No. 21-___

In the Supreme Court of the United States

THE STATE OF TEXAS, PETITIONER

v.

DEB HAALAND, SECRETARY OF THE U.S. DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION APPENDIX VOLUME II

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PRISCILLA R. OWEN, *Chief Judge*, concurring in part, dissenting in part.

I

A

I first consider whether the States have standing. For the reasons articulated in JUDGE DENNIS's and JUDGE COSTA's opinions[1] the States do not have standing to assert in this suit that the Indian Child Welfare Act of 1978 (ICWA)[2] violates the Equal Protection Clause of the Fifth Amendment. As to all other claims, I conclude that the States do have standing.

The States have asserted various, often overlapping, claims in Counts I through IV and Count VII of the live complaint in the district court—the Second Amended Complaint. Briefly summarized, the States seek a determination that Congress did not have the authority to supplant state law in child-welfare and adoption cases with certain directives in ICWA, and that Congress cannot require state courts to follow ICWA. The States also contend that the Bureau of Indian Affairs (BIA) violated the Administrative Procedure Act (APA) and the federal Constitution when it promulgated the Final Rule (Count I). The States contend that the Indian Commerce Clause did not empower Congress to enact certain provisions of ICWA (Count II); that adoption, foster care, and pre-adoptive placement of "Indian children" are not permissible subjects of regulation under the Tenth Amendment (Count III); that ICWA and the Final Rule violate anti-commandeering

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[1] *See* DENNIS, J., concurring and dissenting, part I(A)(1), p. 39 n.13; COSTA, J., concurring and dissenting, part I, p. 3 n.2.

[2] 25 U.S.C. §§ 1901-1923, 1951-1952.

principles under the Tenth Amendment (Count III); that ICWA and the Final Rule violate the Equal Protection Clause of the Fifth Amendment(Count IV); and that ICWA and the Final Rule violate the non-delegation doctrine of Article I, Section 1 because they "delegate to Indian tribes the legislative and regulatory power to pass resolutions in each Indian child custody proceeding that alter the placement preferences state courts must follow" (Count VII).

The States complain about the costs of complying with ICWA and the Final Rule, including the hours and resources that child-welfare agencies expend, costs borne by the States to employ experts, and the time consumed in state-court proceedings resolving ICWA issues. The States further contend they "are directly and substantially injured by the delegation of power over placement preferences because it violates the Constitution's separation of powers through abdication of Congress's legislative responsibility and requires State Plaintiffs to honor the legislation and regulation passed by tribes in each child custody matter, which can vary widely from one child to the next and one tribe to another."

The States have adequately alleged that they are injured by ICWA and the Final Rule for standing purposes.[3] The determinative question is whether those

[3] *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized…and (b) actual or imminent, not conjectural or hypothetical." (citations, footnote, and internal quotation marks omitted)).

injuries could be redressed if a federal court were to grant the relief the States seek in this case.

The States seek a declaration that parts of ICWA are unconstitutional and therefore that state rather than federal law governs. To the extent the States are seeking to supplant ICWA with state substantive and procedural law in child-welfare proceedings, such a declaration would not redress the States' injuries because no state court would be bound by such a declaration.[4] Every state court would, of course, be free to decide the constitutionality of ICWA de novo because the rulings of the federal district court and of this court would not bind state courts and would not bind private litigants in state court proceedings. For this reason, the assertion in JUDGE DUNCAN's opinion that a decision of this court "would also remove state child welfare officials' obligations to implement [ICWA's] preferences"[5] is, with great respect, incorrect.

The States contended in the district court that because various provisions of ICWA are unconstitutional, the federal government cannot require the States to comply with those provisions and therefore could not withhold federal funding for child welfare as a consequence of noncompliance with ICWA. Specifically, the States requested the district court to hold that certain statutes authorizing the Secretary to withhold federal child welfare funds from states that do not comply with ICWA, including 42 U.S.C. §§ 622(b)(9) and

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[4] *See Aransas Project v. Shaw*, 775 F.3d 641, 648 (5th Cir. 2014) (per curiam) ("Redressability requires 'a likelihood that the requested relief will redress the alleged injury.'" (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998))).

[5] *See* DUNCAN, J., concurring and dissenting, part I(B), p. 21.

677(b)(3)(G), are unconstitutional. The States sought an injunction prohibiting the federal defendants from implementing or enforcing those statutes in their initial pleadings.

However, the States did not thereafter pursue any relief in the district court regarding the withholding of funds by the federal defendants. The States moved for summary judgment, but they did not seek summary judgment or request injunctive relief in their motion with regard to federal funding of child welfare. They did not cross-appeal in this court seeking such relief, nor could they since they did not pursue it in the district court. The question then arises as to whether there is redressability at this point in the proceedings, since standing must be present at each stage of litigation.[6]

A determination in this case that certain provisions of ICWA, the Final Rule, or both were unconstitutional would be a binding determination (res judicata) as between those States and the federal government. This would mean that the States could categorically direct their child-welfare agencies to cease compliance with the provisions of ICWA if it were held unconstitutional. Such relief would address injuries asserted by the States and establishes the States' Article III standing to raise the constitutional challenges to ICWA, other than equal protection. The States would no longer be burdened with ICWA's requirements and would not incur the costs and

[6] *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990) ("[The] case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed . . . ." (first citing *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); and then citing *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974))).

expenses associated with compliance unless and until, in a state-court proceeding, individual plaintiffs asserted rights under ICWA and a final state-court judgment were to hold, contrary to a judgment of this court or the district court, that ICWA is constitutional and the State is bound by its requirements in that state-court proceeding. The potential for such a collision between state and federal courts as to ICWA's constitutionality does not mean that federal courts cannot redress the States' injuries in the present case. A federal-court judgment in the States' favor in this case could conceivably redress their injuries, though in the longer term, a state court's view of the constitutionality of ICWA might ultimately carry the day were a conflict between state-court holdings and federal-court holdings to arise.

A judgment in the present case holding that the States prevail against the federal defendants on their claims that ICWA is unconstitutional could also potentially be the basis for precluding the federal government from withdrawing funding for a State's failure to comply with unconstitutional statutory or regulatory provisions. Does that mean that the federal government is prohibited from using a "carrot/stick" approach to persuade a State to comply with ICWA or else withdraw funding? That issue was not raised or briefed in the district court or this court. It has not been decided. But the point is, it is not improbable that the relief that the States do continue to seek in the present case would, in future litigation between the States and the federal government, preclude the federal government from withholding child welfare funds under ICWA as a consequence of the States' failure to comply

with ICWA. The constitutionality of ICWA would be off the table in any such future litigation between a State who is a party to this case and the federal government.

Not all the States' claims are grounded in the federal Constitution. The States challenge 24 C.F.R. § 23.132(b) on the basis that the clear-and-convincing-evidence standard is contrary to 25 U.S.C. § 1915, and on the basis that in promulgating the Final Rule, the Bureau of Indian Affairs (BIA) did not provide a reasoned explanation for reversing its prior, long-held interpretation of ICWA. The relief sought by the States in this regard would redress their complaint that the Final Rule imposes too high a standard on state agencies seeking to place a child other than in accordance with ICWA's preferences. The Final Rule's offending provisions would be abrogated and therefore would not be a factor or at issue in state-court adoption or placement proceedings. This would redress the injuries identified by the States.

Accordingly, I concur in parts I(C) and (D) of JUDGE DENNIS's opinion, with the exception of the last sentence in part I(D).

B

As to the standing of the individual plaintiffs, I concur in part I(A)(1) of JUDGE DENNIS's opinion, and parts I and II(A) and the final paragraph of part II(B) of JUDGE COSTA's opinion.

I add these observations. None of the individual plaintiffs have standing to press any of their claims, other than those with regard to the APA and the Final Rule, because nothing this court has to say about ICWA binds any state court in adoption or foster care placement cases when a private party asserts that

ICWA's provisions are constitutional and must be applied or that they are unconstitutional and cannot be applied. Private parties in child-welfare and adoption proceedings would not be bound by a judgment issued by a federal district court or this court declaring rights as between the Brackeens, for instance, and the federal defendants, or as between the States and the federal government.

The assertion in JUDGE DUNCAN's opinion that the individual plaintiffs' claims are redressable because the "Federal Defendants would be barred from inducing state officials to implement ICWA, including the preferences, by withholding funding,"[7] is, with great respect, erroneous. None of the individual plaintiffs have standing to argue that the federal government is precluded from withholding child welfare funds from a State. They do not argue that they have a right or interest that would permit them to insert themselves into disputes as to funding between the federal government and the States under ICWA. The individual plaintiffs cite no statute or constitutional provision that would confer such a right. Any relief granted to the States regarding child-welfare funding under ICWA would redress the individual plaintiffs' claims, if at all, only incidentally and tangentially. In any event, as discussed above, the States did not pursue in the district court their request for a declaration that the federal defendants are barred from withholding child-welfare funding under ICWA. Such relief was not granted by the district court, and the States do not seek such relief in this court. No judgment of this court could now grant the relief that JUDGE

[7] DUNCAN, J., concurring and dissenting, part I(B), p. 21.

DUNCAN's opinion says would redress the individual plaintiffs' claims regarding ICWA's preferences.

The individual plaintiffs do have standing to challenge the Final Rule. However, even were the Final Rule abrogated in its entirety, ICWA's statutory preferences and other requirements would remain intact. The individual plaintiffs do not have standing to challenge ICWA's provisions directly or in the abstract in the present case. A judgment of this court would not resolve any actual case or controversy as between the individual plaintiffs and the federal defendants, other than challenges to the Final Rule, for the reasons considered above and in JUDGE DENNIS's and JUDGE COSTA's opinions.

II

I agree with the conclusion in JUDGE DENNIS's opinion,[8] as a general proposition, that Congress had the authority under the Indian Commerce Clause[9] to enact ICWA. However, I do not join JUDGE DENNIS's analysis fully. I join part II(A) of JUDGE COSTA's opinion as to this issue.

III

A

Because I conclude that neither the States nor the individual plaintiffs have standing to bring direct equal protection challenges to ICWA's statutory provisions, I would not and do not reach the merits of any of those claims. To the extent that equal protection claims have

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[8] DENNIS, J., concurring and dissenting, part II(A)(1).

[9] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

been asserted by the individual plaintiffs in challenging the Final Rule, I join the final paragraph in part II(B) of JUDGE COSTA's opinion. The individual plaintiffs have standing to assert equal protection challenges to ICWA in this context. I agree with the conclusion in JUDGE DENNIS's opinion that ICWA's preferences are political not racial. Those preferences withstand rational-basis scrutiny. I therefore conclude that the Final Rule did not violate the Equal Protection Clause in implementing ICWA's statutory preferences, including the preference for "Indian Families."

B

Regarding the commandeering and preemption claims, I join part II(A)(2)(a)(i) of JUDGE DENNIS's opinion and part III(B) of JUDGE DUNCAN's opinion.

To clarify, with regard to part III(B)(1)(a)(iii) of JUDGE DUNCAN's opinion, I agree that 25 U.S.C. §§ 1915(a)-(b), and implementing regulations, in large measure violate the anti-commandeering doctrine. However, the placement preferences set forth in that statute and its implementing regulations, standing alone, do not commandeer, as JUDGE DUNCAN's opinion explains.[10] Those federal laws preempt contrary state-law preferences. The commandeering occurs because state agencies are directed to undertake action to identify and assist individuals who might be entitled to preference over others seeking to adopt or to provide foster care. To the extent the state courts and state agencies become aware of individuals who seek to have

[10] DUNCAN, J., concurring and dissenting, part III(B)(1)(a)(iii), p. 83.

ICWA's preferences applied, ICWA's preferences should be followed.

C

Only the State plaintiffs asserted claims that Congress impermissibly delegated legislative power to Indian tribes in ICWA. With regard to the non-delegation issues, I join part II(C) of JUDGE DENNIS's opinion.

D

Regarding the APA claims, I join part III(D)(3) of JUDGE DUNCAN's opinion. I do not join part III(D)(2) of that opinion because the discussion as to whether regulations bind state courts is abstract. It is unclear from the discussion which regulations purport to bind state courts separate and apart from statutory provisions which do bind state courts to the extent the statutory provisions are constitutional.

E

I would grant declaratory relief consistent with the conclusions in this opinion.

JACQUES L. WIENER, JR., *Circuit Judge*, dissenting in part:

I concur with JUDGE DENNIS's Opinion, except for its holding on standing to challenge 25 U.S.C. § 1915(a) and (b) on equal protection grounds. I also concur with JUDGE COSTA in his partial dissent on standing. For the reasons more explicitly stated below, I write separately because the Plaintiffs' second amended complaint is deficient and should be dismissed for lack of standing.

JUDGES DUNCAN and DENNIS each conclude that the Individual Plaintiffs, through the Brackeens and Cliffords, have Article III standing to challenge § 1915(a) and (b) of ICWA on equal protection grounds.[1] This conveniently allows the Opinions to proceed to the merits of the Plaintiffs' equal protection arguments. Like JUDGE COSTA, I disagree with JUDGES DUNCAN's and DENNIS's conclusions that the Plaintiffs have Article III standing to challenge § 1915(a) and (b), so I would not reach the merits of the Plaintiffs' equal protection claim. In addition to the redressability problems cited in JUDGE COSTA's dissent, JUDGES DUNCAN and DENNIS choose to ignore three important facts: (1) the date that the most recent complaint was filed, (2) the Brackeens' delayed supplementation of the record, and (3) the fact that the Cliffords could have appealed their case to the Minnesota Supreme Court but did not do so. Those facts are dispositive of the Plaintiffs' ability to show standing: The Brackeens and Cliffords (and, by extension, all of the Individual Plaintiffs) do not have standing to challenge

[1] JUDGE DENNIS concludes that the Plaintiffs do not have standing to challenge § 1913(d) and 1914, and I concur for the reasons provided in that opinion.

§ 1915(a) and (b), so we do not have jurisdiction to decide whether these parts of ICWA pass constitutional muster.

I. Background

The Plaintiffs filed their initial complaint in October 2017, seeking declaratory and injunctive relief, claiming that ICWA and the Final Rule are unconstitutional and violate the Administrative Procedure Act.[2] At that time, the Brackeens were attempting to adopt A.L.M., who qualified as an "Indian child" under ICWA. A.L.M.'s biological parents voluntarily terminated their parental rights in May 2017, and the Brackeens completed their adoption of A.L.M. in January 2018. The Plaintiffs filed a second amended complaint two months later. Presumably because they knew that standing would be an issue, the Brackeens stated that they "also intend to provide foster care for, and possibly adopt, additional children in need. Because of their experience with the Final Rule and ICWA, however, [they] are reluctant to provide a foster home for other Indian children in the future." Despite their reluctance, however, the Brackeens attempted to adopt A.L.M.'s sister, Y.R.J., who was born in June 2018—three months *after* the second amended complaint was filed. The Plaintiffs supplemented the district court record in October 2018 (after it had entered final judgment), notifying the court that the Brackeens were attempting to adopt Y.R.J. The Brackeens intervened in a state court adoption proceeding in November 2018, seeking to terminate the

[2] *See Brackeen v. Zinke*, 338 F. Supp. 3d 514, 526–46 (N.D. Tex. 2018), *rev'd sub nom.* 937 F.3d 406 (5th Cir. 2019), *reh'g en banc granted,* 942 F.3d 287 (5th Cir. 2019).

parental rights of Y.R.J.'s mother—eight months after the second amended complaint was filed.[3]

The Plaintiffs also stated in their second amended complaint that the Cliffords wished to adopt Child P., a six-year-old girl whom the Cliffords had fostered since July 2016. With the support of Child P.'s guardian ad litem, the Cliffords moved to adopt Child P. The Minnesota court denied their petition in January 2019 because Child P.'s tribe intervened in her case and invoked ICWA's placement preferences.[4] The Cliffords appealed the Minnesota court's order, but the Minnesota court of appeals affirmed.[5] It does not appear that the Cliffords timely appealed that court's judgment.

II. Article III Standing

Under Article III of the United States Constitution, federal courts only have jurisdiction over a "case" or "controversy."[6] "To establish a 'case or controversy,' a plaintiff must establish that it has standing."[7] Standing requires that a plaintiff show (1) "an injury in fact" that is (2) fairly traceable to the challenged action of the defendant, and that is (3) likely to be "redressed by a favorable decision."[8] JUDGES DUNCAN and DENNIS only analyze standing to challenge § 1915(a) and (b) on equal

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[3] *See In re Y.J.*, 2019 WL 6904728, at *3 (Tex. App. Dec. 19, 2019).

[4] *See In re Welfare of the Child in the Custody of: Comm'r of Human Servs.*, No. 27-JV-15-483 (4th Dist. Minn. Jan. 17, 2019).

[5] *In re S.B.*, No. A19-0225, 2019 WL 6698079, at *6 (Minn. Ct. App. Dec. 9, 2019).

[6] *See* U.S. CONST. art. III, § 2, cl. 1.

[7] *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 366 (5th Cir. 2018) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

[8] *Lujan*, 504 U.S. at 560–61.

protection grounds as to the Brackeens and the Cliffords. No other Individual or State Plaintiff can show standing to challenge these provisions of ICWA.

Fatal to the Brackeens' assertion of standing are the facts that (1) they had already adopted A.L.M. prior to the Plaintiffs' filing of the second amended complaint, and (2) their stated desires to adopt or provide foster care for other Indian children were too vague to constitute an injury in fact. The Brackeens must show Article III standing both at the time of the filing of the complaint and throughout the lawsuit.[9] The court must analyze standing at the time that the latest complaint is filed.[10]

The first requirement of standing is that a plaintiff must have suffered an "injury in fact."[11] An injury in fact must be (1) concrete and particularized and (2) actual or imminent, not conjectural or hypothetical.[12] Some courts have held that when "plaintiffs seek declaratory and injunctive relief only, there is a further requirement that they show a very significant possibility of future harm; it is insufficient for them to demonstrate only a past

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[9] *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007) (noting that standing is assessed at the time the complaint is filed); *Arizonans for Off. Eng. v. Ariz.*, 520 U.S. 43, 45 (1997) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.").

[10] *See Rockwell*, 549 U.S. at 473–74 ("[W]hen a plaintiff…voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (analyzing standing at the time the second amended complaint was filed).

[11] *Lujan*, 504 U.S. at 560–61.

[12] *Id.* at 560.

injury."[13] "A request for injunctive relief remains live only so long as there is some present harm left to enjoin."[14] "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[15]

The Brackeens could not show an actual injury in fact at the time the Plaintiffs filed the second amended complaint because the Brackeens had already adopted A.L.M. Actual injury requires the Plaintiffs to show that they are *presently* affected by ICWA and the Final Rule.[16] The Brackeens' injury was a "past injury," which "is insufficient for them to demonstrate" the injury in fact necessary to obtain injunctive or declaratory relief.[17]

Neither could the Brackeens show an imminent injury in fact.[18] Their stated desire to adopt or provide

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[13] *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996).

[14] *Taylor v. Resol. Tr. Corp.*, 56 F.3d 1497, 1502 (D.C. Cir. 1995).

[15] *O'Neal v. City of Seattle*, 66 F.3d 1064, 1066 (9th Cir. 1995) (omission in original) (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983)).

[16] *See N.J. Physicians, Inc. v. Obama*, 653 F.3d 234, 239 (3d Cir. 2011) (noting that a plaintiff must be "presently impacted" by the defendant's actions).

[17] *Reno*, 98 F.3d at 1126.

[18] JUDGE DUNCAN notes that he would reach the same conclusion as to the Brackeens' adoption of A.L.M. because it fits within the "capable of repetition, yet evading review" exception to mootness. This exception is inapposite, so the case would be moot were it not lacking an injury in fact, because (1) the adoption proceedings were not too short in duration to be fully litigated, and (2) there is no reasonable expectation that the Brackeens would be subject to the same injury again. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008). As to the first prong, the Brackeens could have litigated their ICWA challenges in state court

foster care for other Indian children was too vague because they had not specified a date or time that they would attempt to adopt Y.R.J. or other Indian children.[19] The Brackeens did not attempt to show that they planned to adopt another Indian child until October 2018—seven months after the second amended complaint had been filed and after final judgment had been entered. At the time that the second amended complaint was filed, the Brackeens' "intent" to provide foster care for Indian children, or the "possibility" that they would adopt any, was insufficient to show injury in fact. As the Supreme Court has explicitly held, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[20]

The Brackeens' standing issue in this case is similar to those found in cases—some of which are cited in JUDGE DENNIS's Opinion—wherein the Supreme Court has held that plaintiffs lack standing because their injuries were not "imminent." For example, in *O'Shea v. Littleton*, the Court held that the plaintiffs lacked standing because, even though they had suffered past unconstitutional practices they could not prove a present

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during A.L.M.'s July 2017 adoption proceedings, long before October 2018 when the district court entered judgment against the Defendants. As to the second prong, the Brackeens' stated reluctance to adopt more Indian children was too vague, as discussed above. *See Lujan*, 504 U.S. at 564 (holding that a sufficient specification of when the injury in fact will occur is necessary).

[19] *See Reno*, 98 F.3d at 1127 (holding that plaintiffs could not show injury in fact, because "[t]he complaint does not specify any particular time or date on which plaintiffs intend to violate the Act").

[20] *Lujan*, 504 U.S. at 564.

or future impact as a result of those practices.[21] The Court noted that the alleged imminent threat was not "sufficiently real and immediate to show an existing controversy simply because [the plaintiffs] anticipate violating lawful criminal statutes and being tried for their offenses."[22] Similarly, in *City of Los Angeles v. Lyons*, the Court rejected the plaintiff's standing argument, noting that the complaint "depended on whether [the plaintiff] was likely to suffer future injury from the use of the chokeholds by police officers."[23]

Further, JUDGES DUNCAN and DENNIS err by considering Y.R.J.'s proceedings for purposes of standing because the Plaintiffs did not move to supplement the record with information relating to the Brackeens' attempted adoption of Y.R.J. until October 10, 2018. Final judgment had been entered, however, on October 4, 2018. The Supreme Court has explicitly held that a lack of standing cannot be cured by evidence entered into the record after final judgment.[24] Unlike

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[21] 414 U.S. 488, 493, 495–96 (1974).

[22] *Id*. at 496.

[23] 461 U.S. at 105. Although these cases arose in the context of unconstitutional police practices, which are unlike allegedly unconstitutional adoptive proceedings, they are instructive. Here, like the plaintiffs in *O'Shea* and *Lyons*, the Plaintiffs are seeking future remedies based on past exposures to harm, which JUDGES DUNCAN and DENNIS incorrectly classify as a regulatory burden. On the contrary, there can be no regulatory burden in a completed adoption proceeding, *viz*., the completed adoption of A.L.M.

[24] *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009) ("After the District Court had entered judgment, and after the Government had filed its notice of appeal, respondents submitted additional affidavits to the District Court. We do not consider these. If respondents had not met the challenge to their

Mathews v. Diaz, in which the Supreme Court held that a supplemental pleading cured the jurisdictional defect, the Brackeens' supplementation of the district court record occurred *after* judgment had been entered.[25]

Finally, the Cliffords do not have standing to challenge § 1915(b) because their claim is not

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standing at the time of judgment, they could not remedy the defect retroactively.").

[25] *Cf.* 426 U.S. 67, 75 (1976). In *Mathews*, cited by JUDGE DENNIS, the Court noted that "[a] supplemental *complaint* would have eliminated this jurisdictional issue; since the record discloses, both by affidavit and stipulation, that the jurisdictional condition was satisfied, it is not too late, even now, to supplement the complaint to allege this fact." *Id.* (emphasis added). *Mathews* involved Federal Rule of Civil Procedure 15(d), which allows a party to file a supplemental *pleading*. *See id.* at 75 n.8; *accord Northstar Fin. Advisors Inc. v. Schwab Inv.*, 779 F.3d 1036, 1044 (9th Cir. 2015). The Brackeens did not file a supplemental pleading. Instead, they filed a supplement to the record. Further, *Mathews* involved the issue of exhaustion, not standing. *See* 426 U.S. at 75-76. Finally, *Mathews*' language that "even now," filing a supplemental pleading would not be "too late," is dictum. In *Mathews*, the plaintiffs filed a supplemental pleading after the complaint had been filed but *before* final judgment had been entered. *Id.* at 75 (noting that the pleading was supplemented "while the case was pending in the District Court"). There was no issue of filing a supplemental pleading at the Supreme Court level; thus, this language is dictum. Here, as stated, the Brackeens did not supplement the record until *after* final judgment was entered, and this cannot cure the defective complaint. *See Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008) (noting that "while 'later events may not create jurisdiction where none existed at the time of filing, the proper focus in determining jurisdiction are the facts at the time the complaint under consideration was filed'" (brackets and emphasis omitted) (quoting *GAF Bldg. Materials Corp. v. Elk Corp.*, 90 F.3d 479, 483 (Fed. Cir. 1996)).

redressable.[26] They could have appealed their challenges to ICWA in Minnesota state court but likely missed the deadline to appeal.[27] The state of Minnesota is also not a party to this lawsuit, so any ruling we make on the constitutionality of ICWA would have no effect on the Cliffords' adoption proceedings.[28]

III. Conclusion

It would be convenient if we could ignore facts that are dispositive of Article III standing—as do JUDGES DUNCAN and DENNIS—and proceed to the merits in important constitutional cases such as this. We are, however, governed by the rule of law. And a federal court cannot weigh in on an issue over which it lacks jurisdiction, however appealing doing so might be. I concur with JUDGE COSTA that the Plaintiffs lack standing because their case is not redressable. And even though I join JUDGES DENNIS's well-reasoned and thorough Opinion on the merits, I would reverse the district court's order that the Plaintiffs have Article III standing to challenge 25 U.S.C. § 1915(a) and (b) on equal protection grounds.

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[26] *See Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 158 (2014) (noting that redressability is a requirement for standing)

[27] *See In re S.B.*, No. A19-0225, 2019 WL 6698079, at *1 (Minn. Ct. App. Dec. 9, 2019) (showing no notice of appeal to the January 2020 judgment); *see also* Minn. R. Civ. App. P. 117 subd 1 (requiring filing of notice of appeal within 30 days of the filing of the Court of Appeals' decision).

[28] *See Okpalobi v. Foster*, 244 F.3d 405, 426–27 (5th Cir. 2001) (en banc) (concluding that the plaintiffs' claim was not redressable because the defendants were "powerless to enforce [the Act] against the plaintiffs (or to prevent any threatened injury from its enforcement")).

HAYNES, *Circuit Judge*, concurring:

I concur with portions of both JUDGE DENNIS's and JUDGE DUNCAN's Opinions (respectively, the "Dennis Opinion" and the "Duncan Opinion").[1] On standing, I concur with the conclusions of Part I of the Duncan Opinion that Plaintiffs have standing to bring all their claims.[2]

On the equal protection issues, I concur in part with Part II(B)(2) of the Dennis Opinion that the definition of "Indian child" does not violate the Equal Protection Clause. As to the placement preferences, I conclude that the first two prongs of ICWA § 1915(a)—concerning the members of the child's extended family and tribe—withstand even strict scrutiny, so I concur with Part II(B)(2) of the Dennis Opinion that they are constitutional; but I concur with Part III(A)(3) of the Duncan Opinion that the "other Indian families" prong of ICWA § 1915(a) violates the Equal Protection Clause because it fails to be rationally tied to fulfilling Congress's goals of protecting Indian tribes.

On the anti-commandeering/preemption issues, I concur with the conclusion in Part II(A)(1) of the Dennis Opinion that Congress had plenary authority under the Indian Commerce Clause to enact ICWA, but I concur with Parts III(B)(1)(a)(i) and III(B)(1)(a)(iv) and in part with Parts III(B)(1)(a)(ii), III(B)(1)(b), and III(B)(2)(b) of the Duncan Opinion that ICWA §§ 1912(d), (e) and 1915(e) violate the anti-commandeering doctrine and are

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[1] All references to the Dennis Opinion and Duncan Opinion are to the enumerated sections under the "Discussion" portion of each opinion.

[2] In that regard, I also agree with the conclusions of Parts I(A)(2)–(D) of the Dennis Opinion.

invalid preemption provisions. With respect to the remaining statutory provisions at issue, I concur with the Dennis Opinion that they do not violate the anti-commandeering doctrine and validly preempt state law.

On the nondelegation doctrine issue, I concur with Part II(C) of the Dennis Opinion that ICWA § 1915(c) does not violate that doctrine.

Lastly, on the Administrative Procedure Act issues, I concur with Part III(D)(1) of the Duncan Opinion that the Final Rule is invalid to the extent that it implements the unconstitutional statutory provisions identified above: ICWA §§ 1912 (d), (e), and 1915(e) and the "other Indian families" prong of ICWA § 1915(a). However, to the extent that the Final Rule implements constitutional ICWA provisions, I concur with Part II(D)(1) of the Dennis Opinion that those portions of the Final Rule are valid. I also concur with Part II(D)(2) of the Dennis Opinion that BIA did not exceed its authority in making the Final Rule binding. But I concur with Part III(D)(3) of the Duncan Opinion that the "good cause" standard in 25 C.F.R. § 23.132(b) fails at *Chevron* step one.

STEPHEN A. HIGGINSON, *Circuit Judge*, concurring in part, with whom JUDGE COSTA joins:

I concur in Judge Dennis's comprehensive opinion except for Discussion § I.A.2 and write separately to highlight lessons I draw from two Supreme Court cases.

"Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). Engaging in this type of policy weighing, the dissent would strike a statute that has garnered support from Congressional members on both sides of the aisle, a large number of states, and at least 325 federally recognized Indian tribes and has been the law of the land for over four decades.

Specifically, the dissent would hold that the "structural guarantee of state sovereignty" limits Congress's authority to regulate state child custody proceedings involving Indian children. It bases this on two observations: "[n]o Supreme Court decision supports Congress deploying its Indian affairs power to govern state government proceedings," and there is no "comparable founding-era exercise[ ] of Congress's Indian affairs power."

Yet, in *Garcia*, the Court explained why it rejected, "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'": (1) "it prevents a court from accommodating changes in the historical functions of States, changes that have resulted

in a number of once-private functions like education being assumed by the States and their subdivisions"; (2) it "results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated"; (3) it is "unworkable," in part "because of the elusiveness of objective criteria for 'fundamental' elements of state sovereignty"; and (4) "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 543–52. Contrary to this Supreme Court instruction, the dissent risks resuscitating a misunderstanding of state sovereignty that entangles judges with the problematic policy task of deciding what issues are so inherent in the concept and history of state sovereignty that they fall beyond the reach of Congress.

"[T]he fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies." *Id.* at 550. Instead, it is the nature of our federalist system that states retain sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Id.* at 549. As Judge Dennis comprehensively explains, the Indian Commerce Clause has done exactly that with respect to Indian Affairs.

But it is not only the dissent's test that diverges from Supreme Court authority—it would also be its result.

The Supreme Court has repeatedly recognized that Congress *can* preempt state law that applies in state domestic relations proceedings. *See, e.g., Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001) (holding that ERISA preempted application of Washington statute in state probate proceedings); *Boggs v. Boggs*, 520 U.S. 833, 841 (1997) (holding that ERISA preempted application of Louisiana community property law in state probate proceedings); *McCarty v. McCarty*, 453 U.S. 210, 232–33 (1981) (holding that federal law preempted application of California community property law in state divorce proceedings); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979) (holding that the Railroad Retirement Act preempted application of California community property law in state divorce proceedings); *Free v. Bland*, 369 U.S. 663, 670 (1962) (holding that federal law preempted application of Texas community property law in state probate proceedings); *Wissner v. Wissner*, 338 U.S. 655, 658–59 (1950) (holding that the National Service Life Insurance Act preempted application of California community property law in state probate proceedings); *McCune v. Essig*, 199 U.S. 382, 389–90 (1905) (holding that the Homestead Act preempted application of Washington community property law in state probate proceedings); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Congress may legislate in areas traditionally regulated by the States."). That is exactly what Congress did here. *See* 25 U.S.C. § 1902 (declaring Congress's intent to establish "minimum Federal standards" to be applied in state child custody proceedings involving Indian children).

