No. 04-15477

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY DOE,

Plaintiff and Appellant,

v.

JOHN DOE I, et al.,

Defendants and Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
HONORABLE MARILYN HALL PATEL
CASE NO. C 02-3448 MHP

BRIEF OF THE YUROK TRIBE, AS PROPOSED *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT DECISION

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I. Statement of Interest

California has the largest Native American population in the nation. *See* CALIFORNIA DEPARTMENT OF SOCIAL SERVICES AMERICAN INDIAN/ALASKA NATIVE CHILDREN IN THE CHILD WELFARE SERVICES PROGRAM, REPORT CALENDAR YEAR 2000 (AUG. 29 2002) (attached hereto as Addendum A), at 4 (hereinafter "AUG. 29, 2002, DSS REPORT"). The State is home to 109 federally recognized Tribes and approximately 40 unrecognized Tribes. *See id.*

The Yurok Tribe, with 4,718 members, is the largest federally recognized Tribe in California. The Yuroks are a fishing and timber people whose abundant resources made them self-sufficient until the late nineteenth century. *See* TESTIMONY OF SUSAN MASTEN BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE AND THE SENATE COMMERCE COMMITTEE, May 14, 2002 (attached hereto as Addendum B). The current Yurok Reservation, occupying only a small portion of the original aboriginal territories, spans Humboldt and Del Norte counties and contains approximately 55,000 acres. *Id.* It extends one mile on each side of the Klamath River and approximately 50 miles northwest to the Pacific Ocean. *Id.*

A federally recognized tribe since 1851, the Yurok Tribe became statutorily organized in 1988 as a result of passage of the Hoopa-Yurok

Settlement Act (P.L. 100-580, as codified at 25 U.S.C. § 1300(i)-(l)). In 1993, the Yurok Tribe adopted a Constitution and instituted its current council form of government. The Federal Bureau of Indian Affairs acknowledged and approved the Yurok Constitution, even though it was not required to do so.

The Yurok Constitution mandates that the Tribe "preserve forever the survival of [the Yurok] tribe and protect it from forces which may threaten its existence." *Preamble to the Constitution of the Yurok Tribe* (1993) (attached hereto as Addendum C). Accordingly, the Yurok Tribe routinely executes memoranda of understanding with county, state, and federal entities and enacts ordinances to protect tribal sovereignty, interests, and resources from unauthorized infringement by the State of California. This is no small task; the Yurok Tribe, like all California tribes, must constantly defend itself against improper state encroachment. Indeed, this case is emblematic of the systematic abuses the Yurok Tribe and other tribes have endured at the hands of the State.

Children are the most valuable resource of any culture, particularly Native American tribes, which rely on their youth to carry on tribal traditions. The Yurok Tribe is committed to protecting its most precious resource, its children, and keeping them close to their Indian culture, for the

sake of its own tribe as well as for children of other tribes. The injustices suffered by Mary Doe, Jane Doe, and the Elem Indian Colony are representative of the residual policies of termination and assimilation that continue to threaten the sovereignty and governance of all tribes and the well-being of all Indian families in California. The Yurok Tribe, accordingly, has a vested interest in ensuring that exclusive jurisdiction over child welfare proceedings involving Indians domiciled on a reservation remains with California Tribes and that any such jurisdiction that is instead being exercised by the State *de facto* cease immediately.

II. The State of California's Historical Policy of Assimilation and Termination of Indians Has Threatened Tribal Existence and Curtailed Indian Self-Determination

To understand the threat posed by the district court's ruling, one must consider that ruling's historical context: namely, the tradition of abuse and disenfranchisement inflicted on California Indians by the State.

A. California and its "Termination Era" Policies Advocated and Permitted the Hunting of Indian Parents and Taking of Indian Children

When Spain relinquished its claims to California in the Treaty of Guadalupe Hidalgo in 1848, California tribes almost immediately faced an onslaught of settlers consumed with gold fever. The settlers were hostile to the tribes' culture, society, and sovereignty and prepared to destroy any

aspect of Native American life in their quest for gold – including killing adults and taking their children.

During the late 1840s and early 1850s, adult Native Americans living on the land, including the Yurok Tribe, were literally hunted down like animals by the gold miners. As historian Hubert Howe Bancroft observed:

> The savages were in the way; the miners and settlers were arrogant and impatient ... It was one of the last human hunts of civilization, and the basest and most brutal of them all.

