Members of the Commission:

My testimony focuses on the harms that the Indian Child Welfare Act (ICWA) inflicts on children of Native American descent in the United States.

This has proven a controversial topic, because tribal government officials and outspoken ideologues typically refuse even to consider questions about the justice or effectiveness of ICWA, as I will discuss later. They prefer to accuse those who criticize ICWA of racism, and ignore the *facts* of how ICWA operates.

But trying to silence discussion cannot change the fact that ICWA stands today as one of the greatest obstacles to justice and security for Native American children in this country. It does so for many reasons, some of which are quite complicated,[1] so I have submitted written testimony that gets into some of the more complex aspects of the law.[2] Here, I will address only three problems: (1) ICWA's restrictions on termination of parental rights, (2) ICWA's "active efforts" requirement, and (3) ICWA's race-based placement preferences for foster care and adoption. I will also discuss the popular soundbite that falsely claims that ICWA is the "gold standard" of child welfare.

ICWA was passed with good intentions: to put an end to abusive practices whereby states often took children away from Native parents without sufficient reason. This sometimes resulted from ignorance of tribal cultural practices, and sometimes from an outright policy of forced assimilation. Nobody disputes that these were improper and hurtful practices that resulted in harm to Native children and parents. The problem is that ICWA fails to remedy this problem, and in fact worsens the treatment of both parents and children.

Another preliminary note: ICWA applies to what it calls "Indian children." This is not the same thing as tribal membership, and the difference is important to keep in mind. Tribal membership is a function of tribal law (and every tribe is free to set its criteria as it chooses). But "Indian child" status under ICWA is a function of federal and state law, which means it must comply with constitutional rules.[3]

ICWA defines Indian children as either children who are current tribal members, or as children who are eligible for tribal membership and who have a biological parent who is a tribal member. What that means is that a child is deemed "Indian" under ICWA even if that child has no cultural, social, or political connection to a tribe, has never visited tribal lands, and maybe has no idea that he or she has Native heritage. On the other hand, a child who is fully acculturated to a tribe, speaks a tribal language, practices a Native religion, etc., may *not* qualify if that child lacks the biological criteria for membership or lacks a biological parent who is a tribal member.

Now, how does ICWA harm "Indian children" and their parents? Consider first the termination of parental rights. While it's always a tragedy when a parent's rights must be terminated, the fact is that it is often a necessary step, if a child is going to be rescued from abusive or neglectful parents. Under the law of every state, and under federal law, parental rights may be terminated when there is "clear and convincing evidence" that the child is at serious risk. That "clear and convincing" standard requires more proof than the "preponderance of the evidence" standard used in ordinary civil lawsuits, but less than the "beyond a reasonable doubt" standard used in criminal law. And in the case of *Santosky v. Kramer*, the U.S. Supreme Court said that the "clear and convincing" standard was required for termination of parental rights, because the "preponderance" standard would make it too easy to take children away from parents, and the "reasonable doubt" standard would make it too hard. In fact, the Court said "a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption."[4]

But ICWA imposes that "reasonable doubt" standard. In fact, it goes even further, and requires both "beyond a reasonable doubt" and *also* expert witness testimony. What that means is that it is literally easier to put a criminal on death row than it is to terminate parental rights when an Indian child is being abused by a parent.

It should be obvious that making it harder to rescue children from abusive homes does not serve their best interests.

And because state courts also force *parents themselves* to comply with this rule, the result is often to block *Native parents* from taking steps necessary to protect their own children.

Consider the 2016 case of *In re TAW*, for example, a Washington State Supreme Court decision that involved a Shoalwater Bay mother who wanted to terminate the rights of her abusive ex-spouse, who was non-Native, and who was a repeat criminal offender.[5] She wanted to terminate his rights so that her new husband, a tribal member, could adopt her son legally. But the court ruled that she was still required to comply with the "reasonable doubt" rule and the expert testimony rule. And because that's such an extremely high standard, she could not terminate the rights of her non-Native ex. Such an outcome does nothing to preserve Native families. On the contrary, it prevented the Native mother from forming a new, legally recognized Native family.

