

No.

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**In the Supreme Court of the United States**

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THE CHEROKEE NATION AND  
BRITINEY JANE LITTLE DOVE NIELSON,  
*Petitioners,*

v.

SUNNY KETCHUM AND JOSHUA KETCHUM,  
*Respondents.*

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**On Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Tenth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Enacted to protect the survival and integrity of American Indian tribes, the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.*, establishes “minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes.” The Act defines an “Indian child” in relevant part to mean an unmarried person under the age of eighteen who is “a member of an Indian tribe.” 25 U.S.C. § 1903(4)(a). In this case, the question presented is:

Whether a federally recognized Indian tribe’s membership criteria determine whether a child is a “member” of that tribe for purposes of the Indian Child Welfare Act.

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners Cherokee Nation and Britiney Jane Little Dove Nielson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

### OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App., *infra*, 1a-15a) is reported at 640 F.3d 1117. The decision of the district court (App., *infra*, 16a-27a) is reported at 629 F. Supp. 2d 1258. The orders of the district court granting the Cherokee Nation's motion to intervene (App., *infra*, 28a-29a) and of the court of appeals denying the motion for rehearing (App., *infra*, 30a-31a) are not reported.

### JURISDICTION

The court of appeals entered its judgment on April 5, 2011, and denied a timely petition for rehearing on July 6, 2011. On September 23, 2011, Justice Sotomayor extended the time for filing the petition for a writ of certiorari to December 2, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

### STATUTORY PROVISIONS INVOLVED

Section 103 of the Indian Child Welfare Act, 25 U.S.C. § 1903(4), provides in relevant part:

“Indian Child” means 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.



Section 103 of the Indian Child Welfare Act, 25 U.S.C. § 1913(a), further provides in relevant part:

Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

Section 11A of the Cherokee Nation Code provides in relevant part:

A. This Section 11A is enacted \* \* \* for the specific purpose of protecting the rights of the Cherokee Nation under the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*

B. [E]very newborn child who is a Direct Descendant of an Original Enrollee shall be automatically admitted as a member of the Cherokee Nation for the period of 240 days following the birth of the child. No request or application for Tribal Membership or other documentation need be submitted or delivered \* \* \* as a prerequisite to the temporary Tribal Membership of a child under this section. Such temporary Tribal Membership shall be effective automatically from and after the birth of the child for all purposes although the name of the child is not entered on the Cherokee Register.

C. The temporary Tribal Membership granted to a child pursuant to subsection A of this section shall automatically expire without notice to the child or to the Sponsor or any other interested person, at the end of the 240-day period following the child's birth.

#### **STATEMENT**

In the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, Congress addressed the serious problem of Indian children being separated from

their families and tribes through adoption or placement in foster homes. To limit this practice, ICWA imposes a number of strict substantive and procedural requirements, among them that consent to termination of parental rights given within ten days of the birth of an “Indian child”—defined in relevant part as an unmarried person under the age of 18 who is a “member of an Indian tribe”—is not valid. In this case, petitioner Nielson’s child was a member of the Cherokee Nation under that Tribe’s Citizenship Act. (The Tribe is also a petitioner here.) But the Tenth Circuit nevertheless refused to hold that the child was a member of the Cherokee Nation for ICWA purposes, dismissing the Citizenship Act as an illegitimate exercise in “gamesmanship” and holding that a child may not be a “member” of a tribe for ICWA purposes even though he or she *is* a member for internal tribal purposes.

This holding should not stand. It cannot be squared with the language and policy of ICWA, while departing from the approach taken to that statute by other courts. It undermines fundamental principles of tribal sovereignty. And it creates considerable confusion about the broader significance of a tribe’s determination of tribal membership. For all of these reasons, further review of the decision below is warranted.

### **A. Statutory Background**

1. As this Court has explained, ICWA “was the product of rising concern in the mid-1970’s over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian

homes.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Oversight hearings held by Congress illustrated the scope of the problem and the basis for congressional concern. Surveys indicated that “25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions.” *Id.* at 32. The adoption rate for Indian children was eight times that for non-Indians, and 90% of the adopted Indian children were placed in non-Indian homes. *Ibid.* Overall, witnesses termed “the wholesale removal of Indian children from their homes, \* \* \* the most tragic aspect of Indian life today.” *Id.* at 32 (citation omitted). And while this testimony focused on “the harm to Indian parents and their children,” “there was also considerable emphasis on the impact on the tribes themselves.” *Id.* at 34.

Faced with this evidence, Congress ultimately concluded in legislative findings that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.” 25 U.S.C. § 1901(3). But it also determined that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children \* \* \* by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.” 25 U.S.C. § 1901(4).

2. Congress responded by enacting ICWA, which “seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in society.” *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23, 1978 U.S.C.C.A.N. 7530 (1978)). The statute declares

it “the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children \* \* \*.” 25 U.S.C. § 1902. ICWA effectuates this goal by, among other things, setting “procedural and substantive standards for those child custody proceedings that do take place in state court.” *Holyfield*, 490 U.S. at 36. Included in these procedural safeguards are “requirements concerning notice and appointment of counsel; parental and tribal rights of intervention and petition for invalidation of illegal proceedings; procedures governing voluntary consent to termination of parental rights; and a full faith and credit obligation in respect to tribal court decisions.” *Ibid.*

Most important for present purposes, ICWA provides that “[a]ny consent [to the termination of parental rights] given prior to, or within ten days after, birth of the Indian child shall not be valid.” 25 U.S.C. § 1913(a). This ten-day waiting period ensures that the parents of an Indian child may terminate their parental rights only after a period of deliberation and with clear understanding of the consequences. The parent or guardian of an Indian child *or* the child’s tribe may “petition any court of competent jurisdiction to invalidate [the termination of parental rights] upon a showing that such action violated” this provision. 25 U.S.C. § 1914. And “[n]otwithstanding State law to the contrary,” ICWA provides that when “a final decree of adoption of an Indian child has been vacated or set aside \* \* \* a biological parent \* \* \* may petition for return of custody and the court shall grant such petition unless there is a showing \* \* \* that such return of custody is not in the best interests of the child.” 25 U.S.C. § 1916(a).

To receive this protection under ICWA, however, the child in question must be an “Indian child.” Under the definition set forth in the Act, an “Indian child” is “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). Congress did not further define the terms “Indian child” or “member of an Indian tribe” in ICWA.

3. After the enactment of ICWA, the U.S. Department of the Interior, Bureau of Indian Affairs (“BIA”), promulgated ICWA guidelines to assist courts in the application of the statute. These guidelines declare that “[t]he determination by a tribe that a child is or is not a member of that tribe \* \* \* is conclusive.” *Guidelines for State Courts; Indian Child Custody Proceedings* (“BIA Guidelines”), 44 Fed. Reg. 67,584 § B.1(b)(i) (Nov. 26, 1979). See also *ibid.* (“[T]he best source of information on whether a particular child is Indian is the tribe itself. It is the tribe’s prerogative to determine membership criteria.”) (citing Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4, at 133 (3d ed. 1942)). The guidelines also declare that Congress in passing ICWA “expressed its clear preference for 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.” *Id.* at 67,585-67,586 § A.1. Thus, courts should construe ICWA “liberally \* \* \* in favor of a result that is consistent with these preferences.” *Ibid.*

4. The Cherokee Nation also took steps to fully implement ICWA's policies. Under the Cherokee Nation Constitution, persons are eligible for membership in the Nation if they are "original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls." Cherokee Nation Const., art. IV, sec. 1.<sup>1</sup> Prior to 1993, however, the Cherokee Nation required that individuals eligible for citizenship formally enroll before becoming tribal members. See Cherokee Nation Citizenship Act ("Citizenship Act"), Legis. Act No. 6-92, §§ 6-8 (1992), amended by Legis. Act No. 2-93 (1993) and Legis. Act No. 16-02 (2002).<sup>2</sup> Because the Nation was concerned that this policy had the effect of denying some newborns who were descendants of Dawes enrollees the protection that Congress sought to provide in ICWA, in 1993 the Nation amended the Citizenship Act. Legis. Act No. 2-93 (1993), codified at 11 C.N.C.A. § 11A (1994), amended by Legis. Act No. 16-02 (2002). As amended, the Citizenship Act provides that any newborn child who is a direct descendant of an original Dawes enrollee is automatically admitted as a full member of the Cherokee Nation for a period of 240 days. 11 C.N.C.A. § 11A(B). See Mins. of Tribal Council Meeting, July 12, 1993<sup>3</sup>; 11 C.N.C.A. § 11A(A). The amendment grants full citizenship to such children without the paperwork typically re-

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<sup>1</sup> In 1896, the Dawes Commission was established in part to create membership rolls for the Cherokee Nation. See App., *infra*, 5a n.2.

<sup>2</sup> This enactment was originally titled the "Cherokee Nation Membership Act" (see Legis. Act No. 6-92 (1992)), but was later retitled the "Cherokee Nation Citizenship Act" (see Legis. Act No. 16-02, § 4(a) (2002)).

<sup>3</sup> Available at <http://tinyurl.com/7lkytv3>.

quired for membership benefits: “No request or application for Tribal Membership or other documentation need be submitted or delivered to the Registrar as a prerequisite to the temporary Tribal Membership of a child under this Section.” 11 C.N.C.A § 11A(b).

