of her father, which could also be impacting her academic performance. (Robyn Bradshaw Testimony; Megan Eastman

Testimony). Furthermore, the Court does not blame Ms. Bradshaw for being unable to move [P.S.]'s therapy to another time so [P.S.] does not miss as much school. (See i.e. 312). The Court finds Ms. Eastman's testimony credible that there is not another appointment time available.

The Cliffords actively participated in [P.S.]'s education. Mrs. Clifford communicated with school professionals, regularly volunteered at the school, assisted [P.S.] with school preparation activities prior to kindergarten, and assisted [P.S.] with her homework. (Danielle Clifford Testimony; Ex. 7, p. 3). The Cliffords also filled their home with educational toys and books and took her to museums. (Id.) They met [P.S.]'s educational needs while she was placed in their home.

d. the developmental needs of the child;

[P.S.] has consistently met developmental milestones and has no special developmental needs at this time. (Ex. 6, p. 9; Ex. 7, p. 4; Ex. 8, p. 4; Ex. 9, p. 3; Ex. 10, p. 3; Ex. 11, p. 3; Ex. 13, p. 5). Ms. Bradshaw is currently meeting [P.S.]'s developmental needs by teaching her new skills and by playing board games with her. (Robyn Bradshaw Testimony). [P.S.] has achieved age-appropriate milestones such as learning how to ride a bike and how to swim. (Id.)

The Cliffords also met [P.S.]'s developmental needs and supported her achievement of developmental milestones while she was placed with them. They bought her age-appropriate books and toys, made sure she was very active, and gave her room to build her confidence when trying new things. (Jason Clifford Testimony).

e. the child's history and past experience;

Ms. Bradshaw lived with her daughter and [P.S.] and raised [P.S.] from birth to 3 years old while [P.S.]'s mother went to night school and worked two jobs. (Robyn Bradshaw Testimony). As such, Ms. Bradshaw has been [P.S.]'s primary caregiver for four of the seven years [P.S.] has been alive. Ms. Bradshaw and her friends and relatives are [P.S.]'s history and past experience. Ms. Bradshaw is aware of [P.S.]'s numerous placements in the child protection system and is caring and nurturing about [P.S.]'s childhood traumas, including her separation from Ms. Bradshaw, her biological parents, and the death of her father. (Ex. 11, p. 3; Robyn Bradshaw Testimony). Ms. Bradshaw knows [P.S.]'s family history too and has maintained connections to many of [P.S.]'s relatives on both sides of [P.S.]'s family. (See Robyn Bradshaw Testimony). The record is clear that Ms. Bradshaw and [P.S.] have a deep love

and attachment to each other and share a strong bond.

[P.S.] was placed with the Cliffords for approximately one year and five months. While there, she became very attached to them and believed they were going to adopt her. She called Danielle Clifford "mom" and Jason Clifford "dad." (Ex. 212). [P.S.] also became attached to the Cliffords' extended family and friends, who welcomed her with open arms.

f. the child's religious and cultural needs;

[P.S.] is believed to be of Ojibwe, African American, Egyptian, Puerto Rican, Norwegian, Scotts, and French Canadian descent. (Ex. 12, p. 5). Her religious background is believed to be predominantly Christian.

Ms. Bradshaw is Native American and involved in the American Indian community. (Ex. 1, p. 5). She has relatives living in Minneapolis and from the White Earth Band of Ojibwe. (Id.) She volunteers at Upper Midwest American Indian Center. (Id.) She practices her American Indian Culture by beading, burning sage, and participating in ceremonies, among other things. (Testimony of Robyn Bradshaw). Growing up, Ms. Bradshaw and her family visited the White Earth Reservation for Pow Wows and to see relatives, attended cultural activities in the community such as feasts,

ceremonies, and wakes, and learned some of the Ojibwe language from Ms. Bradshaw's mother. (Ex. 1, p. 3). [P.S.] has demonstrated an interest in learning about her American Indian Culture and participating in cultural activities. (Ex. 5, p. 1) Ms. Bradshaw has encouraged and engaged [P.S.] in these activities and taught [P.S.] about her American Indian culture. (See Ex. 5, pp. 2-3, 5, 6-10). Ms. Bradshaw has maintained connections with [P.S.]'s relatives from other cultural backgrounds including [P.S.]'s relatives on her father's side and [P.S.]'s sister. (Robyn Bradshaw Testimony). Ms. Bradshaw is a practicing Christian and regularly attends church services. (Id.) [P.S.] goes with her and attends the children's program. (Id.)