The dissent relies primarily on *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), to support a contrary result.

But even Chief Justice Rehnquist—the author of *Seminole Tribe* and perhaps the most faithful proponent of state's rights—explicitly recognized that Congress *may* preempt state domestic relations law. *See McCarty*, 453 U.S. at 237 (Rehnquist, J., dissenting) ("[T]he authority of the States should not be displaced *except pursuant to the clearest direction from Congress*." (emphasis added)); *see also Bond v. United States*, 572 U.S. 844, 858 (2014) ("'[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" (quoting *Gregory*, 501 U.S. at 460)). Although Chief Justice Rehnquist's position was narrower than the dissent's here, *see McCarty*, 453 U.S. at 232 (finding state community property law preempted where (1) there was a conflict between the federal and state laws and (2) the consequences of the state law sufficiently injured the objectives of the federal program), I highlight it to demonstrate how consequential the dissent's retort to clearly stated congressional authority actually is. Even applying Chief Justice Rehnquist's dissenting position, the Indian Child Welfare Act ("ICWA") stands. The ICWA establishes "minimum Federal standards" to be applied in state child custody proceedings involving Indian children—it is hard to image a clearer indication of Congress's intent to preempt state law. 25 U.S.C. § 1902.

Just as "[n]one can dispute the central role community property laws play in . . . community property States," *Boggs*, 520 U.S. at 839–40, it is irrefutable that states have a compelling interest in their child custody proceedings. Nevertheless, important,

longstanding, and binding Supreme Court precedent recognizes both the United States' unique and compelling obligation to Indians, *see United States v. Lara*, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" (citations omitted*)); see also McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) ("This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations."), and dictates that "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail," *Free*, 369 U.S. at 666.

GREGG COSTA, *Circuit Judge*, concurring in part and dissenting in part, with whom CHIEF JUDGE OWEN joins as to Parts I and II(A) and the final paragraph of Part II(B), with whom JUDGES WIENER and HIGGINSON join, with whom JUDGE DENNIS joins as to Part II, and with whom JUDGE SOUTHWICK joins as to part I:

Congress passed the Indian Child Welfare Act of 1978 on voice votes, a procedure typically reserved for noncontroversial legislation. The law continues to enjoy bipartisan support. *See* Brief of Members of Congress as Amici Curiae in Support of Defendants-Appellants and Reversal. Leading child welfare organizations believe the law "embodies and has served as a model for the child welfare policies that are [the] best practices generally" and reflects "the gold standard for child welfare policies and practices in the United States." Brief of Casey Family Programs and 30 Other Organizations Working with Children, Families, and Courts to Support Children's Welfare as Amici Curiae in Support of Appellants at 2; Letter from Child Welfare Advocates to Elizabeth Appel, Off. of Regul. Aff. & Collaborative Action, U.S. Dep't of Interior (May 19, 2015), http://www.nativeamericanbar.org/wp-content/uploads/2014/01/CFP-et-al-Support-Letter-Re-Proposed-ICWA-Regulations.pdf.

Yet more than four decades into its existence, a federal district court held key parts of the law unconstitutional. That facial invalidation is contrary to the longstanding views of state courts, where adoption proceedings of course take place.[1] It is ironic that a

[1] *See, e.g., In re K.M.O.*, 280 P.3d 1203, 1214–15 (Wyo. 2012); *In re Phoenix L.*, 708 N.W.2d 786, 795–98 (Neb. 2006); *In re Baby Boy*

federal court saw infringements on state sovereignty that the state courts themselves have not seen.

I.

Such ironies abound in this case. The most astonishing irony results from this being a federal court challenge to laws that apply in state adoption proceedings. It will no doubt shock the reader who has slogged through today's lengthy opinions that, at least when it comes to the far-reaching claims challenging the Indian Child Welfare Act's preferences for tribe members, this case will not have binding effect in a single adoption. That's right, whether our court upholds the law in its entirety or says that the whole thing exceeds congressional power, no state family court is required to follow what we say. *See, e.g., Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (per curiam) (noting that Texas state courts are "obligated to follow only higher Texas courts and the United States Supreme Court"); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (recognizing that state courts "render binding

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L., 103 P.3d 1099, 1106–07 (Okla. 2004); *In re A.B.*, 663 N.W.2d 625, 634–37 (N.D. 2003), *cert. denied*, 541 U.S. 972 (2004); *Ruby A. v. State, Dep't of Health & Soc. Servs.*, 2003 WL 23018276, at *4–5 (Alaska Dec. 29, 2003); *In re Marcus S.*, 638 A.2d 1158, 1158–59 (Me. 1994); *In re Armell*, 550 N.E.2d 1061, 1067–68 (Ill. App. Ct. 1990), *cert. denied*, 498 U.S. 940 (1990); *In re Miller*, 451 N.W.2d 576, 578–79 (Mich. Ct. App. 1990) (per curiam); *In re Application of Angus*, 655 P.2d 208, 213 (Or. Ct. App. 1982), *cert. denied,* 464 U.S. 830 (1983); *In re Appeal in Pima Cty. Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980). *But see In re Santos Y.*, 92 Cal. App. 4th 1274 (Cal. Ct. App. 2001) (upholding "as applied" constitutional challenges to ICWA when the child had never been part of an Indian home).

judicial decisions that rest on their own interpretations of federal law").

There is a term for a judicial decision that does nothing more than opine on what the law should be: an advisory opinion. That is what the roughly 300 pages you just read amount to.

The rule that federal courts cannot issue advisory opinions is as old as Article III. *See Hayburn's Case*, 2 Dall. 409, 410 n.* (1792); 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486–89 (Johnston ed. 1891) (August 8, 1793, letter from Chief Justice Jay refusing to give the Washington Administration advice on legal questions relating to war between Great Britain and France); *see also Flast v. Cohen*, 392 U.S. 83, 96 (1968) ("[I]t is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" (quoting CHARLES ALAN WRIGHT, FEDERAL COURTS 34 (1963))). Early courts could just call such a case what it was—a request for an advisory opinion, *see, e.g., Muskrat v. United States*, 219 U.S. 346, 361–63 (1911); *United States v. Ferreira*, 54 U.S. 40, 51–52 (1851); *Hayburn's Case*, 2 Dall. at 410 n.*. The modern rise of public law litigation resulted in the development of doctrines likes standing, ripeness, and mootness to enforce the "case or controversy" requirement. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992) (noting that the Supreme Court did not use the word "standing" until 1944 (citing *Stark v. Wickard*, 321 U.S. 288 (1944))). This compartmentalization of justiciability law risks losing the forest for the trees. Justiciability doctrines, with their various elements and exceptions, have one

underlying aim: ensuring federal courts only hear cases that actually decide concrete disputes. Decide is the key word here. When a judicial opinion does not actually resolve a dispute, it has no more legal force than a law review article.

The modern doctrinal box most concerned with weeding out advisory opinions is the redressability element of standing. "Satisfaction of this requirement ensures that the lawsuit does not entail the issuance of an advisory opinion without the possibility of any judicial relief, and that the exercise of a court's remedial powers will actually redress the alleged injury." *Los Angeles v. Lyons*, 461 U.S. 95, 129 (1983) (Marshall, J., dissenting).

The redressability requirement proves fatal to at least the equal protection claim (which is really a claim under the Fifth Amendment's Due Process Clause because ICWA is a federal law). Nothing we say about equal protection will redress the Brackeens' alleged injury of potentially being subject to preferences that would favor tribe members in the adoption of Y.R.J.[2] Their argument for redressability is that the family court judge may, or even says he will, follow our constitutional ruling. In other words, our opinion may *advise* him on how to decide the adoption case before him. This description of the plaintiffs' argument reveals why it doesn't work. Maybe the opinion will convince the family court judge, maybe it won't. The same is true for law

[2] The States do not have standing to pursue the equal protection claim because they are not "persons" entitled to the protection of the Fifth Amendment. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966). They thus cannot suffer an equal protection injury of their own. Indeed, neither the opinion from the three-judge panel nor the en banc majority opinion relies on the States for equal protection standing.

review articles or legal briefs. But what is supposed to separate court decisions from other legal writings is that they actually resolve a dispute.

Yet JUDGE DENNIS's Opinion signs off on plaintiffs' redressability theory,[3] finding it sufficient that it is "'substantially likely that [a state court] would abide by an authoritative interpretation' of ICWA."[4] Dennis Op. at 45 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)); *see also id.* at 43 (stating that "the Texas trial court has indicated that it will refrain from ruling on the Brackeens' federal constitutional claims pending a ruling from this court"). Finding redressability based on the possibility that another court will consider the opinion persuasive would allow the requirements of standing to be satisfied by advisory opinions—the very thing that

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[3] On their own, neither JUDGE DENNIS's Opinion nor JUDGE DUNCAN's Opinion garners a majority of the court to find standing for the equal protection claim. Combining the two opinions, however, a majority concludes there is standing. I thus address both opinions.

[4] Don't overlook the ellipsis—it obscures something critical. The replaced language was not referring to a "state court" that might follow the federal decision, but to "the President and other executive and congressional officials." *Franklin*, 505 U.S. at 803. That lawsuit challenging a decennial reapportionment of congressional seats was brought against the Secretary of Commerce, who was certainly bound by the judgment, and the question was whether a ruling against that Cabinet member who oversaw the census could influence the reapportionment even though the President had ultimate policymaking authority in the executive branch. Holding that the head of the relevant cabinet agency could be sued was hardly extraordinary. What is extraordinary—in fact unprecedented—is to find standing based on the chance that another court might follow the federal decision not because it has to but because it might want to.

the doctrine was designed to prevent. Justice Scalia nailed the problem with this reasoning:

> If courts may simply assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees, then redressability will *always* exist. Redressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power.

Franklin, 505 U.S. at 825 (Scalia, J., concurring in part and in the judgment). It therefore is not enough that the family court judge has indicated he might, or even will, follow what the federal court decides.

This court has no authority to resolve whether the ICWA-mandated burden of proof will apply in the Y.R.J. adoption. The binding effect of a legal decision—in standing lingo, its ability to redress an injury—must flow from the judgment itself. *Id; see also United States v. Juvenile Male*, 564 U.S. 932, 937 (2011) (per curiam) (rejecting the notion that a case could be justiciable because "a favorable decision in this case might serve as useful precedent for respondent in a hypothetical [future] lawsuit"). But the Brackeens would come up short even if a decision's precedential effect could establish redressability. Texas courts do not have to follow the decisions of lower federal courts on questions of federal law.[5] *Penrod Drilling Corp.*, 868 S.W.2d at 296;

[5] Apparently recognizing this problem, the Brackeens argue that "if the Supreme Court affirmed, all courts would be bound by that decision." En Banc Brief of Individual Plaintiffs 63. The

see also Arizonans for Official English v. Arizona, 520 U.S. 43, 58 n.11 (1997) (rejecting as "remarkable" the idea that a state court must follow the precedent of lower federal courts); *Lockhart v. Fretwell*, 506 U.S. 364, 375–76 (1993) (Thomas, J., concurring) (explaining that "neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation").

The bottom line is that both before and after the district court held ICWA unconstitutional, the Texas judge in the Y.R.J. adoption case (or any other) could come out either way on an equal protection claim. Indeed, the state court judge has already ruled on some of the constitutional claims presented here. *See In re Y.J.*, 2019 WL 6904728, at *1 (Tex. App.—Fort Worth, Dec. 19, 2019) (noting family court's holding that ICWA violated the anticommandeering doctrine). A petition challenging that ruling is pending with the Supreme Court of Texas. *See In re Y.J.*, Tex. S. Ct. No. 20-0081 (petition available at 2020 WL 750104). Some of the issues the petition asks the state high court to resolve

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argument ignores the principle explained above that redressability must come from the judgment itself as opposed to the precedential force an opinion may have.

And there is another problem with this argument, one again recognized by Justice Scalia. Standing is determined at the outset of a lawsuit, and no one then knows whether the case will be one of the rare ones that makes it to the Supreme Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992) (explaining that "standing is to be determined as of the commencement of suit" and "at that point it could certainly not be known that the suit would reach this Court"). If standing depended on whether the Supreme Court granted cert, then a cert denial would wipe away the years of litigation in the lower federal courts.

will sound familiar: whether ICWA was "lawfully enacted by Congress" and whether it "discriminate[s] on the basis of race." *Id.* at 9, 13. What we think about those same issues will have no binding effect on the state courts that get to resolve the adoption, whether that be the state supreme court or the family court judge. That irrefutable point means our ruling on the lawfulness of ICWA preferences cannot redress the plaintiffs' injury.

One might wonder if the advisory nature of this case doesn't always characterize declaratory judgments. After all, "ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect." *Fidelity Nat'l Bank & Tr. Co. v. Swope*, 274 U.S. 123, 132 (1927). To be sure, there is an advisory flavor to all declaratory actions: they resolve rights in a future suit that has not yet fully materialized. Concerns that declaratory judgments were advisory led the Supreme Court to refuse to hear some claims for declaratory relief before the enactment of the Declaratory Judgment Act of 1934. *Willing v. Chi. Auditorium Ass'n*, 277 U.S. 274, 286–89 (1928) (Brandeis, J.) (explaining that deciding whether a lessee would have violated a lease by demolishing a building before the demolition occurred would be a "declaratory judgment[, which] relief is beyond the power conferred upon the federal judiciary"); *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 76 (1927) (holding there was no jurisdiction over claim under Kentucky's declaratory-judgment law). *But see Nashville, Cent. & St. Louis Ry. v. Wallace*, 288 U.S. 249, 258, 264–65 (1933) (holding that federal courts had jurisdiction over claim brought under state declaratory-judgment law).

What saves proper declaratory judgments from a redressability problem—but is lacking here—is that they have preclusive effect on a traditional lawsuit that is imminent.[6] *See* 10B WRIGHT ET AL., *supra*, § 2771 ("A declaratory judgment is binding on the parties before the court and is claim preclusive in subsequent proceedings as to the matters declared . . . ."); *accord* RESTATEMENT (SECOND) OF JUDGMENTS § 33. Take an insurance coverage dispute, which was the nature of the case upholding the federal Declaratory Judgment Act and remains the prototypical declaratory action today. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937). A federal court's declaration, in a case between the insurer and insured, of whether there is coverage will bind those parties in a subsequent lawsuit seeking to recover on the policy. *See id.* at 239, 243–44. That "definitive determination of the legal rights of the parties" is what allows declaratory judgments in federal court. *Id.* at 241. To be justiciable, a declaratory judgment must seek "specific relief through a decree of a conclusive character." *Id.; accord MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). In contrast, our resolution of the equal protection question will conclude nothing.

A leading federal procedure treatise recognizes that preclusive effect is what separates a permissible

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[6] The more common standing problem for declaratory judgments is whether the second lawsuit "is of sufficient immediacy and reality." *See* 10B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2757 (4th ed. 2020). That is part of standing's injury requirement, which requires an "actual or imminent" harm. *Lujan*, 504 U.S. at 560 (1992) (quotations omitted). The redressability problem this request for declaratory relief poses is less common but no less fundamental.

declaratory judgment from an impermissible advisory opinion:

> The federal Declaratory Judgment Act provides that a declaratory judgment shall have the force and effect of a final judgment or decree. The very purpose of this remedy is to establish a binding adjudication that enables the parties to enjoy the benefits of reliance and repose secured by res judicata. Denial of any preclusive effect, indeed, would leave a procedure difficult to distinguish from the mere advisory opinions prohibited by Article III.

18A WRIGHT ET AL., *supra*, § 4446. This requirement explains why you will not find a declaratory judgment that lacks preclusive effect.

This case will be the first. There is no mutuality of parties, nor is the state court judge who will decide Y.R.J.'s case a party. The Brackeens have suggested that a ruling in this federal case would bind the Navajo Nation in state court. That is not true for multiple reasons. For starters, the Navajo Nation was not a party in the district court (it intervened on appeal), so standing on that basis would not have existed when the suit was filed or even when judgment was entered. *See Lujan*, 504 U.S. at 570 n.5 ("[S]tanding is to be determined as of the commencement of suit.").[7] Relatedly, it is doubtful that

[7] *Lujan* is right on point. The plaintiff sought to establish redressability by arguing that "by later participating in the suit" two federal agencies "created a redressability (and hence a jurisdiction) that did not exist at the outset." *Id.* at 569 n.4. That argument did not work because "[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the*

issue preclusion applies to a party that does not litigate in the trial court. Apart from these defects relating to the timing of Navajo Nation's entering this lawsuit, issue preclusion does not usually apply to pure questions of law like whether ICWA's preferences violate the Fifth Amendment. *John G. & Marie Stella Kenedy Mem. Found. v. Dewhurst*, 90 S.W.3d 268, 288 (Tex. 2002) (explaining that "[d]eterminations of law are not generally given preclusive effect" in refusing to give effect to federal court ruling interpreting old land grant under Mexican civil law); *see also In re Westmoreland Coal Co.*, 968 F.3d 526, 532 (5th Cir. 2020); RESTATEMENT (SECOND) OF JUDGMENTS § 29(7) (1982); 18 WRIGHT ET AL., *supra*, § 4425, at 697-701 (all recognizing same principle). This ordinary reluctance to give preclusive effect to questions of law becomes even stronger when, as here, the two cases are in different forums and neither jurisdiction's highest court has resolved the issue. RESTATEMENT (SECOND) OF JUDGMENTS § 29(7) cmt. i.

JUDGE DUNCAN'S Opinion states the plaintiffs need only show that the "practical consequences" of a ruling by this court would "significantly increase the likelihood of relief." Duncan Op. at 20. Note the opinion does not say—and can't say because no case does—that redressability can be met when the "practical consequence" is convincing a state court judge to follow our lead. That distinction is critical. As I have recounted, state courts have no obligation to follow a lower federal

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complaint is filed." *Id.* (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989)). Any claim of postfiling redressability is even weaker here because Navajo Nation did not intervene until the appeal.

court's ruling on federal law. In contrast, the executive branch officials sued in cases like *Franklin* would be bound in later litigation by the federal court's declaratory judgment. 505 U.S. at 803 (recognizing that the Commerce Secretary's role in "litigating [the] accuracy" of the census meant that declaratory relief against her would redress plaintiff's injuries). The *Franklin* redressability dispute was about whether the Cabinet member being sued had sufficient influence over the challenged policy even though the President had the ultimate say (as is always the case). On that question, a substantial likelihood that the Commerce Secretary could influence the census conducted by the department she headed established redressability. 505 U.S. at 803 (recognizing that it was the Commerce Secretary's "policy determination concerning the census" that was being challenged); *see also supra* note 4. *Franklin's* unremarkable reasoning is why there is redressability for the APA claims—a declaratory judgment against the Interior Secretary would bind her when it comes to enforcing the department's challenged regulations.

But contrary to JUDGE DUNCAN'S Opinion, the Plaintiffs' standing to challenge regulations cannot bootstrap the claims challenging ICWA's *statutory* preferences into federal court. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press."). Even without a regulation requiring "clear and convincing" evidence to justify departing from the preferences, the statutory preferences remain and must be applied by state court judges unless they hold them unconstitutional. The benefit the individual Plaintiffs would receive from a

declaration that the "clear and convincing evidence" regulation is invalid establishes redressability for the APA claim challenging that regulation; it does not show how a declaration that the underlying statutory preferences are unconstitutional would redress plaintiffs' injuries. *But see* Duncan Op. at 21–22.

JUDGE DUNCAN'S second stab at redressability also improperly cross-pollinates standing among different claims. Redressability arising from a declaration that any obligations the placement preferences impose on child welfare officials violate anti-commandeering principles at most establishes standing for that "particular claim[]," *Allen v. Wright*, 468 U.S. 737, 752 (1984), not the equal protection claim that seeks to declare unlawful the preferences as they apply in state court proceedings. *But see* Duncan Op. at 21–22. And the statutory preferences remain on the books regardless of federal funding based on ICWA compliance.[8] *But see id.* at 21.

The final redressability theory in JUDGE DUNCAN'S Opinion is that the "requested relief would make the adoptions less vulnerable to being overturned" because it "would declare unenforceable the collateral attack provisions themselves and the underlying grounds for invalidity." Duncan Op. at 21 (citing 25 U.S.C. §§ 1911-1914). This again mixes and matches claims against different provisions instead of requiring the plaintiffs to "demonstrate standing separately" for each claim.

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[8] CHIEF JUDGE OWEN also correctly notes that the funding issue "was not raised or briefed in the district court or this court." Owen Op. at 5. Nor is it clear how the individual plaintiffs, as opposed to the States which cannot assert a Fifth Amendment claim, are injured by the funding issue.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 185 (2000). More fundamentally, it brings us back to where I started: no state court judge has to follow what we say about ICWA. Consequently, even if standing to challenge the collateral review provisions somehow transfers to support standing for challenging the separate provisions establishing the preferences in the first place, no state court has to follow a "ruling" we make about the collateral review provisions. To a state court judge, our "ruling" is nothing more than pontifications about the law. Perhaps our view persuades the state court, perhaps not.

So both of the opinions that find standing for the equal protection claim end up basing that view, at least in part, on the possibility that a Texas judge might decide to follow our view of the law. Think about the consequences of this unprecedented view of standing. A plaintiff need only find a state court judge who says she would defer to a federal court ruling on the difficult constitutional issue she is facing. Presto! A plaintiff could manufacture standing for a federal lawsuit even when a declaratory judgment would not have preclusive effect on any parties to the federal suit. Talk about upsetting the state/federal balance.

This license to allow outsourcing of traditional state court matters to federal court brings me back to the opening point. To supposedly vindicate federalism, we offend it by deciding questions that state court judges are equipped to decide and have for decades—with the Supreme Court having a chance to review those rulings. *See, e.g., Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (case arising in South Carolina courts); *cf. Moore v. Sims*, 442 U.S. 415, 418, 434–35 (1979) (holding that

Younger abstention applies to family law cases). That we disregard the limits of federal jurisdiction to reach out and decide issues that are raised directly in adoption cases makes our lack of faith in our state court colleagues even more troubling. Why aren't they capable of deciding these issues that are squarely before them? Any historical and institutional concerns about state courts' willingness to vindicate federal constitutional rights are lessened when a federal statute is being challenged. If anything, state court judges would be more receptive to concerns, like the allegations plaintiffs raise here, that a federal law is interfering with constitutional protections for States and individuals.

If the case-or-controversy requirement means anything, it prevents a federal court from opining on a constitutional issue on the mere hope that some judge somewhere may someday listen to what we say. No limitation on Article III is more fundamental than our inability to issue such an advisory opinion.

II.

A.

That brings us to the most tragic irony of today's opinions. After more than two centuries of courts' recognizing sweeping federal power over Indian affairs when that power was often used to destroy tribal life, our court comes within a whisker of rejecting that power when it is being used to sustain tribal life. It would be news to Native Americans that federal authority to wage war against Indian nations, to ratify treaties laying claim to more than a billion acres of Indian land, to remove Indian communities to reservations, and to establish schools aimed at "civilizing" Indian pupils does not reach the Indian family. *See United States v. Lara*, 541 U.S.

193, 201–04 (2004); 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.01–03. Contrary to what a near-majority of our court concludes, the same power Congress once relied on to tear Indian children from Indian homes authorizes Congress to enlist state courts in the project of returning them.

Two centuries of federal domination over Indian affairs are enough to sustain ICWA's provisions regulating state domestic relations proceedings. Congress has "plenary and exclusive" authority "to legislate in respect to Indian tribes." *Lara*, 541 U.S. at 200. This "broad power," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), is found in Article I, which authorizes Congress to "regulate commerce…with the Indian tribes." U.S. CONST. art. I, § 8. The Indian Commerce Clause "accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996).

JUDGE DENNIS well articulates how federal supremacy in the field of Indian affairs grew out of the Founding generation's understanding of the relationship between the new nation and tribes. From the outset, the Continental Congress dealt with Indian tribes just as it did foreign nations, wielding an indivisible bundle of powers that encompassed war, diplomacy, and trade. En Banc Brief for Professor Gregory Ablavsky in Support of Defendants-Appellants and Reversal at 5–6. But under the Articles of Confederation, some states claimed much of the same authority, leaving the state and federal governments jostling for control over Indian relations. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1021–22 (2015) (discussing

ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4). The Constitution solved this predicament by making federal authority over Indian commerce, treatymaking, and territorial administration exclusive. *Id.* The national government soon claimed, with the apparent assent of state leaders, undivided power over Indian affairs. *Id.* at 1041–44. Dennis Op. at 7–13.

The Framers grounded federal power over Indian affairs in both the explicit constitutional text and in implicit preconstitutional understandings of sovereignty.[9] Brief of Indian Law Scholars as Amici Curiae in Support of Defendants-Appellants at 1. They viewed relations between the United States and Indian tribes as governed by the law of nations. Ablavsky, *supra*, at 1059–67. Many early treaties embraced the idea that the United States, as the more powerful sovereign, owed a duty of protection to tribes. Brief of Indian Law Scholars, at 1–2 (collecting examples). And the Supreme Court emphasized that this responsibility for Indian welfare imbued the federal government with immense power at the expense of the states. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 560–61 (1832); *United*

[9] Just as the Supreme Court has stressed that background principles of state sovereign immunity inform interpretation of the Eleventh Amendment, *Seminole Tribe*, 517 U.S. at 72, the Court has recognized the relevance of the historical context from which the plenary federal Indian power emerged. *See Lara*, 541 U.S. at 201 (tracing federal authority over Indian affairs to "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government"); *Morton v. Mancari*, 417 U.S. 535, 551–53 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").

States v. Kagama, 118 U.S. 375, 384 (1886); *United States v. Rickert*, 188 U.S. 432, 437–38 (1903).

How far does this power extend? The Supreme Court has upheld federal authority to enact special criminal laws, in the name of "continued guardianship," affecting U.S. citizens who are Indian tribe members. *United States v. Nice*, 241 U.S. 591, 595–99 (1916) (construing the General Allotment Act of 1887). Congress may violate treaty obligations in its disposal of tribal property, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564, 567–68 (1903) (validating congressional allotment in conflict with treaty between the United States and Kiowa and Comanche Tribes); unilaterally determine tribal membership for the purposes of administering tribal assets, *Del. Tribal Bus. Cmte. v. Weeks*, 430 U.S. 73, 84–86 (1977) (upholding statute appropriating award made by Indian Claims Commission); exercise eminent domain over tribal lands, *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656–67 (1890) (upholding legislation granting railroad right of way through Indian land); and single out Indian applicants for preferred hiring in federal jobs, *Mancari*, 417 U.S. at 551–55 (sustaining constitutionality of Indian Reorganization Act of 1934).[10]

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[10] The Supreme Court has recognized the extraordinary breadth of federal power in another area where Congress wields plenary authority: immigration. *See* Michael Doran, T*he Equal-Protection Challenge to Federal Indian Law*, 6 U. PA. J. L. & PUB. AFF. 1, 34–42 (2020). The foundational cases recognizing plenary federal authority over immigration and Indian affairs were decided just three years apart and rely on similar reasoning. *Compare Chae Chan Ping v. United States*, 130 U.S. 581 (1889), *with Kagama*, 118 U.S. at 375 (1886); *see also* Doran, *supra*, at 34–36 (noting similarities in the reasoning of the cases).

Where do the states stand in relation to the "plenary and exclusive" federal power over Indian affairs? They are "divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe*, 517 U.S. at 62. The states, in ratifying the Constitution, ceded to Congress "the exclusive right to regulate . . . intercourse with the Indians," *Worcester*, 31 U.S. at 590, as clearly as the states gave Congress sole power to "coin money, establish post offices, and declare war," *id.* at 580–81. Even when federal policy favoring state control over Indian affairs reached its height, Congress withheld from the states "general civil regulatory powers . . . over reservation Indians." *Bryan v. Itasca Cty.*, 426 U.S. 373, 390 (1976) (interpreting Pub. L. 280); COHEN'S § 1.06 & n.32.

Some examples illustrate the limits of state authority to regulate Indian affairs even in core areas of state power like criminal law and taxation. Without Congress's blessing, states cannot exercise criminal jurisdiction over Indian country. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439

There is also symmetry in the scope of federal power over these two subjects. Just as limited rational-basis review governs classifications involving tribes, the immigration power allows the federal government to discriminate among noncitizens in a way that states may not. *Compare Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (Congress may withhold Medicare eligibility from certain noncitizens), *with Graham v. Richardson*, 403 U.S. 365, 376 (1971) (states may not constitutionally deny welfare benefits to certain noncitizens); *see also* Doran, *supra*, at 36–39 & n.193 (drawing this comparison). And because "the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government," "[a]ny concurrent state power that may exist is restricted to the narrowest of limits." *Hines v. Davidowitz*, 312 U.S. 52, 66–68 (1941).

U.S. 463, 470–71 (1979) (discussing federal authorization of state jurisdiction under Pub. L. 280); *United States v. John*, 437 U.S. 634, 649–54 (1978) (holding state criminal jurisdiction precluded by Major Crimes Act of 1885); *Kagama*, 118 U.S. at 379–80. Congress can exempt Indians from state property taxes. *Bd. of Comm'rs of Creek Cty. v. Seber*, 318 U.S. 705, 715–18 (1943). Even when Congress has not legislated, exclusive federal authority in the domain of Indian affairs may preempt state regulation. *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165 (1973) (invalidating state tax on tribe member's income earned on reservation); *Bracker*, 448 U.S. at 150–52 (striking down state tax on commercial activities of non-Indians on Indian land).

JUDGE DUNCAN's Opinion proclaims ICWA a novel exercise of congressional power because it interferes with state domestic relations proceedings. But as JUDGE DENNIS recounts, the federal government has been a constant, often deleterious presence in the life of the Indian family from the beginning. And, as will be discussed, ICWA is hardly the only statute to impose federal standards on state courts.

Congress's interest in the destiny of Indian children is older than the Republic itself. The Continental Congress viewed Indian education as a wartime strategy, authorizing a grant to Dartmouth College with the hope that bringing Indian students to the school would deter any possible attack by British-allied tribes. Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 911 (2017). Following Independence, more than one hundred treaties provided for Indian education. Brief of Indian Law Scholars, at 4. But early

federal efforts to offer voluntary education programs morphed into a "coercive and destructive" system of boarding schools designed to assimilate Indian children. MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW § 3.6 (1st ed. 2017); Brief of Ablavsky, at 20. The federal government instituted its "civilization" policy by force, punishing Indian families that resisted turning over their children and hunting down the pupils who escaped. FLETCHER, FEDERAL INDIAN LAW § 3.6. At these schools, students were beaten for speaking their native languages. COHEN'S § 1.04; Dennis Op. at 21–24. While these practices have abated, federal involvement in Indian schooling has not. Under today's federal policy of Indian self-determination, Congress provides substantial funding for Indian education and continues to operate some schools with "tribal input and . . . tribal control." Fletcher & Singel, *supra*, at 964; *see also* Brief of Indian Law Scholars, at 4.