Or take the case of *J.P.C.*, in which a mother who was a member of Tohono O'odham, but lived in Tucson, off the reservation, sought to terminate the rights of her abusive, neglectful ex-husband.[6] If the child had been white, black, Asian, or Hispanic, then Arizona state law would have applied, and the rule would have been "clear and convincing." And if the mother had lived *on* reservation, tribal law would have applied, and it imposes the same "clear and convincing" rule. But because the mother lived off reservation, and the child was deemed an "Indian child," the "reasonable doubt" and expert witness rules applied instead, which meant she could not terminate the ex's rights.

In these and other cases, ICWA bars Native parents themselves from taking the steps necessary to protect their children—and deprives them of their constitutional rights, since the U.S. Supreme

Court has said that parents have a *fundamental right* to direct the upbringing of their children.[7] The only parents in America who are deprived of that right by federal law are Native American parents.

Another way ICWA harms Indian children is through the "active efforts" requirement. Under state and federal law, if child welfare officers take a child away from an abusive family, they must take what are called "reasonable steps" to return the child to the family—to provide them with the social services they need in order to help them get back on their feet. But state and federal law do *not* require this if there are "aggravated circumstances," such as systematic abuse, or sexual molestation, or drug addiction on the part of the parents. That makes sense, because it would be very bad to require child welfare officers to send children back to homes that are already known to be abusive, where they will simply be harmed again.

Yet ICWA *does* require that. Instead of "reasonable" efforts, it requires "active" efforts, and although courts have not definitively said what that means, they have said that it means something more than "reasonable" efforts—and that it is *not* excused by aggravated circumstances. As a result, Indian children must be sent back, time and time again, to the families that the state knows are mistreating them. The horror stories such as Declan Stewart in Oklahoma,[8] Anthony Renova in Montana,[9] or Josiah Gishie[10] here in Arizona, are a direct consequence of the fact that state child welfare officers cannot take steps to protect these children—steps they could take if those children were white, black, Asian, or Hispanic.

Or consider the case of *S.S. v. Stephanie H.*, here in Arizona.[11] The father was a member of the Colorado River Indian Tribes. He sought to terminate the rights of his ex-wife, whom he accused of alcoholism and neglect. Because the children qualified as "Indian children" under ICWA, however, he was required to take "active efforts" to preserve the children's relationship with their mother. In other words, federal law forced him to put his children in the care of a woman he knew to be an unfit parent.

Or consider the case of *Shayla H.*, from Nebraska.[12] State officials knew she and her two sisters were being abused and molested in their home. They took the three girls out of the home—but state courts later ruled that while investigators had satisfied the "reasonable efforts" rule, they fell short of the "active efforts" rule, and the girls had to be returned to the home—where they were molested again. A state court judge later said they had endured "lifetimes of trauma" that they would not have endured, had they not been subject to ICWA.

A third way ICWA harms Indian children comes with the race-based placement preferences for adoption and foster care. ICWA requires that an "Indian child" be placed either with their biological families, or, if this is not possible, with "other Indian families," *regardless of tribe*. This means that a Navajo child must be placed with a Cherokee or Penobscot or Seminole family before that child may be placed in a white, black, Asian, or Hispanic home—even though these tribes have entirely different histories and cultures. Simply put, ICWA treats "Indians" as fungible—as a single group—instead of respecting the differences between tribes. But the idea of the "generic Indian" is a racist concept, one imposed on Native Americans by settlers. ICWA continues to divide people into "Indian" and "non-Indian" categories, perverting traditional concepts of tribal citizenship.

This has real world consequences because there is a drastic shortage of Native foster and adoptive homes.[13] There are so few, in fact, that Native children typically must be placed with non-Native families, which is called "non-compliant" placement—and which means the child can be removed from that foster family at practically any time tribal officials desire. As a consequence, Native foster children are frequently moved from one foster home to another—which deprives them of the stability that is so crucial to any child's upbringing.