The Cliffords do not identify as Native American, although Danielle Clifford has Lac Courte Oreilles ancestry through her father's lineage, and he is a member of the Lac Courte Oreilles Band. (See Danielle and Jason Clifford Testimony; Jeffrey Thibert Testimony). The Cliffords have attempted to teach [P.S.] about all parts of her heritage. The Cliffords took [P.S.] to a Mother's Day Pow Wow, played flute music in their home, and Mrs. Clifford made wild rice for [P.S.]. (Danielle and Jason Clifford Testimony). They read books to [P.S.] about many cultures. (Id.) They asked

Mr. Goodman for suggestions on how they could better teach [P.S.] about the Ojibwe culture. (Id.) The Court believes the Cliffords genuinely wanted to help [P.S.] learn about the cultural practices in her heritage. The Cliffords belong to an expansive Christian faith community, in which they immersed [P.S.]. (Danielle and Jason Clifford Testimony). They taught [P.S.] about The Bible and prayed with her every night before bed. (Jason Clifford Testimony). They would often listen to spiritual music with [P.S.] and they regularly attended church services. (Id.)

g. the child's connection with a community, school, and faith community;

[P.S.] attends the same school now that she did when she was placed with the Cliffords and is doing well there. Ms. Bradshaw has ensured that [P.S.] has after school activities so [P.S.] can spend extra time with her friends. (Robyn Bradshaw Testimony). [P.S.] is a very social little girl and seems to enjoy these activities very much. (Id.) [P.S.] attends church services with Ms. Bradshaw and goes to the children's program. (Id.) She is connected to the Minneapolis Native American community through Ms. Bradshaw and the Upper Midwest American Indian Center. (Id.; Gertrude Buckanaga Testimony). [P.S.] has many relatives with whom Ms. Bradshaw maintains regular contact, including

[P.S.]'s sister. (Robyn Bradshaw Testimony). These people have been in her life since birth, and she is very connected to them. (Id.)

The Cliffords have a robust social and faith community, within which they immersed [P.S.]. (Jason Clifford Testimony; Danielle Clifford Testimony; Ex. 7, p. 5). Mrs. Clifford was also very involved in [P.S.]'s school community, maintaining ongoing relationships with [P.S.]'s teachers, school social worker, and principal. Mrs. Clifford was also very familiar with the school community and with [P.S.]'s school friends due to the volunteer work Mrs. Clifford participated in at the school. (Danielle Clifford Testimony). [P.S.] enjoyed spending time with the Cliffords' large community of family and friends who warmly welcomed her. (Id.)

h. the child's interests and talents;

[P.S.] enjoys playing board games, and Ms. Bradshaw regularly plays games with her. (See i.e. Ex. 5, pp. 1-3, 7; Testimony of Robyn Bradshaw). They even have a game night each week. (Robyn Bradshaw Testimony). [P.S.] also enjoys playing with toys, coloring, watching cartoons, and riding her bike. (Ex. 6, p. 3; Ex. 7, p. 5). Ms. Bradshaw has encouraged [P.S.] to participate in whatever activities [P.S.] seems interested in. (Robyn Bradshaw

Testimony; see also Ex. 10, p. 5). [P.S.] loves to dance, and Ms. Bradshaw is trying to obtain regalia for [P.S.] so she can dance at a Pow Wow. (Robyn Bradshaw Testimony). Ms. Bradshaw and [P.S.] also have regular movie nights. (Id.)

The Cliffords also encouraged [P.S.]'s interests and talents while she lived with them. [P.S.] participated in Girl Scouts and in dance. (Danielle Clifford Testimony). The Cliffords often took [P.S.] to parks and on play dates and were very active with her. (Danielle and Jason Clifford Testimony). They also went to museums (Jason Clifford Testimony).

i. the child's relationship to current caretakers, parents, siblings, and relatives;

Ms. Bradshaw comes from a very large family and has siblings that live in both Minneapolis and in greater Minnesota. (Ex. 1, p. 3). The record notes that prior to her removal from her biological parents, [P.S.] had a good relationship with Ms. Bradshaw's brothers and with Ms. Bradshaw's friend, Michelle, who is like a daughter to Ms. Bradshaw and an auntie to [P.S.]. (Ex. 12, p. 5). Ms. Bradshaw has remained friends with [P.S.]'s maternal grandfather, Mohammad Shams Eshmawy, and he has been part of [P.S.]'s life since she was

a baby. (Id.) Ms. Bradshaw also ensures that [P.S.] is able to regularly see her sister, Nadia, which is important to [P.S.]. (Robyn Bradshaw Testimony; Ex. 5, p. 4). The record is clear that Ms. Bradshaw and [P.S.] share a deep bond. (See Ex. 4, pp. 4-5; Ex. 5, p. 2, 6). Even while [P.S.] was living away from Ms. Bradshaw and [P.S.]'s other relatives, [P.S.] greatly missed them, especially Ms. Bradshaw. (Ex. 6, p. 2). In fact, [P.S.]'s separation from Ms. Bradshaw during the pendency of the child protection proceedings was believed to be a cause of [P.S.]'s separation anxiety, extreme behaviors, and emotional outbursts. (Ex. 12, p. 5). Ms. Bradshaw consistently puts [P.S.]'s needs first and has a genuine desire to act in [P.S.]'s best interests. (Robyn Bradshaw Testimony; see also Ex. 10, p. 2). They are very attached.