The National Park Service, *Five Views: An Ethnic Historic Site Survey for California, History of American Indians in Californ*ia, "on-line book" at 1849-79 (December, 1988) (hereinafter, "*Five Views*") (attached hereto as Addendum D) (citing Hubert Howe Bancroft, *History of California,* Vols. I, II, and IX. Reprint. Santa Barbara: Wallace Hebberd, 1963-64 at 474).

This "human hunt" aimed not only to eliminate the adults, but also to permanently remove their children from the tribe. In 1850, "An Act for the Government and Protection of Indians" became law. Under this Act,

> [a]ny person having or hereafter obtaining a minor Indian, male or female, from the parents or relations of such Indian Minor, and wishing to keep it, such person shall go before a Justice of the Peace in his Township, with the parents or friends of the child, and if the Justice of the Peace becomes satisfied that no compulsory means have been used to obtain the child from its parents or friends, shall enter on record, in a book kept for

> that purpose, the sex and probable age of the child, and shall give to such person a certificate, authorizing him or her to have the care, custody, control, and earnings of such minor, until he or she obtain the age of majority.

The 1850 Act, unfortunately, was only the beginning. In 1851 and 1852, the California Legislature authorized bounties on the heads of Native Americans for the "suppression of Indian hostilities." *Five Views* at 1849-1879. Again, in 1857, the Legislature issued bonds for the same purpose. *Five Views* at 1849-1879 (citing Robert F. Heizer, et al. *Handbook of North American Indians*, Vol. 8: Washington Smithsonian Institution at 108 (1978)). This resulted in the systematic raiding of tribal villages and the murder and enslavement of the resident Indians.

Under this regime of State-sanctioned barbarianism, California Indians became casualties of insatiable greed. It was within this climate that a nefarious practice of stealing Indian children from their parents developed:

> A band of desperate men have carried on a system of kidnapping for two years past. Indian children were seized and carried into lower counties and sold into virtual slavery.... The kidnappers follow at the heels of the soldiers to seize these children when their parents are murdered to sell them at the best advantage...a class of whites...systematically killed adults to get their children.

Five Views at 1849-79 (citing Roxanne Balin, *One of the Last Human Hunts of Civilization, and the Basest and Most Brutal of Them All*, IMAGE 3 GRAPHIC (1971) at 18-19).

California, moreover, thwarted attempts by the federal government to establish treaties with California tribes that would prohibit these abuses and respect tribal sovereignty. Between 1851 and 1852, the executive arm of the federal government negotiated 18 treaties with 139 California Indian tribes. Believing that the treaties "committed an error in assigning large portions of the richest mineral and agricultural lands to the Indians, who did not appreciate the land's value," *Five Views* at 1849-79 (citing W. H. Ellison, *Rejection of California Indian Treaties*, GRIZZLY BEAR, May 1925, at 4-5), the California legislature ensured that the treaties were never ratified by the United States Congress.

In February 1852, after President Millard Fillmore submitted the 18 treaties to the United States Senate for ratification, at the behest of the California senators, the United States Senate went into secret session to "discuss" the treaties. *Five Views* at 1849-79. Not only did the Senate fail to ratify the treaties, but, by Congressional order, the treaties also were placed in secret files, where they remained for the next 53 years. *Id.* Within two decades, the State's power grab was complete: in 1871, the United

States Congress declared that it would no longer negotiate treaties with American Indians. *Id.*

Through both its legislative enactments and its extraordinary efforts to block, and then conceal, any framework for federally negotiated treaties, California made it clear that it considered native tribes to be an impediment to State expansion and growth. Thus, the State had no interest in acknowledging or respecting tribal sovereignty, but rather intended to destroy tribal nations and assimilate the remaining natives into mainstream society through involuntary servitude and other means. Not surprisingly, a sobering and rapid Native depopulation within California followed: only 100,000 Indians remained of the original 310,000 who had populated California prior to statehood. *Five Views* at 1749-1848. The Yurok Tribe's current enrollment of a mere 4,718 members stands as powerful testimony to the efficacy of California's ruthless campaign to eradicate the Indian nations. Indeed, it is remarkable that the Yurok Tribe and other tribes survived the historical era of Indian termination. That they did is a testament to the depth and strength of their culture, society, and sovereign values.