What's more, if a Native child is in need of a permanent, adoptive home, he or she can be—and frequently is—denied that home because the adults who want to protect that child are white, black, Asian, or Hispanic. This is true even if the Native parents want their children to be adopted by adults of another race. For example, in the *Brackeen* case now pending before the U.S. Supreme Court, the parents, both Native, agreed to the adoption of their children by a white family. But ICWA allows tribal governments to veto that decision and send the child to live with strangers in a state the child has never even visited. The U.S. Supreme Court in *Troxel v. Granville*, said that parents have a fundamental constitutional right to make decisions about their children's upbringing.[14] But ICWA deprives Native American parents of that right.

I want to say a final word about the soundbite that you'll often hear, to the effect that ICWA is the "gold standard" of child welfare law. This is a false statement, and a misleading one. That phrase first appeared in a brief filed in a 2013 lawsuit called *Adoptive Couple v. Baby Girl*, where the phrase referred to the idea that the "gold standard" of child welfare is to ensure that child stay with "fit" birth parents.[15] But of course, nobody disagrees with that. *Obviously* children should be raised by *fit* birth parents. The problems arise when parents are not fit, but are abusive or unable to care for their children. In those cases, the state has a legal and moral duty to protect that child—and ICWA stands as a major obstacle to that.

The actual "gold standard" is the well-known "best interest of the child" rule. That rule says that in any child welfare case, the child's *individual, specific* needs and interests take priority over other considerations. The "best interest" test considers everything from the child's physical health to the child's cultural needs. It's an individualized, case-by-case assessment. But ICWA overrides that test, and—depending on how you interpret it—either blocks courts from using the test entirely, or substitutes a different, and less-protective test that prioritizes other considerations, and particularly the interests of tribal governments, over the welfare of the individual child.

This is literally "separate but equal"—or, actually, separate but substandard. In a case called *Alexandria P.*, the California Court of Appeal declared that while a child's best interest is the overriding concern for most children, the rule for Indian children is different—for them, best interests is only one of a "constellation of factors" that judges should evaluate.[16] The Texas courts have been even more explicit. They've declared that there are two separate tests: the white best-interests rule, and the Indian best-interest rule. Under the white best-interest rule, the child's welfare is the most important consideration. But for Indian children, that doesn't matter as much.[17] This is doubly tragic because the traditional best interests test—the one the Texas courts have called "white"—*does* include consideration of a child's need for tribal connections. But it also includes consideration of the child's emotional and physical well-being in ways that current law ignores.

Others have said that ICWA doesn't eliminate the best interest rule, but instead imposes a one-size-fits-all federal "presumption" that an Indian child should stay in the Indian community. But the Supreme Court has already said that it is unconstitutional to use "presumptions" in child welfare law, because children are entitled to have their own, unique circumstances viewed as the most important consideration.[18] For Congress to impose a one-size-fits-all standard on Native children—to declare what's in their best interest, regardless of their own particular circumstances—harkens back to the worst elements of the government's treatment of Native Americans, and perpetuates injustices that reach back centuries.

Let me end by being frank with you. I know that ICWA is an emotionally fraught issue. I know that tribal government officials claim that ICWA is crucial for protecting tribal communities, and they tend to downplay the abuses and harms that I've mentioned as mere "anecdotes." I also know that hearing someone who looks like me talk about this issue in this way makes many people uncomfortable. Many people refuse to let themselves be convinced by the facts and the law. I consider that tragic. But the reality is that ICWA is in drastic need of fixing, if we are to spare the next generation of American Indian children—and the adults who love them—from harm.

I beg you—I beg anyone who hears my words—to lay aside your preconceptions and examine how this law actually operates—how it denies children of Native ancestry the legal protections that kids of other races enjoy and that they are entitled to under our Constitution. Too many Native kids are in need. And there are people willing to help them. It is a crime against humanity that federal law today says no—because their skin is the wrong color.