Newborns admitted under this section enjoy the protections and benefits of tribal membership “for all purposes” (11 C.N.C.A. § 11A(B)) and qualify as “tribal citizen[s].” 11 C.N.C.A. § 4(F), amended by Legis. Act No. 16-02 (2002). After the 240-day period expires, membership is revoked unless the child’s parents or guardians submit documentation requesting his or her formal registration as a tribal member. 11 C.N.C.A. § 11A(C). The Tribe chose that period because, at the time of the enactment of the provision, 240 days was the typical amount of time necessary to formally register a new member with the Tribe and the BIA. Thus, newborn Cherokee children automatically receive membership benefits during this period until the formal registration process, if begun at the newborn’s birth, is complete.

## **B. Procedural History**

1. On November 5, 2007, petitioner Nielson, then age seventeen, gave birth to C.D.K. App., *infra*, 3a. The next day, Nielson appeared in state court in Utah to relinquish her parental rights and give C.D.K up for adoption to respondents, who were present at the proceeding. *Ibid*. Respondents were represented by counsel; petitioner was not. *Ibid*. At the hearing, Nielson testified that she had an eighth-grade education and that, although she was not currently on any medications because she had just given birth, she normally takes medication for depression and bipolar disorder. *Id.* at 3a-4a.

At the adoption hearing, Nielson's mother stated that she (C.D.K.'s grandmother) was enrolled in a tribe, and that she was considering enrolling Nielson in the next few months. App., *infra*, at 3a n.1. (Nielson subsequently did become an enrolled member of the Cherokee Nation. *Ibid.*) Nevertheless, the state court judge accepted Nielson's relinquishment of her parental rights and awarded temporary custody of C.D.K. to respondents. The court finalized the adoption in May 2008. *Id.* at 4a.

2. The next month, however, Nielson filed a petition in U.S. District Court for the District of Utah asking that termination of her parental rights be abrogated under ICWA; she argued that C.D.K. is an Indian child and that termination of her parental rights was invalid because it came fewer than ten days after C.D.K.'s birth. App., *infra*, 6a. Petitioner Cherokee Nation intervened in the proceeding on Nielson's behalf (*id.* at 28a-29a), having determined that C.D.K. was an "Indian child" at the time of his adoption (*id.* at 4a-5a).

The district court agreed, finding "that C.D.K. was a direct descendant of an original enrollee of the Cherokee Nation, and thus, based on the Citizenship Act, an Indian child within the meaning of the ICWA." App., *infra*, 6a. As a consequence, the court held that the adoption did not accord with ICWA's requirements because the statute precluded termination of parental rights over C.D.K. within ten days of his birth. The court accordingly invalidated Nielson's termination of her parental rights, although it went on to conclude that it lacked the authority under ICWA to order the return of C.D.K. to her, leaving



ultimate determination of parental rights over the child to the Utah state courts. *Id.* at 6a-7a.<sup>4</sup>

3. The court of appeals reversed, holding that C.D.K. was not a member of the Cherokee Nation for ICWA purposes and therefore not an “Indian child” at the time of his adoption. App., *infra*, 1a-15a. The court recognized that the case “turns on whether C.D.K. is an ‘Indian child’ within the meaning of the ICWA—if he is, then the ICWA applies and [Nielson’s] voluntary termination of parental rights must be invalidated.” *Id.* at 9a. The court also agreed that C.D.K. is a direct descendant of an original Dawes enrollee, making him a citizen of the Cherokee Nation under the Citizenship Act as of the time of the purported parental termination. *Id.* at 11a-12a.

The court held, however, that the Citizenship Act “could not grant C.D.K. [tribal] citizenship for ICWA purposes.” *Id.* at 13a. In the court’s view, “the ICWA does not apply to th[e] sort of temporary [tribal] membership” provided by the Citizenship Act (*ibid.*); the court declared that “Congress did not intend ICWA to authorize this sort of gamesmanship on the part of a tribe—e.g., to authorize a temporary and nonjurisdictional citizenship upon a nonconsenting person in order to invoke ICWA protections.” *Ibid.* Even if it did, the Tenth Circuit continued, a reading of the statutory term “Indian child” that reached C.D.K. would be inconsistent with the court’s understanding of ICWA’s legislative history. *Id.* at 14a-15a. And the court rejected application here of the principle that a “court cannot interfere with the

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<sup>4</sup> The subsequent action in state court has been stayed pending the resolution of this proceeding. Order, *In re. C.D.K.*, No. 20090808 (Utah S. Ct. Sept. 29, 2010).

tribe's determination of who is a member" because "the Cherokee Nation does not seek to define membership only for *tribal* purposes, but also seeks to define membership for the purposes of a federal statute." *Ibid.* Here, the court concluded, "[t]he tribe cannot expand the reach of a federal statute by a tribal provision that extends automatic citizenship to the child of a nonmember of the tribe." *Id.* at 15a.

The full Tenth Circuit denied rehearing, with Chief Judge Briscoe and Judges Kelly, Lucero, and Holmes noting that they would have granted rehearing en banc. *Id.* at 30a-31a.

### **REASONS FOR GRANTING THE PETITION**

The question who qualifies as an "Indian child" for ICWA purposes, and broader questions regarding the authority of Indian tribes to determine tribal membership, are recurring matters of great importance. Yet the Tenth Circuit's resolution of those questions is wrong: It departs from the plain purpose of ICWA, disregards the clear contrary guidance of the BIA, and undermines fundamental principles of Indian sovereignty. Unsurprisingly, the approach taken below also is inconsistent with the holdings of other state and federal appellate courts. This Court should grant review to clarify the law, effectuate the congressional intent, and rectify an injury to significant sovereign interests.

#### **A. The Tenth Circuit Misunderstood ICWA's Text And Purpose.**

On the face of it, Congress would appear to have written ICWA for precisely the situation here: Petitioner Nielson's child C.D.K. was born a member of the Cherokee Nation under that Tribe's unambiguous law, yet Nielson surrendered her parental

rights the day after C.D.K.'s birth. But the Tenth Circuit rejected application of ICWA here, for two principal reasons. It regarded the Citizenship Act as inconsistent with Congress's intent in ICWA; and it believed that tribal membership for "tribal purposes" does not determine tribal membership for federal statutory purposes. Both of those conclusions are wrong—and both depart from the holdings of other courts, in a manner that will confuse the law and frustrate the important goals of ICWA.

1. To begin with, the Tenth Circuit's understanding of ICWA—under which a federal or state court is free to reject a tribe's conclusion that particular categories of persons are tribal members—is, for several reasons, a shocking departure from the statute's text and policy. "The starting point in discerning congressional intent is the existing statutory text \* \* \*." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). In relevant part, Congress provided in ICWA that an "Indian child" is a child who is "a member of an Indian tribe." 25 U.S.C. § 1903(4). Nothing in the statutory language suggests that courts rather than the tribes themselves are to decide who is "a member of an Indian tribe."

To the contrary, the contemporaneous understanding when Congress wrote ICWA was that tribes determine their own membership: "Courts have consistently recognized that one of an Indian tribe's most basic powers is the authority to determine questions of its own membership. A tribe has power to grant, deny, revoke, and qualify membership." Felix S. Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* § 3.03, at 176 (4th ed. 2005) (footnotes omitted). See, e.g., *Montana v. United States*, 450 U.S. 544, 564 (1981) ("[T]he Indian tribes retain their inherent

power to determine tribal membership.”); *Roff v. Burney*, 168 U.S. 218, 222 (1897) (“The citizenship which the Chicksaw Nation could confer it could withdraw.”); F. Cohen, *supra*, § 4, at 133 (1942) (“The courts have consistently recognized that in the absence of express legislation by Congress to the contrary, an Indian tribe has complete authority to determine all questions of its own membership.”). Congress surely was aware of that principle when it enacted ICWA, and there is no reason to doubt that Congress intended the statutory language to incorporate the principle when it referred generally to “members” of Indian tribes. “The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.” *Midlantic Nat’l Bank v. New Jersey Dep’t of Envtl. Prot.*, 474 U.S. 494, 501 (1986). But Congress signaled no such departure in ICWA.

That understanding is confirmed by other elements of ICWA’s text. In a subsequent section of the statute, Congress instructed the Secretary of the Interior to inform adopted Indian children, upon request and once the children reach the age of eighteen, of their eligibility for enrollment in or membership benefits from an Indian tribe. 25 U.S.C. § 1951(b). If the child’s parents desire anonymity, Congress provided that “the Secretary shall certify to the Indian child’s tribe, where the information warrants, that the child’s parentage and other circumstances of birth entitle the child to enrollment *under the criteria established by such tribe.*” *Ibid.* (emphasis added). It therefore is plain that Congress intended the Tribe’s *own* criteria to determine in the ICWA context whether a child is entitled to tribal membership.

2. The presumption that a tribe determines tribal membership for ICWA purposes has been explicitly endorsed by the BIA, which concluded unequivocally that “[t]he determination by a tribe that a child is or is not a member of that tribe \* \* \* is *conclusive*.” *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584 § B.1(b)(i) (Nov. 26, 1979) (emphasis added). In particular, “[i]t is the tribe’s prerogative to determine membership criteria.” *Ibid.* (B.1 Commentary) (citing F. Cohen, *supra*, § 4, at 133 (1942)). That conclusion unambiguously governs in the circumstances of this case, where the Cherokee Nation determined the relevant membership criteria and specifically found that C.D.K. was a member of the Cherokee Nation. Although the Tenth Circuit chose to ignore the BIA guidance, the agency’s view “constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The Tenth Circuit offered no reason for discounting the expert agency’s view on this question.