The Cliffords are not [P.S.]'s *current* caretakers, parents, siblings, or relatives, so this section does not apply to them. The Cliffords are arguably kin, however. [P.S.] is attached to the Cliffords and enjoys her visits with them. (Danielle and Jason Clifford Testimony; Barbara Reis Testimony).

j. the reasonable preference of the child, if the court, or the child-placing agency in the case of a voluntary placement, deems the child to be of sufficient age to express preferences;

[P.S.] is of an age where she can express preferences; however, the record does not contain any evidence clearly indicating [P.S.]'s placement preference. Ms. Eastman testified that [P.S.] told her it would be all right with [P.S.] if she had a visit with the Cliffords and then did not see them again for a while, but the context of this statement was not entirely clear. As such, the Court does not know [P.S.]'s placement preference.

k. for an Indian child, the best interests of an Indian child as defined in section 260.755, subdivision 2a.

The best interests of an Indian child means, "[C]ompliance with the Indian Child Welfare Act and the Minnesota Indian Family Preservation Act to preserve and maintain an Indian child's family. The best interests of an Indian child support the child's sense of belonging to family, extended family, and tribe. The best interests of an Indian child are interwoven with the best interests of the Indian child's tribe." Minn. Stat. §260.755, subd. 2a (2017).

The Cliffords urge the Court to depart from the ICWA placement preferences, but they have not shown good cause to do so. As previously stated in paragraph 25 above; [P.S.] does not have "extraordinary physical, mental, or emotional needs, such as specialized treatment services that may be

unavailable in the community where families who meet the placement preferences live." 81 FR 38778-01(c).

The Cliffords also urge the Court to depart from the ICWA placement preferences using Deena McMahon's testimony to satisfy the MIFPA departure requirements. The Cliffords argue that Qualified Expert Witness ("QEW") testimony is not required to establish a good cause departure based on the extraordinary physical, mental, or emotional needs of a child. (Cliffords' Closing Memorandum, p. 3, 01/11/2019). The Court agrees that QEW testimony is not required to depart from the ICWA placement preferences under the ICWA for the extraordinary needs of the child. However, the MIFPA is different, and the law is clear:

> ...the testimony of a qualified expert designated by the child's tribe and, if necessary, testimony from an expert witness who meets qualifications of subdivision 6, paragraph (d), clause (2), that supports placement outside the order of placement preferences due to extraordinary physical or emotional needs of the child that require highly specialized services; §260.771, subd. 7(b) (2017).

As previously ruled during the evidentiary hearing, Deena McMahon does not meet the Qualified Expert Witness requirements of §260.771, so her testimony cannot be used under the MIFPA to depart from the ICWA placement preferences. See Minn. Stat. §260.771, subd. 6, 7. Accordingly, the Cliffords have not met their good cause burden under either the ICWA or the MIFPA to depart from the ICWA placement preferences.

Even if Deena McMahon were a QEW, her testimony and report do not support placement outside of the placement preferences due to "extraordinary physical or emotional needs of the child that require highly specialized services." She was hired to conduct attachment assessments on Ms. Bradshaw and the Cliffords, not to diagnostically evaluate [P.S.]. (Deena McMahon Testimony). Also, her attachment assessment of Ms. Bradshaw is socioeconomically biased. Her clinical summary essentially concludes that [P.S.] is not attached to Ms. Bradshaw because she was removed from Ms. Bradshaw in the past and because Ms. Bradshaw does not have financial stability. (Ex. 215A, pp. 9-10). In contrast, Ms. McMahon opines that the Cliffords "have all the hallmarks of a couple able to parent to attachment" and then lists six characteristics to support that conclusion — four of which are

based on financial stability. (Ex. 215B, p. 11). Ms. McMahon's assessments suggest that a child can only be securely attached to a caregiver when a caregiver can provide financially for that child, and the Court does not find this suggestion credible. Ms. McMahon's assessments are also obviously biased in favor of the Cliffords. In Ms. Bradshaw's assessment in the Healthy and Discriminating Boundaries section, the information about Ms. Bradshaw has nothing to do with the italicized language describing what that category is supposed to evaluate. (Ex. 215A, p. 5, ¶g). It talks about how bossy [P.S.] is, suggests that Ms. Bradshaw has no control over her, and it even blames Ms. Bradshaw for [P.S.]'s weight gain. (Id.) The same section of the Cliffords' assessment, however, talks about how [P.S.] "struggles with boundaries," yet discusses this in the passive tense so that the Cliffords are not even mentioned. (Id.)

The Court does not find Deena McMahon credible and believes [P.S.] is securely attached to Ms. Bradshaw. The record shows that many of [P.S.]'s prior behavior issues stemmed from her attachment to and removal from Ms. Bradshaw. (Ex. 12, p. 5). The Court finds credible the testimony of Stephen Luzar regarding the bias within Ms. McMahon's report. The Court also finds

> credible the other professionals who testified regarding the strong bond between Ms. Bradshaw and [P.S.]. (Lee Goodman Testimony, Gertrude Buckanaga Testimony, Megan Eastman Testimony; Dr. Priscilla Day Testimony). The Court finds the testimony and report of Dr. Priscilla Day to be significantly more credible on the issue of [P.S.]'s attachment to Ms. Bradshaw than Ms. McMahon's testimony and report. (Dr. Priscilla Day Testimony; Ex. 326). Despite Ms. McMahon's extensive experience as an attachment expert, her report is clearly biased, and she did not assess [P.S.]'s relationship with Ms. Bradshaw through a culturally specific lens. For these reasons, the Court adopts the findings of Dr. Day's report over that of Deena McMahon's assessments.
>
> Accordingly, factor (k) supports placement with Ms. Bradshaw.