In the view of JUDGE DUNCAN's Opinion, this narrative sheds little light on whether Congress can set standards for state adoptions involving Indian children because no Supreme Court decision or "founding-era congressional practice" explicitly blesses federal intervention in state domestic relations proceedings. Duncan Op. at 2, 29. But adoption as we know it today did not exist at common law and did not become the subject of state legislation until the mid-nineteenth century. Stephen B. Presser, *The Historical Background of American Adoption Law*, 11 J. FAM. L. 443, 443 (1971). It would have been "anachronistic . . . and bizarre," in the words of one amicus, for the founding-era Congress to attempt legislative interference with state proceedings that would not exist for another eight decades. Brief of

Ablavsky, at 16; *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 489–90 (noting that the history of the Fourteenth Amendment was "inconclusive" on the issue of school segregation because "[i]n the South, the movement toward free common schools, supported by general taxation, had not yet taken hold" at the time of enactment). Given that "at least during the first century of America's national existence . . . Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law," it should come as no surprise that the focus of the broad federal power over Indian affairs has shifted over time. *Lara*, 541 U.S. at 200 (internal citation omitted).

Still, JUDGE DUNCAN's Opinion declares ICWA—as a "federal Indian law [that] governs states' own administrative and judicial proceedings" for domestic relations—to be highly "unusual," and finds no historical analogue for this (highly specific) category of legislation. Duncan Op. at 2, 34. But while family court proceedings typically are governed by state law, they are not a "no fly zone" for federal interests. *See* Brief of Casey Family Programs, at 24–26 (discussing federal laws that apply in domestic relations cases). Take the Servicemember's Civil Relief Act. 50 U.S.C. §§ 3901–4043. The law sets rules governing child custody proceedings in state courts by, among other things, limiting the court's consideration of a servicemember's deployment when determining custody. *See id.* §§ 3931, 3938. In asserting a federal interest in family court proceedings, the Servicemember's Civil Relief Act is not unique. To further the federal government's treatymaking and foreign relations powers, the International Child Abduction Remedies Act charges state courts with

administering the Hague Convention on the Civil Aspects of International Child Abduction to ensure "prompt return" of abducted children. *See* 28 U.S.C. §§ 9001–03. And JUDGE HIGGINSON cites several examples of federal laws that preempt state domestic relations law. Higginson Op. at 2-3 (citing cases involving ERISA, the Railroad Retirement Act, the National Service Life Insurance Act, and Homestead Act). If these statutes permissibly "govern[] states' own administrative and judicial proceedings," Duncan Op. at 2, why would Congress lack authority to do the same through its "plenary and exclusive" power over Indian affairs?

When Congress enacted ICWA, it declared the removal of Indian children from their homes by state officials "the most tragic and destructive aspect of American Indian life today." *See* H.R. Rep. No. 95-1386, at 9 (1978). Family-separation policies had "contributed to a number of problems, including the erosion of generations of Indians from Tribal communities, loss of Indian traditions and culture, and long-term emotional effects on Indian children caused by the loss of their Indian identity." Indian Child Welfare Act Proceedings, Final Rule, 81 Fed. Reg. 38,864, 38, 780 (June 14, 2016) (citing *Hearing Before the Subcommittee on Indian Affairs of the Senate Comm. on Interior & Insular Affairs on Problems that Am. Indian Families Face in Raising Their Children & How These Problems Are Affected by Fed. Action or Inaction*, 93 Cong., 2d Sess., at 1–2, 45–51 (1974)). Although ICWA can never heal these wounds, it sought to stanch their bleeding. As the culmination of extensive federal involvement in the education and welfare of Indian children, the law falls

well within the broad congressional power over Indian affairs.

B.

This leads to today's final irony. JUDGE DUNCAN's Opinion overrides the plenary federal power over Indian affairs, with its deep textual and historical roots, based on a principle that finds support in neither text nor history: the notion that the Constitution prohibits the federal government from granting preferences to tribe members. Rather than credit copious originalist evidence of the sweeping federal power over Indian affairs, JUDGE DUNCAN's Opinion adopts the atextual and ahistorical argument that the Fifth Amendment's implicit equal protection guarantee strips Congress of the power to enact tribal preferences. Duncan Op. at 71; *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1955) (recognizing that the Fourteenth Amendment's guarantee of "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness" than the Fifth Amendment's Due Process Clause). That is nothing new. Originalism usually goes AWOL when the issue is whether the government may grant preferences to historically disadvantaged groups. *See, e.g.*, ERIC J. SEGALL, ORIGINALISM AS FAITH 127–30 (2018); CASS R. SUNSTEIN, RADICALS IN ROBES 131–42 (2005); Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 490–91 (2014); Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 76 (2013); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1202–03; Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–32 (1997); Eric Schnapper, *Affirmative Action and the Legislative*

History of the Fourteenth Amendment, 71 VA. L. REV. 753, 754 (1985).[11]

Ignoring the lack of historical support for a constitutional ban on federal preferences to historically-disadvantaged groups is especially flagrant in light of 200-plus years of jurisprudence recognizing vast federal power over Indian affairs. As that authority flows in part from the federal government's plenary power over foreign relations, there is nothing unusual or unconstitutional about exercising it to grant preferences. Preferring some nations over others—through alliances, aid, and treaties, among other things—is the essence of foreign policy. That's why a preference for tribe members "does not constitute racial discrimination." *Mancari*, 417 U.S. 553; *see* Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 627 (2019) ("ICWA's definition of 'Indian children,' which requires either tribal citizenship or that the child has a tribal citizen parent and is eligible for citizenship, rests squarely on the kind of 'political rather than racial' belonging of which *Mancari* approved."). When Congress "single[s] out [Indians] for special treatment," it draws upon its expansive authority to structure relations between the United States and another sovereign. *Mancari,* 417 U.S.

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[11] Although Professor Rappaport recognizes that some court decisions rejecting the constitutionality of affirmative action programs "engage[] in little discussion of the constitutional text and almost no discussion of the history of the Fourteenth Amendment," he tries to push back on the prevailing scholarly view that the original understanding allows *states* to pursue such policies. Rappaport, *supra*, at 76. But even he recognizes that the historical case is much different when it comes to claims that the federal government cannot adopt policies that prefer disadvantaged groups. *Id.* at 71 n.2, 73.

at 554–55 (describing Indians as "members of quasi-sovereign tribal entities"); *accord Fisher v. Dist. Court*, 424 U.S. 382, 390 (1976) (explaining that the jurisdiction of a tribal court "does not derive from [] race . . . but rather from the quasi-sovereign status of [tribes] under federal law"). These preferences further centuries-old interests animating the federal government's "special relationship" with tribes. *Mancari*, 417 U.S. at 541–42, 552.

C.

Why bother with these objections to the substantive aspects of today's opinions if, as I have explained, they will have all the binding effect of a law review article?[12] Because the procedural and substantive problems with this case are two peas in the same activist pod.

Judicial restraint is a double victim of today's tome. The court ignores standing requirements that enforce "the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). And a willingness, even eagerness, to strike down a 43-year-old federal law that continues to enjoy bipartisan support scorns the notion that "declar[ing] an Act of Congress unconstitutional . . . is the gravest and most delicate duty" that federal judges are "called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring).

[12] In addition to a federal court's inability to create precedent for state courts, the two equal protection challenges our court upholds will not even be precedential within our circuit because we are affirming the district court's ruling by an equally divided vote.

Whither the passive virtues? Alexander Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

Whither the "conviction that it is an awesome thing to strike down an act of the legislature approved by the Chief Executive"? ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 323 (Legal Classics ed. 2000).

Heaped, one must conclude, on the pile of broken promises that this country has made to its Native peoples.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-11479

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,

Plaintiffs - Appellees

v.

DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants - Appellants

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants - Appellants

Appeals from the United States District Court
for the Northern District of Texas

ON PETITIONS FOR REHEARING EN BANC

[Entered Nov. 7, 2019]

(Opinion August 9, 2019, Modified August 16, 2019, 5 Cir., 2019, 937 F.3d 409)

Before OWEN, Chief Judge, JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, DUNCAN, ENGELHARDT, and OLDHAM, Circuit Judges.[1]

BY THE COURT:

A member of the court having requested a poll on the petitions for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

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[1] Judge Ho is recused and did not participate in this decision.

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

MODIFIED August 16, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 9, 2019
Lyle W. Cayce
Clerk

No. 18-11479

CHAD EVERET BRACKEEN; JENNIFER KAY BRACKEEN; STATE OF TEXAS; ALTAGRACIA SOCORRO HERNANDEZ; STATE OF INDIANA; JASON CLIFFORD; FRANK NICHOLAS LIBRETTI; STATE OF LOUISIANA; HEATHER LYNN LIBRETTI; DANIELLE CLIFFORD,
Plaintiffs - Appellees

v.

DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR; TARA SWEENEY, in her official capacity as Acting Assistant Secretary for Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, In his official capacity as Secretary of the United States Department of Health and Human

Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants - Appellants

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,
Intervenor Defendants - Appellants

Appeals from the United States District Court for the Northern District of Texas

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Before WIENER, DENNIS, and OWEN, Circuit Judges.

JAMES L. DENNIS, Circuit Judge:

This case presents facial constitutional challenges to the Indian Child Welfare Act of 1978 (ICWA) and statutory and constitutional challenges to the 2016 administrative rule (the Final Rule) that was promulgated by the Department of the Interior to clarify provisions of ICWA. Plaintiffs are the states of Texas, Indiana, and Louisiana, and seven individuals seeking to adopt Indian children. Defendants are the United States of America, several federal agencies and officials in their official capacities, and five intervening Indian tribes. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction, but the district court denied the motion, concluding, as relevant to this appeal, that Plaintiffs had Article III standing. The district court then granted summary judgment in favor of Plaintiffs,

ruling that provisions of ICWA and the Final Rule violated equal protection, the Tenth Amendment, the nondelegation doctrine, and the Administrative Procedure Act. Defendants appealed. Although we AFFIRM the district court's ruling that Plaintiffs had standing, we REVERSE the district court's grant of summary judgment to Plaintiffs and RENDER judgment in favor of Defendants.

BACKGROUND

I. The Indian Child Welfare Act (ICWA)

Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 *et seq*., to address rising concerns over "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." *Miss. Band Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Recognizing that a "special relationship" exists between the United States and Indian tribes, Congress made the following findings:

Congress has plenary power over Indian affairs. 25 U.S.C. § 1901(1) (citing U.S. CONST. art. I, section 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.")).

"[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ." *Id.* at § 1901(3).

"[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them 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." *Id.* at § 1901(4).

"States exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* at § 1901(5).

In light of these findings, Congress declared that it was the policy of the United States "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 from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." *Id.* at § 1902.

ICWA applies in state court child custody proceedings involving an "Indian child," defined 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." *Id.* at § 1903(4). In proceedings for the foster care placement or termination of parental rights, ICWA provides "the Indian custodian of the child and the Indian child's tribe [] a right to intervene at any point in the proceeding." *Id.* at § 1911(c). Where such proceedings are involuntary, ICWA requires that the parent, the Indian custodian, the child's tribe, or the Secretary of the United States Department

of the Interior (Secretary or Secretary of the Interior) be notified of pending proceedings and of their right to intervene. *Id.* at § 1912. In voluntary proceedings for the termination of parental rights or adoptive placement of an Indian child, the parent can withdraw consent for any reason prior to entry of a final decree of adoption or termination, and the child must be returned to the parent. *Id.* at § 1913(c). If consent was obtained through fraud or duress, a parent may petition to withdraw consent within two years after the final decree of adoption and, upon a showing of fraud or duress, the court must vacate the decree and return the child to the parent. *Id.* at § 1913(d). An Indian child, a parent or Indian custodian from whose custody the child was removed, or the child's tribe may file a petition in any court of competent jurisdiction to invalidate an action in state court for foster care placement or termination of parental rights if the action violated any provision of ICWA §§ 1911–13. *Id.* at § 1914.

ICWA further sets forth placement preferences for foster care, preadoptive, and adoptive proceedings involving Indian children. Section 1915 requires that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *Id.* at § 1915(a). Similar requirements are set for foster care or preadoptive placements. *Id.* at § 1915(b). If a tribe establishes by resolution a different order of preferences, the state court or agency effecting the placement "shall follow [the tribe's] order so long as

the placement is the least restrictive setting appropriate to the particular needs of the child." *Id.* at § 1915(c).

The state in which an Indian child's placement was made shall maintain records of the placement, which shall be made available at any time upon request by the Secretary or the child's tribe. *Id.* at § 1915(e). A state court entering a final decree in an adoptive placement "shall provide the Secretary with a copy of the decree or order" and information as necessary regarding "(1) the name and tribal affiliation of the child; (2) the names and addresses of the biological parents; (3) the names and addresses of the adoptive parents; and (4) the identity of any agency having files or information relating to such adoptive placement." *Id.* at § 1951(a). ICWA's severability clause provides that "[i]f any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby." *Id.* at § 1963.

II. The Final Rule

ICWA provides that "the Secretary [of the Interior] shall promulgate such rules and regulations as may be necessary to carry out [its] provisions." 25 U.S.C. § 1952. In 1979, the Bureau of Indian Affairs (BIA) promulgated guidelines (the "1979 Guidelines") intended to assist state courts in implementing ICWA but without "binding legislative effect." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979). The 1979 Guidelines left the "primary responsibility" of interpreting certain language in ICWA "with the [state] courts that decide Indian child custody cases." *Id.* However, in June 2016, the BIA promulgated the Final Rule to "clarify the minimum Federal

standards governing implementation of [ICWA]" and to ensure that it "is applied in all States consistent with the Act's express language, Congress's intent in enacting the statute, and to promote the stability and security of Indian tribes and families." 25 C.F.R. § 23.101; Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,868 (June 14, 2016). The Final Rule explained that while the BIA "initially hoped that binding regulations would not be necessary to carry out [ICWA], a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law." 81 Fed. Reg. at 38,782.

The Final Rule provides that states have the responsibility of determining whether a child is an "Indian child" subject to ICWA's requirements. 25 C.F.R. §§ 23.107–22; 81 Fed. Reg. at 38,778, 38,869–73. The Final Rule also sets forth notice and recordkeeping requirements for states, *see* 25 U.S.C. §§ 23.140–41; 81 Fed. Reg. at 38,778, 38,875–76, and requirements for states and individuals regarding voluntary proceedings and parental withdrawal of consent, *see* 25 C.F.R. §§ 23.124–28; 81 Fed. Reg. at 38,778, 38,873–74. The Final Rule also restates ICWA's placement preferences and clarifies when they apply and when states may depart from them. *See* 25 C.F.R. §§ 23.129–32; 81 Fed. Reg. at 38,778, 38,874–75.

III. The Instant Action

A. Parties

1. Plaintiffs

Plaintiffs in this action are the states of Texas, Louisiana, and Indiana,[1] (collectively, the "State Plaintiffs"), and seven individual Plaintiffs—Chad and Jennifer Brackeen (the "Brackeens"), Nick and Heather Libretti (the "Librettis"), Altagracia Socorro Hernandez ("Hernandez"), and Jason and Danielle Clifford (the "Cliffords") (collectively, "Individual Plaintiffs") (together with State Plaintiffs, "Plaintiffs").

a. The Brackeens & A.L.M.

At the time their initial complaint was filed in the district court, the Brackeens sought to adopt A.L.M., who falls within ICWA's definition of an "Indian Child." His biological mother is an enrolled member of the Navajo Nation and his biological father is an enrolled member of the Cherokee Nation. When A.L.M. was ten months old, Texas's Child Protective Services ("CPS") removed him from his paternal grandmother's custody and placed him in foster care with the Brackeens. Both the Navajo Nation and the Cherokee Nation were notified pursuant to ICWA and the Final Rule. A.L.M. lived with the Brackeens for more than sixteen months

[1] There are three federally recognized tribes in Texas: the Yselta del Sur Pueblo, the Kickapoo Tribe, and the Alabama-Coushatta Tribe. There are four federally recognized tribes in Louisiana: the Chitimacha Tribe, the Coushatta Tribe, the Tunica-Biloxi Tribe, and the Jena Band of Choctaw Indians. There is one federally recognized tribe in Indiana: the Pokagon Band of Potawatomi Indians.

before they sought to adopt him with the support of his biological parents and paternal grandmother. In May 2017, a Texas court, in voluntary proceedings, terminated the parental rights of A.L.M.'s biological parents, making him eligible for adoption under Texas law. Shortly thereafter, the Navajo Nation notified the state court that it had located a potential alternative placement for A.L.M. with non-relatives in New Mexico, though this placement ultimately failed to materialize. In July 2017, the Brackeens filed an original petition for adoption, and the Cherokee Nation and Navajo Nation were notified in compliance with ICWA. The Navajo Nation and the Cherokee Nation reached an agreement whereby the Navajo Nation was designated as A.L.M.'s tribe for purposes of ICWA's application in the state proceedings. No one intervened in the Texas adoption proceeding or otherwise formally sought to adopt A.L.M. The Brackeens entered into a settlement with the Texas state agency and A.L.M.'s guardian ad litem specifying that, because no one else sought to adopt A.L.M., ICWA's placement preferences did not apply. In January 2018, the Brackeens successfully petitioned to adopt A.L.M. The Brackeens initially alleged in their complaint that they would like to continue to provide foster care for and possibly adopt additional children in need, but their experience adopting A.L.M. made them reluctant to provide foster care for other Indian children in the future. Since their complaint was filed, the Brackeens have sought to adopt A.L.M.'s sister, Y.R.J. in Texas state court. Y.R.J., like her brother, is an Indian Child for purposes of ICWA. The Navajo Nation contests the adoption. On February 2, 2019, the Texas court

granted the Brackeens' motion to declare ICWA inapplicable as a violation of the Texas constitution, but "conscientiously refrain[ed]" from ruling on the Brackeens' claims under the United States Constitution pending our resolution of the instant appeal.

b. The Librettis & Baby O.

The Librettis live in Nevada and sought to adopt Baby O. when she was born in March 2016. Baby O.'s biological mother, Hernandez, wished to place Baby O. for adoption at her birth, though Hernandez has continued to be a part of Baby O.'s life and she and the Librettis visit each other regularly. Baby O.'s biological father, E.R.G., descends from members of the Ysleta del sur Pueblo Tribe (the "Pueblo Tribe"), located in El Paso, Texas, and was a registered member at the time Baby O. was born. The Pueblo Tribe intervened in the Nevada custody proceedings seeking to remove Baby O. from the Librettis. Once the Librettis joined the challenge to the constitutionality of the ICWA and the Final Rule, the Pueblo Tribe indicated that it was willing settle. The Librettis agreed to a settlement with the tribe that would permit them to petition for adoption of Baby O. The Pueblo Tribe agreed not to contest the Librettis' adoption of Baby O., and on December 19, 2018, the Nevada state court issued a decree of adoption, declaring that the Librettis were Baby O.'s lawful parents. Like the Brackeens, the Librettis alleged that they intend to provide foster care for and possibly adopt additional children in need but are reluctant to foster Indian children after this experience.

c. The Cliffords & Child P.

The Cliffords live in Minnesota and seek to adopt Child P., whose maternal grandmother is a registered member of the White Earth Band of Ojibwe Tribe (the "White Earth Band"). Child P. is a member of the White Earth Band for purposes of ICWA's application in the Minnesota state court proceedings. Pursuant to ICWA section 1915's placement preferences, county officials removed Child P. from the Cliffords' custody and, in January 2018, placed her in the care of her maternal grandmother, whose foster license had been revoked. Child P.'s guardian ad litem supports the Cliffords' efforts to adopt her and agrees that the adoption is in Child P.'s best interest. The Cliffords and Child P. remain separated, and the Cliffords face heightened legal barriers to adopting her. On January 17, 2019, the Minnesota court denied the Cliffords' motion for adoptive placement.

2. Defendants

Defendants are the United States of America; the United States Department of the Interior and its Secretary Ryan Zinke, in his official capacity; the BIA and its Director Bryan Rice, in his official capacity; the BIA Principal Assistant Secretary for Indian Affairs John Tahsuda III, in his official capacity; and the Department of Health and Human Services ("HHS") and its Secretary Alex M. Azar II, in his official capacity (collectively the "Federal Defendants"). Shortly after this case was filed in the district court, the Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians (collectively, the "Tribal Defendants") moved to intervene, and the

district court granted the motion. On appeal, we granted the Navajo Nation's motion to intervene as a defendant[2] (together with Federal and Tribal Defendants, "Defendants").

B. Procedural History

Plaintiffs filed the instant action against the Federal Defendants in October 2017, alleging that the Final Rule and certain provisions of ICWA are unconstitutional and seeking injunctive and declaratory relief. Plaintiffs argued that ICWA and the Final Rule violated equal protection and substantive due process under the Fifth Amendment and the anticommandeering doctrine that arises from the Tenth Amendment. Plaintiffs additionally sought a declaration that provisions of ICWA and the Final Rule violated the nondelegation doctrine and the Administrative Procedure Act (APA). Defendants moved to dismiss, alleging that Plaintiffs lacked standing. The district court denied the motion. All parties filed cross-motions for summary judgment. The district court granted Plaintiffs' motion for summary judgment in part, concluding that ICWA and the Final Rule violated equal protection, the Tenth Amendment, and the nondelegation doctrine, and that the challenged

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[2] The Navajo Nation had previously moved to intervene twice in the district court. The first motion was for the limited purpose of seeking dismissal pursuant to Rule 19, which the district court denied. The Navajo Nation filed a second motion to intervene for purposes of appeal after the district court's summary judgment order. The district court deferred decision on the motion pending further action by this court, at which time the Navajo Nation filed the motion directly with this court.

portions of the Final Rule were invalid under the APA.[3] Defendants appealed. A panel of this court subsequently stayed the district court's judgment pending further order of this court. In total, fourteen amicus briefs were filed in this court, including a brief in support of Plaintiffs and affirmance filed by the state of Ohio; and a brief in support of Defendants and reversal filed by the states of California, Alaska, Arizona, Colorado, Idaho, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Virginia, Washington, and Wisconsin.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *See Texas v. United States*, 497 F.3d 491, 495 (5th Cir. 2007). Summary judgment is appropriate when the movant has demonstrated "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

DISCUSSION

I. Article III Standing

Defendants first contend that Plaintiffs lack standing to challenge ICWA and the Final Rule. The district court

[3] The district court denied Plaintiffs' substantive Due Process claim, from which Plaintiffs do not appeal.

denied Defendants' motion to dismiss on this basis, concluding that Individual Plaintiffs had standing to bring an equal protection claim; State Plaintiffs had standing to challenge provisions of ICWA and the Final Rule on the grounds that they violated the Tenth Amendment and the nondelegation doctrine; and all Plaintiffs had standing to bring an APA claim challenging the validity of the Final Rule.

Article III limits the power of federal courts to "Cases" and "Controversies." *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing U.S. CONST. art. III, § 2). "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Id.* To meet the Article III standing requirement, plaintiffs must demonstrate "(1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct and that is (3) likely to be redressed by the requested relief." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 590 (1992) (internal quotations omitted). A plaintiff seeking equitable relief must demonstrate a likelihood of future injury in addition to past harm. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). This injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *See Lujan*, 504 U.S. at 560 (cleaned up). "[S]tanding is not dispensed in gross," and "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."

Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 53 n.2 (2006). "This court reviews questions of standing *de novo*." *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 343 (5th Cir. 2013).

A. Standing to Bring Equal Protection Claim

Plaintiffs challenged ICWA sections 1915(a)–(b), 1913(d), and 1914 and Final Rule sections 23.129–32 on equal protection grounds, alleging that these provisions impose regulatory burdens on non-Indian families seeking to adopt Indian children that are not similarly imposed on Indian families who seek to adopt Indian children. The district court concluded that Individual Plaintiffs suffered and continued to suffer injuries when their efforts to adopt Indian children were burdened by ICWA and the Final Rule; that their injuries were fairly traceable to ICWA and the Final Rule because these authorities mandated state compliance; and that these injuries were redressable because if ICWA and the Final Rule were invalidated, then state courts would no longer be required to follow them. Defendants disagree, arguing that the Individual Plaintiffs cannot demonstrate an injury in fact or redressability and thus lack standing to bring an equal protection claim. For the reasons below, we conclude that the Brackeens have standing to assert an equal protection claim as to ICWA sections 1915(a)–(b) and Final Rule sections 23.129–32, but as discussed below, not as to ICWA sections 1913–14. Accordingly, because one Plaintiff has standing, the "case-or-controversy requirement" is satisfied as to this claim, and we do not analyze whether any other

Individual Plaintiff has standing to raise it.[4] *See Rumsfeld*, 547 U.S. at 53 n.2.

The district court concluded that ICWA section 1913(d), which allows a parent to petition the court to vacate a final decree of adoption on the grounds that consent was obtained through fraud or duress, left the Brackeens' adoption of A.L.M. vulnerable to collateral attack for two years. Defendants argue that section 1914,[5] and not section 1913(d), applies to the Brackeens' state court proceedings and that, in any event, an injury premised on potential future collateral attack under either provision is too speculative. We need not decide which provision applies here, as neither the Brackeens nor any of the Individual Plaintiffs havesuffered an injury under either provision. Plaintiffs do not assert that A.L.M.'s biological parents, the Navajo Nation, or any other party seeks to invalidate the Brackeens' adoption of A.L.M. under either provision. Plaintiffs' proffered injury under section 1913 or section 1914 is therefore too speculative to support standing. *See Lujan*,

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[4] State Plaintiffs argue that they have standing to bring an equal protection challenge in *parens patriae* on behalf of their citizens. We disagree. *See South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("[A] State [does not] have standing as the parent of its citizens to invoke [the Fifth Amendment Due Process Clause] against the Federal Government, the ultimate parens patriae of every American citizen.").

[5] "Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, 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." 25 U.S.C. § 1914.

504 U.S. at 560; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("[T]hreatened injury must be *certainly impending* to constitute injury in fact, and [] [a]llegations of *possible* future injury are not sufficient." (cleaned up)). To the extent Plaintiffs argue that an injury arises from their attempts to avoid collateral attack under section 1914 by complying with sections 1911–13, "costs incurred to avoid injury are insufficient to create standing" where the injury is not certainly impending. *See Clapper*, 568 U.S. at 417.

The district court also concluded that ICWA section 1915, and sections 23.129–32 of the Final Rule, which clarify section 1915, gave rise to an injury from an increased regulatory burden. We agree. Prior to the finalization of the Brackeens' adoption of A.L.M., the Navajo Nation notified the state court that it had located a potential alternative placement for A.L.M. in New Mexico. Though that alternative placement ultimately failed to materialize, the regulatory burdens ICWA section 1915 and Final Rule sections 23.129–32 imposed on the Brackeens in A.L.M.'s adoption proceedings, which were ongoing at the time the complaint was filed, are sufficient to demonstrate injury. *See Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015) ("An increased regulatory burden typically satisfies the injury in fact requirement."); *see also Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007) (standing is assessed at the time the complaint was filed); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000) (discussing *Lyons*, 461 U.S. at 108, and finding the

injury requirement satisfied where the alleged harmful conduct was occurring when the complaint was filed).

Defendants contend that the Brackeens' challenge to section 1915 and sections 23.129–32 is moot. They argue that, because the Brackeens' adoption of A.L.M. was finalized in January 2018 and the Navajo Nation will not seek to challenge the adoption, section 1915's placement preferences no longer apply in A.L.M.'s adoption proceedings. Plaintiffs argue that section 1915's placement preferences impose on them the ongoing injury of increased regulatory burdens in their proceedings to adopt A.L.M.'s sister, Y.R.J., which the Navajo Nation currently opposes in Texas state court.

"A corollary to this case-or-controversy requirement is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013). "[A] case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969)(internal quotation marks omitted). However, mootness will not render a case non-justiciable where the dispute is one that is "capable of repetition, yet evading review." *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982). "That exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008) (internal citations and quotations omitted). Here, the Brackeens were unable to fully litigate a challenge to section 1915

before successfully adopting A.L.M. Additionally, they have demonstrated a reasonable expectation that they will be subject to section 1915's regulatory burdens in their adoption proceedings involving A.L.M.'s sister, Y.R.J. Thus, the Brackeens' challenge to section 1915 is justiciable on the grounds that it is capable of repetition, yet evading review. *See Hunt*, 455 U.S. at 482.

Having thus found an injury with respect to ICWA section 1915 and Final Rule sections 23.129–32, we consider whether causation and redressability are met here. *See Lujan*, 504 U.S. at 590. The Brackeens' alleged injury is fairly traceable to the actions of at least some of the Federal Defendants, who bear some responsibility for the regulatory burdens imposed by ICWA and the Final Rule. *See Contender Farms, L.L.P.*, 779 F.3d at 266 (noting that causation "flow[ed] naturally from" a regulatory injury). Additionally, the Brackeens have demonstrated a likelihood that their injury will be redressed by a favorable ruling of this court. In the Brackeens' ongoing proceedings to adopt Y.R.J., the Texas court has indicated that it will refrain from ruling on the Brackeens' federal constitutional claims pending a ruling from this court. Accordingly, Plaintiffs have standing to bring an equal protection claim challenging ICWA section 1915(a)–(b) and Final Rule sections 23.129–32. *See Lujan*, 504 U.S. at 590; *Rumsfeld*, 547 U.S. at 53 n.2.

B. Standing to Bring Administrative Procedure Act Claim

Plaintiffs first argue that ICWA does not authorize the Secretary of the Interior to promulgate binding rules and regulations, and the Final Rule is therefore invalid

under the APA. The district court ruled that State Plaintiffs had standing to bring this claim, determining that the Final Rule injured State Plaintiffs by intruding upon their interests as quasi-sovereigns to control the domestic affairs within their states.[6] A state may be entitled to "special solicitude" in our standing analysis if the state is vested by statute with a procedural right to file suit to protect an interest and the state has suffered an injury to its "quasi-sovereign interests." *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007) (holding that the Clean Air Act provided Massachusetts a procedural right to challenge the EPA's rulemaking, and Massachusetts suffered an injury in its capacity as a quasi-sovereign landowner due to rising sea levels associated with climate change). Applying *Massachusetts*, this court in *Texas v. United States* held that Texas had standing to challenge the Department of Homeland Security's implementation and expansion of the Deferred Action for Childhood Arrivals program (DACA) under the APA. *See* 809 F.3d 134, 152 (5th Cir. 2015). This court reasoned that Texas was entitled to special solicitude on the grounds that the APA created a procedural right to challenge the DHS's actions, and DHS's actions affected states' sovereign interest in creating and enforcing a legal code. *See id.* at 153 (internal quotations omitted).

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[6] The district court also found an injury based on the Social Security Act's conditioning of funding on states' compliance with ICWA. However, because we find that Plaintiffs have standing on other grounds, we decline to decide whether they have demonstrated standing based on an alleged injury caused by the SSA.

Likewise, here, the APA provides State Plaintiffs a procedural right to challenge the Final Rule. *See id.*; 5 U.S.C. § 702. Moreover, State Plaintiffs allege that the Final Rule affects their sovereign interest in controlling child custody proceedings in state courts. *See Texas*, 809 F.3d at 153 (recognizing that, pursuant to a sovereign interest in creating and enforcing a legal code, states may have standing based on, inter alia, federal preemption of state law). Thus, State Plaintiffs are entitled to special solicitude in our standing inquiry. With this in mind, we find that the elements of standing are satisfied. If, as State Plaintiffs alleged, the Secretary promulgated a rule binding on states without the authority to do so, then State Plaintiffs have suffered a concrete injury to their sovereign interest in controlling child custody proceedings that was caused by the Final Rule. Additionally, though state courts and agencies are not bound by this court's precedent, a favorable ruling from this court would remedy the alleged injury to states by making their compliance with ICWA and the Final Rule optional rather than compulsory. *See Massachusetts*, 549 U.S. at 521 (finding redressability where the requested relief would prompt the agency to "reduce th[e] risk" of harm to the state).

C. Standing to Bring Tenth Amendment Claim

For similar reasons, the district court found, and we agree, that State Plaintiffs have standing to challenge provisions of ICWA and the Final Rule under the Tenth Amendment. The imposition of regulatory burdens on State Plaintiffs is sufficient to demonstrate an injury to their sovereign interest in creating and enforcing a legal code to govern child custody proceedings in state courts.