3. It therefore is no surprise that the overwhelming majority of state courts (including several state courts of last resort)—which handle the bulk of cases under ICWA—have held that “[w]hether a person is a member of a Native American tribe for ICWA purposes is for the tribe itself to answer: a Native American ‘tribe’s determination of membership or membership eligibility is conclusive and final.’ \* \* \*. An appellate court may not second-guess the internal decision-making processes of the tribe in regard to its membership determination.” *In re Phillip A.C.*, 149 P.3d 51, 56 (Nev. 2006) (citations and footnotes omitted). See also *In re Adoption of C.D.*, 751 N.W.2d 236, 241 (N.D. 2008) (“An Indian tribe’s de-

terminations of its own membership and eligibility for membership are binding and conclusive in an ICWA proceeding.”); *B.H. v. People ex rel X.H.*, 138 P.3d 299, 303 (Colo. 2006) (en banc) (“Tribal membership \* \* \* is not defined by the Act. Membership for purposes of the Act is instead left to the control of each individual tribe.”); *In re A.G.*, 109 P.3d 756, 758-759 (Mont. 2005) (“Tribes have the sole power to determine tribal membership unless otherwise limited by statute or treaty \* \* \*.”); “[F]or ICWA determination purposes \* \* \* tribes have the ultimate authority to decide who qualifies as an ‘Indian child.’”); *In re Interest of J.L.M.*, 451 N.W.2d 377, 396 (Neb. 1990) (“In the absence of a Congressional definition, an Indian tribe has authority to determine its own membership.”) (quoting *Angus v. Joseph*, 655 P.2d 208, 212 (Or. 1982)); *In re M.C.P.*, 571 A.2d 627, 634 (Vt. 1989) (“The tribe \* \* \* is the arbiter of its membership and as the commentary to the guidelines states is the best source of information on whether the juvenile is a member.”). The Tenth Circuit made no attempt to reconcile its decision with this overwhelming body of authority.<sup>5</sup>

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<sup>5</sup> See also *Jared P. v. Glade T.*, 209 P.3d 157, 161 (Ariz. App. 2009) (“Each tribe \* \* \* determines its membership, and its determination that a person is a member of the tribe is conclusive” for ICWA purposes); *D.B. v. Superior Court*, 89 Cal. Rptr. 3d 566, 574 (Cal. App. 2009) (finding that under ICWA each Indian tribe “has sole authority to determine its membership criteria, and to decide who meets those criteria”) (citation omitted); *People ex rel. T.M.W.*, 208 P.3d 272, 274 (Colo. App. 2009) (“Tribal membership is not defined by the ICWA. Instead, each Indian tribe has the authority to determine its membership criteria and decide who meets those criteria.”).

4. In nevertheless refusing to give effect to the Cherokee Nation's membership criteria, the Tenth Circuit placed much weight on its view that, in making newborns temporary members of the Tribe pending completion of the necessary paperwork, the Nation was engaging in "gamesmanship" by structuring tribal membership rules "in order to invoke ICWA protections." App., *infra*, 13a-14a. That analysis, however, turns the statute on its head. There can be no doubt that Congress intended, emphatically, to give tribes the ability to take advantage of the "numerous prerogatives accorded [them] through the ICWA's substantive provisions." *Holyfield*, 490 U.S. at 49. The Citizenship Act, by precluding circumvention of ICWA's 10-day adoption limit, operates in just that way to make effective one of ICWA's principal provisions; it effectuates, rather than undermines, ICWA's goals. Indeed, it is the Tenth Circuit's view that the Citizenship Act is illegitimate that "would, to a large extent, nullify the purpose the ICWA was intended to accomplish." *Id.* at 51.

Moreover, when it enacted ICWA Congress noted the very concern that is addressed in the Citizenship Act: that infants would be unable to benefit from ICWA due to tribes' cumbersome enrollment processes. See H.R. Rep. No. 95-1386, at 17 (noting that a "minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom"). The Citizenship Act resolves this danger by conferring full citizenship for all purposes on eligible children for a period long enough for their parent or guardian to formally enroll them—or long enough for their Tribe to step in to do so, a matter of considerable importance because

“the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.” *Holyfield*, 490 U.S. at 52 (citation omitted). The decision of a Tribe to loosen the procedural requirements for children’s tribal membership, while maintaining the substantive heritage requirements, therefore is fully commensurate with the congressional intent.

Similarly, the Tenth Circuit complained that the Cherokee Nation imposed “nonjurisdictional citizenship upon a nonconsenting person.” App., *infra*, 13a-14a. This criticism is a bit bewildering. It is not apparent what “nonjurisdictional” citizenship means; newborns who are direct descendants of Dawes enrollees are citizens of the Cherokee Nation for all purposes. As for consent, such newborns are “nonconsenting” in just the same way that children born in New York are not asked whether they consent at birth to become citizens of the United States. And if, instead, the court had it in mind that it is the birth parents who are “nonconsenting,” its rationale runs squarely afoul of basic ICWA policy. As the Court held in *Holyfield*, Congress intended “ICWA’s jurisdictional and other provisions” to apply “even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents.” 490 U.S. at 50.

5. The Tenth Circuit also sought support in ICWA’s legislative history, which it believed showed “that Congress considered, but ultimately rejected, an expansive definition of ‘Indian child’ that was comparable to the definition employed in the Citizenship Act.” App., *infra*, 14a. In support of this conclusion, the court noted that an “earlier draft” of ICWA would have defined “Indian” as “any person



who is a member of *or who is eligible for membership in a federally recognized Indian tribe.*” *Ibid.* (quoting S. Rep. No. 95-597, at 2 (1977)). The court compared this earlier version to the enacted language, in which “Indian child” refers to a child who (1) is a tribal member or (2) is eligible for membership *and* is the biological child of a member of an Indian tribe. Because a child in C.D.K.’s position would have been an “Indian” within the meaning of ICWA under the unenacted language “even without the Citizenship Act because he was eligible for membership in a federally recognized tribe,” the court believed that the enacted ICWA language somehow “limited membership for those children who were *eligible* for membership because they had a parent who is a member.” *Ibid.*

On the face of it, however, this reasoning is premised on a *non sequitur*. The unenacted language would have applied ICWA’s protections to children who were *not* tribal members (so long as they were eligible for membership); the enacted language applies ICWA’s protections to children who *are* members (or who are eligible for membership and whose parents are members). This change in language says *nothing* about the standards that tribes may use in settling tribal membership—and nothing about the status of children like C.D.K., who (at the relevant time) *was* a member of his Tribe under that Tribe’s membership criteria. Here, too, the court’s contrary view makes no sense at all. The court opined that, according to the legislative history, the Citizenship Act’s definition of citizenship would violate Congress’s intent “even if [it granted] full citizenship as opposed to temporary [citizenship].” *Ibid.* But if the Tenth Circuit were correct, that would mean that Congress had simply directed that newborns not be

treated as tribal members under ICWA. And that would write ICWA's 10-day rule out of the statute.<sup>6</sup>

While focusing on unenacted language, the court of appeals ignored the more fundamental and inarguable congressional intent in ICWA: to preserve tribal sovereignty and safeguard Indian children. There is no doubt that Congress sought “to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in society.” *Holyfield*, 490 U.S. at 37 (citation omitted). The Citizenship Act accomplishes that purpose; the Tenth Circuit's rule undermines it.<sup>7</sup>

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<sup>6</sup> In fact, legislative background disregarded by the Tenth Circuit offers an explanation for the change in the enacted language. After examining the proposed original text, the Department of Justice voiced concern that the language would inappropriately make a race-based distinction that could implicate the rights of non-tribal members to seek redress in state court. See H.R. Rep. No. 95-1386, at 35-37, 39. Congress put the language in its current form after receipt of this criticism. See H.R. Rep. No. 95-1386, at 12. In doing so, it appears that the change in language signaled Congress's view that making ICWA protection contingent on tribal membership, rather than ancestry, would limit the concern with making a race-based distinction. See H.R. Rep. No. 95-1386, at 12 (“While the committee did not agree with the Department [of Justice] on these issues, certain changes were made in the legislation which will meet some of the Department's concerns.”). Even so, however, Congress recognized its authority “to act to protect the valuable rights of a minor Indian who is eligible for enrollment in a tribe[.] \* \* \* Obviously, Congress has power to act for their protection.” *Id.* at 17.

<sup>7</sup> To the extent that there is any doubt on this point, it is clear that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

**B. The Tenth Circuit Erred In Distinguishing Between “Membership” For Tribal And Federal Statutory Purposes.**

The Tenth Circuit’s misunderstanding of ICWA was not the extent of its error. In response to petitioners’ argument below that a “court cannot interfere with the tribe’s determination of who is a member,” the court acknowledged that “tribes \* \* \* have exclusive authority on membership determinations for tribal purposes.” App., *infra*, 14a (citation omitted). But it held that principle immaterial to the interpretation of ICWA because “the Cherokee Nation does not seek to define membership only for *tribal* purposes, but also seeks to define membership for the purposes of a federal statute.” *Id.* at 14a-15a. That holding was a fundamental error that threatens to undermine basic principles of Indian sovereignty.