B. The Assimilation Era and Enactment of PL 280

During the two decades after World War II, state and federal efforts established a new threat to tribal sovereignty: government-organized Indian

"assimilation." This insidious policy ultimately proved to be as great an attack on Indian sovereignty as the genocide of the Termination Era.

In 1949, the federal Hoover Commission presented its *Report on Indian Affairs*. The Commission recommended "complete integration" of Indians "into the mass of the population." *See* Testimony of Kevin Gover, Assistant Secretary for Indian Affairs, DEPT. OF THE INTERIOR (May 16, 2000) (attached hereto as Addendum E) The central component of this strategy was to sever Indian children's ties to their society and history by submerging them into the dominant, white culture. During this time, Indian children were systematically removed from their parents and placed in boarding schools, which forbade them from speaking their native languages, practicing their spiritual beliefs, or adhering to their traditional grooming and attire. *See, e.g.*, B.J. Jones, *In their Native Lands: The Legal Status of American Indian Children in North Dakota*, 75 N.DAK. L. REV. 241, 248 (1999). "[N]ever before in this country has there been such a concerted effort to transform a group of people by legally manipulating their children." *Id.*

It was within this context, in 1953, that Public Law 280 (hereinafter, "PL 280") was introduced. The purpose of PL 280 was, in part, to "assimilate" Indians into the dominant white society and to eliminate the

distinctions between Indians and non-Indians. Even in this hostile climate, however, the scope of PL 280 was confined to giving states jurisdiction over criminal matters on Indian reservations and over very limited civil issues. *See, e.g.*, *Bryan v. Itasca County*, 426 U.S. 373, 385-88 (1976); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 539 (9th Cir. 1994).

Significantly, even in an era of assimilationist fervor, Congress's enactment of PL 280 did not go so far as to cede to states a tribe's inherent jurisdiction over involuntary child custody proceedings concerning Indians domiciled on tribal lands. This fact is evident not only from fifty years of jurisprudence interpreting PL 280, but also was expressly acknowledged by the court below. *Doe v. Mann*, 285 F. Supp. 2d 1229, 1235-37 (N.D. Cal. 2003).

The district court's suggestion, however, that Indian tribes lost this jurisdiction, not under PL 280, but under ICWA – *anti-assimilationist* legislation that was enacted to *remedy* the injustices of past policies — is simply not credible. As discussed below, rather than seeking to expand the States' post-war assimilationist policies, Congress in ICWA at last embraced a policy of Indian self-determination: one that sought to restrict – not to expand – the scope of state interference in Indian tribal matters relating to child welfare.

III. ICWA Was Enacted Pursuant to a Congressional Policy of Indian Self-Determination and was Intended to Remedy State and Local Abuses of Tribal Sovereignty

Despite the hostile policies and practices imposed on California Indians, Indian tribes, such as the Yurok Tribe, survived long enough to see the pendulum swing away from a policy of termination and assimilation to one of self-determination. *See, e.g.*, Jones, *supra*, 75 N. DAK. L. REV. at 248. During the 1960's and 1970's, Congress recognized the destructive effects of past federal and state policies upon Indian tribes and determined that formal legislation was needed to ensure that state officials honor and respect Indian sovereignty and their right to self-determination for their tribes and children. To this end, Congress passed a variety of federal laws[1] that confirmed the inherent sovereign rights of Indian nations to determine their own laws and be governed by them. *Id.* It was within this environment that Congress enacted ICWA.

The hearings before Congress leading up to ICWA's enactment confirmed the tragic effect that state encroachment and discrimination had had on American Indians. Before passing ICWA, the 95th Congress heard testimony from Indians who were victims of the prior policies of termination

[1] Examples of these laws, aside from ICWA, include the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C.

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and assimilation. One poignant example is the testimony of a child who at age thirteen, along with his seven siblings, was removed from the custody of his mother on the Fond Du Lac Reservation in Minnesota following the death of his father. The child testified regarding the effect of his removal from the reservation and placement in successive non-Indian homes:

> They took me away from my people, from my family, all my friends, brothers and sisters, everyone. I lost all my Indianness, language, religion, beliefs, my sense of belonging. ... [It] built in me a resentment, a feeling of anger, they had stolen everything away from me.