See Texas, 809 F.3d at 153. Additionally, the causation and redressability requirements are satisfied here, as a favorable ruling from this court would likely redress State Plaintiffs' injury by lifting the mandatory burdens ICWA and the Final Rule impose on states. *See Lujan*, 504 U.S. at 590.

D. Standing to Bring Nondelegation Claim

Finally, Plaintiffs contend that ICWA section 1915(c), which allows a tribe to establish a different order of section 1915(a)'s placement preferences, is an impermissible delegation of legislative power that binds State Plaintiffs. Defendants argue that State Plaintiffs cannot demonstrate an injury, given the lack of evidence that a tribe's reordering of section 1915(a)'s placement preferences has affected any children in Texas, Indiana, or Louisiana or that such impact is "certainly impending." State Plaintiffs respond that tribes can change ICWA's placement preferences at any time and that at least one tribe, the Alabama-Coushatta Tribe of Texas, has already done so. We conclude that State Plaintiffs have demonstrated injury and causation with respect to this claim, as State Plaintiffs' injury from the Alabama-Coushatta Tribe's decision to depart from ICWA section 1915's placement preferences is concrete and particularized and not speculative. *See Lujan*, 504 U.S. at 560. Moreover, a favorable ruling from this court would redress State Plaintiffs' injury by making a state's compliance with a tribe's alternative order of preferences under ICWA section 1915(c) optional rather than mandatory. *See id.*

Accordingly, having found that State Plaintiffs have standing on the aforementioned claims, we proceed to

the merits of these claims. We note at the outset that ICWA is entitled to a "presumption of constitutionality," so long as Congress enacted the statute "based on one or more of its powers enumerated in the Constitution." *See United States v. Morrison*, 529 U.S. 598, 607 (2000). "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Id.* (citing, among others, *United States v. Harris*, 106 U.S. 629, 635 (1883)).

II. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. 14, § 1. This clause is implicitly incorporated into the Fifth Amendment's guarantee of due process. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). We apply the same analysis with respect to equal protection claims under the Fifth and Fourteenth Amendments. *See Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995). In evaluating an equal protection claim, strict scrutiny applies to laws that rely on classifications of persons based on race. *See id.* But where the classification is political, rational basis review applies. *See Morton v. Mancari*, 417 U.S. 535, 555 (1974). The district court granted summary judgment on behalf of Plaintiffs, concluding that section 1903(4)—setting forth ICWA's definition of "Indian Child" for purposes of determining when ICWA applies in state child custody proceedings—was a race-based classification that could

not withstand strict scrutiny.[7] On appeal, the parties disagree as to whether section 1903(4)'s definition of "Indian Child" is a political or race-based classification and which level of scrutiny applies. "We review the constitutionality of federal statutes de novo." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 192 (5th Cir. 2012).

A. Level of Scrutiny

We begin by determining whether ICWA's definition of "Indian child" is a race-based or political classification and, consequently, which level of scrutiny applies. The district court concluded that ICWA's "Indian Child" definition was a race-based classification. We conclude that this was error. Congress has exercised plenary power "over the tribal relations of the Indians . . . from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). The Supreme Court's decisions "leave no doubt that federal legislation with respect to

[7] As described above, we conclude that Plaintiffs have standing to challenge ICWA section 1915(a)–(b) and Final Rule sections 23.129–32 on equal protection grounds. The district court's analysis of whether the ICWA classification was political or race-based focused on ICWA section 1903(4), presumably because section 1903(4) provides a threshold definition of "Indian child" that must be met for any provision of ICWA to apply in child custody proceedings in state court. Because we are satisfied that our analysis would produce the same result with respect to section 1903(4) and the specific provisions Plaintiffs have standing to challenge, we similarly confine our discussion of whether ICWA presents a political or race-based classification to section 1903(4).

Indian tribes . . . is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645 (1977). "Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations." *Mancari*, 417 U.S. at 552. "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.*

In *Morton v. Mancari*, the Supreme Court rejected a challenge to a law affording to qualified Indian applicants—those having one-fourth or more degree Indian blood with membership in a federally recognized tribe[8]—a hiring preference over non-Indians within the BIA. *Id.* at 555. The Court recognized that central to the resolution of the issue was "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes." *Id.* at 551. It reasoned that the

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[8] The United States currently recognizes 573 Tribal entities. *See* 84 Fed. Reg. 1,200 (Feb. 1, 2019). Federal recognition "is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." *See California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3], at 138 (2005 ed.) (internal quotation marks omitted)). It "[i]s a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify." 25 C.F.R. § 83.2.

BIA's hiring preference was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. The preference was thus a non-racial "employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It [was] directed to participation by the governed in the governing agency." *Id.* at 553–54. The disadvantages to non-Indians resulting from the hiring preferences were an intentional and "desirable feature of the entire program for self-government."[9] *Id.* at 544.

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[9] Plaintiffs argue that, unlike the law in *Mancari*, ICWA is not a law promoting tribal self-governance. However, prior to enacting ICWA, Congress considered testimony from the Tribal Chief of the Mississippi Band of Choctaw Indians about the devastating impacts of removing Indian children from tribes and placing them for adoption and foster care in non-Indian homes:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

Holyfield, 490 U.S. at 34. This testimony undoubtedly informed Congress's finding that children are the most vital resource "to the continued existence and integrity of Indian tribes." 25 U.S.C. § 1901(3). Thus, interpreting ICWA as related to tribal self-government and the survival of tribes makes the most sense in light of Congress's explicit intent in enacting the statute. *See id.*

The district court construed *Mancari* narrowly and distinguished it for two primary reasons: First, the district court found that the law in *Mancari* provided special treatment "only to Indians living on or near reservations." Second, the district court concluded that ICWA's membership eligibility standard for an Indian child does not rely on actual tribal membership as did the statute in *Mancari*. The district court reasoned that, whereas the law in *Mancari* "applied 'only to *members* of 'federally recognized' tribes which operated to exclude many individuals who are racially to be classified as Indians,'" ICWA's definition of "Indian child" extended protection to children who were *eligible* for membership in a federally recognized tribe and had a biological parent who was a member of a tribe. The district court, citing the tribal membership laws of several tribes, including the Navajo Nation, concluded that "[t]his means one is an Indian child if the child is related to a tribal ancestor by blood."

We disagree with the district court's reasoning and conclude that *Mancari* controls here. As to the district court's first distinction, *Mancari's* holding does not rise or fall with the geographical location of the Indians receiving "special treatment." *See Mancari*, 417 U.S. at 552. The Supreme Court has long recognized Congress's broad power to regulate Indians and Indian tribes on and off the reservation. *See e.g., United States v. McGowan*, 302 U.S. 535, 539 (1938) ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States."); *Perrin v. United States*, 232 U.S. 478, 482 (1914) (acknowledging Congress's power to regulate

Indians "whether upon or off a reservation and whether within or without the limits of a state").

Second, the district court concluded that, unlike the statute in *Mancari*, ICWA's definition of Indian child extends to children who are merely eligible for tribal membership because of their ancestry. However, ICWA's definition of "Indian child" is not based solely on tribal ancestry or race. ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). As Defendants explain, under some tribal membership laws, eligibility extends to children without Indian blood, such as the descendants of former slaves of tribes who became members after they were freed, or the descendants of adopted white persons. Accordingly, a child may fall under ICWA's membership eligibility standard because his or her biological parent became a member of a tribe, despite not being racially Indian. Additionally, many racially Indian children, such as those belonging to non-federally recognized tribes, do not fall within ICWA's definition of "Indian child." Conditioning a child's eligibility for membership, in part, on whether a biological parent is a member of the tribe is therefore not a proxy for race, as the district court concluded, but rather for not-yet-formalized tribal affiliation, particularly where the child is too young to formally apply for membership in a tribe.[10]

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[10] The Navajo Nation's membership code is instructive on these points, despite the district court's reliance on it to the contrary. The Navajo Nation explains that, under its laws, "blood alone is never

Our conclusion that ICWA's definition of Indian child is a political classification is consistent with both the Supreme Court's holding in *Mancari* and this court's holding in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1212 (5th Cir. 1991). In *Mancari*, the hiring preference extended to individuals who were one-fourth or more degree Indian blood and a member of a federally recognized tribe. *See* 417 U.S. at 554. Similarly, in *Peyote Way*, this court considered whether equal protection was violated by federal and state laws prohibiting the possession of peyote by all persons except members of the Native American Church of North America (NAC), who used peyote for religious purposes. *See* 922 F.2d at 1212. Applying *Mancari's* reasoning, this court upheld the preference on the basis that membership in NAC "is limited to Native American members of federally recognized tribes who have at least 25% Native American ancestry, and therefore represents a political classification." *Id.* at 1216. ICWA's "Indian child" eligibility provision similarly turns, at least in part, on whether the child is eligible for membership in a federally recognized tribe. *See California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (federal recognition "is a formal political act" that "institutionaliz[es] the

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determinative of membership." The Navajo Nation will only grant an application for membership "if the individual has some tangible connection to the Tribe," such as the ability to speak the Navajo language or time spent living among the Navajo people. "Having a biological parent who is an enrolled member is per se evidence of such a connection." Additionally, individuals will not be granted membership in the Navajo Nation, regardless of their race or ancestry, if they are members of another tribe.

government-to-government relationship between the tribe and the federal government."); 25 U.S.C. § 1903(4).

The district court concluded, and Plaintiffs now argue, that ICWA's definition "mirrors the impermissible racial classification in *Rice [v. Cayetano*, 528 U.S. 495 (2000)], and is legally and factually distinguishable from the political classification in *Mancari*." The Supreme Court in *Rice* concluded that a provision of the Hawaiian Constitution that permitted only "Hawaiian" people to vote in the statewide election for the trustees of the Office of Hawaiian Affairs (OHA) violated the Fifteenth Amendment. 528 U.S. at 515. "Hawaiian" was defined by statute as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id*. The Court noted the state legislature's express purpose in using ancestry as a proxy for race and held that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id*. at 514–17 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Distinguishing *Mancari*, the Court noted that its precedent did not afford Hawaiians a protected status like that of Indian tribes; that the OHA elections were an affair of the state and not of a "separate quasi sovereign" like a tribe; and that extending "*Mancari* to this context would [] permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs." *Id*. at 522.

Rice is distinguishable from the present case for several reasons. Unlike *Rice*, which involved voter eligibility in a state-wide election for a state agency, there is no similar concern here that applying *Mancari* would permit "by racial classification, [the fencing] out [of] whole classes of [a state's] citizens from decisionmaking in critical state affairs." *See* 528 U.S. at 518–22. Additionally, as discussed above, ICWA's definition of "Indian child," unlike the challenged law in *Rice*, does not single out children "*solely* because of their ancestry or ethnic characteristics." *See id.* at 515 (emphasis added). Further, unlike the law in *Rice*, ICWA is a federal law enacted by Congress for the protection of Indian children and tribes. *See Rice*, 528 U.S. at 518 (noting that to sustain Hawaii's restriction under *Mancari*, it would have to "accept some beginning premises not yet established in [its] case law," such as that Congress "has determined that native Hawaiians have a status like that of Indians in organized tribes"); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) (rejecting an equal protection challenge brought by Native Hawaiians, who were excluded from the U.S. Department of the Interior's regulatory tribal acknowledgement process, and concluding that the recognition of Indian tribes was political). Additionally, whereas the OHA elections in *Rice* were squarely state affairs, state court adoption proceedings involving Indian children are simultaneously affairs of states, tribes, and Congress. *See* 25 U.S.C. § 1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."). Because we find *Rice* inapplicable, and

Mancari controlling here, we conclude, contrary to the district court's determination, that ICWA's definition of "Indian child" is a political classification subject to rational basis review. *See Mancari*, 417 U.S. at 555.

B. Rational Basis Review

Having so determined that rational basis review applies, we ask whether "the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. Given Congress's explicit findings and stated objectives in enacting ICWA, we conclude that the special treatment ICWA affords Indian children is rationally tied to Congress's fulfillment of its unique obligation toward Indian nations and its stated purpose of "protect[ing] the best interests of Indian children and [] promot[ing] the stability and security of Indian tribes." *See* 25 U.S.C. §§ 1901–02; *see also Mancari*, 417 U.S. at 555. ICWA section 1903(4)'s definition of an "Indian child" is a political classification that does not violate equal protection.

III. Tenth Amendment

The district court concluded that ICWA sections 1901–23[11] and 1951–52[12] violated the anticommandeering

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[11] ICWA sections 1901–03 set forth Congress's findings, declaration of policy, and definitions. Sections 1911–23 govern child custody proceedings, including tribal court jurisdiction, notice requirements in involuntary and voluntary state proceedings, termination of parental rights, invalidation of state proceedings, placement preferences, and agreements between states and tribes.

[12] Section 1951 sets forth information-sharing requirements for state courts. Section 1952 authorizes the Secretary of the Interior to promulgate necessary rules and regulations.

doctrine by requiring state courts and executive agencies to apply federal standards to state-created claims. The district court also considered whether ICWA preempts conflicting state law under the Supremacy Clause and concluded that preemption did not apply because the law "*directly* regulated states." Defendants argue that the anticommandeering doctrine does not prevent Congress from requiring state courts to enforce substantive and procedural standards and precepts, and that ICWA sets minimum procedural standards that preempt conflicting state law. We examine the constitutionality of the challenged provisions of ICWA below and conclude that they preempt conflicting state law and do not violate the anticommandeering doctrine. .

A. Anticommandeering Doctrine

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Congress's legislative powers are limited to those enumerated under the Constitution. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). "[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Id.* The anticommandeering doctrine, an expression of this limitation on Congress, prohibits federal laws commanding the executive or legislative branch of a state government to act or refrain from acting.[13] *Id.* at

[13] Though Congress is prohibited from commandeering states, it can "encourage a State to regulate in a particular way, or . . . hold out

1478 (holding that a federal law prohibiting state authorization of sports gambling violated the anticommandeering rule by "unequivocally dictat[ing] what a state legislature may and may not do"); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that a federal law requiring state chief law enforcement officers to conduct background checks on handgun purchasers "conscript[ed] the State's officers directly" and was invalid); *New York v. United States*, 505 U.S. 144, 175–76 (1992) (holding that a federal law impermissibly commandeered states to implement federal legislation when it gave states "[a] choice between two unconstitutionally coercive" alternatives: to either dispose of radioactive waste within their boundaries according to Congress's instructions or "take title" to and assume liabilities for the waste).

1. State Courts

Defendants argue that because the Supremacy Clause requires the enforcement of ICWA and the Final Rule by state courts, these provisions do not run afoul of the anticommandeering doctrine. We agree. The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the

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incentives to the States as a method of influencing a State's policy choices." *New York*, 505 U.S. at 166. For example, Congress may also condition the receipt of federal funds under its spending power. *See id*. at 167. Defendants also contend that ICWA is authorized under Congress's Spending Clause powers because Congress conditioned federal funding in Title IV-B and E of the Social Security Act on states' compliance with ICWA. However, because we conclude that ICWA is constitutionally permissible on other bases, we need not reach this argument.

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. In setting forth the anticommandeering doctrine, the Supreme Court drew a distinction between a state's courts and its political branches. The Court acknowledged that "[f]ederal statutes enforceable in state court do, in a sense, direct state judges to enforce them, but this sort of federal "direction" of state judges is mandated by the text of the Supremacy Clause." *New York*, 505 U.S. at 178–79 (internal quotation marks omitted). Early laws passed by the first Congresses requiring state court action "establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907. State courts were viewed as distinctive because, "unlike [state] legislatures and executives, they applied the law of other sovereigns all the time," including as mandated by the Supremacy Clause. *Id.* Thus, to the extent provisions of ICWA and the Final Rule require state courts to enforce federal law, the anticommandeering doctrine does not apply. *See id.* at 928–29 (citing *Testa v. Katt*, 330 U.S. 386 (1947), "for the proposition that state courts cannot refuse to apply federal lawa conclusion mandated by the terms of the Supremacy Clause").

2. State Agencies

Plaintiffs next challenge several provisions of ICWA that they contend commandeer state executive agencies, including sections 1912(a) (imposing notice requirements

on "the party seeking the foster care placement of, or termination of parental rights to, an Indian child"), 1912(d) (requiring that "any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."), 1915(c) (requiring "the agency or court effecting [a] placement" adhere to the order of placement preferences established by the tribe), and 1915(e) (requiring that "the State" in which the placement was made keep a record of each placement, evidencing the efforts to comply with the order of preference, to be made available upon request of the Secretary or the child's tribe). *See* 25 U.S.C. §§ 1912, 1915. Plaintiffs argue that ICWA's requirements on state agencies go further than the federal regulatory scheme invalidated in *Printz* and impermissibly impose costs that states must bear. Defendants contend that the challenged provisions of ICWA apply to private parties and state agencies alike and therefore do not violate the anticommandeering doctrine.

In *Printz*, the Supreme Court affirmed its prior holding that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program," and "Congress cannot circumvent that prohibition by conscripting the State's officers directly." 521 U.S. at 925, 935 (quoting *New York*, 505 U.S. at 188). The *Printz* Court, rejecting as irrelevant the Government's argument that the federal law imposed a

minimal burden on state executive officers, explained that it was not "evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments," but rather a law whose "whole *object* . . . [was] to direct the functioning of the state executive." *Id.* at 931–32. Expanding upon this distinction, the Court in *Murphy* discussed *Reno v. Condon*, 528 U.S. 141 (2000), and *South Carolina v. Baker*, 485 U.S. 505 (1988), and held that "[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." 138 S. Ct. at 1478.

In *Condon*, the Court upheld a federal regulatory scheme that restricted the ability of states to disclose a driver's personal information without consent. 528 U.S. at 151. In determining that the anticommandeering doctrine did not apply, the Court distinguished the law from those invalidated in *New York* and *Printz*:

> [This law] does not require the States in their sovereign capacity to regulate their own citizens. The [law] regulates the States as the owners of [Department of Motor Vehicle] data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

Id. In *Baker*, the Court rejected a Tenth Amendment challenge to a provision of a federal statute that eliminated the federal income tax exemption for interest earned on certain bonds issued by state and local

governments unless the bonds were registered, treating the provision "as if it directly regulated States by prohibiting outright the issuance of [unregistered] bearer bonds." 485 U.S. at 507–08, 511. The Court reasoned that the provision at issue merely "regulat[ed] a state activity" and did not "seek to control or influence the manner in which States regulate private parties." *Id.* at 514. "That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *Id.* at 514–15. "[S]ubstantial effort[s]" to comply with federal regulations are "an inevitable consequence of regulating a state activity." *Id.* at 514.

In light of these cases, we conclude that the provisions of ICWA that Plaintiffs challenge do not commandeer state agencies. Sections 1912(a) and (d) impose notice and "active efforts" requirements on the "party" seeking the foster care placement of, or termination of parental rights to, an Indian child. Because both state agencies and private parties who engage in state child custody proceedings may fall under these provisions, 1912(a) and (d) "evenhandedly regulate[] an activity in which both States and private actors engage."[14] *See Murphy*, 138 S. Ct. at 1478.

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[14] Similarly, section 1912(e) provides that no foster care placement may be ordered in involuntary proceedings in state court absent "a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *See* 25 U.S.C. § 1912(e). Section 1912(f) requires that no termination of parental rights may be ordered in involuntary proceedings in

Moreover, sections 1915(c) and (e) impose an obligation on "the agency or court effecting the placement" of an Indian child to respect a tribe's order of placement preferences and require that "the State" maintain a record of each placement to be made available to the Secretary or child's tribe. These provisions regulate state activity and do not require states to enact any laws or regulations, or to assist in the enforcement of federal statutes regulating private individuals. *See Condon*, 528 U.S. at 151; *Baker*, 485 U.S. at 514; *see also Printz*, 521 U.S. at 918 (distinguishing statutes that merely require states to provide information to the federal government from those that command state executive agencies to actually administer federal programs). To the contrary, they merely require states to "take administrative . . . action to comply with federal standards regulating" child custody proceedings involving Indian children, which is permissible under the Tenth Amendment.[15] *See Baker*, 485 U.S. at 514–15.

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state court absent evidence beyond a reasonable doubt of the same. *See id.* at 1912(f). Neither section expressly refers to state agencies and, in conjunction with section 1912(d), both sections must be reasonably read to refer to "any party" seeking the foster care placement of, or the termination of parental rights to, an Indian child. Thus, like section 1912(d), sections 1912(e)–(f) "evenhandedly regulate[] an activity in which both States and private actors engage" and do not run afoul of the anticommandeering doctrine. *See Murphy*, 138 S. Ct. at 1478; *see also Condon*, 528 U.S. at 151.

[15] In ruling otherwise, the district court discussed *Murphy* and emphasized that adhering to the anticommandeering rule is necessary to protect constitutional principles of state sovereignty, promote political accountability, and prevent Congress from shifting the costs of regulation to states. *See Murphy*, 138 S. Ct. at 1477. These principles do not compel the result reached by the

B. Preemption

Defendants argue that, to the extent there is a conflict between ICWA and applicable state laws in child custody proceedings, ICWA preempts state law. The Supremacy Clause provides that federal law is the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Conflict preemption occurs when "Congress enacts a law that imposes restrictions or confers rights on private actors;

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district court. *See id.* First, the anticommandeering doctrine is not necessary here to protect constitutional principles of state sovereignty because ICWA regulates the actions of state executive agencies in their role as child advocates and custodians, and not in their capacity as sovereigns enforcing ICWA. *See id.* at 1478; *see also Condon*, 528 U.S. at 151 (concluding that the law in question there "does not require the States in their sovereign capacity to regulate their own citizens [but] regulates the States as the owners of data bases"). The need to promote political accountability is minimized here for similar reasons, as ICWA does not require states to regulate their own citizens. *See Murphy*, 138 S. Ct. at 1477 (noting concern that, if states are required to impose a federal regulation on their voters, the voters will not know who to credit or blame and responsibility will be "blurred"). Finally, the need to prevent Congress from shifting the costs of regulation to states is also minimized here, where some of the requirements at issue, like those in sections 1912(d) and 1915(c), simply regulate a state's actions during proceedings that it would already be expending resources on. ICWA's recordkeeping and notice requirements could impose costs on states, but we cannot conclude that these costs compel application of the anticommandeering doctrine. *See Condon*, 528 U.S. at 150 (a federal law that "require[d] time and effort on the part of state employees" was constitutional); *Baker*, 485 U.S. at 515 (that states may have to raise funds necessary to comply with federal regulations "presents no constitutional defect").

a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Murphy*, 138 S. Ct. at 1480. For a federal law to preempt conflicting state law, two requirements must be satisfied: The challenged provision of the federal law "must represent the exercise of a power conferred on Congress by the Constitution" and "must be best read as one that regulates private actors" by imposing restrictions or conferring rights. *Id.* at 1479–80. The district court concluded that preemption does not apply here, as ICWA regulates states rather than private actors. We review de novo whether a federal law preempts a state statute or common law cause of action. *See Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 442 (5th Cir. 2001).

Congress enacted ICWA to "establish[] minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902. Defendants contend that these minimum federal standards preempt conflicting state laws. Plaintiffs contend that preemption does not apply here because ICWA regulates states and not individuals, and nothing in the Constitution gives Congress authority to regulate the adoption of Indian children under state jurisdiction.

ICWA specifies that Congress's authority to regulate the adoption of Indian children arises under the Indian Commerce Clause as well as "other constitutional authority." 25 U.S.C. § 1901(1). The Indian Commerce Clause provides that "[t]he Congress shall have Power To . . . regulate Commerce . . . with the Indian Tribes."

U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has repeatedly held that the Indian Commerce Clause grants Congress plenary power over Indian affairs. *See Lara*, 541 U.S. at 200 (noting that the Indian Commerce and Treaty Clauses are sources of Congress's "plenary and exclusive" "powers to legislate in respect to Indian tribes"); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982) (discussing Congress's "broad power . . . to regulate tribal affairs under the Indian Commerce Clause"); *Mancari*, 417 U.S. at 551–52 (noting that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from," inter alia, the Indian Commerce Clause). Plaintiffs do not provide authority to support a departure from that principle here.

Moreover, ICWA clearly regulates private individuals. *See Murphy*, 138 S. Ct. at 1479–80. In enacting the statute, Congress declared that it was the dual policy of the United States to protect the best interests of Indian children and promote the stability and security of Indian families and tribes. 25 U.S.C. § 1902. Each of the challenged provisions applies within the context of state court proceedings involving Indian children and is informed by and designed to promote Congress's goals by conferring rights upon Indian children and families.[16] *See* H.R. REP. No. 95-1386, at 18

[16] Arguably, two of the challenged provisions of ICWA could be construed to simultaneously "confer[] rights" on Indian children and families while "imposing restrictions" on state agencies. *See Murphy*, 138 S. Ct. at 1479–80. Section 1915(c) requires "the agency or court effecting [a] placement" to adhere to a tribe's established

(1978) ("We conclude that rights arising under [ICWA] may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local law, is adequate to the occasion." (quoting *Second Employers' Liability Cases*, 223 U.S. 1, 59 (1912))). Thus, to the extent ICWA's minimum federal standards conflict with state law, "federal law takes precedence and the state law is preempted." *See Murphy*, 138 S. Ct. at 1480.

IV. Nondelegation Doctrine

Article I of the Constitution vests "[a]ll legislative Powers" in Congress. U.S. CONST. art. 1, § 1, cl. 1. "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The limitations on Congress's ability to delegate its legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *See United States v. Mazurie*, 419 U.S. 544, 556–57 (1975). ICWA section 1915(c) allows Indian tribes to establish through tribal resolution a different order of preferred placement than that set forth in sections

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order of placement preferences, and section 1915(e) requires states to keep records and make them available to the Secretary and Indian tribes. 25 U.S.C. § 1915(c), (e). However, *Murphy* instructs that for a provision of a federal statute to preempt state law, the provision must be "*best read* as one that regulates private actors." *See* 138 S. Ct. at 1479 (emphasis added). In light of Congress's express purpose in enacting ICWA, the legislative history of the statute, and section 1915's scope in setting forth minimum standards for the "Placement of Indian children," we conclude that these provisions are "best read" as regulating private actors by conferring rights on Indian children and families. *See id.*

1915(a) and (b).[17] Section 23.130 of the Final Rule provides that a tribe's established placement preferences apply over those specified in ICWA.[18] The district court determined that these provisions violated the nondelegation doctrine, reasoning that section 1915(c) grants Indian tribes the power to change legislative preferences with binding effect on the states, and Indian tribes, like private entities, are not part of the federal government of the United States and cannot exercise federal legislative or executive regulatory power over non-Indians on non-tribal lands.

Defendants argue that the district court's analysis of the constitutionality of these provisions ignores the inherent sovereign authority of tribes. They contend that section 1915 merely recognizes and incorporates a tribe's exercise of its inherent sovereignty over Indian children and therefore does not—indeed cannot—delegate this existing authority to Indian tribes.

The Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine. *See Mazurie*, 419 U.S. at 557 ("[I]ndependent tribal authority is quite sufficient to protect Congress'

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[17] The section provides: "In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section." 25 U.S.C. § 1915(c).

[18] "If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply." 25 C.F.R. § 23.130.

decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'"); *United States v. Sharpnack*, 355 U.S. 286, 293–94 (1958) (holding that a statute that prospectively incorporated state criminal laws "in force at the time" of the alleged crime was a "deliberate continuing adoption by Congress" of state law as binding federal law in federal enclaves within state boundaries); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 80 (1824) ("Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject."). "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Mazurie*, 419 U.S. at 557. Though some exercises of tribal power require "express congressional delegation," the "tribes retain their inherent power to determine tribal membership [and] to regulate domestic relations among members . . . ." *See Montana v. United States*, 450 U.S. 544, 564 (1981); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) ("tribes retain the power to create substantive law governing internal tribal affairs" like tribal citizenship and child custody).

In *Mazurie*, a federal law allowed the tribal council of the Wind River Tribes, with the approval of the Secretary of the Interior, to adopt ordinances to control the introduction of alcoholic beverages by non-Indians on privately owned land within the boundaries of the reservation. *See* 419 U.S. at 547, 557. The Supreme Court held that the law did not violate the nondelegation doctrine, focusing on the Tribes' inherent power to regulate their internal and social relations by controlling

the distribution and use of intoxicants within the reservation's bounds. *Id. Mazurie* is instructive here. ICWA section 1915(c) provides that a tribe may pass, by its own legislative authority, a resolution reordering the three placement preferences set forth by Congress in section 1915(a). Pursuant to this section, a tribe may assess whether the most appropriate placement for an Indian child is with members of the child's extended family, the child's tribe, or other Indian families, and thereby exercise its "inherent power to determine tribal membership [and] regulate domestic relations among members" and Indian children eligible for membership. *See Montana*, 450 U.S. at 564.

State Plaintiffs contend that *Mazurie* is distinguishable because it involves the exercise of tribal authority on tribal lands, whereas ICWA permits the extension of tribal authority over states and persons on non-tribal lands. We find this argument unpersuasive. It is well established that tribes have "sovereignty *over both their members and their territory*." *See Mazurie*, 419 U.S. at 557 (emphasis added). For a tribe to exercise its authority to determine tribal membership and to regulate domestic relations among its members, it must necessarily be able to regulate all Indian children, irrespective of their location.[19] *See Montana*, 450 U.S. at 564 (tribes retain inherent power to regulate domestic relations and determine tribal membership); *Merrion*, 455 U.S. at 170 (tribes retain power to govern tribal citizenship and child custody). Section 1915(c), by

[19] Indeed, as the BIA noted in promulgating the Final Rule, at least 78% of Native Americans lived outside of Indian country as of 2016. *See* 81 Fed. Reg. at 38,778, 38,783.

recognizing the inherent powers of tribal sovereigns to determine by resolution the order of placement preferences applicable to an Indian child, is thus a "deliberate continuing adoption by Congress" of tribal law as binding federal law. *See Sharpnack*, 355 U.S. at 293–94; *see also* 25 U.S.C. § 1915(c); 81 Fed. Reg. at 38,784 (the BIA noting that "through numerous statutory provisions, ICWA helps ensure that State courts incorporate Indian social and cultural standards into decision-making that affects Indian children"). We therefore conclude that ICWA section 1915(c) is not an unconstitutional delegation of Congressional legislative power to tribes, but is an incorporation of inherent tribal authority by Congress. *See Mazurie*, 419 U.S. at 544; *Sharpnack*, 355 U.S. at 293–94.

V. The Final Rule

The district court held that, to the extent sections 23.106–22, 23.124–32, and 23.140–41 of the Final Rule were binding on State Plaintiffs, they violated the APA for three reasons: The provisions (1) purported to implement an unconstitutional statute; (2) exceeded the scope of the Interior Department's statutory regulatory authority to enforce ICWA with binding regulations; and (3) reflected an impermissible construction of ICWA section 1915. We examine each of these bases in turn.

A. The Constitutionality of ICWA

Because we concluded that the challenged provisions of ICWA are constitutional, for reasons discussed earlier in this opinion, the district court's first conclusion that the Final Rule was invalid because it implemented an

unconstitutional statue was erroneous. Thus, the statutory basis of the Final Rule is constitutionally valid.