33. Ms. Reis has been Guardian ad Litem on this case since the case opened in 2014. (Barbara Reis Testimony). She clearly supports [P.S.]'s placement with the Cliffords over Ms. Bradshaw. (Id.) Ms. Reis is not an ICWA Guardian ad Litem, but she did conduct her own limited research to educate herself on the ICWA. (Id.) It appeared to the Court that she had little to no familiarity with the subject prior to conducting her research. (Id.) Ms. Reis's bias in favor of the Cliffords is palpable. When Ms. Reis talks about [P.S.]'s best

interests, it is often couched in the parties' respective financial resources. (Id.) She testified that in her opinion, "Ms. Bradshaw is not parent material." (Id.) The way Ms. Reis has behaved at prior court hearings has suggested to the Court that Ms. Reis will never believe Ms. Bradshaw is a successful parent no matter what she does. The Court believes Ms. Reis thinks she is truly considering what is in [P.S.]'s best interests. However, Ms. Reis's testimony was very dismissive of the importance of [P.S.]'s Ojibwe culture and of growing up in that culture. (Id.) In Ms. Reis's opinion, despite not identifying as Native American, the Cliffords can meet [P.S.]'s cultural needs simply by reading books and occasionally bringing her to cultural events. (Id.) This demonstrates Ms. Reis's fundamental misunderstanding of what it means to be adopted into a family that does not share your predominant cultural identity. It makes an individual feel as if they are living between two worlds and that they do not really fit within either one. (See Faron Jackson, Sr. Testimony). The Court finds credible the testimony received regarding the difference between culture and heritage. (Gertrude Buckanaga Testimony; Faron Jackson, Sr. Testimony; Lee Goodman Testimony; Laurie York Testimony; Stephen Luzar Testimony). In addition to our nation's horrific history of separating Native American parents from their children, the distinct between culture and heritage is a large part of why the ICWA was enacted and why it is so important to follow the ICWA placement

preferences absent a showing of good cause. (See Id.) For these reasons, the Court did not find Ms. Reis's testimony credible on the issue of [P.S.]'s best interests.

34. This case is very difficult because it is so clear which decision points caused this litigation. If White Earth had not failed to acknowledge [P.S.]'s membership for so long or if HSPHD had seriously considered Ms. Bradshaw and/or [P.S.]'s other relatives for placement, none of this would have happened. Instead, [P.S.] has been traumatized by our system due to numerous failed placements, Ms. Bradshaw has been equally traumatized by the same system that for years ignored her as a placement option for her granddaugher, and the Cliffords have lost a child whom they love and considered their own.

35. Danielle and Jason Clifford took excellent care of [P.S.] during her time in their home, and they did everything foster parents are supposed to do. However, Minnesota law requires local social services agencies to consider placement with relatives first, and the ICWA and the MIFPA require placement within the ICWA placement preferences absent a showing of good cause. The Cliffords have not made this showing under the ICWA or the MIFPA, and therefore the Court will not depart from the placement preferences. Furthermore, the Court truly believes that the most suitable home for [P.S.] is with Ms. Bradshaw. Ms. Bradshaw deeply loves [P.S.] and they share a strong bond and a secure attachment. Ms. Bradshaw has demonstrated an ability to meet all of [P.S.]'s

needs. Ms. Bradshaw can nurture [P.S.]'s connection to her tribe, to her Ojibwe culture, to her sister, and to both sides of her family in a way that the Cliffords cannot. The Cliffords can provide love, attachment, an active two-family household and extended family, and ample financial resources for [P.S.], but these considerations do not offset the family connections and connections to her culture that Ms. Bradshaw can provide [P.S.]. It is in [P.S.]'s best interests to be placed for adoption with Ms. Bradshaw.

36. For these reasons, the Court denies the Cliffords' motion for adoptive placement.

IT IS HEREBY ORDERED

1. Danielle and Jason Clifford's motion for adoptive placement is denied.

2. The Department shall work with Robyn Bradshaw toward the finalization of her adoption of [P.S.] [P.S. Birthday] (2011).

BY THE COURT:

/s/ Angela Willms
Angela Willms
Judge of District Court
Juvenile Court Division

APPENDIX G

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0225

In re the Matter of the Welfare of the Child of: S. B., Parent.

Filed December 9, 2019
[2019 WL 6698079]
Affirmed
Florey, Judge
Hennepin County District Court
File No. 27-JV-15-483

Mark D. Fiddler, Rachel Osband, Fiddler Osband, L.L.C., Minneapolis, Minnesota (for appellants J.C. and D.C.)