124 CONG. REC. at 21044 (June 27, 1977) (attached hereto as Addendum F).

When Congress passed ICWA it did so in powerful fashion, denouncing the lack of respect shown by States for the sovereign authority of Indian tribes and acknowledging its own prior failure to protect Indians and, in particular, Indian children. Congress admonished the States for their particular hostility towards Indians:

> The most distressing and critical factor giving rise to this emerging crisis of Indian families has been the ... failure or inability of State agencies, courts, and procedures to fairly consider the differing

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§ 450(a)-(n), and the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301, *et seq.* *See, e.g.*, Jones, *supra*, 75 N. DAK. L. REV. at 248, n. 47.

> cultural and social norms in Indian communities and families.

124 CONG. REC. at 38102 (attached hereto as Addendum G). Congress also recognized its own "obligation to act to remedy th[e] serious problem" of Indian children being torn away from their families and tribal communities. *Id.*

Thus, ICWA was enacted to safeguard Indian tribes and families from the pervasive state practices of wrongly subjecting Indians to state forums and using state mechanisms to "steal[] their children," 123 CONG. REC. 9994, or otherwise dismantle the tribes and their Indian families, all in the name of assimilation and integration. The very purpose of ICWA was to remove any uncertainty that the tribe, and not the state, is the appropriate entity to determine the welfare of Indian children and to regulate the domestic affairs of Indians living on tribal lands, except for limited issues. *See* 44 Fed. Reg. 67584, 67585-86 (Nov. 26, 1979) (Congress established a federal policy of "keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes."); S*ee also id.* at 67592 (in enacting ICWA, "Congress has established a policy of preferring tribal control over custody decisions affecting tribal members. . ."). Thus, to suggest, as the district

court below has done, that ICWA somehow divested tribes of their inherent right to regulate domestic affairs on tribal lands, is insupportable not only based upon the text of the act, but also based upon its legislative history and historical framework. Indeed, ICWA was enacted to protect against the precise injustices present in the underlying case.

IV. The District Court's Findings Erroneously Assume that States are Better equipped than Tribes to Handle Child Custody Issues in PL 280 States Notwithstanding Congress's Determination to the Contrary

The district court's conclusion that, in enacting ICWA section 1918, Congress merely "wanted to offer tribes who had the necessary structures the *opportunity* for self-governance," *Doe v. Mann*, 285 F. Supp. 2d at 1238 (emphasis added), is reminiscent of the paternalistic and undermining "logic" employed by state institutions that was the impetus for enacting ICWA. Moreover, such a finding contravenes the plain language of ICWA and Congressional intent. *See* Plaintiff-Appellant's Opening Brief, at 31-39, 45-56. Contrary to the district court's view, Congress made clear that tribes are not required to plead for "opportunit[ies] for self-governance." 44 Fed. Reg. 45094-95 (July 31, 1979) ("States are not denied jurisdiction over child custody matters relating to their residents simply because a neighboring state could handle the cases better. Tribes should not be required to compete with neighboring jurisdictions any more than states are."). Instead, they are

presumed to have the right and ability to self-govern as part of their inherent sovereignty. H.R. REP. NO. 95-1386, at 21 ("The provisions on exclusive tribal jurisdiction confirms the developing federal and state case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on the reservation.).

The district court's opinion rests on the false assumption that states are uniquely equipped to administer justice in the realm of involuntary Indian child custody proceedings and that tribes in PL 280 states are inherently ill-equipped to do so. Thus, the district court concludes, the ICWA Congress intended to place a *heavier* burden on tribes, requiring them to demonstrate their ability to meet the mandates of ICWA because Congress "was clearly concerned about the feasibility of tribal jurisdiction." *See Doe v. Mann*, 285 F. Supp. 2d at 1239. Under this view, tribes – which at the time of ICWA's enactment already had full authority to determine involuntary custody matters involving reservation children – now, post-ICWA, must "prove" or "earn" their ability to regulate tribal domestic affairs by petitioning for this right under Section 1918, whereas states are automatically granted this right by default. *See id.* at 1238. To conclude otherwise, the district court asserts, would be "illogical." *See id.*