B. The Scope of the BIA's Authority

Congress authorized the Secretary of the Interior to promulgate rules and regulations that may be necessary to carry out the provisions of ICWA. *See* 25 U.S.C. § 1952. Pursuant to this provision, the BIA, acting under authority delegated by the Interior Department, issued guidelines in 1979 for state courts in Indian child custody proceedings that were "not intended to have binding legislative effect." 44 Fed. Reg. at 67,584. The BIA explained that, generally, "when the Department writes rules needed to carry out responsibilities Congress has explicitly imposed on the Department, those rules are binding." *Id.* However, when "the Department writes rules or guidelines advising some other agency how it should carry out responsibilities explicitly assigned to it by Congress, those rules or guidelines are not, by themselves, binding." *Id.* With respect to ICWA, the BIA concluded in 1979 that it was "not necessary" to issue binding regulations advising states how to carry out the responsibilities Congress assigned to them; state courts were "fully capable" of implementing the responsibilities Congress imposed on them, and nothing in the language or legislative history of 25 U.S.C. § 1952 indicated that Congress intended the BIA to exercise supervisory control over states. *Id.* However, in 2016, the BIA changed course and issued the Final Rule, which sets binding standards for state courts in Indian child-custody proceedings. *See* 25 C.F.R. §§ 23.101, 23.106; 81 Fed. Reg. at 38,779, 38,785. The BIA explained that its earlier, nonbinding guidelines were "insufficient to fully

implement Congress's goal of nationwide protections for Indian children, parents, and Tribes." 81 Fed. Reg. at 38,782. Without the Final Rule, the BIA stated, state-specific determinations about how to implement ICWA would continue "with potentially devastating consequences" for those Congress intended ICWA to protect. *See id.*

In reviewing "an agency's construction of the statute which it administers," we are "confronted with two questions." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). First, we must examine whether the statute is ambiguous. *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842–43. We must uphold an agency's reasonable interpretation of an ambiguous statute. *Id.* at 844.

Under *Chevron* step one, the question is whether Congress unambiguously intended to grant the Department authority to promulgate binding rules and regulations. ICWA provides that "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." 25 U.S.C. § 1952. The provision's plain language confers broad authority on the Department to promulgate rules and regulations it deems necessary to carry out ICWA. This language can be construed to grant the authority to issue binding rules and regulations; however, because

"Congress has not directly addressed the precise question at issue," we conclude that section 1952 is ambiguous. *See Chevron*, 467 U.S. at 843.

Moving to the second *Chevron* step, we must determine whether the BIA's current interpretation of its authority to issue binding regulations pursuant to section 1952 is reasonable. *See* 467 U.S. at 843–44. Defendants argue that section 1952's language is substantively identical to other statutes conferring broad delegations of rulemaking authority. Indeed, the Supreme Court has held that "[w]here the empowering provision of a statute states simply that the agency may make . . . such rules and regulations as may be necessary to carry out the provisions of this Act . . . the validity of a regulation promulgated thereunder will be sustained so long as it is reasonably related to the purposes of the enabling legislation." *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) (internal quotation marks omitted); *see also City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 306 (2013) (noting a lack of "case[s] in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field"). Here, section 1952's text is substantially similar to the language in *Mourning*, and the Final Rule's binding standards for Indian child custody proceedings are reasonably related to ICWA's purpose of establishing minimum federal standards in child custody proceedings involving Indian children. *See* 25 U.S.C. § 1902. Thus, the Final Rule is a reasonable exercise of the broad authority granted to the BIA by Congress in ICWA section 1952.

Plaintiffs contend that the BIA reversed its position on the scope of its authority to issue binding regulations after thirty-seven years and without explanation and its interpretation was therefore not entitled to deference. We disagree. "The mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion. But if these pitfalls are avoided, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) (internal citations and quotation marks omitted). The agency must provide "reasoned explanation" for its new policy, though "it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "[I]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.*

The BIA directly addressed its reasons for departing from its earlier interpretation that it had no authority to promulgate binding regulations, explaining that, under Supreme Court precedent, the text of section 1952 conferred "a broad and general grant of rulemaking authority." 81 Fed. Reg. at 38,785 (collecting Supreme Court cases). The BIA further discussed why it now considered binding regulations necessary to implement

ICWA: In 1979, the BIA "had neither the benefit of the *Holyfield* Court's carefully reasoned decision nor the opportunity to observe how a lack of uniformity in the interpretation of ICWA by State courts could undermine the statute's underlying purposes." 81 Fed. Reg. at 38,787 (citing *Holyfield*, 490 U.S. at 30).

In *Holyfield*, the Supreme Court considered the meaning of the term "domicile," which ICWA section 1911 left undefined and the BIA left open to state interpretation under its 1979 Guidelines. 490 U.S. at 43, 51. The Court held that "it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law," given that "Congress was concerned with the rights of Indian families vis-à-vis state authorities" and considered "States and their courts as partly responsible for the problem it intended to correct" through ICWA. *Id.* at 45. Because Congress intended for ICWA to address a nationwide problem, the Court determined that the lack of nationwide uniformity resulting from varied state-law definitions of this term frustrated Congress's intent. *Id.* The *Holyfield* Court's reasoning applies here. Congress's concern with safeguarding the rights of Indian families and communities was not limited to section 1911 and extended to all provisions of ICWA, including those at issue here. Thus, as the BIA explained, all provisions of ICWA that it left open to state interpretation in 1979, including many that Plaintiffs now challenge, were subject to the lack of uniformity the Supreme Court identified in *Holyfield* and determined was contrary to Congress's intent. 81 Fed. Reg. at

38,782. Thus, in light of *Holyfield*, the BIA has provided a "reasoned explanation" for departing from its earlier interpretation of its authority under section 1952 and for the need of binding regulations with respect to ICWA. *See Fox Television Stations*, 556 U.S. at 515.

In addition to assessing whether an agency's interpretation of a statute is reasonable under *Chevron*, the APA requires that we "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Contrary to Plaintiffs' contentions, the BIA explained that the Final Rule resulted from years of study and public outreach and participation. *See* 81 Fed. Reg. 38,778, 38,784–85. In promulgating the rule, the BIA relied on its own expertise in Indian affairs, its experience in administering ICWA and other Indian child-welfare programs, state interpretations and best practices,[20] public hearings, and tribal consultations. *See id.* Thus, the BIA's current interpretation is not "arbitrary, capricious, [or] an abuse of discretion" because it was not sudden and unexplained. *See Smiley*, 517 U.S. at 742; 5 U.S.C. § 706(a)(2). The district court's contrary conclusion was error.

C. The BIA's Construction of ICWA Section 1915

ICWA section 1915 sets forth three preferences for the placement of Indian children unless good cause can

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[20] Since ICWA's enactment in 1978, several states have incorporated the statute's requirements into their own laws or have enacted detailed procedures for their state agencies to collaborate with tribes in child custody proceedings.

be shown to depart from them. 25 U.S.C. § 1915(a)–(b). The 1979 Guidelines initially advised that the term "good cause" in ICWA section 1915 "was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." 44 Fed. Reg. 67,584. However, section 23.132(b) of the Final Rule specifies that "[t]he party seeking departure from [section 1915's] placement preferences should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." 25 C.F.R. § 23.132(b). The district court determined that Congress unambiguously intended the ordinary preponderance-of-the-evidence standard to apply, and the BIA's interpretation that a higher standard applied was therefore not entitled to *Chevron* deference.

Defendants contend that the Final Rule's clear-and-convincing standard is merely suggestive and not binding. They further aver that the Final Rule's clarification of the meaning of "good cause" and imposition of a clear-and-convincing-evidence standard are entitled to *Chevron* deference. Plaintiffs respond that state courts have interpreted the clear-and-convincing standard as more than just suggestive in practice, and the Final Rule's fixed definition of "good cause" is contrary to ICWA's intent to provide state courts with flexibility.

Though provisions of the Final Rule are generally binding on states, the BIA indicated that it did not intend for section 23.132(b) to establish a binding standard. *See* 25 C.F.R. § 23.132 ("The party seeking departure from the placement preferences *should* bear the burden of

proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." (emphasis added)). The BIA explained that "[w]hile the final rule advises that the application of the clear and convincing standard 'should' be followed, it does not categorically require that outcome . . . [and] the Department declines to establish a uniform standard of proof on this issue." *See* 81 Fed. Reg. at 38,843.

The BIA's interpretation of section 1915 is also entitled to *Chevron* deference. For purposes of *Chevron* step one, the statute is silent with respect to which evidentiary standard applies. *See* 25 U.S.C. § 1915; *Chevron*, 467 U.S. at 842. The district court relied on the canon of *expressio unius est exclusio alterius* ("the expression of one is the exclusion of others") in finding that Congress unambiguously intended that a preponderance-of-the-evidence standard was necessary to show good cause under ICWA section 1915. The court reasoned that because Congress specified a heightened evidentiary standard in other provisions of ICWA, but did not do so with respect to section 1915, Congress did not intend for the heightened clear-and-convincing-evidence standard to apply. This was error. "When interpreting statutes that govern agency action, . . . a congressional mandate in one section and silence in another often suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion." *Catawba Cty., N.C. v. E.P.A.*, 571 F.3d 20, 36 (D.C. Cir. 2009). "[T]hat Congress spoke in one place but remained silent in another . . . rarely if ever suffices for the direct answer that *Chevron* step one requires." *Id.* (cleaned up);

see also Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 694 (D.C. Cir. 1991) ("Under *Chevron*, we normally withhold deference from an agency's interpretation of a statute only when Congress has directly spoken to the precise question at issue, and the *expressio* canon is simply too thin a reed to support the conclusion that Congress has clearly resolved this issue.") (internal citations and quotation marks omitted).

Under *Chevron* step two, the BIA's current interpretation of the applicable evidentiary standard is reasonable. *See Chevron*, 467 U.S. at 844. The BIA's suggestion that the clear-and-convincing standard should apply was derived from the best practices of state courts. 81 Fed. Reg. at, 38,843. The Final Rule explains that, since ICWA's passage, "courts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress's intent in ICWA to maintain Indian families and Tribes intact." *Id.* Because the BIA's current interpretation of section 1915, as set forth in Final Rule section 23.132(b), was based on its analysis of state cases and geared toward furthering Congress's intent, it is reasonable and entitled to *Chevron* deference. Moreover, the BIA's current interpretation is nonbinding and therefore consistent with the 1979 Guidelines in allowing state courts flexibility to determine "good cause." Section 23.132(b) of the Final Rule is thus valid under the APA. *See* 5 U.S.C. § 706(a)(2).

* * *

For these reasons, we conclude that Plaintiffs had standing to bring all claims and that ICWA and the Final

Rule are constitutional because they are based on a political classification that is rationally related to the fulfillment of Congress's unique obligation toward Indians; ICWA preempts conflicting state laws and does not violate the Tenth Amendment anticommandeering doctrine; and ICWA and the Final Rule do not violate the nondelegation doctrine. We also conclude that the Final Rule implementing the ICWA is valid because the ICWA is constitutional, the BIA did not exceed its authority when it issued the Final Rule, and the agency's interpretation of ICWA section 1915 is reasonable. Accordingly, we AFFIRM the district court's judgment that Plaintiffs had Article III standing. But we REVERSE the district court's grant of summary judgment for Plaintiffs and RENDER judgment in favor of Defendants on all claims.

PRISCILLA R. OWEN, Circuit Judge, concurring in part and dissenting in part:

I agree with much of the majority opinion. But I conclude that certain provisions of the Indian Child Welfare Act (ICWA)[1] and related regulations violate the United States Constitution because they direct state officers or agents to administer federal law. I therefore dissent, in part.

The offending statutes include part of 25 U.S.C. § 1912(d) (requiring a State seeking to effect foster care placement of an Indian child to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have proved unsuccessful"), § 1912(e) (prohibiting foster care placement unless a State presents evidence from "qualified expert witnesses . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"), and § 1915(e) (requiring that "[a] record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section" and that "[s]uch record[s] shall be made available at any time upon the request of the Secretary or the Indian child's tribe"). Regulations requiring States to maintain related records also violate the Constitution.[2]

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[1] 25 U.S.C. §§ 1901 et seq.

[2] *See* 25 C.F.R. § 23.141:

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an

The Supreme Court has made clear that Congress cannot commandeer a State or its officers or agencies: "[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[3] "The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States."[4] "The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms."[5] The Supreme Court has recognized that "conspicuously absent from the list of powers given to Congress is the power to issue direct

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Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.

[3] *Printz v. United States*, 521 U.S. 898, 925 (1997).

[4] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018).

[5] *Id.* at 1476.

orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority."[6]

The defendants in the present case contend that the Indian Commerce Clause[7] empowers Congress to direct the States as it has done in the ICWA.

They are mistaken. "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."[8]

The panel's majority opinion concludes that the ICWA does "not commandeer state agencies"[9] because it "evenhandedly regulate[s] an activity in which both States and private actors engage."[10] This is incorrect with respect to the part of 25 U.S.C. § 1912(d) addressed to foster care placement, § 1912(e), § 1915(e), and 25 C.F.R. § 23.141.

Though § 1912(d) nominally applies to "[a]ny party seeking to effect a foster care placement of . . . an Indian child under State law,"[11] as a practical matter, it applies only to state officers or agents. Foster care placement is not undertaken by private individuals or private actors. That is a responsibility that falls upon state officers or

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[6] *Id.*

[7] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

[8] *Murphy*, 138 S. Ct. at 1477 (quoting *New York v. United States*, 505 U.S. 144, 178 (1992)).

[9] *Brackeen v. Bernhardt*, __ F.3d __, __, 2019 WL 3759491, at *14 (5th Cir. 2019).

[10] *Id.* (quoting *Murphy*, 138 S. Ct. at 1478).

[11] 25 U.S.C. § 1912(d).

agencies. Those officers or agencies are required by § 1912(d) to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[12] That directive means that a State cannot place an Indian child in foster care, regardless of the exigencies of the circumstances, unless it first provides the federally specified services and programs without success. Theoretically, a State could decline to protect Indian children in need of foster care. It could, theoretically, allow Indian children to remain in abusive or even potentially lethal circumstances. But that is not a realistic choice, even if state law did not apply across the board and include all children, regardless of their Indian heritage.

Certain of the ICWA's provisions are a transparent attempt to foist onto the States the obligation to execute a federal program and to bear the attendant costs. Though the requirements in § 1912(d) are not as direct as those at issue in *Printz v. United States*,[13] the federal imperatives improperly commandeer state officers or agents:

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. *See Texas v. White*, 7 Wall. [700,] 725 [(1868)]. It is no more compatible with this independence and autonomy that their officers be

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[12] *Id.*

[13] 521 U.S. 898 (1997).

> "dragooned" (as Judge Fernandez put it in his dissent below, [*Mack v. United States*], 66 F.3d [1025,] 1035 [(9th Cir. 1995)]) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.[14]

Similarly, § 1912(e) provides that "[n]o foster care placement may be ordered" unless there is "qualified expert witness[]" testimony "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[15] This places the burden on a State, not a court, to present expert witness testimony in order to effectuate foster care for Indian children. If the federal government has concluded that such testimony is necessary in every case involving an Indian child's foster care placement, then the federal government should provide it. It cannot require the States to do so.

The requirements in 25 U.S.C. § 1912(d) apply to termination of parental rights, not just foster care placement.[16] The laws of Indiana, Louisiana, and Texas each permit certain individuals to petition for the termination of parental rights in some circumstances,[17] and § 1912(d) applies to all parties seeking termination,

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[14] *Id.* at 928.

[15] 25 U.S.C. § 1912(e).

[16] *Id.* § 1912(d).

[17] *See, e.g.,* IND. CODE §§ 31-35-2-4, 31-35-3.5-3 (2018); IND. CODE § 31-35-3-4 (2013); LA. CHILD. CODE ANN. art. 1122 (2019); TEX. FAM. CODE ANN. § 102.005 (West 2019); TEX. FAM. CODE ANN. § 161.005 (West Supp. 2019).

not just state actors.[18] At least superficially, § 1912(d) appears to be an evenhanded regulation of an activity in which both States and private actors engage.[19] But it is far from clear based on the present record that § 1912(d) applies in a meaningful way to private actors and if so, how many private actors, as compared to state actors, have actually met its requirements. Additionally, it appears that the State plaintiffs contend that "the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments."[20] I would remand for further factual development. It may be that in the vast majority of *involuntary* parental termination proceedings, the party seeking the termination is a state official or agency. It also seems highly unlikely that individuals or private actors seeking termination of parental rights (if and when permitted to do so under a State's laws) will have been in a position "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family."[21] It seems much more likely that these requirements fall, de facto, on the shoulders of state actors and agencies.

The records-keeping requirements in 25 U.S.C. § 1915(e) and 25 C.F.R. § 23.141 are direct orders to the

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[18] 25 U.S.C. § 1912(d).

[19] *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018) ("The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.").

[20] *Printz v. United States*, 521 U.S. 898, 932 (1997).

[21] 25 U.S.C. § 1912(d).

States.[22] They do not apply to private parties in parental termination or foster care placement proceedings. They do not apply "evenhandedly [to] an activity in which both States and private actors engage."[23]

The Supreme Court expressly left open in *Printz* whether federal laws "which require only the provision of information to the Federal Government" are an unconstitutional commandeering of a State or its officers or agents.[24] But the principles set forth in *Printz* lead to the conclusion that Congress is without authority to order the States to provide the information required by § 1915(e) and related regulations. Even were the burden on the States of creating, maintaining, and supplying the required information "minimal and only temporary," the Supreme Court has reasoned that "where . . . it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate."[25] The Supreme Court stressed, "It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."[26]

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[22] *Id.* at § 1915(e) ("A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made . . . ."); 25 C.F.R. § 23.141 ("The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child . . . .").

[23] *Brackeen v. Bernhardt*, __ F.3d __, __, 2019 WL 3759491, at *14 (5th Cir. 2019) (quoting *Murphy*, 138 S. Ct. at 1478).

[24] 521 U.S. at 918.

[25] *Id.* at 932.

[26] *Id.*

The panel's majority opinion concludes that the requirements of 25 U.S.C. § 1915(e) and 25 C.F.R. § 23.141 do not commandeer state officers or agents because they "regulate state activity and do not require states to enact any laws or regulations, or to assist in the enforcement of federal statutes regulating private individuals."[27] But the statute orders States to maintain records of each placement of an Indian child and requires those records to "evidenc[e] the efforts to comply with the order of preference specified in this section."[28] That directs States to assist in the enforcement of the ICWA by requiring States to document efforts to comply with the ICWA's preferences. The panel's majority opinion also cites three Supreme Court decisions, none of which supports its holding regarding the creation and maintenance of records.[29] The statute at issue in *Condon* prohibited States from disclosing or selling personal information they obtained from drivers in the course of licensing drivers and vehicles, unless the driver consented to the disclosure or sale of that information.[30] The Court's decision in *Condon* focused on that prohibition rather than the statute's additional requirement that certain information be disclosed to carry out the purposes of federal statutes including the Clean Air Act and the Anti Car Theft Act of 1992.[31] The

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[27] *Brackeen*, __ F.3d at __, 2019 WL 3759491, at *14.

[28] 25 U.S.C. § 1915(e).

[29] *Brackeen*, __ F.3d at __, 2019 WL 3759491, at *14 (citing *Reno v. Condon*, 528 U.S. 141, 151 (2000); *Printz*, 521 U.S. at 918; *South Carolina v. Baker*, 485 U.S. 505, 514 (1988)).

[30] *Condon*, 528 U.S. at 143-44 (citing the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725).

[31] *Id*. at 145, 148-51.

Baker decision did not concern a requirement that States create and maintain records.[32] The federal statute at issue in *Baker* allowed a tax exemption for registered, but not bearer, bonds, and the statute "cover[ed] not only state bonds but also bonds issued by the United States and private corporations."[33] As already discussed above, the *Printz* decision expressly left open the question of whether federal statutes requiring States to provide information was constitutional,[34] but the rationale of *Printz* compels the conclusion that some of the ICWA's commandments result in a commandeering of state officers and agents.

I agree with the panel's majority opinion that in some respects, the ICWA "merely require[s] states to 'take administrative . . . action to comply with federal standards regulating' child custody proceedings involving Indian children, which is permissible under the Tenth Amendment."[35] Unlike the congressional enactment at issue in *Murphy*, the ICWA does "confer . . . federal rights on private actors interested in"[36] foster care placement, the termination of parental rights to an Indian child, and adoption of Indian children. States cannot override or ignore those private actors' federal rights by failing to give notice to interested or affected parties or by failing to follow the placement preferences expressed in the ICWA. If a State desires to place an

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[32] *See Baker*, 485 U.S. at 508-10.

[33] *Id*. at 510.

[34] *Printz*, 521 U.S. at 918.

[35] *Brackeen*, __ F.3d at __, 2019 WL 3759491, at *14 (quoting *Baker*, 485 U.S. at 515).

[36] *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1467 (2018).

Indian child with an individual or individuals other than the child's birth parents, the State must respect the federal rights of those upon whom the ICWA confers an interest in the placement of the Indian child or Indian children more generally. But 25 U.S.C. § 1912(d) (to the extent it concerns foster care placement), § 1912(e), § 1915(e), and 25 C.F.R. § 23.141, require more than the accommodation of private actors' federal rights regarding the placement of Indian children. Those statutes and regulations commandeer state officers or agents by requiring them "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" and to demonstrate that such "efforts have proved unsuccessful";[37] to present "qualified expert witnesses" to demonstrate "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child";[38] and to create and maintain records of every placement of an Indian child as well as records "evidencing the efforts to comply with the order of preference specified in this section."[39]

That these statutes and regulations "serve[] very important purposes" and that they are "most efficiently administered" at the state level is of no moment in a commandeering analysis.[40] As JUSTICE O-CONNOR, writing for the Court in *New York v. United States*, so eloquently expressed, "the Constitution protects us from our own best intentions: It divides power among

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[37] 25 U.S.C. § 1912(d).
[38] *Id.* § 1912(e).
[39] *Id.* § 1915(e).
[40] *Printz v. United States*, 521 U.S. 898, 931-32 (1997).

sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[41]

[41] 505 U.S. 144, 187 (1992).

APPENDIX D

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

CHAD BRACKEEN, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action**
	§	**No.4:17-cv-00868-O**
RYAN ZINKE, et al.,	§	
Defendants,	§	
	§	
CHEROKEE NATION, et al.,	§	
Intervenors-Defendants.	§	

ORDER

This case arises because three children, in need of foster and adoptive placement, fortunately found loving adoptive parents who seek to provide for them. Because of certain provisions of a federal law, however, these three children have been threatened with removal from, in some cases, the only family they know, to be placed in another state with strangers. Indeed, their removals are opposed by the children's guardians or biological parent(s), and in one instance a child was removed and placed in the custody of a relative who had previously been declared unfit to serve as a foster parent. As a result, Plaintiffs seek to declare that federal law, known as the Indian Child Welfare Act (the "ICWA"), unconstitutional.

In this case, the State Plaintiffs have filed a Motion for Summary Judgment (ECF No. 72), on April 26, 2018, and the Individual Plaintiffs filed a Motion for Summary Judgment (ECF No. 79), on the same day. Plaintiffs seek judgment as a matter of law on all of their claims. The parties appeared at a hearing on these motions and presented oral arguments on August 1, 2018. *See* Hr'g Tr., ECF No. 163. For the following reasons, the Court finds Plaintiffs' motions for summary judgment should be and are hereby **GRANTED in part and DENIED in part**.

I. BACKGROUND

First, the Court identifies the parties, next the legal backdrop of this dispute, and then the parties' claims, drawing in large part on those facts set out in the Order denying Defendants' motions to dismiss. *See* July 24, 2018 Order, ECF No. 155. Following these sections, this order will analyze the claims.

Plaintiffs are comprised of three states—Texas, Louisiana, and Indiana, (collectively, the "State Plaintiffs"), and seven individual Plaintiffs—Chad Everett and Jennifer Kay Brackeen (the "Brackeens"), Nick and Heather Libretti (the "Librettis"), Altagracia Socorro Hernandez ("Ms. Hernandez"), and Jason and Danielle Clifford (the "Cliffords") (collectively, the "Individual Plaintiffs") (together with the State Plaintiffs, "Plaintiffs"). State Pls.' Br. Supp. Mot. Summ. J. 1–2, ECF No. 74 [hereinafter "State Pls.' Br."]. Defendants are the United States of America; the United States Department of the Interior (the "Interior") and its Secretary Ryan Zinke ("Zinke") in his official capacity; the Bureau of Indian Affairs (the "BIA") and

its Director Bryan Rice ("Rice") in his official capacity; the BIA Principal Assistant Secretary for Indian Affairs John Tahsuda III ("Tahsuda")[1] in his official capacity; the Department of Health and Human Services ("HHS") and its Secretary Alex M. Azar II ("Azar") (collectively the "Federal Defendants"). *Id.* Shortly after this case was filed, the Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians (collectively, the "Tribal Defendants") filed an unopposed motion to intervene, which the Court granted. *See* Trib. Defs.' Mot. Intervene, ECF No. 42; Mar. 28, 2018 Order, ECF No. 45.

Plaintiffs seek to declare unconstitutional certain provisions of the ICWA and its accompanying regulations (codified at 25 C.F.R. part 23), known as the Indian Child Welfare Act Proceedings (the "Final Rule"), as well as certain provisions of the Social Security Act (the "SSA") that predicate federal funding for portions of state child-welfare payments on compliance with the ICWA. Plaintiffs argue that the ICWA and the Final Rule implement a system that mandates racial and ethnic preferences, in direct violation of state and federal law. Am. Comp. ¶ 193, ECF No. 35; 42 U.S.C. § 1996(b);

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[1] Initially Plaintiffs sued Michael Black in his official capacity as Acting Assistant Secretary of Indian Affairs. *See* Orig. Compl. ¶ 17, ECF No. 1. On September 13, 2017, Secretary of the Interior Ryan Zinke appointed Tahsuda as the Department of Interior's Principal Assistant Secretary of Indian Affairs. *See* Press Release, *Secretary Zinke Names John Tahsuda III the Principal Deputy Assistant Secretary for Indian Affairs*, DEP'T OF THE INT., (Sept. 13, 2017), https://www.doi.gov/pressreleases/secretary-zinke-names-john-tahsuda-iii-principal-deputy-assistant-secretary-indian. Accordingly, Tahsuda has been substituted as a Defendant.

TEX. FAM. CODE §§ 162.015, 264.1085; LA. CONST. art. 1, § 3. Plaintiffs ask that the Final Rule be declared invalid and set aside as a violation of substantive due process and as not in accordance with law (Counts One and Five). Am. Compl. ¶¶ 265, 349, ECF No. 35; 5 U.S.C. § 705(2)(A). Plaintiffs also ask that the ICWA, specifically sections 1901–23 and 1951–52, be declared unconstitutional under Article One and the Tenth Amendment of the United States Constitution because these provisions violate the Commerce Clause, intrude into state domestic relations, and violate the anti-commandeering principle (Counts Two and Three). Am. Compl. ¶¶ 281, 323, ECF No. 35. Finally, Plaintiffs ask that the ICWA sections 1915(a)–(b) be declared unconstitutional in violation of the equal protection guarantee of the Fifth Amendment to the United States Constitution and Individual Plaintiffs alone ask the same sections be declared unconstitutional in violation of substantive due process. (Counts Four and Six). *Id.* ¶¶ 338, 367. State Plaintiffs alone bring the final count, seeking a declaration that ICWA section 1915(c) and Final Rule section 23.130(b) violate the non-delegation doctrine (Count Seven). Am. Compl. ¶ 376, ECF No. 35.

A. The ICWA and the SSA

Congress passed the ICWA in 1978 in response to rising concerns over "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." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). "Congress found that 'an alarmingly high percentage of Indian families [were being] broken up by

the removal, often unwarranted, of their children from them by nontribal public and private agencies.'" *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013) (quoting 25 U.S.C. § 1901(4)). Recognizing "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," Congress created a framework to govern the adoption of Indian children.[2] *See* 25 U.S.C. § 1901, *et seq*. This framework establishes: (1) placement preferences in adoptions of Indian children; (2) good cause to depart from those placement preferences; (3) standards and responsibilities for state courts and their agents; and (4) consequences flowing from noncompliance with the statutory requirements. *See id*.

The ICWA established "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. The ICWA mandates placement preferences in foster care, preadoptive, and adoptive proceedings involving Indian children. *Id*. § 1915. It requires that "in any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a place with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other

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[2] *See also* Br. of *Amicus Curiae* 123 Federally Recognized Indian Tribes, *et al*. in Opposition to Plaintiffs' Motions for Summary Judgment 1, ECF No. 138. ("Congress enacted the Indian Child Welfares Act of 1978 ("ICWA" or "the Act"), 25 U.S.C. 1901 *et seq*., in response to a nationwide crisis—namely, the widespread and wholesale displacement of Indian children from their families by state child welfare agencies at rates far higher than those of non-Indian families.").

Indian families." *Id.* § 1915(a). Similar requirements are set for foster care or preadoptive placements. *Id.* § 1915(b). If the Indian child's tribal court should establish a different order of the preferences than that set by Congress, the state court or agency "shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." *Id.* § 1915(c).

Absent good cause, the state court shall transfer proceedings concerning an Indian child to the Indian child's tribal court. 25 U.S.C. § 1911(b). In any state court proceeding for the "foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." *Id.* § 1911(c). The ICWA prohibits the termination of parental rights for an Indian child in the absence of "evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(f).

State agencies and courts must notify potential intervenors and the Director of the BIA of an Indian child matter. 25 U.S.C. § 1912. In any involuntary child custody proceeding, the ICWA commands state agencies and courts—when seeking foster care placement of or termination of parental rights to an Indian child—to notify the parents or Indian custodian and the Indian child's tribe of the pending proceedings and of their right to intervene. 25 U.S.C. § 1912(a). Copies of these notices must be sent to the Secretary of the Interior and the

BIA. No foster care placement or termination of parental rights proceeding may be held until at least ten days after receipt of such a notice by the parent or Indian custodian and tribe or the Secretary of the Interior. *Id.* The ICWA also grants the Indian custodian or tribe up to twenty additional days to prepare for such proceedings. *Id.*

The ICWA dictates that an Indian parent or guardian may not give valid consent to termination of parental rights before ten days after the birth of the Indian child. 25 U.S.C. § 1913(a). Before parental rights are terminated "any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time." *Id.* § 1913(b). In any voluntary proceeding for termination of parental rights or adoptive placement of an Indian child, the biological parents or the Indian tribe may withdraw consent for any reason prior to the entry of a final decree, and the child shall be returned. *Id.* § 1913(c). Finally, the ICWA permits the parent of an Indian child to withdraw consent to a final decree of adoption on the grounds that the consent was obtained through fraud or duress for up to two years after the final decree. *Id.* § 1913(d); Ind. Pls.' Br. Supp. Mot. Summ. J. 20, ECF No. 80 [hereinafter "Ind. Pls.' Br."].

The ICWA places recordkeeping duties on state agencies and courts, to demonstrate their compliance with the statute. 25 U.S.C. § 1915(e). Additionally, state courts entering final decrees must provide the Secretary of the Interior with a copy of the decree or order, along with the name and tribal affiliation of the child, names of the biological parents, names of the adoptive parents,

and the identity of any agency having files or information relating to the adoption. *Id.* § 1951.

If the state court or prospective guardian fails to comply with the ICWA, the final child custody orders or placements may be overturned, whether on direct appeal or by another court of competent jurisdiction. 25 U.S.C. § 1914.[3] To ensure state agencies and courts comply with the ICWA's mandates, it enables any Indian child who is the subject of any action under the ICWA, any parent or Indian custodian from whose custody the child was removed, and the Indian child's tribe, to petition any court of competent jurisdiction to invalidate a state court's decision for failure to comply with the ICWA sections 1911, 1912, and 1913. *Id.* Section 1914 has also been applied to allow collateral attacks of adoptions after the close of the relevant window under state law. *See id.*; Ind. Pls.' Br. 6, ECF No. 80; *see e.g., Belinda K. v. Baldovinos*, No. 10-cv-2507-LHK, 2012 WL 13571, at *4 (N.D. Cal. Jan. 4, 2012).