Michael P. Boulette, Barnes & Thornburg, L.L.P., Minneapolis, Minnesota; and

Ronald M. Walters, ICWA Law Center, Minneapolis, Minnesota (for respondent grandmother R.B.)

Rebecca McConkey-Greene, McConkey-Greene Law Office, Duluth, Minnesota (for White Earth Band of Chippewa, Indian Child Welfare)

Michael O. Freeman, Hennepin County Attorney, Mary Lynch, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Human Services and Public Health Department)

Eric Rehm, Law Office of Eric S. Rehm, Burnsville, Minnesota (for guardian ad litem)

Considered and decided by Florey, Presiding Judge; Reyes, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

FLOREY, Judge

Appellant former foster parents argue that the district court erred by applying the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1907-1963 (2012) and the Minnesota Indian Family Preservation Act (MIFPA), Minn. Stat. §§ 260.751-.835 (2018) to their motion for adoptive placement because the child is not eligible for membership in a federally recognized Indian tribe. Appellants also argue that ICWA is facially unconstitutional on three grounds: (1) it violates equal protection; (2) it exceeds Congress's Article I authority; and (3) it violates the anticommandeering doctrine. We affirm.

FACTS

P.S. was born to C.S. and S.B. in July 2011. In July 2016, the district court terminated C.S.'s and S.B.'s parental rights. Based upon an April 23, 2015 letter from the White Earth Reservation Tribal Council which stated that P.S. was not eligible for membership with respondent the White Earth Band of Chippewa (White Earth) and therefore the tribe would not intervene, the district court determined that ICWA did not apply to the termination proceeding.

Starting with the initiation of the removal proceedings in August 2014, P.S. was placed in seven different homes. Beginning in July 2016, P.S. was placed with appellants. On January 4, 2017, White

Earth submitted a letter indicating that P.S. was eligible for membership, notwithstanding its earlier determination, and moved to intervene as a party in the child-custody proceedings. Prior to White Earth's intervention, respondent Hennepin County Human Services and Public Health Department (the county) informally supported adoptive placement with appellants, but following White Earth's intervention, the county began supporting respondent R.B., P.S.'s maternal grandmother, as P.S.'s adoptive placement.

R.B. was P.S.'s primary caregiver for the first four years of P.S.'s life. R.B. met with the county in August 2014 and indicated she was willing to be a permanent-placement option, but was told that the county would not recommend her due to her criminal record. The district court found that R.B. "has been unwavering in her desire to adopt [P.S.]." In March 2017, the county approved R.B. for child-foster-care licensure and adoption. The county removed P.S. from appellants' home and placed her with R.B. in January 2018.

Appellants moved the district court for an order granting them adoptive placement of P.S. in December 2017. R.B. did not move for adoptive placement at that time because the county and White Earth supported her as P.S.'s adoptive placement. The district court deferred ruling on appellants' motion because the county had not yet executed an adoption-placement agreement (APA) with R.B., and the county possessed the exclusive authority to make the adoptive placement. The county and R.B. executed the APA in May 2018. In July 2018, the district court found that appellants made a prima facie showing that the county was unreasonable in failing to place

P.S. with them for adoption, and set the matter for an evidentiary hearing.

In addition to challenging the reasonableness of the county's adoptive placement, appellants also brought several challenges to the applicability of ICWA and MIFPA. Following the district court's initial deferral on ruling on their motion for adoptive placement, appellants petitioned this court for writs of prohibition and mandamus directing the district court to return P.S. to preadoptive placement in their home, and to prevent the application of ICWA and MIFPA. This court denied the petitions.

Appellants next moved the district court to vacate the portion of its February 5, 2018 order—which deferred ruling on appellants' motion for adoptive placement—that reiterated its previous finding that ICWA and MIFPA apply to P.S.'s custody proceedings. Appellants asserted that this finding should be vacated due to White Earth's misrepresentation that P.S. qualifies as an "Indian child" within the meaning of the statutes. The district court found there was insufficient evidence of misrepresentation, that it was bound by White Earth's membership determination, and denied the motion to vacate. Finally, appellants moved the district court to permanently enjoin its enforcement of ICWA and MIFPA, which the district court denied.

Following an evidentiary hearing, the district court denied appellants' motion for adoptive placement. This appeal followed.

D E C I S I O N

Appellants challenge the district court's denial of their motion for adoptive placement. Appellate courts

review a district court's decision on whether to grant an adoption petition for an abuse of discretion. *In re S.G.*, 828 N.W.2d 118, 125 (Minn. 2013). However, appellants do not challenge the specific findings of the district court upon which it based its denial of their motion, but instead assert that the district court erred by applying ICWA and MIFPA to their motion for adoptive placement. They argue that ICWA and MIFPA are inapplicable because White Earth does not satisfy the statutory definitions of a federally recognized Indian tribe and also assert that ICWA is unconstitutional on three bases.

I. Applicability of ICWA and MIFPA

As a threshold matter, appellants assert that the district court erred by applying ICWA and MIFPA to their motion for adoptive placement because P.S. is not eligible for membership in a federally recognized tribe, and thus she does not meet the statutory definitions of an Indian child. The de novo standard of review typically applied to a district court's reading of a Minnesota statute also applies to review of a district court's reading of ICWA. *See In re Welfare of Children of S.R.K.*, 911 N.W.2d 821, 827 (Minn. 2018).