As a general matter, “Indian tribes are ‘distinct, independent political communities, retaining their original natural rights’ in matters of local self-government.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)). And as an elemental aspect of its sovereign authority, “[a] tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” *Id.* at 72 n.32.

To be sure, as the Tenth Circuit recognized, the meaning of terms used in federal statutes is a federal question, and Congress *could* provide that the word “membership” used in the tribal context for federal statutory purposes diverges from a tribe’s own definition. See generally *Santa Clara Pueblo*, 436 U.S. at 56 (noting that Congress has “plenary authority to limit, modify or eliminate the powers of local self-

government which the tribes otherwise possess”). But the Tenth Circuit went astray in concluding that Congress *did* depart from use of the tribes’ own membership criteria in ICWA. In fact, absent the clearest congressional statement to the contrary in the statutory text, there must be a strong presumption that a congressional reference to tribal membership incorporates the tribe’s *own* membership criteria. There is a compelling reason for this: tribal membership is bound up in the tribe’s sovereign self-determination—as it is in ICWA, where the statutory focus on tribal membership is designed to “promote the stability and security of Indian tribes.” 25 U.S.C. § 1902. In this context, it is almost nonsensical to read a federal statute as incorporating a concept of tribal membership that departs from a tribe’s own definition. Such an outcome could not be thought proper absent a wholly unambiguous direction from Congress. *Cf. Lane v. Pena*, 518 U.S. 187, 192 (1996) (U.S. sovereign immunity will be found waived only where congressional intent to do so is “unequivocally expressed in statutory text”).

Applying this understanding, other courts have recognized that federal statutes turning on tribal membership look dispositively to the tribes’ own determination of who is a member. In *Smith v. Babbitt*, 100 F.3d 556 (8th Cir. 1996), for example, the Eighth Circuit addressed the application of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, which provides for the distribution of gaming proceeds to tribal members. Plaintiffs challenged the distribution of funds, a question that “turn[ed] on the issue of tribal membership.” *Smith*, 100 F.3d at 558. But the Eighth Circuit stated that “[s]uch membership determinations are generally committed to the discretion of the tribes themselves \* \* \*. As the United

States Supreme Court has stated, “[a] tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.” *Ibid.* (quoting *Santa Clara Pueblo*, 436 U.S. at 72 n.32). And quoting with approval the district court’s decision, the Eighth Circuit continued:

Congress did not define “member” when it enacted IGRA, nor would federally imposed criteria be consonant with federal Indian policy. The great weight of authority holds that tribes have exclusive authority to determine membership issues. A sovereign tribe’s ability to determine its own membership lies at the very core of tribal self-determination; indeed, there is perhaps no greater intrusion upon tribal sovereignty than for a federal court to interfere with a sovereign tribe’s membership determinations.

*Id.* at 559 (quotation omitted).

The Tenth Circuit’s approach in this case, which reasoned that Congress departed (in an undefined way) from the tribal definition of “membership,” cannot be squared with the Eighth Circuit’s holding in *Smith*. Indeed, we are not aware of *any* other case in which a court, construing a federal statute that turns on tribal membership, found Congress to have provided that persons treated as members *by* a tribe nevertheless should be denied member status *in* that tribe as a matter of federal statutory law. As we have explained, state supreme courts uniformly have followed the *Smith* approach in the context of ICWA, accepting tribal membership determinations as conclusive. See pp. 14-15, *supra*. If left undisturbed, the decision below therefore will call into question the

application of this rule and place in doubt a range of tribal membership decisions. Given the interference with tribal self-determination worked by that outcome, review by this Court is imperative.

**C. The Tenth Circuit’s Decision Is Significant And Far-Reaching.**

For a number of reasons, the issue presented here is one of substantial practical significance. *First*, ICWA is the subject of frequent litigation and advances enormously important policies.<sup>8</sup> Congress recognized that “the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.” 25 U.S.C. § 1901(3). In enacting the statute, Congress emphasized that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,” 25 U.S.C. § 1901(3), and that additional safeguards were needed to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families,” *id.* § 1902. See F. Cohen, *supra*, § 11.01[1] (2005) (the “overriding purpose [of ICWA] is to protect, preserve, and advance the integrity of Indian families”). Congress thus intended to halt the “wholesale separation of Indian children from their families” through state court proceedings. H.R. Rep. No. 95-1386, at 9. The decision below will frustrate that important goal—a point made manifest by the Tenth Circuit’s disregard for the guidance provided by the BIA, which emphasizes that “[t]he determination by a tribe that a child is or is not a

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<sup>8</sup> A Westlaw search reveals nearly 2500 reported ICWA-related cases decided by state and federal courts across the United States.

member of that tribe \* \* \* is conclusive.” BIA Guidelines, 44 Fed. Reg. at 67,584 § B.1(b)(i).

*Second*, the Tenth Circuit’s holding on a matter of Indian law will have wide application. The Tenth Circuit is home to seventy-five federally recognized Indian tribes and to more than forty percent of the Native American population of the United States. See *2010 Census*, U.S. CENSUS BUREAU, <http://tinyurl.com/pkyzck>; Population Distribution and Change, *2010 Census of Population and Housing*, U.S. Census Bureau, <http://tinyurl.com/3gdko8e>; Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, No. 190, 75 Fed. Reg. 60810 (Oct. 1, 2010). Moreover, ICWA questions are frequently litigated in state courts within the Tenth Circuit. See, e.g., *In re Esther V.*, 248 P.3d 863 (N.M. 2011); *In re A.J.S.*, 204 P.3d 543 (Kansas 2009); *In re Adoption of Holloway*, 732 P.2d 962 (Utah 1986). That raises the danger that the Tenth Circuit’s aberrant rule will lead to inconsistent results and forum shopping. Indeed, the approach taken below cannot be reconciled with the Colorado Supreme Court’s holding that “[t]ribal membership \* \* \* is not defined by the Act. Membership for purposes of the Act is instead left to the control of each individual tribe.” *People ex rel X.H.*, 138 P.3d at 303.

*Third*, the Tenth Circuit’s holding creates broader uncertainty about the deference due tribes in the determination of tribal membership for federal statutory purposes. That issue is a significant one; Congress often hinges federal rights and benefits on membership in an Indian tribe. See, e.g., Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (2006) (extending due process and individual liberties to members of

Indian tribes); Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (establishing the federal framework for regulating Indian gaming); Indian Reorganization Act, 25 U.S.C. § 476 *et seq.* (restoring rights to Native Americans including self-government and asset management). Until the decision below, the virtually unanimous presumption had been that such provisions look to the tribe's own criteria in identifying tribal members. The Tenth Circuit's departure from that understanding warrants this Court's attention.

### CONCLUSION

The petition for a writ of certiorari should be granted.



Respectfully submitted.

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DECEMBER 2011

## **APPENDICES**

**APPENDIX A**

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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|   |                       |
|---|-----------------------|
| BRITNEY JANE LITTLE<br>DOVE NIELSON,<br><br>Petitioner-Appellee,<br><br>v.<br><br>SUNNY KETCHUM;<br>JOSHUA KETCHUM,<br><br>Respondents-<br>Appellants,<br><br>-----<br><br>CHEROKEE NATION,<br><br>Intervenor-Appellee. | Nos. 09-4113, 09-4129 |
|---|-----------------------|

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**Appeal from the United States District  
Court for the District of Utah  
(D.C. No. 2:08-CV-00490-TS)**

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Chrissi R. Nimmo, Assistant Attorney General, Cherokee Nation, Tahlequah, Oklahoma for Intervenor-Appellee.

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Before **HARTZ, TACHA,** and **EBEL,** Circuit Judges.

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**EBEL,** Circuit Judge.

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This case concerns the application of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, which, among other things, imposes a period of ten days before a parent can consent to the termination of her parenting rights over an “Indian child.” The day after giving birth to C.D.K., Petitioner-Appellee Britney Jane Little Dove Nielson appeared in state court in Utah to relinquish her parenting rights and consent to the adoption of her son by Respondents-Appellants Sunny and Joshua Ketchum. The court determined that although Nielson’s mother was a registered member of the Cherokee Nation, Nielson was not, and consequently the court approved the adoption without applying the procedural safeguards of the ICWA.

Later, Nielson filed suit in federal district court, claiming that C.D.K. was an Indian child at the time of the adoption and hence the ICWA’s ten-day waiting period should have applied. Even though she was not herself a member of the Cherokee Nation, Nielson pointed to a law passed by the Cherokee Nation establishing automatic temporary Cherokee citizenship for any newborn who is the direct descendant of a Cherokee listed on the Dawes Commission Rolls.

The district court agreed that this act established tribal citizenship for C.D.K., and it invalidated Nielson's relinquishment of parental rights, leaving the matter of custody of C.D.K. for the Utah state courts. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and reverse on the grounds that C.D.K. was not a member of the Cherokee Nation for ICWA purposes at the time of the adoption.