Congress has also tied child welfare funding to compliance with the ICWA. The SSA requires states who receive child welfare funding through Title IV-B, Part 1 of the SSA to file annual reports, including a description of their compliance with the ICWA. Social Security Amendments Act of 1994, Pub. L. No. 103-432, § 204, 108 Stat. 4398 (1994); 42 U.S.C. § 622(a). Title IV-B funding

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[3] While a "court of competent jurisdiction" is not defined in the ICWA or the Final Rule, state appellate courts and federal district courts have heard challenges to adoption proceedings under the ICWA. *See e.g., Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017, 1022 (D.S.D. 2014); *Doe v. Mann*, 285 F. Supp. 2d 1229, 1231 (N.D. Cal. 2003).

is partially contingent on how well the states demonstrate their compliance with the ICWA. Part 'b' requires that a state's plan must also "contain a description, developed after consultation with tribal organizations . . . in the State, of the specific measures taken by the State to comply with the [ICWA]." 42 U.S.C. § 622(b).

Congress expanded the requirement for states to comply with the ICWA to receive SSA funding in 1999 and 2008 when it amended Title IV-E to require states to certify ICWA compliance to receive foster care and adoption services funding. Foster Care Independence Act of 1999, Pub. L. No. 106-69, § 101, 113 Stat. 1822 (1999); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 301, 122 Stat. 3949 (2008). Finally, HHS regulations state that the HHS Administration for Children and Families ("ACF") "will determine a title IV–E agency's substantial conformity with title IV–B and title IV–E plan requirements" based on "criteria related to outcomes." 45 C.F.R. § 1355.34(a). Part 'b' of the same section includes compliance with the ICWA. *Id.* § 1355.34(b).

In fiscal year 2018, Congress allocated to Texas approximately $410 million in federal funding for Title IV-B and Title IV-E programs, Louisiana received approximately $64 million, and Indiana received approximately $189 million. Am. Compl. ¶¶ 76–78, ECF No. 35. Plaintiffs argue that HHS and Secretary Azar have the authority to administer funding under Title IV-B and Title IV-E and are vested with discretion to approve or deny a state's compliance with the requirements of 42 U.S.C. §§ 622, 677. Therefore,

Plaintiffs claim that funding under Title IV-B and IV-E is dependent on compliance with the ICWA. Am. Compl. ¶ 80, ECF No. 35.

B. The 1979 Guidelines and Final Rule

In 1979, before passage of the Final Rule, the BIA promulgated the Guidelines for State Courts—the Indian Child Custody Proceedings (the "1979 Guidelines"). 44 Fed. Reg. 67,584 (Nov. 26, 1979). The BIA intended these guidelines to assist in the implementation of the ICWA but they were "not intended to have binding legislative effect." *Id.* The 1979 Guidelines left the "primary responsibility" for interpreting the ICWA "with the courts that decide Indian child custody cases." *Id.* The 1979 Guidelines also emphasized that "the legislative history of the [ICWA] states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." *Id.* As state courts applied the ICWA, some held that the 'good cause' exception to the ICWA placement preferences required a consideration of a child's best interest, including any bond or attachment the child formed. Ind. Pls.' Br. 7, ECF No. 80; *see e.g., In re Interest of Bird Head*, 331 N.W.2d 785, 791 (Neb. 1983); *In re Appeal in Maricopa Cnty.*, Juvenile Action No. A-25525, 667 P.2d 228, 234 (Ariz. Ct. App. 1983). Other state courts limited the ICWA's application to situations where the child had some significant political or cultural connection to the tribe. Ind. Pls.' Br. 7, ECF No. 80; *see* e.g., *In re Interest of S.A.M*, 703 S.W.2d 603, 608–09 (Mo. Ct. App. 1986); *Claymore v. Serr*, 405 N.W.2d 650, 653–54 (S.D. 1987); *In*

re Adoption of T.R.M., 525 N.E.2d 298, 303 (Ind. 1988); *Hampton v. J.A.L.*, 658 So. 2d 331, 335 (La. Ct. App. 1995).

In June 2016, the BIA promulgated the Final Rule, which purported to "clarify the minimum Federal standards governing implementation of the [ICWA]" and to ensure that it "is applied in all States consistent with the Act's express language." 25 C.F.R. § 23.101. The regulations declared that while the BIA "initially hoped that binding regulations would not be necessary to carry out [the ICWA], a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law." 81 Fed. Reg. 38,782 (June 14, 2016).

Plaintiffs contend the main departure from the previous decades of practice under the ICWA was the Final Rule's definition of the 'good cause' exception to the preference placements and the evidentiary standard required to show good cause. Am. Compl. ¶ 116, ECF No. 35; Ind. Pls.' Br. 60–63, ECF No. 80. The Final Rule noted that "State courts . . . differ as to what constitutes 'good cause' for departing from ICWA's placement preferences." 81 Fed. Reg. at 38,782. In response, the Final Rule mandates that "[t]he party urging that ICWA preferences not be followed bears the burden of proving by clear and convincing evidence the existence of good cause" to deviate from such a placement. 81 Fed. Reg. at 38,838; *see also* 25 C.F.R. § 23.132(b). The Final Rule further provides that state courts "may not consider factors such as the participation of the parents or Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and

his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum." 81 Fed. Reg. at 38,868 (codified at 25 C.F.R. § 23.103(c)).

Plaintiffs contrast the text of the 1979 Guidelines where "the use of the term 'good cause' was designed to provide state courts with flexibility" with the Final Rule, which now claims that "Congress intended the good cause exception to be narrow and limited in scope." *Compare* 44 Fed. Reg. at 67,584 (Nov. 26, 1979), *with* 81 Fed. Reg. at 38,839 (June 14, 2016). Accordingly, the Final Rule sets forth "five factors upon which courts may base a determination of good cause to deviate from the placement preferences," and further "makes clear that a court may not depart from the preferences based on the socioeconomic status of any placement relative to another placement or based on the ordinary bonding or attachment that results from time spent in a non-preferred placement that was made in violation of ICWA." 81 Fed. Reg. at 38,839; *see also* 25 C.F.R. § 23.132(c)–(e); Ind. Pls.' Br. 7–9, ECF No. 80.

Beyond limiting what state courts may consider in determining "good cause," the Final Rule places more responsibilities on states to determine if the child is an Indian child. 25 C.F.R. § 23.107(a). These inquiries "should be on the record," and "state courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child." *Id.*; 25 C.F.R. § 23.107(b). Whenever a state court enters a final adoption decree or an order in an Indian child placement, the Final Rule requires the state court or agency to provide a copy of the decree or order to the BIA. 25

C.F.R. § 23.140. The Final Rule also requires states to "maintain a record of every voluntary or involuntary foster care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary [of the Interior]." 25 C.F.R. § 23.141.

In an involuntary foster care or termination of parental rights proceeding, the Final Rule requires state courts to ensure and document that the state agency has used "active efforts" to prevent the breakup of the Indian family. 25 C.F.R. § 23.120. The Final Rule defines "active efforts" to include "assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan." 25 C.F.R. § 23.2.

When determining if the child is an Indian child, only the Indian tribe of which the child is believed to be a member may determine whether the child is a member of the tribe or eligible for membership. 25 C.F.R. § 23.108(a). "The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe." *Id.* § 23.108(b).

When an Indian child is a member or eligible for membership in only one tribe, that tribe must be designated by the state court as the Indian child's tribe. But when the child meets the definition of "Indian child" for more than one tribe, then the Final Rule instructs state agencies and courts to defer to "the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes," or allow "the Tribes to determine which should be designated as the Indian

child's Tribe." 25 C.F.R. §§ 23.109(b)–(c). Only when the tribes disagree about the child's membership may state courts independently designate the tribe to which the child belongs, and the Final Rule provides criteria the courts must use in making that designation. *Id.* § 23.109(c)(2).

The Final Rule instructs state courts to dismiss a voluntary or involuntary child custody proceeding when the Indian child's residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings. 25 C.F.R. § 23.110(a). The Final Rule requires state courts to terminate child custody proceedings if any party or the state court has reason to believe that the Indian child was improperly removed from the custody of his parent or Indian custodian. 25 C.F.R. § 23.114.

C. The Adoption Proceedings

1. The Brackeens and A.L.M.

The Brackeens wished to adopt A.L.M, who was born in Arizona to an unmarried couple, M.M. and J.J. Ind. Pls.' App. Supp. Mot. Summ. J. 60, ECF No. 81 [hereinafter "Ind. Pls.' App."]. A.L.M. is an Indian child under the ICWA and the Final Rule because he is eligible for membership in an Indian tribe—his biological mother is an enrolled member of the Navajo Nation and his biological father is an enrolled member of the Cherokee Nation. *Id.*; *see* 25 C.F.R. § 23.2. A few days after A.L.M. was born, his biological mother brought him to Texas to live with his paternal grandmother. Ind. Pls.' App. 61, ECF No. 81. When he was ten months old, Child Protective Services ("CPS"), a division of the Texas

Department of Family and Protective Services ("DFPS"), removed A.L.M. from his grandmother and placed him in foster care with the Brackeens. *Id.* at 61. Pursuant to the ICWA and the Final Rule, 25 C.F.R. § 23.11, the Cherokee Nation and the Navajo Nation were notified of A.L.M.'s placement with the Brackeens. *Id* at 61–62. Because DFPS identified no ICWA-preferred foster placement for A.L.M., he remained with the Brackeens. *Id.* A.L.M. lived with the Brackeens for more than sixteen months before, with the support of his biological parents and paternal grandmother, the Brackeens sought to adopt him. *Id.*

In May 2017, a Texas state court terminated the parental rights of A.L.M.'s biological parents, making him eligible for adoption under Texas law. *Id.* at 61. Shortly thereafter, a year after the Brackeens took custody of A.L.M., the Navajo nation notified the state court that it had located a potential alternative placement for A.L.M. with non-relatives in New Mexico. *Id.* The Brackeens note that this placement would have moved A.L.M away from both his biological parents and the only home he has ever known. *Id.* at 61-62.

In July 2017, the Brackeens filed an original petition seeking to adopt A.L.M. Id. at 62. The Cherokee and Navajo Nations were notified of the adoption proceeding in accordance with the ICWA and the Final Rule. *Id.*; *see* 25 U.S.C. § 1912; *see* 25 C.F.R. § 23.11. No one intervened in the Texas adoption proceeding or otherwise formally sought to adopt A.L.M. *Id.* at 63. On August 1, 2017, a Texas family court held a hearing regarding the Brackeens' petition for adoption. *Id.* at 62. The Navajo Nation was designated as A.L.M.'s tribe, but

this "determination of [A.L.M.'s] Tribe for purposes of ICWA and [the Final Rule] [did] not constitute a determination for any other purpose." 25 C.F.R. § 23.109(c)(3).

Under the ICWA and the Final Rule placement preferences, absent good cause, an Indian child should be placed with a member of the child's extended family, a member of the child's Indian tribe, or another Indian family, in that order. *See* 25 U.S.C. § 1915(a). The Brackeens argued in state court that the ICWA's placement preferences should not apply because they were the only party formally seeking to adopt A.L.M., and that good cause existed to depart from the preferences. Ind. Pls.' App. 63, ECF No. 81. The Final Rule places the burden on the Brackeens, the party seeking adoption, to prove "by clear and convincing evidence that there was 'good cause'" to allow them, a non-Indian couple, to adopt A.L.M. 25 C.F.R. § 23.132(b). The Brackeens submitted testimony by A.L.M.'s biological parents, his court appointed guardian, and an expert in psychology to show good cause. Ind. Pls.' App. 62, ECF No. 81. However, Texas DFPS pointed to the Final Rule's heightened evidentiary requirements and argued that the Brackeens did not provide clear and convincing evidence of good cause to justify a departure from the placement preferences. *Id.* at 61–62.

In January 2018, the Brackeens successfully petitioned to adopt A.L.M., but under the ICWA and the Final Rule, the Brackeens' adoption of A.L.M. is open to collateral attack for two years. *Id.* at 64; *see* 25 U.S.C § 1914; Ind. Pls.' Br. at 6, ECF No. 80; *see e.g.*, *Belinda K. v. Baldovinos,* No. 10-cv-2507-LHK, 2012 WL 13571,

at *4 (N.D. Cal. Jan. 4, 2012). Plaintiffs explain that the Brackeens intend to continue to provide foster care for, and possibly adopt, additional children in need. Ind. Pls.' App. 64, ECF No. 81. But they are reluctant, after this experience, to provide foster care for other Indian children in the future. *Id.* Plaintiffs argue that the ICWA and the Final Rule therefore interfere with the Brackeens' intention and ability to provide a home to additional children. Am. Compl. ¶ 154, ECF No. 35. Additionally, Plaintiffs argue that this legal regime harms Texas's interests by limiting the supply of available, qualified homes necessary to help foster-care children in general and Indian children in particular. *Id.*

2. The Librettis and Baby O.

The Librettis are a married couple living in Sparks, Nevada. *See* Ind. Pls.' App. 66, ECF No. 81. They sought to adopt Baby O. when she was born in March 2016. *Id.* at 67. Baby O.'s biological mother, Ms. Hernandez, felt that she would be unable to care for Baby O. and wished to place her for adoption at her birth. *Id.* at 72. Ms. Hernandez has continued to be a part of Baby O.'s life and she and the Librettis visit each other regularly. *Id.* at 73. Baby O.'s biological father, E.R.G., descends from members of the Ysleta del sur Pueblo Tribe (the "Pueblo Tribe"), located in El Paso, Texas. *Id.* at 69. At the time of Baby O.'s birth, E.R.G. was not a registered member of the Pueblo Tribe. *Id.* at 73.

The Pueblo Tribe intervened in the Nevada custody proceedings in an effort to remove Baby O. from the Librettis. *Id.* at 69. Once the Librettis joined the challenge to the constitutionality of the ICWA and the Final Rule, the Pueblo Tribe indicated its willingness to

discuss settlement. *Id.* at 69. The Librettis have agreed to a settlement with the tribe that would permit them to petition for adoption of Baby O. *Id* at 70. But Plaintiffs point out that any settlement would still be subject to collateral attack under the ICWA for two years. Am. Compl. ¶ 168, ECF No. 35. The Librettis intend to petition to adopt Baby O. as soon as they are able and are the only people who have indicated an intent to adopt her. Ind. Pls.' App. at 69–70, ECF No. 81.

Similar to the Brackeens, the Librettis intend to provide foster care for and possibly adopt additional children in need. *Id.* at 70. Due to their experiences with the ICWA, the Librettis are "reluctant to provide a foster home for other Indian children in the future." *Id.*

3. The Cliffords and Child P.

The Cliffords live in Minnesota and seek to adopt Child P. *See* Ind. Pls.' App. 2, ECF No. 81. Child P.'s maternal grandmother is a registered member of the White Earth Band of Ojibwe Tribe (the "White Earth Band"). *Id.* at 4. Child P. is a member of the White Earth Band for the purposes of the ICWA only. *Id.* The Minnesota state court considered itself bound by the White Earth Band's pronouncement and concluded that the ICWA must apply to all custody determinations concerning Child P. *Id.* at 4. However, because the ICWA placement preferences apply, county officials removed Child P. from the Cliffords. *Id.* at 5–6. Child P. was placed in the care of her maternal grandmother—whose foster licensed had been revoked—in January 2018. *Id.* at 3–6.

Child P.'s guardian ad litem supports the Cliffords' efforts to adopt her and agrees that the adoption is in

Child P's best interest. *Id.* at 5. However, due to the application of the ICWA, the Cliffords and Child P. remain separated and the Cliffords face heightened legal barriers to adopt Child P. *Id.* at 53. If the Cliffords are successful in petitioning for adoption, that adoption may be collaterally attacked for two years under the ICWA. 25 U.S.C. § 1915(a).

D. State Plaintiffs

Texas, Louisiana, and Indiana bring this suit in their capacities as sovereign states. *See* Am. Compl. ¶ 178, ECF No. 35. They claim that the ICWA and the Final Rule harm state agencies charged with protecting child welfare by usurping their lawful authority of the regulation of child custody proceedings and management of child welfare services. *Id.* Additionally, State Plaintiffs contend the ICWA and the Final Rule jeopardize millions of dollars in federal funding. *Id.* State Plaintiffs each have at least one Indian tribe living within their borders and have regular dealings with Indian child adoptions and the ICWA.[4] *Id.*

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[4] Three federally recognized tribes reside in Texas—Yselta del Sur Pueblo in El Paso, Texas; the Kickapoo Tribe in Eagle Pass, Texas; and the Alabama-Coushatta Tribe near Livingston, Texas. Both the Kickapoo Tribe and the Alabama-Coushatta Tribe have reservations in Texas. *See* State Pls' App at 481, ECF No. 73. Four tribes reside in Louisiana—the Chitimacha Tribe in Charenton, Louisiana; Coushatta Tribe in Elton, Louisiana; the Tunica-Biloxi Tribe in Marksville, Louisiana; and the Jena Band of Choctaw Indians in Jena, Louisiana. Am. Compl. ¶ 180, ECF No. 35. One federally recognized tribe resides in Indiana—the Pokagon Band of Potawatomi Indians. *Id.* ¶ 181. For example, as of December 2017, there were thirty-nine children in the care of Texas DFPS who were verified to be enrolled or eligible for membership in a federally

Plaintiffs argue that the ICWA and the Final Rule place significant responsibilities and costs on state agencies and courts to carry out federal Executive Branch directives. *Id.* at ¶ 187. Texas DFPS, Louisiana Department of Child and Family Services ("DCFS"), and the Indiana Department of Child Services ("DCS") each handle Indian child cases. *See* State Pls.' App at 10, 370, 394, ECF No. 73.

The State Plaintiffs require their state agencies and courts to act in the best interest of the child in foster care, preadoptive, and adoptive proceedings. *See id.* at 37, 40, 44, 46, 64, 382. But the State Plaintiffs argue that the ICWA and Final Rule require these courts and agencies to apply the mandated placement preferences, regardless of the child's best interest, if the child at issue is an "Indian child." Am. Compl. ¶¶ 194–95, ECF No. 35. Additionally, State Plaintiffs argue that the ICWA's requirement that state courts submit to mandates from an Indian child's tribe violates state sovereignty because the Indian tribe is not an equal sovereign deserving full faith and credit. *Id.* ¶ 196; 25 U.S.C. § 1915(c).

In every child custody case, the ICWA and Final Rule require the State Plaintiffs to undertake additional responsibilities, inquiries, and costs. As an example of how the ICWA and the Final Rule affect state administrative and judicial procedures, State Plaintiffs submit the Texas CPS Handbook (the "Texas Handbook"). Ind. Pls.' App. 16 (Texas Handbook) § 1225, ECF No. 73 [hereinafter "Texas Handbook"]. The Texas

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recognized tribe, many of them living in Texas DFPS homes. *Id.* ¶ 189.

Handbook contains Texas DFPS's policies and procedures for compliance with the ICWA and the Final Rule. *Id.* at 9–29. First, these standards require that, in every case, CPS workers determine if the child or child's family has Native American ancestry or heritage. *Id.* at 12. The Texas Handbook provides guidance on how to ascertain if the ICWA and the Final Rule apply, how to comply with it, and warns that failure to comply could result in the final adoption order being overturned. *Id.* at 9–29. The Texas Handbook also states that if an Indian child is taken into DFPS custody, "almost every aspect of the social work and legal case is affected." Texas Handbook § 5844. If the ICWA applies, the legal burden of proof for removal, obtaining a final order terminating parental rights, and restricting a parent's custody rights is higher. *Id.* Texas DFPS must serve the child's parent, tribe, Indian custodian, and the BIA with a specific notice regarding the ICWA rights, and DFPS and its caseworkers "must make active efforts to reunify the child and biological Indian family." *Id.* Finally, the child must be placed according to the ICWA statutory preferences; expert testimony on tribal child and family practices may be necessary; and a valid relinquishment of parental rights requires a parent to appear in court and a specific statutory procedure is applied. *Id.*

Indiana and Louisiana have similar requirements in place to assure that their child welfare systems comply with the ICWA and the Final Rule. *See id.* at 370–400. Louisiana DCFS must maintain ongoing contact with the Indian child's tribe because each tribe may elect to handle the ICWA differently. Am. Compl. ¶ 220, ECF No. 35. They are also required to ensure that the state

agencies take "all reasonable steps" to verify the child's status. 25 C.F.R. § 23.124.

The ICWA and the Final Rule require state courts to ask each participant, on the record, at the commencement of child custody proceedings whether the person knows or has reason to know whether the child is an Indian child and directs the parties to inform the court of any such information that arises later. 25 C.F.R. § 23.107(a). If the state court believes the child is an Indian child, it must document and confirm that the relevant state agency (1) used due diligence to identify and work with all of the tribes that may be connected to the child and (2) conducted a diligent search to find suitable placements meeting the preference criteria for Indian families. *Id.* §§ 23.107(b), 23.132(c)(5). The ICWA and the Final Rule require the State Plaintiffs' agencies and courts to maintain indefinitely records of placements involving Indian children and subject those records to inspection by the Director of the BIA and the child's Indian tribe at any time. 25 U.S.C. §§ 1915(e), 1917; 25 C.F.R. §§ 23.140–41. State Plaintiffs claim this increases costs for the agencies and courts who have to maintain additional records not called for under state law and hire or assign additional employees to maintain these records indefinitely. Am. Compl. ¶ 225, ECF No. 35.

The statutes also affect the State Plaintiffs' rules of civil procedure. The ICWA section 1911(c) and the Final Rule dictate that the Indian child's custodian and the child's tribe must be granted mandatory intervention. Texas Rule of Civil Procedure 60 permits Texas courts to strike the intervention of a party upon a showing of sufficient cause by another party, but the ICWA imposes

a different legal standard of intervention to child custody cases involving Indian children. TEX. R. CIV. P. 60; 25 U.S.C. § 1911(c) ("In any State court proceeding . . . the Indian child's tribe *shall have a right* to intervene at any point in the proceeding.") (emphasis added). In Louisiana, any person with a justiciable interest in an action may intervene. LA. CODE CIV. PROC. art. 1091. In Indiana, a person may intervene as of right or permissively, similar to the Federal Rules of Civil Procedure. IND. R. TR. PROC. 24. The ICWA, however, eliminates these requirements and provides mandatory intervention for the Indian child's custodian and the child's tribe. 25 U.S.C. § 1911(c).

Finally, the ICWA and the Final Rule override the State Plaintiffs' laws with respect to voluntary consent to relinquish parental rights. *See* 25 U.S.C. § 1913(a); 25 C.F.R. § 23.125(e). Texas law permits voluntary relinquishment of parental rights forty-eight hours after the birth of the child; Louisiana allows surrender prior to or after birth of the child, and surrender of maternal rights five days after the birth of the child, and Indiana permits voluntary termination of parental rights after birth of the child. TEX. FAM. CODE § 161,103(a)(1); LA. CHILD CODE art. 1130; IND. CODE § 31-35-1-6. The ICWA and Final Rule prohibit any consent until ten days after the birth. 25 U.S.C. § 1913(a); 25 C.F.R. § 23.125(e).

The ICWA and the Final Rule also affect how long a final adoption decree is subject to challenge. Under the ICWA, state courts must vacate a final adoption decree involving an Indian child, and return the child to the biological parent, any time within two years if the parent withdraws consent on the grounds that it was obtained

through fraud or duress. 25 U.S.C. § 1913(d); 25 C.F.R. § 23.136. This directly conflicts with Texas, Louisiana, and Indiana state law, which provide that an adoption decree is subject to direct or collateral attack for no more than one year. TEX. FAM. CODE § 162.012(a) (up to six months); *Goodson v. Castellanos,* 214 S.W.3d 741, 748–49 (Tex. App.—Austin 2007, pet. denied); LA. CHILD. CODE art. 1263 (up to six months); IND. CODE § 31-19-14-2 (up to six months after entry of adoption decree; or up to one year after adoptive parents obtain custody, whichever is later). It also contradicts the Texas common law principle, as well as Indiana statutory law, which hold that the best interest of the child is served by concluding child custody decisions so that these decisions are not unduly delayed. *In re M.S.,* 115 S.W.3d 534, 548 (Tex. 2003); IND. CODE § 31-19-14-2. The ICWA however permits the invalidation, by any court of competent jurisdiction, of a state court's final child custody order if it fails to comply with the ICWA. 25 U.S.C. § 1914; 25 C.F.R. § 23.137.[5]

Finally, the State Plaintiffs contend if they fail to comply with the ICWA, they risk losing funding for child welfare services under Title IV-B and Title IV-E of the SSA. Am. Compl. ¶ 243, ECF No. 35; 42 U.S.C. §§ 622, 677. Defendants Zinke, Rice, Tahsuda, and Azar, and their respective federal departments, determine if the State Plaintiffs are in compliance with the ICWA's statutory requirements, and in turn, whether they are eligible for continued funding under Title IV-B and Title IV-E funding.

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[5] *See supra* note 3.

Plaintiffs moved for summary judgment on all counts, arguing there is no dispute of material fact and only questions of law remain. *See* ECF Nos. 72, 79. The motions are ripe for review.

II. LEGAL STANDARD

The Court may grant summary judgment where the pleadings and evidence show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A genuine dispute as to any material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant must inform the Court of the basis of its motion and demonstrate from the record that no genuine dispute as to any material fact exists. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

When reviewing the evidence on a motion for summary judgment, the Court must decide all reasonable doubts and inferences in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co.,* 853 F.2d 355, 358 (5th Cir. 1988). The court cannot make a credibility determination in light of conflicting evidence or competing inferences. *Anderson,* 477 U.S. at 255. If there appears to be some support for disputed allegations, such that "reasonable minds could differ as to the import of the evidence," the Court must deny the motion. *Id.* at 250.[6]

[6] The Federal Defendants disputed facts relating to Individual Plaintiffs' standing in this case. *See* Fed. Defs.' Br. Resp, ECF No.

III. ANALYSIS

Plaintiffs move for summary judgment, claiming that the ICWA and the Final Rule violate: (1) the equal protection requirements of the Fifth Amendment; (2) the Due Process Clause of the Fifth Amendment; (3) the Tenth Amendment; and (4) the proper scope of the Indian Commerce Clause. Plaintiffs also argue that: (1) the Final Rule violates the Administrative Procedure Act (the "APA"); and (2) the ICWA violates Article I of the Constitution.[7] *See generally* Ind. Pls.' Br., ECF No. 80; State Pls.' Br., ECF No. 74.

A. Fifth Amendment Equal Protection Claim

Plaintiffs claim that sections 1915(a)–(b), section 1913(d), and section 1914 of the ICWA as well as sections 23.129–132 of the Final Rule violate the Fifth Amendment's guarantee of equal protection under the laws. The parties primarily disagree about whether sections 1915(a)–(b) of the ICWA rely on racial classifications requiring strict scrutiny review. Ind. Pls.' Br. 41, ECF No. 80; Fed. Defs.' Br. Supp. Resp. Obj. Ind.

124-1. But the dispute over standing was resolved in the July 24, 2018 Order, ECF No. 156. Neither the Federal nor Tribal Defendants have disputed facts in the record relating to the claims to be resolved by summary judgment. *See* Tribal Defs.' Br. Supp. Resp. Mot. Summ. J. 2 n.1, ECF No. 118. ("[Individual] Plaintiffs rely on none of the other facts in their brief and declarations to support their legal arguments, and none is relevant to the issues currently before the court.").

[7] Individual Plaintiffs alone argue the Fifth Amendment due process claim. *See generally* Ind. Pls.' Br.; State Pls.' Br.; Ind. Pls.' Reply; State Pls.' Reply. State Plaintiffs alone argue the Article I non-delegation claim. *Id.*

Mot. Summ. J. 14, ECF No. 123 [hereinafter "Fed. Defs.' Resp. Ind."]. Plaintiffs argue the ICWA provides special rules in child placement proceedings depending on the race of the child, which is permissible only if the race-based distinctions survive strict scrutiny. Ind. Pls.' Br. 42–44. ECF No. 80; State Pls.' Br. 57, ECF No. 74. The Federal Defendants and Tribal Defendants (collectively, "Defendants") disagree, contending the ICWA distinguishes children based on political categories, which requires only a rational basis. Fed. Defs.' Resp. Ind. 11, ECF No. 123; Trib. Defs.' Resp. 16, ECF No. 118. Resolution of this issue will direct the level of scrutiny to be applied to Plaintiffs' challenge of the ICWA and Final Rule.

1. Appropriate Level of Review

Unlike the Fourteenth Amendment, the text of the Fifth Amendment does not contain an equal protection clause. But courts "employ the same test to evaluate alleged equal protection violations under the Fifth Amendment as under the Fourteenth Amendment." *Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995) (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217, (1995)). This means that to survive strict scrutiny, "federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* at 202; *see also Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 664 (5th Cir. 2014). On the other hand, when a federal statute governing Indians relies on political classifications, the legislation is permissible if singling out Indians for "particular and special treatment" is "tied rationally to the fulfillment of Congress' unique obligation toward the

Indians." *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974). This requirement mirrors typical rational basis review which requires only that the government show a statute is rationally related to a legitimate government interest. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993).