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). ICWA defines an Indian tribe as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians . . . ." *Id*. § 1903(8).

MIFPA defines an Indian child as "an unmarried person who is under age 18 and is: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe." Minn. Stat. § 260.755, subd. 8. The MIFPA definition of an Indian tribe is the same as that set forth in ICWA. *Id*., subd. 12.

Appellants argue that the district court erred by determining that White Earth satisfies the statutory definition of an Indian tribe. Appellants rely on *State v. Davis* for the asserted proposition that only the Minnesota Chippewa Tribe, of which White Earth is a constituent band, satisfies the ICWA definition of an Indian tribe, but that is not what the supreme court stated in *Davis*. 773 N.W.2d 66, 68 (Minn. 2009). *Davis* centered upon a question of whether federal law preempted the state's ability to enforce its traffic laws against a member of the Leech Lake Band who was stopped for speeding while traveling on land held in trust by the United States for the Mille Lacs Band. *Id*. at 67-68. Both bands are members of the Minnesota Chippewa Tribe. *Id*. at 68.

Appellants isolate and rely on the following language from *Davis* to support their contention that eligibility for membership in the White Earth Band is insufficient to meet ICWA's definition of an Indian tribe: "The Minnesota Chippewa Tribe (MCT) is a federally recognized Indian tribe with six member bands, including the Leech Lake Band and the Mille Lacs Band." *Id*. Appellants argue that based on this language, only eligibility for membership in the Minnesota Chippewa Tribe is sufficient to qualify as an Indian tribe—and by extension, an Indian child—within the meaning of ICWA and MIFPA. This argument is not supported by either binding Minnesota appellate caselaw or statute.

As set forth above, under both ICWA and MIFPA, an Indian tribe is defined as "an Indian tribe, *band*, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the secretary because of their status as Indians . . . ." 25 U.S.C. §1903(8); Minn. Stat. § 260.755, subd. 8 (emphasis added). In *In re the Welfare of S.N.R.*, this court stated that eligibility for membership in a constituent band of the Minnesota Chippewa Tribe satisfied ICWA's eligibility requirement. 617 N.W.2d 77, 81 n.2 (Minn. App. 2000) ("Because the Leech Lake Band has been recognized as eligible for such services, the band is an Indian tribe for the purposes of the ICWA."), *review denied* (Minn. Nov. 15, 2000). The same is true here.

Like the Leech Lake Band, the White Earth Band is recognized as eligible for services provided by the United States Bureau of Indian Affairs. Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34863, 34865. Therefore, the district court did not err by finding that eligibility for membership in White Earth is sufficient to meet the relevant statutory definitions of an Indian tribe.

Any inquiry into White Earth's internal eligibility determinations is not permitted as a matter of tribal sovereignty. *S.N.R.* 617 N.W.2d at 84 ("[A] tribal determination that a child is a member or eligible for membership in that tribe is conclusive evidence that a child is an 'Indian child' under [ICWA]."). Accordingly, a district court is not to inquire into "the tribe's application of its membership standards to a particular child . . . . Rather, the [district] court must determine whether the party who states that the child

is a member or eligible for membership in a tribe is authorized to make such statements on the tribe's behalf." *Id*. Here, the district court found that White Earth is authorized to make membership determinations on behalf of the Minnesota Chippewa Tribe and that, based upon an affidavit of the Director of the White Earth Band, P.S. is a member of White Earth. Therefore, the district court did not err by determining that White Earth satisfies the definition of an Indian tribe set forth in ICWA and MIFPA, and thus the statutes applied to appellants' motion for adoptive placement.

II. Constitutional Questions

A. Notice of Constitutional Challenge

Before turning to the merits of appellants' constitutional arguments, we note our concern with their failure to file and serve notice of their constitutional challenges.

For a challenge to a federal statute, Minn. R. Civ. P. 5A(1)(A) requires a party challenging its constitutionality in Minnesota district court to file a notice of constitutional question when "neither the United States nor any of its agencies, officers, or employees is a party in an official capacity." Rule 5A(2) requires the party to serve the notice upon the U.S. Attorney General. No element of the federal government was a party to this proceeding, and appellants neither filed a notice with the district court nor served that notice and the associated documents as required by rule 5A.

For a challenge to a state statute, the party must file a notice of constitutional question in accordance with Minn. R. Civ. P. 5A(1)(B), and the notice must be

served upon the Minnesota Attorney General in accordance with rule 5A(2). When the constitutionality of a state statute is challenged on appeal, Minn. R. Civ. App. P. 144 requires the party challenging the statute to file and serve notice of the challenge on the attorney general when "the state or an officer, agency or employee of the state is not a party."