### **I. Background**

On November 5, 2007, Nielson, who was seventeen at the time, gave birth to C.D.K. The very next day, Nielson, accompanied by her mother, appeared in state court in Utah and (a) relinquished her parenting rights and (b) consented to the adoption of the child by Joshua and Sunny Ketchum, in accordance with Utah law. *See* Utah Code Ann. § 78B-6-125(1) ("A birth mother may not consent to the adoption of her child or relinquish control or custody of her child until at least 24 hours after the birth of her child."). The Ketchums were also present and were represented by counsel; the court informed Nielson of her right to be represented by counsel, but Nielson stated that she did not wish to retain counsel.

At the hearing, Nielson's mother stated that she (C.D.K.'s grandmother) was enrolled in a tribe, but that she had never enrolled her children, including Nielson.<sup>1</sup> No one at the hearing specifically inquired as to whether the newborn was a member of an Indian tribe. Nielson testified that she had only an eighth-grade education and stated that although she

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<sup>1</sup> She did, however, state that they were considering enrolling Nielson in the next few months, and Nielson in fact became an enrolled member of the Cherokee Nation on August 5, 2008.

was not currently on any medications because she had just given birth, she normally does take medication for depression and bipolar disorder. She also stated that she understood that by relinquishing her parenting rights, she would not be allowed to later change her mind, and she signed a consent and relinquishment form and agreed to the adoption of C.D.K. by the Ketchums. The state court judge accepted the relinquishment, awarded temporary custody to the Ketchums, and the adoption was finalized in May 2008.

On June 25, 2008, Nielson filed a petition in the U.S. District Court for the District of Utah asking that her voluntary termination of parental rights be invalidated pursuant to § 1914 of the ICWA. The ICWA “regulates proceedings for termination of parental rights, adoptions, and foster care placement involving Indian children.” Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 11.01[1], at 820 (2005 ed.). The ICWA provides rights to the Indian child, the child’s parents, and the child’s tribe, and creates “a statutory scheme to prevent states from improperly removing Indian children from their parents, extended families, and tribes.” *Id.* The “overriding purpose [of the ICWA] is to protect, preserve, and advance the integrity of Indian families” by providing for procedural and substantive safeguards that limit the ability of the state courts to remove an Indian child from her family. *Id.*

The Cherokee Nation subsequently intervened on Nielson’s behalf. Both Nielson and the Cherokee Nation argued that C.D.K. was an “Indian child” within the meaning of the ICWA at the time of his adoption, pursuant to Chapter 2, Section 11A of the Cherokee Nation Citizenship Act (“Citizenship Act”).

The Citizenship Act was adopted “for the specific purpose of protecting the rights of the Cherokee Nation under the [ICWA].” (App. at 340.) Section 11A(B) provides as follows:

Notwithstanding any provisions of this title to the contrary, *every newborn child who is a Direct Descendant of an Original Enrollee<sup>2</sup> shall be automatically admitted as a citizen of the Cherokee Nation for a period of 240 days following the birth of the child.* No request or application for Tribal Citizenship or other documentation need be submitted or delivered to the Registrar as a prerequisite to the temporary Tribal Citizenship of a child under this section. Such temporary Tribal Citizenship shall be effective automatically from and after the birth of the child for all purposes although the name of the child is not entered on the Cherokee Register.

(*Id.* (emphasis, footnote added).) The temporary citizenship automatically expires after 240 days unless the child applies for citizenship. (*Id.* § 11A(C).) Based on the Citizenship Act, Nielson claimed that C.D.K. was an Indian child at the time of his adoption and thus protected by the ICWA. Accordingly, she argues, because the ICWA procedural requirements were not followed when she consented to the termination of her parental rights—specifically, Nielson

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<sup>2</sup> An “original enrollee” is someone who was listed on the Dawes Commission Rolls. (App. at 463.) The Dawes Commission was established in 1896 to, among other things, create membership rolls for the Cherokee Nation. *See Vann v. Kempthorne*, 534 F.3d 741, 744 (D.C. Cir. 2008) (citing Act of June 10, 1896, ch. 398, 29 Stat. 321, 339).

relinquished her parenting rights less than ten days after C.D.K.'s birth, *see* 25 U.S.C. § 1913(a)—the termination was invalid. *See* 25 U.S.C. § 1914 (permitting courts to invalidate a termination of parental rights when the procedural requirements of the ICWA are not complied with).

The district court agreed. On June 3, 2009, the district court concluded that C.D.K. was a direct descendant of an original enrollee of the Cherokee Nation, and thus, based on the Citizenship Act, an Indian child within the meaning of the ICWA. Accordingly, because the adoption process did not accord with the ICWA the court invalidated Nielson's termination of her parental rights over C.D.K., pursuant to 25 U.S.C. § 1914. The court thus granted Nielson partial summary judgment and denied the Ketchums' motion for summary judgment.

Less than two weeks later, on June 15, 2009, the court clarified that while it granted Nielson's motion for summary judgment pursuant to § 1914—thus invalidating the relinquishment of parental rights—it also denied Nielson's motion for summary judgment seeking vacature of the adoption proceedings under 25 U.S.C. § 1913(d) on the ground that Nielson's consent was obtained through fraud and duress. *See* 25 U.S.C. § 1913(d) (“Upon a finding that such consent [to the adoption] was obtained through fraud or duress, the court shall vacate [the adoption] decree and return the child to the parent.”). Nielson has not appealed this determination.

Three days later, on June 18, 2009, the district court concluded that it lacked jurisdiction to order C.D.K.'s return to Nielson's custody. Because the court denied Nielson's motion for summary judgment under § 1913(d)—which would have required the



court to order a return of the child if the adoption decree had been vacated due to fraud or duress—that section of the ICWA could not support jurisdiction to order C.D.K.’s return to Nielson’s custody. The court stated, and the parties agreed, that the court could not order return of custody unless the petitioner complied with § 1916, which allows the federal district court to order return of the child only if the adoption decree is vacated. Here, there was no vacature, and so the court had no statutory basis on which to order the return of the child. The court thus concluded that its involvement in the case was at an end—it had invalidated Nielson’s relinquishment of her parental rights, and as the ICWA did not provide any basis on which the court could order the return of the child, it now fell to the state courts to determine the child’s fate. The court also denied the Ketchums’ motion to stay execution of the judgment pending appeal, and dismissed without prejudice the Ketchums’ counterclaim for expenses incurred while raising C.D.K.

The Ketchums filed a notice of appeal (appeal no. 09-4113) regarding the court’s June 3 order finding that C.D.K. is an Indian child and invalidating Nielson’s relinquishment of her parental rights.<sup>3</sup> Nielson has not filed any cross-appeal.<sup>4</sup>

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<sup>3</sup> The Ketchums also filed an appeal of the June 18 order (appeal no. 09-4127), but they have not raised any issues from that order and instead argue solely that the district court erred by invalidating Nielson’s relinquishment of parental rights. Any issue related to the June 18 order is therefore waived. See *Thomas v. Int’l Bus. Machs.*, 48 F.3d 478, 482 n.2 (10th Cir. 1995) (noting in parenthetical, that a “failure to argue an issue in the appellate brief or at oral argument constitutes waiver,

In the meantime, Nielson filed a motion in state court seeking return of custody of C.D.K. The Utah state court determined that the statute of limitations barred the action and prevented the court from invalidating the adoption. Nielson appealed, and the Utah Court of Appeals certified the case for immediate transfer to the Utah Supreme Court, where the case is still pending.<sup>5</sup>

## II. Discussion

The Ketchums appeal the district court’s partial grant of summary judgment in favor of Nielson. “We review summary judgment decisions *de novo*, applying the same legal standard as the district court.” *Willis v. Bender*, 596 F.3d 1244, 1253 (10th Cir. 2010) (quotations omitted). Thus, we will affirm a grant of summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2) (amended Dec. 2010).

25 U.S.C. §1914 provides that

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even when the appellant lists the issue in the notice of appeal” (citation omitted)).

<sup>4</sup> She does argue, however, on pages 31-34 of her brief, that the district court erred and that “C.D.K. should have been returned to Nielson’s custody.” (Nielson Br. at 34.) Because she has not filed an appeal in this matter, that issue is not before this court. See *Peterson v. Jensen*, 371 F.3d 1199, 1201 n.2 (10th Cir. 2004) (“Because the [Appellees] did not file a cross-appeal on the additional issues decided by the District Court, we do not consider them here.”).

<sup>5</sup> On July 29, 2010, the Utah Supreme Court granted a motion to continue oral argument—so it appears that no decision in this case will be forthcoming soon.

[a]ny Indian child who is the subject of any action for . . . termination of parental rights under State law. . . and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

The parties do not dispute that Nielson relinquished her parental rights within ten days of C.D.K.'s birth, which, if he is an Indian child, violates § 1913. *See* 25 U.S.C. § 1913(a) (“Any consent [to termination of parental rights] given prior to, or within ten days after, birth of the Indian child shall not be valid.”).