The parties rely on precedent developed by the Supreme Court's (and various circuits') review of statutes focused on American Indians and other native peoples. *See* Mancari, 417 U.S. 535; *see Rice v. Cayetano*, 528 U.S. 495 (2000). The Supreme Court's decisions in *Rice* and *Mancari* explain the differences between classifications based on race and those based on tribal membership. *See id.* Plaintiffs argue that *Rice* controls because the ICWA, like the statute in Rice, utilizes ancestry as a proxy for a racial classification. Ind. Pls.' Br. 42–44, ECF No. 80; State Pls.' Reply 18, ECF 142. Defendants counter that *Mancari* and other decisions going back hundreds of years support their contention that the ICWA's Indian classification is based on political characteristics. Fed. Defs.' Resp. Ind. 11, ECF No. 123; Trib. Defs.' Resp. 16, ECF No. 118.

a. Ancestry as Racial Classification

Plaintiffs argue that the placement preferences in sections 1915(a)–(b) of the ICWA, as well as the collateral-attack provisions in section 1913(d) and section 1914, include race-based classifications like those in *Rice*, which must survive strict scrutiny review. Ind. Pls.' Br. 41, ECF No. 80; State Pls.' Br. 54–57, ECF No. 74. In *Rice*, the Supreme Court overturned a Hawaiian statute restricting voter eligibility to only "native Hawaiians" and those with "Hawaiian" ancestry for positions at a

state agency. *Rice*, 528 U.S. at 519. By declaring this restriction an unlawful racial preference, the Supreme Court found that "ancestry can be a proxy for race" and noted that "racial discrimination is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.'" *Id.* at 515 (citation omitted). The Supreme Court held that Hawaii had "used ancestry as a racial definition and for a racial purpose" and noted "ancestral tracing . . . employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name." *Id.* at 517. Plaintiffs contend the ICWA preferences are no different than the preferences struck down in *Rice*.

b. Tribal Membership as a Political Classification

Defendants respond that the ICWA's placement preferences rely on political classifications like the statute in *Mancari*, rather than racial classifications like the statute in *Rice*, and are therefore only subject to rational basis review. Fed. Defs.' Resp. Ind. 11, ECF No. 123; Trib. Defs.' Resp. 16, ECF No. 118. In *Mancari*, the plaintiffs sought to declare unconstitutional a BIA hiring standard that gave preference to Indian applicants. *See Mancari*, 417 U.S. at 535. The Supreme Court upheld this hiring preference, concluding it was a political, rather than a racial, preference. *Id.* Because the preference was "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups," it was "reasonably and directly related" to a legitimate non-racial goal. *Id.* at 554. The preference was designed to give those Indians who were

"members of quasi-sovereign tribal entities" and who chose to apply for jobs at the BIA, an opportunity to govern tribal activities in "a unique fashion." *Id.* at 554. While the Supreme Court held the preference was constitutional, its decision was uniquely tailored to that particular set of facts. *Id.* at 551 ("the Indian preference statute is a specific provision applying to a very specific situation"); *see Rice*, 528 U.S. at 520 ("The [*Mancari*] opinion was careful to note, however, that the case was confined to the authority of the BIA, an agency described as '*sui generis.*'"). Importantly, the preference in *Mancari* applied "only to members of 'federally recognized' tribes which operated to exclude many individuals who are racially to be classified as Indians." *Id.* at 555 n.24. And this preference provided special treatment only to Indians living on or near reservations.[8]

[8] Defendants rely on a number of cases in support of their argument. Those cases confirm however that this authority is directed at Indian self-government and affairs on or near Indian lands. In *Antelope*, the Supreme Court found no equal protection violation because the legislation involved "federal regulation of criminal conduct *within Indian country* implicating Indian interest." 439 U.S. 641, 646 (1977) (emphasis added); *cf. Plains Comm. Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 330 (2008) ("[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid."). Other cases cited by Defendants also relate to Indian affairs occurring in Indian country. *See, e.g., Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana, in and for Rosebud Cty,* 424 U.S. 382 (1976); *United States v. Mazurie*, 419 U.S. 544 (1975); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1996); *U.S. v. Lara*, 541 U.S. 193 (2004). Even *United States v. McGowan*, 302 U.S. 535 (1938), dealt with prohibitions on Indian land. Similarly, the Fifth Circuit found no equal protection violation in *Peyote Way Church of God, Inc. v. Thornburgh*, where the federal government made an exception

Id. at 552; *see also Rice*, 528 U.S. at 516–17 ("Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification neutral"). *Mancari* therefore did not announce that all arguably racial preferences involving Indians are actually political preferences. *Id.* at 554. Instead, the Supreme Court recognized that applying its decision more broadly would raise the "obviously more difficult question that would be presented by a blanket exemption for Indians." *Id.* at 554.

c. The ICWA Classification

The specific classification at issue in this case mirrors the impermissible racial classification in *Rice*, and is legally and factually distinguishable from the political classification in *Mancari*. The ICWA's membership eligibility standard for an Indian child does not rely on actual tribal membership like the statute in *Mancari. Id.* at 554, n.24 (the preference only applied to members of federally recognized tribes, which "operates to exclude many individuals who are racially classified as 'Indians'"); *see* 25 U.S.C. § 1903(4). Instead, it defines an Indian child as one who is a member "of an Indian tribe" as well as those children simply *eligible* for membership who have a biological Indian parent. *See* 25 U.S.C. § 1903(4). This means one is an Indian child if the child is related to a tribal ancestor by blood. *See e.g.* Navajo Nation Code § 701; *see* CHEROKEE CONST. art. IV, § 1;

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under the Controlled Substance Act for a Native American church's use of peyote, when the church limited membership to *only members of federally recognized tribes* who have at least twenty-five percent Indian ancestry. 922 F.2d 1210 (5th Cir. 1991) (emphasis added).

see CONST. OF WHITE EARTH NATION, Chap. 2. Art. 1; *see* Yselta del Sur Pueblo Tribe Code of Laws § 3.01; Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. Law 100-89, 101 Stat. 669 (1987). These classifications are similar to the "blanket exemption for Indians," which *Mancari* noted would raise the difficult issue of racial preferences, as well as the classifications declared unconstitutional in *Rice*.[9] 528 U.S. at 499 ("racial discrimination is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.").[10] By deferring to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, the ICWA's jurisdictional definition of "Indian children" uses ancestry as a proxy

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[9] At the hearing, the Federal Defendants identified specific exceptions to the general rule that tribal membership eligibility depends on biological ancestry. Aug. 1, 2018 Hr'g Tr. at 83:1–11. The Federal Defendants noted some tribes may include African Americans who are descendants of freed slaves and that some tribes may include "adopted whites" as members. *Id.* Individual Plaintiffs responded that the Supreme Court addressed similar limited exceptions in *Rice*. *Id.* at 109. Indeed, *Rice* controls on this issue. Defendants in that case argued that the preferential statute did not rely on a racial category because it also could include descendants of "Native Hawaiians" who were not racially Polynesian. *Rice*, 528 U.S. at 514. The Court "reject[ed] this line of argument" and noted immediately thereafter that "Ancestry can be a proxy for race." *Id.*

[10] Notably, in *Adoptive Couple v. Baby Girl*, the Supreme Court mentioned that an interpretation of provisions of the ICWA that prioritizes a child's Indian ancestry over all other interests "would raise equal protection concerns." 570 U.S. 637, 655 (2013); *see* Hr'g Tr. 103 (acknowledging the equal protection violation *Adoptive Couple* referenced was race discrimination).

for race and therefore "must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227.

2. Strict Scrutiny Review

Because the ICWA relies on racial classifications, it must survive strict scrutiny. Courts "apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). To survive strict scrutiny review, the classifications must be "narrowly tailored to further a compelling governmental interest." *Id.*

a. Compelling Interest Requirement

Here, the Federal Defendants have not offered a compelling governmental interest that the ICWA's racial classification serves, or argued that the classification is narrowly tailored to that end. Rather, the Federal Defendants rest their entire defense to this claim on their argument that the ICWA classified Indians politically, which requires *only* that it be rationally tied to fulfillment of Congress's unique obligation to the Indians. Fed. Defs.' Resp. Ind. 25, ECF No. 123. Given the ICWA is a race-based statute,[11] the Government has failed to meet its burden to show the challenged statute

[11] In *Rice*, after determining that ancestry can be a proxy for race, the Supreme Court noted the legislation at issue used ancestry "as a racial definition and for a racial purpose," and subsequently referred to the legislation as being "based on race." *See Rice* 528 U.S. at 514, 523. Accordingly, as described above, the ICWA uses ancestry as a proxy for race and is therefore race-based.

is narrowly tailored to a compelling interest. *Fisher*, 758 F.3d at 664 (citation omitted). Because the government did not prove—*or attempt to prove*—why the ICWA survives strict scrutiny, it has not carried its burden to defend the ICWA and Plaintiffs are entitled to judgment as a matter of law on their equal protection claim.[12]

b. Narrow Tailoring Requirement

The Federal Defendants argue that "fulfilling Congress's unique obligation toward the Indians" is a legitimate government purpose supporting their rational basis analysis. Fed. Defs.' Resp. Ind. 312 ECF No. 123 (citing *Mancari*, 417 U.S. at 555). Likewise, at the hearing on these motions the Tribal Defendants offered "maintain[ing] the Indian child's relationship with the tribe" as a possible compelling interest. Hr'g Tr. 87: 23–

[12] Both Defendants requested an opportunity to provide additional briefing if the Court concludes the ICWA contains racial preferences. However, Defendants were on notice that Plaintiffs sought judgment on all of their claims. This obligated Defendants to meet their burden. *See Apache Corp. v. W&T Offshore, Inc.*, 626 F.3d 789, 798–99 (5th Cir. 2010) (when a party is on notice that its opponent seeks judgment on all of its claims, it is obligated to respond to all of the claims); *see also United States v. Paradise*, 480 U.S. 149, 193 (1987) (Stevens, J. concurring) ("governmental decisionmaker who would make race-conscious decisions must overcome a strong presumption against them"). The Federal Defendants have failed to do so, nor have they offered a sufficient reason for this failure. Even so, at oral argument the Court permitted them to offer any arguments they desired on this issue even though they failed to brief it. The Federal Defendants failed to articulate any interest they viewed as compelling. *See* Hr'g Tr. 55–61.

25, ECF No. 163. [13] The compelling interest standard necessarily requires a stronger interest than is required under the broad legitimate government purpose standard. *See Richard*, 70 F.3d at 417 (describing rational basis and strict scrutiny review standards). Here, however, the Court will assume these interests are compelling and will evaluate whether the statute is narrowly tailored.

As stated above, a racial statute must be narrowly tailored to a compelling government interest to survive strict scrutiny. *Grutter*, 539 U.S. at 326. In other words, the statute's means must be narrowly tailored to its ends. *Id*. To evaluate whether a statute is narrowly tailored to a compelling interest, the Supreme Court has considered whether the statute covers too many—or too few—people to achieve its stated purpose. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 804 (2011). The Supreme Court labels statutes that fail this test as overinclusive, underinclusive, or both. *See id.* A statute is overinclusive when it "burdens more people than necessary to accomplish the legislation's goal."

[13] The Federal Defendants similarly point to Congress's obligation to Indian tribes to justify Congressional authority to enact the ICWA. To bolster those arguments, it notes that Congress intended the ICWA to "protect the 'continued existence and integrity of Indian *tribes*' by protecting their most vital resources—their children." Fed. Defs.' Resp. Ind. 37, ECF No. 123 (emphasis added) (quoting 25 U.S.C. § 1901(3)). The Federal Defendants note that in congressional hearings about the ICWA there was considerable emphasis "on the impact on the tribes themselves of the massive removal of their children." *Id.* (quoting *Holyfield,* 490 U.S. at 34) (emphasis added). The emphasis on tribes is telling; indeed the Indian Commerce Clause specifically references "Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

Overinclusive. MERRIAM-WEBSTER'S DICTIONARY OF LAW (2016); *see e.g. Church of the Lukumi Babalu Aye, Inc v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J. concurring) (an overinclusive statute is "one that encompasses more . . . than necessary to achieve its goal"); *see e.g. Mance v. Sessions* (Ho, J. dissenting from denial of rehearing en banc) ("a *categorical* ban . . . is over-inclusive—it prohibits a significant number of transactions that fully comply with state law.") (emphasis added).

Here, the statute is broader than necessary because it establishes standards that are unrelated to specific tribal interests and applies those standards to *potential* Indian children. First, portions of the ICWA preferences are unrelated to specific tribal interests in that the statute includes as a priority a child's placement with any Indian, regardless of whether the child is eligible for membership in that person's tribe. *See* 25 U.S.C. § 1915(a)(3). By doing so, the ICWA preferences categorically, and impermissibly, treat "all Indian tribes as an undifferentiated mass." *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring). Applying the preference to *any* Indian, regardless of tribe, is not narrowly tailored to maintaining the Indian child's relationship with his tribe. *See* Br. for the Goldwater Inst. as *Amicus Curiae* in Opposition to Defs.' Mot. to Dismiss 5, ECF No. 133 ("ICWA's placement preferences do *not* depend on tribal or political or cultural affiliation; they depend on generic "Indianness."). The ICWA applies to many children who will never become members of any Indian tribe, 25 U.S.C. § 1903(4), and the first preference is to place the

child with family members who may not be tribal members at all. 25 U.S.C. § 1915(1). These provisions burden more children than necessary to accomplish the goal of ensuring children remain with their tribes.

The ICWA's racial classification applies to potential Indian children, including those who will never be members of their ancestral tribe, those who will ultimately be placed with non-tribal family members, and those who will be adopted by members of other tribes. Because two of the three preferences have no connection to a child's tribal membership, this blanket classification of Indian children is not narrowly tailored to a compelling governmental interest and thus fails to survive strict scrutiny review. For these reasons, the Court finds that Plaintiffs' motion for summary judgment on their Equal Protection Claim is **GRANTED.**

B. Article I Non-Delegation Claim

State Plaintiffs also argue that section 1915 (c) of the ICWA is unconstitutional because it delegates congressional power to Indian tribes in violation of the non-delegation doctrine outlined in Article I of the Constitution. Article I, known as the vesting clause, provides: "All legislative Powers . . . shall be vested in a Congress of the United States." U.S. CONST. I, § 1, cl.1. State Plaintiffs argue that the ICWA impermissibly grants Indian tribes the authority to reorder congressionally enacted adoption placement preferences by tribal decree and then apply their preferred order to the states. State Pls.' Br. 47, ECF No. 74. They also contend that section 23.130 (b) of the Final Rule, which provides that a tribe's established placement

preferences apply over those specified in the ICWA, violates the doctrine.[14] Am. Compl. ¶ 372, ECF No. 35; 25 C.F.R. § 23.130 (b). Tribal Defendants respond that the tribes are permissibly exercising regulatory power subject to an intelligible principle. Tribal Defs.' Br. Supp. Resp. Mot. Summ. J. at 35, ECF No. 118 [hereinafter "Trib. Defs.' Resp."]. If so, Defendants argue the ICWA survives the non-delegation challenge. *Id.*

1. Legislative or Regulatory Power

Distinguishing between permissible and non-permissible delegations of congressional power usually requires asking whether Congress is delegating discretion to *create* law or discretion to *execute* law. *Loving v. United States*, 517 U.S. 748, 758 (1996). Congress plainly cannot delegate its inherent legislative power to create law, defined as the power to formulate binding rules generally applicable to private individuals. *Dep't. of Transp. v. Ass'n of Am. R.R.'s*, 135 S. Ct. 1246 (Thomas, J. concurring); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); *see Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825) (Marshall, C.J.). On the other hand, Congress may grant a federal agency the regulatory power necessary to execute legislation as well as interpret ambiguities therein. *See City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013).

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[14] Texas provides that the Alabama-Coushatta-Tribe of Texas has filed with DFPS a notice of different placement preferences. State Pls.' App. at 918, ECF No. 73.

An exercise of regulatory power does not empower an entity to "formulate generally applicable rules of private conduct." *Ass'n of Am. R.R.'s*, 135 S. Ct. at 1252 (Thomas, J. concurring). The core of regulatory power involves factual determination or policy judgment necessary to *execute* the law. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)). To determine whether a delegation of regulatory power is proper, courts employ the "intelligible principle" standard which states that Congress properly delegates regulatory power to federal agencies when it establishes an "intelligible principle" on which the agency can base decisions. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474 (2001). Defendants are correct that the Supreme Court applies the test liberally and has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those *executing* or *applying* the law." *Id.* at 474–75 (emphasis added).

Here, the Tribes were granted the power to change the legislative preferences Congress enacted in the ICWA, and those changes are binding on the States. *See* 25 U.S.C. § 1915(c); *see also* Br. of *Amicus Curiae* 123 Federally Recognized Indian Tribes *et al.* in Opposition to Pls.' Mots. Summ. J. 22–23, ECF No. 138 (". . . ICWA *confirms* tribes' authority to enact placement preferences for their member children, and as an exercise of Congress' established authority over Indian affairs, requires that state courts, when exercising their concurrent jurisdiction over those children, give effect to those *legislative preferences*.") (emphasis added). The

power to change specifically enacted Congressional priorities and impose them on third parties can only be described as legislative. *Ass'n of Am. R.R.'s*, 135 S. Ct. at 1253–1254 (Thomas, J. concurring) ("an exercise of policy discretion . . . requires an exercise of legislative power"). This is particularly true when the entity allowed to change those priorities is not tasked with executing the law. Congress "cannot delegate its exclusively legislative authority at all." *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980); *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1281 (9th Cir. 1981). Accordingly, section 1915(c) of the ICWA and section 23.130 (b) of the Final Rule violate the non-delegation doctrine.

2. Federal Actor Requirement

Alternatively, even if Congress granted permissible regulatory power through the ICWA, it impermissibly granted *federal* regulatory power to an Indian tribe. Congress certainly has authority to regulate the Indian tribes. U.S. CONST., art. 1, § 8, cl. 3. Likewise, tribes unquestionably may regulate conduct on tribal lands and reservations. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 650–51 (2001). And, Congress may obtain assistance from its *coordinate* branches by delegating regulatory authority without violating the non-delegation doctrine. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). But, Indian tribes are not a coordinate branch of government. *See* Trib. Defs.' Resp. 36–38, ECF No. 118. (describing the Tribes as an independent separate sovereign); *see also* Lawson, Delegation and Original Meaning, 88 VA. L. REV. 327, 352–53 (2002)

(Congress cannot delegate legislative or executive power to a non-federal entity).

Nor is section 1915(c) saved because, as Tribal Defendants argue, Congress recognized that Indian tribes carry a unique, long-held, quasi-sovereign status, and may thus delegate federal authority to them. Trib. Defs.' Resp. 36–37, ECF No. 118. An Indian tribe, like a private entity, is "not part of the [federal] Government at all," which "would necessarily mean that it cannot exercise…governmental power." *Ass'n of Am. R.R.s*, 135 S. Ct.at 1253 (Thomas, J. concurring); *see also id.* at 1237.

Therefore, whatever label is affixed to the tribes by Defendants is inapposite. No matter how Defendants characterize Indian tribes—whether as quasi-sovereigns or domestic dependent nations—the Constitution does not permit Indian tribes to exercise *federal* legislative or executive regulatory power over non-tribal persons on non-tribal land. *Id.* The Court finds Article I does not permit Congress to delegate its inherent authority to the Tribes through section 1915(c) of the ICWA or the BIA through section 23.130(b) of the Final Rule, which unequivocally states tribal placement preferences apply over those enacted by Congress in the ICWA. Accordingly, Plaintiffs are entitled to judgment as a matter of law on their non-delegation claim. For these reasons, the Court finds that Plaintiffs' motion for summary judgment on their Article I non-delegation claim is **GRANTED.**

C. Tenth Amendment Anti-Commandeering Claim

Plaintiffs also claim that the ICWA and the Final Rule commandeer the States in violation of the Tenth Amendment. State Pls.' Br. 37, ECF No. 74; Ind. Pls.' Br. 68, ECF No. 80. They specifically challenge the ICWA sections 1901–23 and 1951–52.[15] Am. Compl. ¶ 284, ECF No. 35. The Federal Defendants respond that Congress passed the ICWA pursuant to its enumerated powers and thus authority over Indian children was never reserved to the States. Fed. Defs.' Br. Supp. Resp. States Mot. Summ. J. 29, ECF No. 121 [hereinafter "Fed. Defs.' Resp. States"]. Tribal Defendants argue that, to the extent the ICWA conflicts with state law, state law is preempted by the Supremacy Clause. Trib. Defs.' Resp. 29, ECF No. 118.

The anti-commandeering principle "is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the states." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1470, 1475 (2018). The Constitution grants to "Congress not plenary legislative power but only certain enumerated powers." *Id.* at 1476. "Conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States" because the Constitution "confers upon Congress the power to regulate

[15] These provisions include the congressional findings and declaration of policy, definitions, child custody proceedings, record keeping, information availability, and timetables. *See* 25 U.S.C. §§ 1901–23, 1951–52.

individuals, not States." *Murphy*, 138 S. Ct. at 1476. Legislative power that is not enumerated is reserved to the States through the Tenth Amendment, and "Congress may regulate areas of traditional state concern only if the Constitution grants it such power." *Adoptive Couple*, 133 S. Ct. at 2566 (2013) (Thomas, J. concurring).

The Court must therefore first consider whether Congress may require state courts and agencies to apply federal standards to exclusively state created causes of action.[16]

1. Commandeering State Courts and Agencies

Plaintiffs argue that the ICWA unconstitutionally requires state courts and executive agencies to apply federal standards and directives to state created claims. State Pls.' Br. 37, ECF No. 74; Ind. Pls.' Br. 68, ECF No. 80. The Federal Defendants respond that the power to enact the ICWA was granted to Congress by the Indian Commerce Clause, was never reserved to the States, and presents no constitutional problem. Fed. Defs.' Resp. States 29, ECF No. 121. The Court finds that requiring the States to apply federal standards to state created claims contradicts the rulings in *Murphy, Printz*, and *New York*. *See Murphy*, 138 S. Ct. 1470 (2018); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

[16] The ICWA includes federal requirements that apply in a state child custody proceedings including: involuntary proceedings, voluntary proceedings, and proceedings involving foster-care, preadoptive, or adoptive placement, or termination of parental rights. *See* 25 CFR §§ 23.103, 23.106.

a. Federal Standards Applied in State Created Claims

It is unquestionably true that state and federal courts share concurrent jurisdiction in many legal matters. *See generally Mims v. Arrow Fin. Ser., LLC*, 565 U.S. 368 (2012). The law is similarly clear about when a state court must hear a federal claim. In *Testa*, the Supreme Court held that where a state court would hear a comparable state law claim it must also hear a *federal claim*. *See Testa v. Katt*, 330 U.S. 386 (1947) (emphasis added). In other words, Congress may create a private federal cause of action and authorize concurrent jurisdiction in state courts. When it does so, the state courts cannot refuse to hear the federal claim. Later, in *Haywood*, the Supreme Court confirmed that states "lack authority to nullify a *federal right or cause of action* they believe is inconsistent with their local policies." *Haywood v. Drown*, 556 U.S. 729, 736 (2009) (emphasis added). The Supreme Court concluded that when "state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights," state courts may not refuse to adjudicate the federal claim. *Id.* at 735. The controversy here, however, does not involve a federal cause of action that may be adjudicated in a federal forum. *See* 25 U.S.C. § 1915(a). Instead, the ICWA commands that states modify existing state law claims. Congress directs state courts to implement the ICWA by incorporating federal standards that modify *state created* causes of action. *Id.*

b. The Murphy Standard

In *Murphy*, the Supreme Court ruled that a federal statute prohibiting state legislatures from authorizing sports gambling violated the anti-commandeering doctrine because it directly regulated States rather than individuals. *See Murphy*, 138 S. Ct. 1461. The Supreme Court outlined three reasons why the anti-commandeering principle is important. First, it is "one of the Constitution's structural protections of liberty." *Id.* at 1477. Second, the principle "promotes political accountability." *Id.* Third, it "prevents Congress from shifting the costs of regulation to the States." *Id.*

Congress violated all three principles when it enacted the ICWA. First, the ICWA offends the structure of the Constitution by overstepping the division of federal and state authority over Indian affairs by commanding States to impose federal standards in state created causes of action. *See* 25 U.S.C. § 1915(a). Second, because the ICWA only applies in custody proceedings arising under state law, it appears to the public as if state courts or legislatures are responsible for federally-mandated standards, meaning "responsibility is blurred." *Murphy*, 138 S. Ct. at 1477.

Third, the ICWA shifts "the costs of regulations to the States" by giving the sole power to enforce a federal policy to the States.[17] *Id.* Congress is similarly not forced

[17] As an example, the ICWA and the Final Rule require State Plaintiffs' agencies and courts to maintain *indefinitely* records of placements involving Indian children, and subject those records to inspection by the Director of the BIA and the child's Indian tribe at any time, as opposed to simply transferring those records to the

to weigh costs the States incur enforcing the ICWA against the benefits of doing so. In sum, Congress shifts all responsibility to the States, yet "unequivocally dictates" what they must do. *Id.*

That this case primarily involves state courts, rather than legislative bodies or executive officers, does not mean the principles outlined in *Murphy, New York*, and *Printz* do not apply. In those cases, the Supreme Court relied on the idea that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz*, 521 U.S. at 920. Here, the ICWA regulates states. As stated above, the ICWA requires that the state "in any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C § 1915(a). Similar requirements are set for foster care or preadoptive placements. *Id.* § 1915(b). If the Indian child's tribal court establishes a different order of preferences, the state court or agency "shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." *Id.* § 1915(c). That requirement is, on its face, a direct command from Congress to the states. The Court finds that the ICWA directly regulates the State Plaintiffs and doing so contradicts the principles outlined by the Supreme Court in *Murphy*. *Cf.* 138 S. Ct. 1470 (2018). Notwithstanding this impact on the state courts, Texas has also

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BIA so they may keep them indefinitely. 25 U.S.C. §§ 1915(e), 1917; 25 C.F.R. §§ 23.140–41.

indisputably demonstrated that the ICWA requires its executive agencies to carry out its provisions. [18] Hr'g Tr. at 22–23, ECF No. 163; State Pls.' App. Supp. Mot. Summ. J. 28–29, ECF No. 73 [hereinafter State Pls.' App.]. Accordingly, Congress regulates States—not individuals—through the ICWA, and the Constitution does not grant it that power.

Nor does the Indian Commerce Clause save the ICWA's mandate to the states. Federal Defendants assert that the plenary power the Indian Commerce Clause grants Congress permits directing states in child custody proceedings involving Indian children eligible for tribal membership, therefore no power was reserved to the states, and no Tenth Amendment violation is possible. Fed. Defs.' Resp. States 29, ECF No. 121. But regardless of the reach of the Indian Commerce Clause, no provision in the Constitution grants Congress the right to "issue direct orders to the governments of the States," and the Indian Commerce Clause can be no different. *Cf. Murphy*, 138 S. Ct. at 1478. Like in *Murphy*, there is no way to understand mandating state enforcement of the ICWA "as anything other than a direct command to the States. And that is exactly what the anti-commandeering rule does not allow." *Murphy*, 138 S. Ct. at 1481.

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[18] The Texas DFPS must, among other things; serve notice of suit on Indian tribes, verify a child's tribal status, make a diligent effort to find a suitable placement according to the ICWA preferences and show good cause if the preferences are not followed, ensure a child is enrolled in his tribe before referring him for adoption, and keep a written record of the placement decision. State Pls.' App. 28–29, ECF No. 73.

2. State Law Preemption

Finally, the Tribal Defendants argue that the anti-commandeering principle does not apply because the ICWA, enacted pursuant to the Indian Commerce Clause, simply preempts conflicting state laws regulating individuals. Trib. Defs.' Resp. 29, ECF No. 118. Preemption generally applies when federal and state law conflict over matters in which they have concurrent jurisdiction. *See Wyeth*, 555 U.S. at 584. While Supremacy Clause preemption may apply to a conflict between state and "federal law that regulates the conduct of private actors," it cannot rescue a law that *directly* regulates states. *Murphy*, 138 S. Ct. at 1481. Even though the ICWA's general policy is directed towards protecting Indian children, 25 U.S.C. § 1902, its specific provisions, like section 1915, directly command states to enforce the ICWA without a comparable federal enforcement mechanism and do not "impose any federal restrictions on private actors." *Id.* at § 1915; *Murphy*, 138 S. Ct. at 1481. As such, these commands do not result in a *conflict* between duly enacted state and federal law. Rather, the provisions command states to *directly* adopt federal standards in their state causes of actions. This argument is not unlike the one rejected in *Murphy*, where Congress relied on its commerce clause power, yet even that express power does not permit it to command states in this manner. *Murphy*, 138 S. Ct. at 1479.

Preemption arguments therefore cannot rescue the ICWA's impermissible direct commands to the states. The ICWA is structured in a way that directly requires states to adopt and administer comprehensive federal standards in state created causes of action. Therefore,

the Court finds that sections 1901–23 and 1951–52 of the ICWA violate the anti-commandeering doctrine. For these reasons, the Court finds that Plaintiffs' motion for summary judgment on their Tenth Amendment Anti-Commandeering Claim is **GRANTED.**

D. Administrative Procedure Act Claims

Plaintiffs also claim that the Final Rule violates the APA because it: (1) purports to implement an unconstitutional law and therefore must be vacated as contrary to law; (2) exceeds the scope of Interior's statutory regulatory authority under the ICWA; (3) reflects an impermissibly ambiguous construction of the statute; and (4) is otherwise arbitrary and capricious. Ind. Pls.' Reply at 16, ECF No. 143; State Pls.' Reply 18, ECF No. 142; *see also* Ind. Pls' Br., ECF 80. Defendants respond that the Final Rule was properly passed and promulgated, deserves *Chevron* deference, and stands after *Chevron* review. Trib. Defs.' Resp. 39–47, ECF No. 118; Fed. Defs.' Resp. States 41, ECF No. 121.

1. Constitutionality Requirement

As a threshold matter, if the Final Rule purports to implement an unconstitutional statute, the Court must hold it unlawful and set it aside. 5 U.S.C. § 706. As previously explained, the Court has concluded sections 1901–23 and 1951–52 of the ICWA are unconstitutional. The challenged sections of the Final Rule that regulate unconstitutional portions of the ICWA, 25 C.F.R. §§ 23.106–112, §§ 23.114–19, §§ 23.121–22, §§ 23.124–28, and §§ 23.130–132 must therefore also be set aside because "the authority of administrative agencies is constrained by the language of the statute they

administer." *Texas v. United States*, 497 F.3d 491, 500–01 (5th Cir. 2007) (citing *Massachusetts v. EPA*, 549 U.S. 497 (2007)). For that reason, Plaintiffs' Motion for Summary Judgment on their APA claims is **GRANTED**. Alternatively, the Court will address Plaintiffs' arguments that the Final Rule exceeds the scope of Interior's—and thus the BIA's—statutory regulatory authority under the ICWA, reflects an impermissibly ambiguous construction of the statute, and is arbitrary and capricious.

2. APA Statutory Authority Requirement

Plaintiffs argue that the challenged portions of the Final Rule exceed the scope of the BIA's regulatory authority under the ICWA because the Final Rule issues *binding* regulations—which the BIA previously deemed unnecessary to enforce the ICWA—without the statutory authority necessary to do so. Ind. Pls.' Reply 17–19, ECF 143; State Pls.' Reply 18, ECF No. 142. "Expanding the scope" of a BIA regulation "in vast and novel ways is valid only if it is authorized" by the ICWA. *Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360, 369 (5th Cir. Mar. 15, 2018). "A regulator's authority is constrained by the authority that Congress delegated it by statute. Where the text and structure of a statute unambiguously foreclose an agency's statutory interpretation, the intent of Congress is clear, and 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Id.* (quoting *Chevron, U.S.A., Inc. v. N.R.D.C., Inc.,* 467 U.S. 837, 842–43 (1984)). When an agency waits decades to discover a new interpretation of a rule it "highlights the Rule's unreasonableness," and

"gives us reason to withhold approval or at least deference for the Rule." *Id.* at 380. When a court reviews an agency's construction of a statute and determines Congress has spoken directly to an issue, the court must give effect to Congress's unambiguously expressed intent. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 121 (2000); *City of Arlington, Tex. v. FCC,* 133 S. Ct. 1863, 1874 (2013); *Chevron*, 467 U.S. at 842–43.

Here, Congress expressly and unambiguously granted the Secretary of Interior authority to regulate if *necessary*. Congress stated in the ICWA that "within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as *may be necessary* to carry out the provisions in this chapter." 25 U.S.C § 1952 (emphasis added); *see* 44 Fed. Reg. 67,584. The BIA concluded that the ICWA differs from most other federal statutes because the majority of the work required to "carry out the provisions" falls to state courts and administrative agencies, not a federal agency. *See, e.g.*, 25 U.S.C § 1915. The BIA conceded as much when administering the 1979 Guidelines:

> Promulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the act, however, is *not necessary to carry out the Act. State and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.* Nothing in the legislative history indicates that Congress intended this

> Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters. For Congress to assign an administrative agency such supervisory control over courts would be an extraordinary step . . . so at odds with concepts of both federalism and separation of powers that it should not be imputed to Congress in the absence of an express declaration of Congressional intent to that effect.