The district court got it exactly wrong. It is indeed the district court's reasoning, *not* Plaintiff's, the ICWA Congress's, or the Yurok Tribe's, that is "illogical." *See Doe v. Mann*, *supra*, 285 F. Supp. 2d at 1237. There is no evidence of Congress's concern "about the feasibility of tribal jurisdiction" other than the district court's own self-imposed concerns. In fact, the 95th Congress concluded that Indian tribes presumptively were capable of providing for the welfare of their own children, and it did not see "any reason to believe that the Indian community itself cannot, within its own confines, deal with problems of child neglect when they do arise." 123 CONG. REC. 9994 (April 1, 1977) (attached hereto as Addendum H). The plain language of ICWA and everything in the legislative history demonstrates that the 95th Congress's "clear concern" was that states, not tribes, were not authorized or qualified to exercise jurisdiction over Indian child-custody proceedings and that state agencies were "striking at the heart of Indian communities and literally stealing Indian children." *Id.* It is these concerns that prompted Congress to enact ICWA to "see to it that Indian people receive equal justice and the support of the Federal Government" in eliminating "the abuses and injustices present in Indian child welfare." *Id.*

That Congress did not perceive tribes to be less qualified than states to administer Indian child welfare and thus did not intend to place a heavier

burden on tribes than on states is also evidenced by the fact that almost all of ICWA's provisions provide for increased tribal control or involvement. *See* BRIEF OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION AND THE TAKANA CHIEFS CONFERENCE, AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT DECISION, at 7-9. Indeed, the "findings in the Act indicate that Congress believes tribal jurisdiction will, in most cases, be better for Indian children." 44 Fed. Reg. at 45094.

Indeed, the history of this case – and in particular appellees' conduct below– confirms the wisdom of Congress in declaring that states must honor tribes' exclusive jurisdiction under Section 1911(a). Here, appellees entirely disregarded the dictates of ICWA, placing the child in a non-tribal family off the reservation and against the wishes of the child's parent and Tribe. Moreover, the underlying circumstances of this case are not anomalous, but are characteristic of California's handling of Indian child welfare matters. *See, e.g.*, JANUARY 10, 2003 UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES CHILDREN'S BUREAU CHILD AND FAMILY SERVICES REVIEW KEY FINDINGS REPORT, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES (attached hereto as Addendum I) (finding the State of California failed to meet the "national standards [for child and family services] for

none of the six standards" and "achieved substantial conformity for none of the seven outcomes," including failing to "preserv[e] children's connections with their family, faith, community, culture and friends," to "diligently recruit foster and adoptive families that reflect the ethnic and racial diversity of the children for whom homes are needed," and to "mak[e] efforts to achieve permanency for children through reunification [and] *permanent placement with relatives*") (emphasis added).[2] Even when the State legitimately exercises jurisdiction over a child welfare proceeding involving an Indian child, the mandates of ICWA are routinely flouted. Furthermore, evidence suggests that Indian children are still disproportionately removed from their families and tribes in comparison with non-Indian children. *See* AUG. 29, 2002 DSS REPORT at 13 (stating that in the year 2000, American Indians entered the child welfare system at twice the statewide average for all children).

V. Conclusion

Throughout much of its history, California has had a reprehensible policy of Indian child removal that ICWA sought once and for all to end. As this case demonstrates, however, even after ICWA, the impulse by states to

[2] This report is publicly available on the United States Department Of Health And Human Services' website at

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encroach on the very core of Indian tribal culture – the rearing of Indian children in their tribal traditions – has not abated, and remains a critical threat today. To enforce Congress's will in enacting ICWA – both in letter and in spirit – this Court must overturn the incorrect and paternalistic decision of the district court so that state courts in California and other PL 280 states may not conduct involuntary child custody proceedings involving Indian children domiciled on reservations. As the largest tribe in California, the Yurok Tribe has a deep and vested interest in ensuring that the dictates of ICWA are fulfilled in this State. Accordingly, the Yurok Tribe urges the Court to overturn the district court's ruling.

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http://www.acf.hhs.gov/programs/cb/cwrp/key/findings02/ca.pdf, but is attached for the Court's convenience.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief is in compliance with Fed. R. App. P. 29(d), 32(a)(5), and 32(a)(7) since it is written in a proportionally spaced typeface of 14 points and contains 3,889 words.

John W. Corbett

John W. Corbett

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served by U.S. priority mail two copies of the foregoing BRIEF OF THE YUROK TRIBE, AS PROPOSED *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT DECISION this 8th day of June 2004 to the following:

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