This case thus turns on whether C.D.K. is an “Indian child” within the meaning of the ICWA—if he is, then the ICWA applies and Nielson's voluntary termination of parental rights must be invalidated, as the district court concluded; if he is not, then the ICWA does not apply and the district court's judgment must be reversed. For purposes of the ICWA, “Indian child” means 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). Nielson and the Cherokee Nation have only ever argued that C.D.K. is an Indian child because he was a member of an Indian tribe at the time of the relinquishment hearing, so subparagraph (b) is not at issue.<sup>6</sup>

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<sup>6</sup> In any event, subparagraph (b) could not apply to bestow “Indian child” status to C.D.K. because it is undisputed that Nielson was not a member of an Indian tribe at the time of the adoption, and no information has been provided about C.D.K.'s

C.D.K. was thus an Indian child at the time of the relinquishment hearing if, and only if, he was a member of the Cherokee Nation at that time. Further, C.D.K. was a member of the Cherokee Nation at that time only if the Citizenship Act applied to C.D.K. at the time of the relinquishment hearing. As mentioned above, the Citizenship Act provides that “every newborn child who is a Direct Descendant of an Original Enrollee shall be automatically admitted as a citizen of the Cherokee Nation for a period of 240 days following the birth of the child.” (App. at 340.) Accordingly, the Citizenship Act operated to make C.D.K. an Indian child subject to the protections of the ICWA at the time of the relinquishment hearing if (a) he is a direct descendant of an original enrollee, and (b) if the Citizenship Act can permissibly extend citizenship to C.D.K. *in the ICWA context*. We address these issues in turn.

**A. Whether C.D.K. is a direct descendant of an original enrollee**

In order for the Citizenship Act’s automatic citizenship provision to apply, Nielson must prove that C.D.K. was “a Direct Descendant of an Original Enrollee.” The district court admonished Appellees for not providing documentary evidence that clearly showed that C.D.K. had ancestors who were original enrollees. Nevertheless, the court found enough indirect evidence so as to conclude “that no reasonable factfinder could conclude that C.D.K. is anything other than a direct descendant of an original enrollee

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father, so no evidence has been presented from which we could conclude that C.D.K. is “the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4)(b).

of the Cherokee Nation . . . .” (App. at 464.) The Ketchums argue that the district court did not draw every reasonable inference in their favor in reaching this conclusion, as the court is required to do in considering a summary judgment motion. *See Harman v. Pollock*, 586 F.3d 1254, 1268 (10th Cir. 2009), *cert denied*, 131 S.Ct. 73 (2010).

We agree with the district court that, although the evidence of C.D.K.’s ancestry was not clearly presented in the district court, the record nevertheless compels the conclusion that he is a direct descendant of an original enrollee. The current constitution of the Cherokee Nation, adopted in 2003, provides that “[a]ll citizens of the Cherokee Nation must be original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls.” (App. at 292.) The prior constitution, enacted in 1976, also called for reference to the Dawes Commission Rolls to prove membership in the Cherokee Nation.<sup>7</sup> (App. at 217 (“All members of the Cherokee Nation must be citizens as proven by reference to the Dawes Commission Rolls . . . .”).)

The record contains approved applications for citizenship in the Cherokee Nation for both Nielson and her mother, filed in May 2008.<sup>8</sup> Under the terms of the 2003 Constitution, in order for those applications to be approved, Nielson and her mother “*must*

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<sup>7</sup> The 1976 constitution is printed verbatim in a document comparing the 1976 and 2003 constitutions, which was provided to the voters who adopted the 2003 constitution and which is in the record.

<sup>8</sup> It is unclear whether Nielson’s mother was a registered member of the tribe prior to filing this application, as she claimed at the relinquishment hearing.

be original enrollees or descendants of original enrollees.” (App. at 292 (emphasis added).) The Registration Committee approved their applications,<sup>9</sup> and so the record permits only the conclusion that Nielson and her mother must be descendants of original enrollees. This conclusion is corroborated by a Certificate of Degree of Indian Blood issued to Nielson by the United States Department of the Interior, which lists Dawes Roll Numbers for Nielson’s great-great grandparents. The record also contains a Certificate of Degree of Indian Blood issued to Nielson’s grandfather which also shows the Dawes Roll Numbers for these ancestors.

The record thus demonstrates that Nielson—as well as her mother—is a direct descendant of Dawes enrollees. C.D.K., who is a descendant of Nielson, must therefore be a descendant of Dawes enrollees as well.

### **B. Applicability of the Citizenship Act to Declare Cherokee Citizenship on C.D.K.**

According to the Citizenship Act, C.D.K. was a citizen of the Cherokee Nation at the time of his adoption and thus an “Indian child” subject to the protections of the ICWA. *See* 25 U.S.C. § 1903(4) (“‘Indian child’ means any unmarried person who is under age eighteen and is . . . a member of an Indian tribe . . .”). The Ketchums challenge whether the Citizenship Act can apply at all in this situation, arguing that it could not grant C.D.K. citizenship for ICWA purposes. We agree.

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<sup>9</sup> According to the Cherokee Constitution, a Registration Committee considers the eligibility of applicants to see if they qualify for Cherokee citizenship. The decisions of the Committee are reviewable by tribal courts.

Assuming, without deciding, that the tribe possessed the authority to declare that the offspring of a nonmember is a citizen without the nonmember's consent for internal tribe purposes, the type of citizenship provided by the Citizenship Act does not make the child a "member" within the meaning of the ICWA. The ICWA explicitly defines "Indian child" as "any unmarried person who is under age eighteen and is . . . a *member* of an Indian tribe." 25 U.S.C. § 1903(4) (emphasis added). While the Citizenship Act purports to make newborns who are directly descended from Dawes enrollees *temporary citizens* for 240 days following their birth, the ICWA does not apply to this sort of temporary membership. Appellees have not identified any other law by any other tribe that provides for temporary membership, let alone that such a temporary membership was within the contemplation of Congress when it applied the ICWA to children who are "member[s]" of Indian tribes. We find that Congress did not intend the ICWA to authorize this sort of gamesmanship on the part of a tribe—e.g. to authorize a temporary and nonjurisdictional citizenship upon a nonconsenting person in order to invoke ICWA protections. Therefore, we conclude that § 1903(4)(a)'s definition of an Indian child as including a "member of an Indian tribe" does not include the type of temporary membership provided in the Citizenship Act.

Not only does the temporary membership provision of the Citizenship Act fail to bring temporary members under the protection of the ICWA, but the Citizenship Act's broad definition of citizenship—even if it was full citizenship as opposed to temporary—violates Congress' intent. The legislative history of the ICWA shows that Congress considered, but ultimately rejected, an expansive definition of

“Indian child” that was comparable to the definition employed in the Citizenship Act and that would have included C.D.K. within its terms. Specifically, an earlier draft of the ICWA did not define “Indian child,” but rather defined “Indian” as “any person who is a member of *or who is eligible for membership in a federally recognized Indian tribe.*” (App. at 414 (123 Cong. Rec. S37223 (1977) (emphasis added).) Under this rejected definition, C.D.K. would have been an Indian child even without the Citizenship Act because he was eligible for membership in a federally recognized tribe. But the final draft of the statute limited membership for those children who were *eligible* for membership because they had a parent who is a member.

Appellees contend that this court cannot interfere with the tribe’s determination of who is a member because “tribes . . . have exclusive authority on membership determinations for tribal purposes.” *Ordinance 59 Ass’n v. U.S. Dep’t of Interior Sec’y*, 163 F.3d 1150, 1153 n.3 (10th Cir. 1998); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (“A tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”). In this context, however, the Cherokee Nation does not seek to define membership only for *tribal* purposes, but also seeks to define membership for the purposes of a federal statute.

We are interpreting the ICWA, a federal statute, and conclude only that the Citizenship Act does not bring C.D.K. within the definition of “Indian child” under the ICWA. The tribe cannot expand the reach of a federal statute by a tribal provision that extends



automatic citizenship to the child of a nonmember of the tribe.

Based on the definition of “Indian child” provided in the ICWA, we conclude that C.D.K. was not an “Indian child” at the time of the adoption proceedings for ICWA purposes, and so the procedural safeguards provided for in the ICWA did not apply to the relinquishment hearing and adoption proceedings. The district court’s conclusion that those proceedings had to comply with the ICWA was in error.

### **III. Conclusion**

We REVERSE the district court’s grant of partial summary judgment in favor of Nielson, and REMAND for proceedings consistent with this opinion.

**APPENDIX B**

IN THE UNITED STATES COURT FOR THE  
DISTRICT OF UTAH  
CENTRAL DIVISION

IN THE MATTER OF  
THE ADOPTION OF  
C.D.K., a minor child

MEMORANDUM  
DECISION AND ORDER  
GRANTING  
PETITIONER'S MOTION  
FOR SUMMARY  
JUDGMENT AND  
DENYING  
RESPONDENTS' MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT

Case No. 2:08-CV-490 TS

This matter is before the Court on Petitioner's Motion for Summary Judgment, joined by Intervenor Cherokee Nation, on her Petition to invalidate an adoption, and on Respondents' Motion for Partial Summary Judgment. The underlying case arises out of a relinquishment hearing which occurred in November 2007 (the "Relinquishment Hearing"), at which Petitioner relinquished her parental rights to her biological child, C.D.K., in the Second Judicial District Court of Davis County.

In her Motion, Petitioner claims that, as a matter of law, C.D.K. is an Indian Child, as defined by the

Indian Child Welfare Act (“ICWA”)<sup>1</sup>, and that the Relinquishment Hearing did not comply with the requirements of the ICWA. Respondents, the adoptive parents, argue in their Motion that Petitioner has failed to establish that C.D.K. is an Indian Child. Because the Court finds that Petitioner has provided sufficient evidence to establish that C.D.K. is an Indian Child pursuant to the ICWA and that the Relinquishment Hearing did not comply with the procedural requirements of the ICWA, the Court will grant Petitioner’s Motion for Summary Judgment and deny Respondents’ Motion for Partial Summary Judgment.