Here, the Hennepin County Human Services and Public Health Department, represented by the Hennepin County Attorney, is a party to the action. However, the Supreme Court has stated that

> even if the county is an agent of the state for some purposes, we do not agree that it is for this purpose . . . . It is only in those actions or proceedings where the state or an officer, agency, or employee of the state is a party represented by the attorney general's office that an exception exists under this rule. In other words, service must be made upon the attorney general in all cases where he is not already in the case.

Elwell v. Hennepin County, 221 N.W.2d 538, 544 (Minn. 1974) (quotation omitted).[1] Upon this basis, we question whether the Hennepin County Human Services and Public Health Department's participation in this action, represented by the

[1] The pertinent language of rule 144 in effect in 1974 when *Elwell* was decided also required notice upon the attorney general when "the state or an officer, agency, or employee of the state is not a party . . . ."

Hennepin County Attorney, would satisfy rule 144's notice requirement.

Because neither the applicability of rule 5A nor rule 144 was raised or briefed by the parties, we proceed to address the merits of appellants' facial constitutional challenges, but note that appellants may have forfeited review of their constitutional challenges, *Elwell* 221 N.W.2d at 545, or they may be limited to an as-applied challenge, *Clay v. Clay*, 397 N.W.2d 571, 576 (Minn. App. 1986), *review denied* (Minn. Feb. 17, 1987), due to appellants' failure to file and serve notice of their constitutional challenges.

B. Equal Protection

ICWA creates rebuttable adoptive-placement preferences for "Indian children" that are different than those for other children. *Compare* 25 U.S.C. § 1915(a) (ICWA preferences), *with* Minn. Stat. §§ 260C.605 (2018), .212, subd. 2 (2018) (non-ICWA preferences). Appellants assert that ICWA's creation of preferences applicable only to Indian children creates a racial classification that cannot withstand strict scrutiny under the equal-protection component of the Fifth Amendment.[2] *See U.S. v. Windsor*, 570 U.S. 744, 774, 133 S. Ct. 2675, 2695 (2013) (noting the existence of an equal-protection component of the Fifth Amendment).

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[2] The heading of the equal-protection section of appellants' brief states that both ICWA and MIFPA violate equal protection. Appellants, however, make no argument and cite no authority for the idea that MIFPA violates the equal-protection facet of the Fourteenth Amendment. Appellate courts decline to address inadequately briefed questions. *State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997). Therefore, we decline to address MIFPA here.

Rejecting a due-process challenge to a hiring practice of the Bureau of Indian Affairs (BIA) that favored Indian applicants, the Supreme Court rejected the idea that the preference was racially based: "The preference, as applied, is 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." *Morton v. Mancari*, 417 U.S. 535, 554, 94 S. Ct. 2474, 2484 (1974). Relying upon the "unique legal status" of tribal members, the Supreme Court stated that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id*. at 555, 94 S. Ct. at 2485. Thus, because classifications based on tribal membership are not racial, they are subject to rational-basis review rather than strict scrutiny. *Id*., 417 U.S. at 554-55, 94 S. Ct. at 2484-85.

We reject appellants' assertion that this aspect of *Mancari* was superseded by *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S. Ct. 2552 (2013). The majority in *Adoptive Couple* mentions neither *Mancari* nor its holding that statutory classifications based on tribal membership are subject to rational-basis review. Absent an affirmative basis for concluding that the Supreme Court has decided that tribal membership is no longer a non-racial classification, we lack a basis for applying anything other than a rational-basis test to ICWA.

Appellants also assert that *Rice v. Cayetano*, 528 U.S. 495, 120 S. Ct. 1044 (2000) supersedes *Mancari* because ICWA, like the Hawaiian constitutional provision at issue in *Rice*, uses ancestry as a proxy for race. We disagree. *Rice* involved who could vote in a

statewide election for an office that administered public lands held by the state. *Id*. at 521, 120 S. Ct. at 1059. *Rice*, however, distinguished the special treatment afforded Indian tribal members under federal law, declined to extend the quasi-sovereign status of Indian tribal members to classifications involving native Hawaiians, *Id*. at 520-22, 120 S. Ct. at 1058-59, and did not otherwise indicate that it was altering the treatment of tribal members for constitutional purposes. Thus, we conclude that the tribal quasi-sovereignty underpinning *Mancari* was not implicated in, and hence was not superseded by, *Rice*.

Appellants also cite *Adarand Constructors, Inc. v. Pena* for the idea that all racial classifications are subject to strict scrutiny. 515 U.S. 200, 227, 115 S. Ct. 2097, 2113 (1995). But because appellants have not shown that tribal membership is a racial classification, *Adarand* is inapplicable.

Because ICWA's placement preferences are subject to rational-basis review, we must uphold the statute "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555, 94 S. Ct. at 2485. ICWA identifies "protect[ing] the best interests of Indian children" and "promot[ing] the stability of and security of Indian tribes and families by the establishment of minimum Federal standards" as matters of national policy relating to the adoptive placement of Indian children. 25 U.S.C. § 1902. ICWA's placement preferences favoring Indian homes for adoptive placement of Indian children are rationally tied to Congress's unique obligation to the Indians. Accordingly, we reject appellants' equal-protection challenge to ICWA.