Timothy Sandefur
Goldwater Institute

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[1] There are, for example, questions of the constitutionality of allowing tribal courts to assert jurisdiction in the absence of constitutionally required "minimum contacts," or of dictating to state courts how they may interpret their own child welfare statutes, and other questions, or of interpreting such family law questions as the amount of time required for the acknowledgement of paternity under ICWA—among other things. On the minimum contacts issue, see Timothy Sandefur, "Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children," *Children Legal Rights Journal* 37 (2017), pp. 23–32. On the commandeering of state courts, see Timothy Sandefur, "The Federalism Problems with the Indian Child Welfare Act," *Texas Review of Law & Politics* 26 (forthcoming, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853970, pp. 32-42. On the question of acknowledgement of paternity, see Timothy Sandefur, "Recent Developments in Indian Child Welfare Act Litigation: Moving Toward Equal Protection?," *Texas Review of Law and Politics* 23 (2019), pp. 448–52. (2019)

[2] Timothy Sandefur, "Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children," *Children's Legal Rights Journal* 37 (2017): 1–80 https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1137&context=clrj; Timothy Sandefur, "The Federalism Problems with the Indian Child Welfare Act," *Texas Review of Law & Politics* 26

(forthcoming, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853970; Timothy Sandefur, "The Unconstitutionality of the Indian Child Welfare Act," *Texas Review of Law & Politics* 26 (forthcoming, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3823987.

[3] *In re Abbigail A.*, 1 Cal. 5th 83, 95 (2016).

[4] *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

[5] *In Re Adoption of T.A.W.*, 387 P.3d 636 (Wash. 2016).

[6] *In re J.P.C.*, No. S20150158 (Pima County Super. Ct.), *special action denied,* CV-17-0298-PR (Ariz. Feb. 13, 2018).

[7] *Troxel v. Granville*, 530 U.S. 57 (2000).

[8] Mark Flatten, "Death on a Reservation," pp. 25-26, https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2015/8/14/Final%20Epic%20pamplet.pdf

[9] Naomi Schaefer Riley, "The Indian Child Welfare Act: A Law That Paved the Way for a 5-Year-Old's Death," *USA Today*, Jan. 29, 2020, https://www.usatoday.com/story/opinion/2020/01/29/indian-child-welfare-act-law-paved-death-column/4519511002/

[10] Arizona Department of Child Safety, "Statement on the Death of One-Year-Old Josiah Gishie," Oct. 12, 2018, https://dcs.az.gov/sites/default/files/StatementFatality/Fatality%20Statement%20Josiah%20Gishie.pdf

[11] *S.S. v. Stephanie H.*, 388 P.3d 569 (Ariz. Ct. App. 2017), *cert. denied*, 138 S.Ct. 380 (2017).

[12] 846 N.W.2d 668 (Neb. App. 2014), *aff'd* 855 N.W.2d 774 (Neb. 2014); *see also In re Interest of Shayla H., et al.*, Doc. JV13 (Juvenile Court of Lancaster County, May 1, 2015).

[13] Elizabeth Stuart, "Native American Foster Children Suffer under a Law Originally Meant to Help Them," *Phoenix New Times*, Sep. 7, 2016, https://www.phoenixnewtimes.com/news/native-american-foster-children-suffer-under-a-law-originally-meant-to-help-them-8621832; Daniel Heimpel, "L.A.'s One-and-Only Native American Foster Mom," *The Imprint*, June 14, 2016, https://imprintnews.org/news-2/l-a-s-one-native-american-foster-mom/18823.

[14] 530 U.S. 57 (2000).

[15] Brief of Casey Foundation, et al., 2013 WL 1279468 at *4.

[16] *In re Alexandria P.*, 1 Cal. App. 5th 331, 351 (2016), *cert. denied*, 137 S.Ct. 713 (2017).

[17] *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 170 (Tex. App. 1995).

[18] *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).