## I. STANDARD OF REVIEW

Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.<sup>2</sup> In considering whether genuine issues of material fact exist, the Court determines whether a reasonable factfinder could return a verdict for the nonmoving party in the face of all the evidence presented.<sup>3</sup> The Court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party.<sup>4</sup>

## II. BACKGROUND

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<sup>1</sup> 25 U.S.C. §§ 1901-1963.

<sup>2</sup> See Fed. R. Civ. P. 56(c).

<sup>3</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir. 1991).

<sup>4</sup> See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991).

The following undisputed facts are taken from Petitioner's Petition, the affidavits of the parties, and the records of the adoption proceedings, including the transcript of the Relinquishment Hearing. In November 2007, Petitioner gave birth to C.D.K., a minor. The next day, Petitioner, accompanied by her mother (the "Grandmother"), and Respondents appeared in the Second Judicial District Court of Davis County, State of Utah. During the Relinquishment Hearing, Respondents were represented by counsel, but Petitioner was not. The transcript of the Relinquishment Hearing reveal that, after being placed under oath, Petitioner acknowledged that she understood that she had a right to counsel, but indicated that she did not wish to retain counsel. Petitioner also indicated, among other things, that she could read, write, and understand English, that she had read the documents relinquishing parental rights to C.D.K., and that she had been presented with sufficient opportunity to have any questions answered.<sup>5</sup> Petitioner also affirmed that she understood that, once she signed the documents relinquishing parental rights, and the court accepted that document, that she would not be allowed to withdraw the relinquishment.<sup>6</sup>

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<sup>5</sup> In her Petition, Petitioner argues that she was given very little time to review the termination papers, that no one explained them to her, and that Respondents' counsel pushed on with the proceedings. Docket No. 1, ¶ 13. However, at the Relinquishment Hearing, under oath, Petitioner answered questions from both Respondents' counsel and the state court judge that she had read the documents and that she "already asked all the questions [she] had." Docket No. 12-3 at 32.

<sup>6</sup> In direct contrast to her statements to the contrary at the Relinquishment Hearing, Petitioner alleges in her Petition that no

During the Relinquishment Hearing, the state court judge asked the Grandmother if she was “of Indian extraction.”<sup>7</sup> The Grandmother indicated that she was enrolled, but that she had not enrolled her children, and had planned to “look at” it in the following months.<sup>8</sup> The Grandmother affirmed that Petitioner was “not a member of a Native American tribe at [that] time.”<sup>9</sup> The state court judge found that the natural mother had appeared and signed the relinquishment of her own free will and choice. The state court judge then accepted the relinquishment, reviewed the pre-placement adoption study, and approved temporary custody of C.D.K. with the Respondents. The adoption was finalized in May 2008.

Petitioner’s grandfather (the “Great Grandfather”) had been an enrolled member of the Cherokee Nation, a federally recognized Indian tribe.<sup>10</sup> The Grandmother became an enrolled member of the

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one inquired as to whether she understood what she was signing. Docket No. 1, ¶ 18. Petitioner also alleges that the consent form was invalid because it was not accompanied by the type of certificate required by 25 U.S.C. § 1913(a). Section 1913(a) does not specify the form the certificate must take, and the state court judge did issue oral findings of fact that included findings required by § 1913(a). Because the Court will find that the ICWA applies, and because all parties agree that the Relinquishment Hearing took place before the ten-day waiting period prescribed by § 1913(a) had ended, the Court need not reach the issue of whether the state court judge’s oral findings of fact meet the requirements of § 1913(a).

<sup>7</sup> Docket No. 12-3 at 29.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Petr.’s Aff., Attachment D.

Cherokee Nation on June 4, 2008.<sup>11</sup> Petitioner became an enrolled member of the Cherokee Nation on August 5, 2008. Respondents are not a member of any federally recognized Indian tribe. C.D.K. is not, and has never been, an enrolled member of any federally recognized Indian tribe.

Petitioner seeks invalidation of the adoption of C.D.K. by the Respondents because the Relinquishment Hearing allegedly did not meet the procedural requirements of the ICWA. Alternatively, Petitioner argues that the adoption should be vacated, pursuant to the ICWA, because it was induced through fraud and duress. While there is some dispute regarding other procedural requirements of the ICWA, all parties agree that the Relinquishment Hearing took place within ten days of birth, which is prohibited by the ICWA, and Respondents therefore concede that the procedural requirements of the ICWA were not fully complied with. Respondents argue, however, that the ICWA is inapplicable because C.D.K. is not an Indian Child within the meaning of the ICWA.

### III. DISCUSSION

#### A. DOES THE ICWA APPLY?

The ICWA establishes “minimum Federal standards for the removal of Indian children from their families.”<sup>12</sup> In order for the ICWA to apply in the present case, the Relinquishment Hearing must have been an adoptive placement and C.D.K. must have

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<sup>11</sup> *Id.*, Attachment C.

<sup>12</sup> 25 U.S.C. § 1902.

been an Indian Child at the time of the Relinquishment Hearing. It is undisputed that the Relinquishment Hearing qualifies as an adoptive placement under the ICWA.<sup>13</sup> The 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.”<sup>14</sup>

Petitioner and Intervenor base their arguments solely upon the argument that C.D.K. was an actual member of the Cherokee Nation,<sup>15</sup> pursuant to the Cherokee Nation Membership Act, § 11A (the “Membership Act”). That Act provides for automatic admission into the Cherokee Nation of “every newborn child who is a Direct Descendant of an Original Enrollee . . . for a period of 240 days following the birth of the child.”<sup>16</sup> Petitioner argues that C.D.K. is a direct descendant of an Original Enrollee and was therefore an automatic member of the Cherokee Nation at the time of the Relinquishment Hearing.

Petitioner and Intervenor also argue that the Cherokee Nation determined that C.D.K. was, at the time of the Relinquishment Hearing, a member of

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<sup>13</sup> *Id.*, § 1903(1)(iv).

<sup>14</sup> *Id.*, § 1903(4).

<sup>15</sup> Petitioner originally argued that C.D.K. was an Indian Child because Petitioner had, subsequent to the Relinquishment Hearing, been enrolled as a member of the Cherokee Nation. Docket No. 12-2 at 7. However, Petitioner has apparently abandoned this line of argument, so the Court will deal solely with whether C.D.K. was a member of the Cherokee Nation at the time of the Relinquishment Hearing.

<sup>16</sup> Docket No. 32, Ex. B at 5.

the Cherokee Nation, pursuant to the Membership Act, and that the Cherokee Nation's determination of C.D.K.'s membership is conclusive, essentially depriving this Court of any jurisdiction over the question of whether C.D.K. is a member of the Cherokee Nation. The Court disagrees that it has no jurisdiction.

The ICWA makes clear that a petition to invalidate an adoption under the ICWA is to be made to a court of competent jurisdiction, including this Court.<sup>17</sup> It is therefore the responsibility of the Court, not the relevant Indian tribe, to determine whether the ICWA applies, including the determination as to whether the child is an Indian Child under the ICWA.<sup>18</sup> Petitioner and Intervenor make much of Supreme Court precedent that "Indian tribes retain their inherent power to determine tribal membership"<sup>19</sup> and Bureau of Indian Affairs Guidelines that a "determination by a tribe that a child . . . is or is not eligible for membership in that tribe . . . is conclusive."<sup>20</sup> However, such determinations in proceedings

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<sup>17</sup> 25 U.S.C. § 1914.

<sup>18</sup> See *In re Baby Boy Doe*, 849 P.2d 925, 930 (Idaho 1993) ("[T]he . . . court must make the necessary determinations regarding application of ICWA. This includes determining whether the child meets the definition of an Indian child contained in 25 U.S.C. § 1903(4).").

<sup>19</sup> *Montana v. United States*, 450 U.S. 544, 564 (1981); See also *Matter of Petition of Philip A.C.*, 149 P.3d 51, 56 (Nev. 2006) ("Whether a person is a member of a Native American Tribe for ICWA is for the tribe itself to determine.").

<sup>20</sup> 44 Fed. Reg. 67,584 (1979).



under the ICWA are intended “merely to aid . . . courts in deciding whether to apply ICWA.”<sup>21</sup>

However, the Court finds that the Indian tribes’ “inherent power to determine tribal membership”<sup>22</sup> entitles determinations of membership by Indian tribes to great deference. Respondents argue that Petitioner and the Cherokee Nation have failed to provide any evidence that C.D.K. was an Indian Child. The Court disagrees.

Petitioner has claimed that the Grandmother and Great Grandfather are original enrollees of the Cherokee Nation. It is not in dispute that both the Grandmother and Great Grandfather were enrolled members of the Cherokee Nation, but in order to be an original enrollee, as defined in the Constitution of the Cherokee Nation,<sup>23</sup> an individual must be listed on the Dawes Commission Rolls.<sup>24</sup> The Dawes Commission Rolls contain names collected by the United States government from 1898 to 1914, and neither the Grandmother nor the Great Grandfather were alive in 1914. Petitioner cannot, therefore, rely solely on the enrolled status of the Grandmother and Great Grandfather. However, Petitioner has provided genealogical evidence that indicates that her great-great grandfather, J.G., and great-great grandmother, E.G., were enrolled members of the Cherokee Nation<sup>25</sup>. Petitioner argues that J.G.’s and E.G.’s mothers, Petitioner’s great-great-great grandmothers,

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<sup>21</sup> *Baby Boy Doe*, 849 P.2d at 931.