C. Commerce with Foreign Nations

Appellants next argue that ICWA is unconstitutional because it exceeds Congress's legislative authority under Article I of the Constitution. Article I, Section 8 grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Appellants assert that Congress is only granted the authority to regulate Indian affairs as they pertain to "commerce," and legislation that does not regulate Indian commerce unconstitutionally intrudes upon the powers reserved to the states by the Tenth Amendment.

Appellants rely on Justice Thomas's concurrence in *Adoptive Couple* for the proposition that ICWA exceeds Congress's Article I authority. 570 U.S. at 666, 133 S. Ct. at 2571 (Thomas, J., concurring) ("Because adoption proceedings like this one involve neither 'commerce' nor 'Indian tribes,' there is simply no constitutional basis for Congress's assertion of authority over such proceedings."). As a concurring opinion, this portion of *Adoptive Couple* lacks precedential authority, and more importantly is inconsistent with current Supreme Court precedent that states that Congress's legislative authority under the Indian Commerce Clause is plenary. *U.S. v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, 1633 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive." (quotation omitted)); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S. Ct. 1698, 1716 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary

power to legislate in the field of Indian affairs."). Because Congress's power to legislate in the field of Indian affairs is plenary, ICWA does not exceed Congress's legislative authority.

D. Anticommandeering Doctrine

Finally, appellants argue that ICWA unconstitutionally commandeers state sovereign authority over matters of domestic relations. Appellants principally rely on *Murphy v. Nat'l Collegiate Athletic Ass'n*, which struck down a federal law that prevented, among other things, state legislatures from authorizing sports gambling in their respective states, but *Murphy* is distinguishable. 138 S. Ct. 1461, 1478 (2018).

"The anticommandeering doctrine . . . 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." *Id.* at 1475. In *Murphy*, the Supreme Court held that the Professional and Amateur Sports Protection Act (PASPA) violated the anticommandeering doctrine because, in prohibiting state legislatures from authorizing sports gambling, the PASPA "unequivocally dictates what a state legislature may and may not do." *Id.* at 1478.

Appellants argue that 25 U.S.C. § 1915(a) unconstitutionally commandeers state authority over adoptions by providing a list of placement preferences for the adoption of Indian children inconsistent with Minnesota statutory requirements applicable to adoptions not involving Indian children. *Compare* 25 U.S.C. § 1915(a) ("In 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."), *with* Minn. Stat. § 260C.605, subd. 1(b) ("Reasonable efforts to make a placement in a home according to the placement considerations under section 260C.212, subdivision 2, with a relative or foster parent who will commit to being the permanent resource for the child . . . .").

Here, it is possible to avoid the constitutional question altogether, because Minnesota has specifically enacted the ICWA placement preferences into state law. Minn. Stat. § 260.771, subd. 7(a) ("The court must follow the order of placement preferences required by [ICWA], United States Code title 25, section 1915, when placing an Indian Child."). Assuming without accepting that ICWA violates the anticommandeering doctrine, here, appellants have no basis to assert that the federal government has unconstitutionally directed state action when, by legislative enactment, the state has freely adopted the federal requirement.

Because the district court did not err by determining that White Earth satisfies the statutory definitions of an Indian tribe under MIFPA and ICWA and because ICWA is not unconstitutional under any of the bases identified by appellants, the district court did not err by applying ICWA and MIFPA to appellants' motion for adoptive placement.

Affirmed.

APPENDIX H

STATE OF MINNESOTA

IN SUPREME COURT

A19-0225

In re the Matter of the Welfare of the Child of: S.B., Parent.

[Filed: Jan. 9, 2020]
[2020 Minn. LEXIS 17]
ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of D.C. and J.C. for further review be, and the same is, denied.

Dated: January 9, 2020 **BY THE COURT**

/s/ Lorie S. Gildea
Lorie S. Gildea
Chief Justice

APPENDIX I

STATE OF MINNESOTA COUNTY OF HENNPIN	DISTRICT COURT- JUVENILE DIVISION FOURTH JUDICIAL DISTRICT

In the Matter of the Child In the Custody of the Commissioner of Human Services	**DISMISSAL ORDER UPON ADOPTION FINALIZATION** FAM No.: 349034 J.C. Case No.: 27-JV-15-483 SSIS Workgroup No.:451143943

[Filed: June 19, 2020]

Child: [P.S.], [P.S. Birthday] 2011

The above-referenced child being under the guardianship of the Commissioner of Human Services, and this matter being before the undersigned Judge of District Court, Juvenile Division pursuant to Minnesota Statutes § 260C.607, and Title IV-E of the Social Security Act:

IT IS HEREBY ORDERED:

The adoption of the child having been finalized on May 21, 2020, before the Honorable Judge Lyonel Norris, Judge of the District Court, Juvenile Division in the County of Hennepin, State of Minnesota, this case is dismissed.

Date: June 19, 2020 BY THE COURT:

/s/ Hilary Lindell Caligiuri

HILARY LINDELL CALIGIURI

Judge of District Court

Kianna Batteau, CCM, MC 629

Hannah Ghosh, ARW, MC 629