<sup>22</sup> *Montana*, 450 U.S. at 564.

<sup>23</sup> See Docket No. 23, Appendix C.

<sup>24</sup> Constitution of the Cherokee Nation, Art. IV, sec. 1.

<sup>25</sup> Docket No. 33, Ex. E.

were original enrollees of the Cherokee Nation.<sup>26</sup> There is not clear and conclusive evidence to support these final claims, which are central to the question of whether C.D.K. was a member of the Cherokee Nation under the Membership Act.

The Court notes with some frustration that Petitioner or Intervenor could have greatly simplified the present inquiry by providing, at any point, documentary evidence that J.G.'s and E.G.'s mothers were original enrollees, listed as members of the Cherokee Nation on the Dawes Rolls. However, there is indirect evidence that J.G. and E.G. were both full-blooded Cherokee,<sup>27</sup> indicating that their mothers would have been eligible for enrollment at the time that the Dawes Rolls were being compiled. The Court, therefore, finds that no reasonable factfinder could conclude that C.D.K. is anything other than a direct descendant of an original enrollee of the Cherokee Nation and that C.D.K. was a member of the Cherokee Nation, pursuant to the Membership Act, at the time of the Relinquishment Hearing. Therefore, C.D.K. was an Indian Child and the procedural requirements of the ICWA are applicable to the Relinquishment Hearing. Because the parties agree that the procedural requirements of the ICWA were not fully complied with, the adoption of C.D.K. by Respondents must be invalidated, pursuant to 25 U.S.C. § 1914.

#### B. RESPONDENTS' OTHER ICWA ARGUMENTS

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<sup>26</sup> Docket No. 33 at 5.

<sup>27</sup> *Id.*, Ex. E.

Respondents make other arguments related to the ICWA and the Membership Act. Specifically, Respondents argue that the Membership Act is in violation of the Constitution of the Cherokee Nation by providing for other avenues for membership other than those expressly listed in the Constitution of the Cherokee Nation.<sup>28</sup> Petitioner responds that this Court is “not the proper forum for determining a political decision by the Tribe.”<sup>29</sup> Petitioner argues that Respondents are attempting to use the Court to mandate how the Cherokee Nation must enroll members. This is overstating their case, because Respondents’ argument, on its face, is merely an attempt to require the Nation to abide by its own Constitution. However, because the Constitution of the Cherokee Nation does not explicitly prohibit the Membership Act, this Court is an improper forum for determining whether the Membership Act violates the Constitution.

Respondents also argue that the Membership Act is violative of the United States Constitution because it allows the Nation to impose tribal membership on anyone without the consent of parents or the child. Respondents argue that doing so would be a violation of the individual’s fundamental liberty interest of as-

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<sup>28</sup> *Allen v. Cherokee Nation Tribal Council, Lela Ummertskee, Registrar and Registration Committee*, Cherokee Nation Judicial Appeals Tribunal 2006 (JAT-04-09, p.5) (holding that the tribe may not violate its constitution to define membership contrary to constitutional provisions. *See also Seminole Nation of Oklahoma*, 223 F. Supp. 2d at 139 (“Neither the Secretary, nor the Indians themselves, may ignore the express provisions of the [tribal] constitution.”).

<sup>29</sup> Docket No. 31 at 10.

sociation.<sup>30</sup> However, there is no case law to support the application of that principle to Indian tribes and otherwise legitimate members of those tribes, especially as applied to a rule intended to provide Indian birth parents with protection for their children during the period in which they could put together the paperwork to be granted full membership. Courts have typically enforced an individual's right to disassociate themselves from an Indian tribe,<sup>31</sup> and it could be argued that the right extends to a parent disassociating their child from an Indian tribe by placing the child with a non-Indian family. However, the express language of the ICWA places limitations on the right of the parent to disassociate their child from the tribe and Respondents' argument fails.

Finally, Respondents argue that the Membership Act is an unlawful attempt to broaden the ICWA. Specifically, the ICWA defines Indian child as one who is either a member or is eligible for membership in a tribe and whose parent is a member of a tribe. Respondents argue that Congress, in considering the ICWA, rejected language that would have extended the ICWA to all children with Native American ancestry, and opted for the two discreet categories currently listed in the ICWA. Respondents argue that the Membership Act is an attempt by the Cherokee Nation to expand the the scope of the ICWA into

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<sup>30</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 617-618 (1984).

<sup>31</sup> See, e.g., *Thompson v. County of Franklin*, 180 F.R.D. 216, 225 (N.D.N.Y. 1998) ("Any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses.").

areas expressly rejected by Congress. The Court finds that the ICWA applies to children who are “members” of a tribe, but does not constrain how membership is to be defined. Therefore, the Court finds that the Membership Act does not improperly expand the scope of the ICWA.

#### C. PETITIONER’S FRAUD AND DURESS CLAIMS

Petitioner also seeks to vacate the Relinquishment Hearing based on fraud and duress. Because the Court will grant summary judgment on Petitioner’s ICWA procedural claims, it need not reach Petitioner’s fraud and duress claims.

#### IV. CONCLUSION

Because the Court finds that C.D.K. was an Indian Child at the time of the Relinquishment Hearing, and because the parties agree that the ICWA’s procedural requirements were not strictly complied with during the Relinquishment Hearing, it is therefore ORDERED that Petitioner’s Motion for Summary Judgment (Docket No. 12) is GRANTED and Respondents’ Motion for Partial Summary Judgment (Docket No. 24) is DENIED. Petitioner’s consent to termination of her parental rights over C.D.K. is hereby invalidated.

DATED June 3, 2009.

BY THE COURT:

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TED STEWART

United States District Judge

**APPENDIX C**

Docket No. 19.  
IN THE UNITED STATES COURT FOR THE  
DISTRICT OF UTAH  
CENTRAL DIVISION

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| BRITNEY JANE LITTLE<br>DOVE NIELSON,<br>Plaintiff,<br>vs.<br>SUNNY KETCHUM and<br>JOSHUA KETCHUM,<br>Defendants. | MEMORANDUM<br>DECISION AND<br>ORDER GRANTING<br>MOTION TO<br>INTERVENE<br>Case No. 2:08-CV-490<br>TS |
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This matter is before the Court on the Motion to Intervene, filed January 13, 2009, by the Cherokee Nation.<sup>1</sup>

Defendants Sunny and Joshua Ketchum do not oppose intervention by the Cherokee Nation, but do challenge the grounds upon which the Cherokee Nation seeks to intervene. Specifically, the Cherokee Nation seeks to intervene by virtue of Fed. R. Civ. P. 24(a)(1), which allows intervention by anyone who has been given an unconditional right to intervene by federal statute. The Cherokee Nation incorrectly cites 25 U.S.C. § 1911(c) as providing that right, but

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<sup>1</sup> Docket No. 15.

§ 1911(c) provides an unconditional right to intervene only in state court proceedings. The Cherokee Nation cites no other federal statute which provides it an unconditional right to intervene, so it must rely on Fed. R. Civ. P. 24(a)(2), which allows intervention to anyone who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest . . . .” Defendants acknowledge that the Cherokee Nation claims an interest in the case,<sup>2</sup> and do not dispute the Cherokee Nation’s right to intervene under Rule 24(a)(2).

It is therefore

ORDERED that the Cherokee Nation’s Motion to Intervene (Docket No. 15) is GRANTED pursuant to Fed. R. Civ. P. 24(a)(2).

DATED January 27, 2009.

BY THE COURT:

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TED STEWART

United States District Judge

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<sup>2</sup> A claim which Defendants contest, and which is at the heart of the present case.

**APPENDIX D**

FILED July 6, 2011

**UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT**

|  |              |                                |
|--|--------------|--------------------------------|
| BRITNEY<br>LITTLE<br>NIELSON,<br><br>Petitioner-Appellee,<br><br>vs.<br><br>SUNNY KETCHUM<br>and JOSHUA<br>KETCHUM,<br><br>Respondents-<br>Appellants,<br><br>-----<br><br>CHEROKEE<br>NATION,<br><br>Intervenor-Appellee. | JANE<br>DOVE | Case Nos. 09-4113, 09-<br>4129 |
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**ORDER**

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Before **BRISCOE**, Chief Judge, **KELLY, LUCERO,**  
**MURPHY, HARTZ, O'BRIEN, TYMKOVICH,**



**GORSUCH, HOLMES** and **MATHESON**, Circuit Judges.

These matters are before the court on *Cherokee Nation's Petition for Rehearing or Rehearing En Banc*. We also have a response from Appellant. The request for panel rehearing is denied, as a majority of the panel members that rendered the court's decision voted to deny that request.

The petition for rehearing en banc and the response were transmitted to all of the judges of the court who are in regular active service. A poll was requested. A majority voted to deny the en banc suggestion. Accordingly, the request for en banc consideration is denied as well. Chief Judge Briscoe, as well as Judges Kelly, Lucero and Holmes would grant rehearing en banc.

Entered for the Court,  
ELISABETH A. SHUMAKER  
Clerk of Court