44 Fed. Reg. 67,584, (Nov. 26, 1979) (emphasis added).

Here, as outlined in the Court's findings *supra* on Plaintiffs' anti-commandeering and non-delegation claims, much of the authority to carry out the ICWA was delegated to the States and Indian tribes. The BIA admitted state and tribal courts were fully capable of carrying out the ICWA without direct federal regulation and allowed them to do so for over thirty years. 44 Fed. Reg. 67,584 (Nov. 26, 1979). In establishing the Final Rule, the BIA contradicted their earlier position and asserted that section 1952 of the ICWA granted authority to promulgate binding regulations. The BIA provides justification for the change in position by noting that state courts have applied the ICWA inconsistently, which makes binding regulations necessary. 81 Fed. Reg. 38,785. But when specifically addressing the change in position about statutory authority under section 1952, the BIA simply states that it "no longer agrees with the statements it made in 1979." *Id.* at 38,786. In the analysis that follows, the BIA never addresses the fact that the 1979 BIA determined that "[n]othing in the language or

legislative history of 25 U.S.C. 1952 compels the conclusion that Congress intended to vest this Department with such extraordinary power" and that nothing indicated Congress intended the BIA to exercise supervisory or legislative control over the state court. 44 Fed. Reg. 67,584, (Nov. 26, 1979). While the BIA expresses frustration with *how* state courts and agencies are applying the ICWA inconsistently, it does not address how, suddenly, it no longer believes the ICWA primarily tasks those state courts and agencies with the authority to apply the statute as they see fit. 81 Fed. Reg. 38,782–90.[19]

A current agency interpretation "in conflict with its initial position, is entitled to considerably less deference" and is met with "a measure of skepticism." *Chamber*, 885 F.3d at 381 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *Util. Air Regulatory Grp v. EPA*, 134 S. Ct. 2427, 2444 (2014)). The 1979 BIA acknowledged that "where…primary responsibility for interpreting a statutory term rests with the courts, administrative interpretations of statutory terms are given important but not controlling significance." 44 Fed. Reg. 67,584 (citing *Batterton v. Francis*, 432 U.S. 416, 424–25 (1977)). Because the BIA does not explain its change in position over its authority to "carry out the provisions" and apply the ICWA—and therefore its authority to issue binding

[19] As an example, in 1979 the BIA provided that the good cause standard "was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." 44 Fed. Reg. 67,584. The Final Rule, however, provided that "courts should only avail themselves of it in extraordinary circumstances, as Congress intended the good cause exception to be narrow and limited in scope." 81 Fed. Reg. 38,839.

regulations—the Court finds those regulations remain not *necessary* to carry out the ICWA. *See* 25 U.S.C § 1952. Accordingly, when the BIA promulgated regulations with *binding* rather than advisory effect, it exceeded the statutory authority Congress granted to it to enforce the ICWA.[20] The Court finds that 25 C.F.R. §§ 23.106–22, §§ 23.124–32 and §§ 23.140–41 are **INVALID** to the extent the regulations are binding on the State Plaintiffs.

Assuming for the sake of argument that Congress granted the BIA statutory authority to implement the legally binding Final Rule, the Court will next consider whether the Final Rule "fills in the statutory gaps" of an

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[20] At the hearing, the Federal Defendants argued that the Final Rule's clear and convincing evidence standard is not binding on state courts. Hr'g Tr. 40:7–20. That argument contradicts the Final Rule itself which clearly implements binding regulations to counteract the very discretion Defendants argue states are allowed. *See* 25 CFR 23.132(b); *see* 81 Fed. Reg. 38,782, 38,786, 38,853. ("The Department's current nonbinding guidelines are insufficient to fully implement Congress's goal of nationwide protections for Indian children…State courts will sometimes defer to the guidelines in ICWA cases [but] State courts frequently characterize the guidelines as lacking the force of law and conclude that they may depart from the guidelines as they see fit."; "As described above, the Department concludes today that this binding regulation is within the jurisdiction of the agency, was encompassed by the statutory grant of rulemaking authority, and is necessary to implement the Act."; "The final rule generally uses mandatory language, as it represents binding interpretations of Federal law."). The preamble to the Final Rule does note that the rule "does not categorically require," that the clear and convincing evidence standard be followed, but that statement cannot change the fact that the Final Rule itself was promulgated as a binding regulation. 81 Fed. Reg. 38,843.

ambiguous statute, and is entitled to Chevron deference. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 159.

3. *Chevron* Deference and the Good Cause Standard

When "a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43; *see, e.g., Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). If a statutory term is ambiguous, courts will assume Congress granted the implementing agency implicit authority to fill in the resulting statutory gaps. *Food and Drug Admin.*, 529 U.S. at 159. Commonly referred to as *Chevron* deference, courts will defer to the resulting agency interpretation if it is reasonable. *See Chevron*, 467 U.S. at 837.

Here, Plaintiffs claim that the BIA violated the APA when it promulgated § 23.132(b) of the Final Rule, which limits the evidence that may be considered by courts to determine "good cause" under section 1915 of the ICWA. Ind. Pls.' Resp. 60–63, ECF No. 80; State Pls.' Reply 18, ECF No. 142. Defendants argue that the Final Rule's interpretation of "good cause" is entitled to *Chevron* deference. Trib. Defs.' Resp. 39–47, ECF No. 118; Fed Defs.' Resp. Ind. 45–49, ECF No. 123.

"Where the text and structure of a statute unambiguously foreclose an agency's statutory interpretation, the intent of Congress is clear, and 'that

is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chamber of Comm.*, 885 F.3d at 369 (quoting *Chevron*, 467 U.S. at 842–43). To determine whether a statute is ambiguous under *Chevron*, a court must: (1) begin with the statute's language; (2) give undefined words their ordinary, contemporary, common meaning; (3) read the statute's terms in proper context and consider them based on the statute as a whole; and (4) consider a statute's terms in light of the statute's purpose. *Contender Farms, L.L.P v. U.S. Dep't of Agric,* 779 F.3d 258, 269 (5th Cir. 2015). But a current agency interpretation "in conflict with its initial position, is entitled to considerably less deference." *Chamber of Comm.,* 885 F.3d at 381 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

Section 23.132(b) of the Final Rule interprets section 1915(b) of the ICWA, which provides in "any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915 (b). The Final Rule states that a "party seeking departure from the placement preferences should bear the burden of proving by *clear and convincing evidence* that there is 'good cause' to depart from the placement preferences." 25 C.F.R. § 23.132(b).

Here, Plaintiffs contend that the Final Rule departs from the BIA's original 1979 interpretation and contradicts the "good cause" standard set by the ICWA because the Final Rule heightens the evidentiary

burden. Ind. Pls.' Reply 20–23, ECF No. 143. Defendants argue that "good cause" is an ambiguous term and it was therefore appropriate for the BIA to promulgate—as part of their interpretation of the term good cause—the necessary evidentiary standard. Trib. Defs.' Resp. 44–45, ECF No. 118; Fed. Defs.' Resp. Ind. 45, ECF No. 123. Plaintiffs counter that the default evidentiary standard in civil cases, preponderance of the evidence, applies to section 1915 and accordingly the Final Rule's clear and convincing evidence standard is not a permissible construction of the statute. Ind. Pls.' Reply 20, ECF No. 143. The issue here is whether Congress established an unambiguous evidentiary standard in section 1915 of the ICWA. That determination is distinct from interpreting the meaning of the term good cause.

Congress did not codify a preponderance of the evidence standard in section 1915 of the ICWA. But other portions of the ICWA specifically included heightened evidentiary burdens. *See* 25 U.S.C. § 1912(e) (establishing a clear and convincing evidence standard for foster placements). Notably, unlike those sections, section 1915 does not establish a heightened evidentiary standard in conjunction with the good cause requirement. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Food & Drug Admin*, 529 U.S. at 133. Similarly, "where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200,

208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Because Congress included the clear and convincing evidence standard in certain sections of the ICWA, but omitted it in section 1915, the Court presumes it did so intentionally.

When interpreting section 1915 the "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof" and "it is fair to infer that Congress intended the ordinary preponderance [of the evidence] standard to govern . . . " *Grogan v. Garner*, 498 U.S. 279, 286–88 (1991). Here, a holistic reading of the statute and the 1979 BIA guidelines confirms that Congress intended the default preponderance of the evidence standard to apply. Accordingly, defining an evidentiary standard in a way that contradicts the standard intended by Congress, as the BIA did in the Final Rule, is contrary to law.

Because the Court finds that the BIA lacked statutory authority to enact the challenged portions of the Final Rule, and that the evidentiary standard in section 1915 is unambiguous, Defendants are not entitled to *Chevron* deference and the Final Rule's change of standard to clear and convincing evidence is contrary to law. For these reasons, the Court finds that Plaintiffs' motion for summary judgment on their APA claim is **GRANTED**.

E. Fifth Amendment Due Process Claim

Individual Plaintiffs alone claim that sections 1910 (a) and (b) of the ICWA, as well as the Final Rule, violate the Fifth Amendment Due Process Clause. Ind. Pls.' Br. 49–55, ECF No. 80. Plaintiffs argue that ICWA's racial preferences "disrupt . . . intimate familial relationships

based solely on the arbitrary fact of tribal membership" and that families have a fundamental right "to make decisions concerning the care, custody, and control of their children." *Id.* at 49, 50. The Federal Defendants respond that this Court has no basis to "recognize a fundamental right where the Supreme Court and Fifth Circuit have refused to do so." Fed. Defs.' Resp. Ind. 33, ECF No. 123. Defendants are correct.

The Supreme Court has recognized both custody and the right to keep the family together as fundamental rights. *See Troxel v. Granville*, 530 U.S. 57 (2000); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). However, the Supreme Court has never applied those rights to foster families. *See Drummond v. Fulton Cnty. Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977) (en banc). Similarly, the Supreme Court has not applied those rights in a situation involving either prospective adoptive parents or adoptive parents whose adoption is open to collateral attack. For these reasons, the Court finds that Plaintiffs' motion for summary judgment on their substantive due process claim is hereby **DENIED.**

F. Indian Commerce Clause Claim

Plaintiffs also claim Congress did not have the constitutional authority to pass sections 1901–23 and sections 1951–52 of the ICWA under the Indian Commerce Clause. Ind. Pls.' Br. 66, ECF No. 80; State Pls.' Br. 49–52, ECF No. 74. Defendants counter that the Indian Commerce Clause grants Congress plenary authority over Indian Affairs. Fed. Def's Resp. Ind. 35, ECF No. 123; Trib. Defs.' Resp. 21–28, ECF No. 118. But as shown above, *Murphy* does not permit Congress

to directly command the States in this regard, even when it relies on Commerce Clause power. *Murphy*, 138 S. Ct. at 1479. Therefore Plaintiffs' request for a declaration that these sections are unconstitutional is **GRANTED**.

IV. CONCLUSION

For the reasons stated above, the Court finds that Plaintiffs' Motions for Summary Judgment (ECF Nos. 72, 79) should be and are hereby **GRANTED in part and DENIED in part**.

SO ORDERED on this **4th day** of **October, 2018**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX E

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

CHAD BRACKEEN, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action**
	§	**No.4:17-cv-00868-O**
RYAN ZINKE, et al.,	§	
Defendants,	§	
	§	
CHEROKEE NATION, et al.,	§	
Intervenors-Defendants.	§	

FINAL JUDGMENT

The Court issued its order partially granting Plaintiffs' Motions for Summary Judgment. It is therefore **ORDERED, ADJUDGED, and DECREED** that Plaintiffs' Motions for Summary Judgment (ECF Nos. 72, 79) are **GRANTED in part and DENIED in part**, and this case is **DISMISSED** with prejudice. The Court **DECLARES** that 25 U.S.C. §§ 1901–23, 25 U.S.C. §§ 1951–52, 25 C.F.R. §§ 23.106–22, 25 C.F.R. §§ 23.124–32, and 25 C.F.R. §§ 23.140–41 are **UNCONSTITUTIONAL.**

SO ORDERED on this **4th day** of **October, 2018**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX F

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

CHAD BRACKEEN, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action**
	§	**No.4:17-cv-00868-O**
RYAN ZINKE, et al.,	§	
Defendants,	§	
	§	
CHEROKEE NATION, et al.,	§	
Intervenors-Defendants.	§	

ORDER

All of the Defendants have filed Motions to Dismiss (ECF Nos. 56, 58).[1] Defendants seek to dismiss Plaintiffs' claims due to lack of standing. Plaintiffs oppose these motions. For the following reasons, Defendants' motions are **DENIED**.

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[1] The Tribal Defendants "rely on, and incorporate by reference as if fully set forth herein" Federal Defendants' motion to dismiss. *See* Tribal Defs.' Mot. Dismiss, ECF No. 58. This Order will refer to both motions collectively as Defendants' Motion to Dismiss. Federal Defendants were also the only Defendants to reply to Plaintiffs' Response.

I. BACKGROUND

The following factual recitation is taken from Plaintiffs' First Amended Complaint (ECF No. 35) unless stated otherwise. Plaintiffs are composed of three states—Texas, Louisiana, and Indiana, (collectively the "State Plaintiffs"), and seven individual Plaintiffs—Chad Everett and Jennifer Kay Brackeen (the "Brackeens"), Nick and Heather Libretti (the "Librettis"), Altagracia Socorro Hernandez ("Ms. Hernandez"), and Jason and Danielle Clifford (the "Cliffords") (collectively the "Individual Plaintiffs"). Am. Compl. 8–10, ECF No. 35. Defendants are the United States of America; the United States Department of the Interior (the "Interior") and its Secretary Ryan Zinke ("Zinke") in his official capacity; the Bureau of Indian Affairs (the "BIA") and its Director Bryan Rice ("Rice") in his official capacity; BIA Principal Assistant Secretary for Indian Affairs John Tahsuda, III ("Tahsuda")[2] in his official capacity; the Department of Health and Human Services ("HHS") and its Secretary Alex M. Azar II ("Azar") (collectively, the "Federal Defendants"). *Id.* Shortly after this case was filed the Cherokee Nation, Oneida Nation, Quinalt Indian Nation, and Morengo Band of Mission Indians

[2] Initially Plaintiffs sued Michael Black in his official capacity as Acting Assistant Secretary of Indian Affairs. *See* Orig. Compl. ¶ 17, ECF No. 1. On September 13, 2017, U.S. Secretary of the Interior Ryan Zinke appointed John Tahsuda III as the Department of Interior's Principal Assistant Secretary of Indian Affairs. Press Release, *Secretary Zinke Names John Tahsuda III the Principal Deputy Assistant Secretary for Indian Affairs*, DEP'T OF THE INT., (Sept. 13, 2017), https://www.doi.gov/pressreleases/secretary-zinke-names-john-tahsuda-iii-principal-deputy-assistant-secretary-indian. Accordingly, he is substituted as a Defendant.

(collectively "Tribal Defendants") filed an unopposed motion to intervene, which the Court granted. *See* Trib. Defs.' Mot. Intervene, ECF No. 42; 28 March 2018 Order, ECF No. 45.

This case is about the constitutionality of the Indian Child Welfare Act (the "ICWA") and the accompanying regulations (codified at 25 C.F.R. pt. 23) known as the Indian Child Welfare Act Proceedings (the "Final Rule") as promulgated by the BIA, as well as certain provisions of the Social Security Act ("SSA") that predicate federal funding for portions of state child-welfare payments on compliance with the ICWA. Plaintiffs argue that the ICWA and the Final Rule implement a system that mandates racial and ethnic preferences, in direct violation of state and federal law. Am. Comp. ¶ 193, ECF No. 35 (citing TEX. FAM. CODE §§ 162.015, 264.1085; LA. CONST. ART. 1, § 3; 42 U.S.C. § 1996b). Plaintiffs ask that the Final Rule be declared invalid and set aside as a violation of substantive due process and as not in accordance with law (Counts One and Five). 5 U.S.C. § 705(2)(A); Am. Compl. ¶¶ 265, 349, ECF No. 35. Plaintiffs also ask that the ICWA, specifically §§ 1901–23 and 1951–52, be declared unconstitutional under Article One and the Tenth Amendment of the United States Constitution because the provisions violate the Commerce Clause, intrude into state domestic relations, and violate principles of anticommandeering (Counts Two and Three). Am. Compl. ¶¶ 281, 323, ECF No. 35. Finally, Plaintiffs ask that the ICWA §§ 1915(a)–(b) be declared unconstitutional in violation of substantive due process and the Equal Protection Clause of the Fifth Amendment to the United States Constitution (Counts

Four and Six). Am. Compl. ¶¶ 338, 367, ECF No. 35. The State Plaintiffs alone bring the final count, seeking a declaration that ICWA § 1915(c) and Final Rule § 23.130(b) violate the nondelegation doctrine (Count Seven). Am. Compl. ¶ 376, ECF No. 35. Defendants move to dismiss, challenging the standing of all Plaintiffs to bring their claims.

A. The ICWA and SSA

Congress passed the ICWA in the mid-1970s due to rising concern over "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." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). "Congress found that 'an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.'" *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013) (quoting 25 U.S.C. § 1901(4)). Recognizing "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," Congress created a framework to govern the adoption of Indian children. *See* 25 U.S.C. §§ 1901–63. This framework establishes: (1) placement preferences; (2) good cause to depart from placement preferences; (3) standards and responsibilities for state courts and their agents; and (4) fiscal and procedural consequences if the ICWA is not followed. *See id.*

The ICWA itself established "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or

adoptive homes." 25 U.S.C. § 1902. The ICWA mandates placement preferences in foster care, preadoptive, and adoptive proceedings involving Indian children. 25 U.S.C. § 1915. The ICWA requires that "in any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a place with: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). Similar requirements are set for foster care or preadoptive placements. *Id.* § 1915(b). If the Indian child's tribal court should establish a different order of the preferences, the state court or agency "shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." *Id.* § 1915(c).

Absent good cause, the state court shall transfer proceedings concerning an Indian child to the Indian child's tribal court. 25 U.S.C. § 1911(b). In any state court proceeding for the "foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." 25 U.S.C. § 1911(c). The ICWA prohibits the termination of parental rights for an Indian child in the absence of "evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).

State agencies and courts must notify potential intervenors and the Director of the BIA of an Indian

child matter. 25 U.S.C. § 1912. In any involuntary Indian child custody proceeding for foster care placement or termination of parental rights, the ICWA commands state agencies and courts to notify the parents or Indian custodian and the Indian child's tribe of the pending proceedings and of their right to intervention. 25 U.S.C. § 1912(a). Copies of these notices must be sent to the Secretary of the Interior and the BIA. The ICWA also grants the Indian custodian or tribe up to twenty additional days to prepare for such proceedings. *Id.*

The ICWA imposes a ten-day waiting period on the termination of parental rights to an Indian child. 25 U.S.C. § 1913(a). Before such parental rights are terminated "any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time." *Id.* § 1913(b). In any voluntary proceeding for termination of parental rights or adoptive placement of an Indian child, the biological parents or the Indian tribe may withdraw consent for any reason prior to the entry of a final decree, and the child shall be returned to its parents or guardians. *Id.* § 1913(c). Finally, the ICWA permits the parent of an Indian child to withdraw consent to a final decree of adoption on the grounds that the consent was obtained through fraud or duress for up to two years after the final decree. 25 U.S.C. § 1913(d); Am. Compl. ¶¶ 58–60, ECF No. 35.

The ICWA places recordkeeping duties on state agencies and courts to demonstrate states' compliance with the statute. 25 U.S.C. § 1915(e); Am. Compl. ¶ 61, ECF No. 35. Additionally, state courts entering final decrees must provide the Secretary of the Interior with a copy of the decree or order, along with the name and

tribal affiliation of the child, names of the biological parents, names of the adoptive parents, and the identity of any agency having files or information relating to the adoption. 25 U.S.C. § 1951.

If the state court or prospective guardians fail to comply with the ICWA, the final child custody orders or placements may be overturned on appeal or by another court of competent jurisdiction.[3] 25 U.S.C. § 1914. To ensure state agencies and courts comply with the ICWA's mandates, it enables any Indian child who is the subject of any action under the ICWA, any parent or Indian custodian from whose custody the child was removed, and the Indian child's tribe, to petition any court of competent jurisdiction to invalidate a state court's decision for failure to comply with the ICWA §§ 1911, 1912, and 1913. 25 U.S.C. § 1914. Section 1914 has also been applied to allow collateral attacks to adoptions after the close of the relevant window under state law. *See Id.*; Am. Compl. ¶ 67, ECF No. 35; *see e.g.*, *Belinda K. v. Baldovinos*, No. 10-cv-2507, 2012 WL 13571, at *4 (N.D. Cal. Jan. 4, 2012).

Congress has also tied child welfare funding to compliance with the ICWA. The SSA requires states who receive child welfare funding through Title IV-B, Part 1 of the SSA to file annual reports, including a description of their compliance with the ICWA. Am. Compl. ¶ 68,

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[3] While "court of competent jurisdiction" is not defined in the ICWA or the Final Rule, state appellate courts and federal district courts have heard challenges to adoption proceedings under the ICWA. *See e.g.*, *Oglala Sioux Tribe v. Van Hunnik*, 993 F. Supp. 2d 1017, 1022 (D.S.D. 2014); *Doe v. Mann*, 285 F. Supp. 2d 1229, 1231 (N.D. Cal. 2003).

ECF No. 35; Pub. L. No. 103–432, § 204, 108 Stat. 4398 (1994); 42 U.S.C. § 622(a). Title IV-B funding is partially contingent on how well the states demonstrate they comply with the ICWA. Part 'b' requires that this plan must also "contain a description, developed after consultation with tribal organizations . . . in the State, of the specific measures taken by the State to comply with the [ICWA]." 42 U.S.C. § 622(b).

Congress expanded the requirement for States to comply with the ICWA to receive SSA funding in 1999 and 2008 when it amended Title IV-E to require States to certify ICWA compliance to receive foster care and adoption services funding. Foster Care Independence Act of 1999, Pub. L. No. 106–69, § 101, 113 Stat. 1822 (1999); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110–351, § 301, 122 Stat. 3949 (2008).

Finally, HHS regulations state that the HHS Administration for Children and Families ("ACF") "will determine a title IV–E agency's substantial conformity with title IV–B and title IV–E plan requirements" based on "criteria related to outcomes." 45 C.F.R. § 1355.34(a). Part 'b' of the same section includes compliance with the ICWA. 54 C.F.R. § 1355.34(b).

In fiscal year 2018, Congress allocated Texas approximately $410 million in federal funding for Title IV-B and Title IV-E programs, Louisiana received approximately $64 million, and Indiana received approximately $189 million. Am. Compl. ¶¶ 76–78, ECF No. 35. Plaintiffs argue that HHS and Secretary Azar administer funding under Title IV-B and Title IV-E and are vested with discretion to approve or deny a state's

compliance with the requirements of 42 U.S.C. §§ 622, 677. Because of this, Plaintiffs claim that funding for Title IV-B and IV-E is dependent on compliance with the ICWA. Am. Compl. ¶ 80, ECF No. 35.

B. The Final Rule

In 1979, before passage of the Final Rule, BIA promulgated Guidelines for State Courts—the Indian Child Custody Proceedings (the "1979 Guidelines"). Am. Compl. ¶ 82, ECF No. 35. BIA intended these guidelines to assist in the implementation of the ICWA but they were "not intended to have binding legislative effect." 44 Fed. Reg. 67,584 (Nov. 26, 1979). The 1979 Guidelines left the "primary responsibility" for interpreting the ICWA "with the courts that decide Indian child custody cases." *Id.* It also emphasized that "the legislative history of the Act states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." *Id.* As state courts applied the ICWA, some held that the 'good cause' exception to the ICWA placement preferences required a consideration of a child's best interest, including any bond or attachment the child formed. *See e.g.*, *In re Interest of Bird Head*, 331 N.W.2d 785, 791 (Neb. 1983); *In re Appeal in Maricopa Cnty*,. Juvenile Action No. A-25525, 667 P.2d 228, 234 (Ariz. Ct. App. 1983); see also Am. Compl. ¶ 83, ECF No. 35. Other state courts limited the ICWA's application to situations where the child had some significant political or cultural connection to the tribe. Am. Compl. ¶ 84, ECF No. 35; *see, e.g., In re Interest of S.A.M*, 703 S.W.2d 603, 608–09 (Mo. Ct. App. 1986); *Claymore v. Serr*, 405 N.W.2d 650, 653–54 (S.D.

1987); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *Hampton v. J.A.L.*, 658 So. 2d 331, 335 (La. Ct. App. 1995).

In June of 2016, BIA promulgated the Final Rule, which purported to "clarify the minimum Federal standards governing implementation of the [ICWA]" and to ensure that the ICWA "is applied in all States consistent with the Act's express language." 25 C.F.R. § 23.101. The regulations declared that while BIA "initially hoped that binding regulations would not be necessary to carry out [the ICWA], a third of a century of experience has confirmed the need for more uniformity in the interpretation and application of this important Federal law." 81 Fed. Reg. at 38,782.

The main departure from the previous decades of practice under the ICWA was the Final Rule's definition of the 'good cause' exception to the preference placements. Am. Compl. ¶ 116, ECF No. 35. The Final Rule noted that "State courts . . . differ as to what constitutes 'good cause' for departing from ICWA's placement preferences." 81 Fed. Reg. at 38,782. In response, the Final Rule mandates that "[t]he party urging that ICWA preferences not be followed bears the burden of proving by clear and convincing evidence the existence of good cause" to deviate from such a placement. 81 Fed. Reg. at 38,838; *see also* 25 C.F.R. § 23.132(b).

The Final Rule provides that state courts "may not consider factors such as the participation of the parents or Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had

custody of the child, or the Indian child's blood quantum." 81 Fed. Reg. at 38,868 (codified at 25 C.F.R. § 23.103(c)).

Plaintiffs contrast the 1979 statutory text where "the use of the term 'good cause' was designed to provide state courts with flexibility" to the Final Rule, which now claims that "Congress intended the good cause exception to be narrow and limited in scope." *Compare* 44 Fed. Reg. 67,584 (Nov. 26, 1979), *with* 81 Fed. Reg. at 38,839. Accordingly, the Final Rule sets forth "five factors upon which courts may base a determination of good cause to deviate from the placement preferences," and further "makes clear that a court may not depart from the preferences based on the socioeconomic status of any placement relative to another placement or based on the ordinary bonding or attachment that results from time spent in a non-preferred placement that was made in violation of ICWA." 81 Fed. Reg. at 38,839; *see also* 25 C.F.R. § 23.132(c)–(e); Am. Compl. ¶ 118, ECF No. 35.

Beyond the narrowing of what state courts may consider in determining "good cause," the Final Rule places more responsibilities on the states to determine if the child is an Indian child. 25 C.F.R. § 23.107(a). These inquiries "should be on the record," and "State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child." *Id.*, § 23.107(b). Whenever a state court enters a final adoption decree or an order in an Indian child placement, the Final Rule requires the state court or agency to provide a copy of the decree or order to BIA. *Id.* § 23.140. The Final Rule requires states to "maintain a record of every voluntary

or involuntary foster care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary [of the Interior].'" *Id.* § 23.141.

In an involuntary foster care or termination of parental rights proceeding, the Final Rule requires state courts to ensure and document that the state agency has used "active efforts" to prevent the breakup of the Indian family. *Id.* § 23.120. The Final Rule defines "active efforts" to include "assisting the parent or parents or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan." *Id.* § 23.2.

When determining if the child is an Indian child, only the Indian tribe of which it is believed the child is a member may determine whether the child is a member of the tribe or eligible for membership. *Id.* § 23.108(a). "The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe." *Id.* § 23.108(b). But when the child meets the definition of "Indian child" for more than one tribe, then the Final Rule instructs state agencies and courts to defer to "the Tribe in which the Indian child is already a member," or allow "the Tribes to determine which should be designated as the Indian child's Tribe." *Id.* § 23.109(b)–(c). Only when the tribes disagree about the child's membership may the state courts designate the tribe to which the child belongs, and the Final Rule provides criteria the courts must use in making that designation. *Id.* § 23.109(c)(2).

The Final Rule instructs state courts to dismiss a voluntary or involuntary child custody proceeding when the Indian child's residence or domicile is on a reservation where the tribe exercises exclusive jurisdiction over child custody proceedings. 25 C.F.R. § 23.110(a). The Final Rule requires state courts to terminate child custody proceedings if any party or the court has reason to believe that the Indian child was improperly removed from the custody of his parent or Indian custodian. 25 C.F.R. § 23.114.

C. The Pertinent Adoption Proceedings

1. The Brackeens and A.L.M.

The Brackeens wished to adopt A.L.M, who was born in Arizona to an unmarried couple, M.M. and J.J. Am. Compl. ¶ 127, ECF No. 35. A.L.M. is an Indian child under the Final Rule because he is eligible for membership in two Indian tribes—his biological mother is an enrolled member of the Navajo Nation, and his biological father is an enrolled member of the Cherokee Nation. *Id.*; *see* 25 C.F.R. § 23.2. A few days after A.L.M. was born, his biological mother brought him to Fort Worth, Texas, to live with his paternal grandmother. When he was ten months old, Child Protective Services ("CPS"), a division of the Texas Department of Family and Protective Services ("DFPS"), removed A.L.M. from his grandmother and placed him in foster care with the Brackeens. *Id.* ¶ 129. Per the ICWA and the Final Rule, the Cherokee Nation and the Navajo Nation were notified of A.L.M.'s placement with the Brackeens. *Id.* The Court identified no ICWA-preferred foster placement for A.L.M., so he remained with the Brackeens. *Id.* A.L.M. lived with the Brackeens for more

than sixteen months before—with the support of his biological parents and paternal grandmother—the Brackeens sought to adopt him. Am. Compl. ¶ 128, ECF No. 35.

On May 2, 2017, a Texas state court terminated the parental rights of A.L.M.'s biological parents, making him eligible for adoption under Texas law. *Id.* ¶ 132. In June 2017, a year after the Brackeens took custody of A.L.M., the Navajo nation notified the family court that it located a potential alternative placement for A.L.M. with non-relatives in New Mexico. *Id.* ¶ 133.

On July 29, 2017, the Brackeens filed an original petition in the 323rd District Court, Tarrant County, Texas seeking to adopt A.L.M. *Id.* ¶ 134. The Cherokee and Navajo Nations were notified of the adoption proceeding. *Id.* ¶ 135; *see* 25 C.F.R. § 23.11. No one intervened in the Texas adoption proceeding or otherwise formally sought to adopt A.L.M. Am. Compl. ¶ 135, ECF No. 35. On August 1, 2017, the family court held a hearing regarding the Brackeens' petition for adoption. *Id.* ¶ 137. At that hearing, the Navajo Nation's social worker testified that the two tribes "came up with [an] agreement" among themselves in the hallway prior to the hearing to determine the designation of A.L.M.'s tribe. *Id.* ¶ 138. According to that agreement, they decided to designate the Navajo Nation as A.L.M.'s tribe, but this "determination of [A.L.M.'s] Tribe for purposes of ICWA and [the Final Rule] do[es] not constitute a determination for any other purpose." 25 C.F.R. § 23.109(c)(3).

Under the ICWA and the Final Rule placement preferences, absent good cause, an Indian child should

be placed with an Indian relative, member of the child's tribe, or another Indian party. *See* 25 U.S.C. § 1915(a). The Brackeens argued in state court that the ICWA's placement preferences should not apply because they were the only party formally seeking to adopt A.L.M., and that good cause existed to depart from the preferences. The burden is on the party seeking adoption to prove "by clear and convincing evidence that there was 'good cause'" to allow them, a non-Indian couple, to adopt A.L.M. 25 C.F.R. § 23.132(b). The Brackeens submitted testimony by A.L.M.'s biological parents, his court appointed guardian, and an expert in psychology to show good cause. Am. Compl. ¶ 141, ECF No. 35. However, Texas DFPS pointed to the Final Rule's heightened evidentiary requirements and argued that the Brackeens did not satisfy the heightened requirements to justify a departure from the placement preferences. *Id.* ¶ 142.

The family court denied the Brackeens' adoption petition, citing the ICWA and the Final Rule, concluding that the Brackeens failed to satisfy the burden of proof necessary to depart from the placement preferences. *Id.* ¶ 143; *see* 23 C.F.R. § 23.132; Order Denying Request for Adoption of Child, *In re A.L.M., a Child*, No. 323-105593-17 (323rd Dist. Ct., Tarrant Cnty., Tex. Aug. 22, 2017). DFPS notified all parties of its intention to move A.L.M. to the Navajo Nation's proposed placement in New Mexico. Am. Compl. ¶ 145, ECF No. 35. The Brackeens sought and obtained an emergency order preventing any placement of A.L.M. *Id.* ¶ 146. DFPS then proposed to take A.L.M., without the Brackeens, on an overnight visit to the proposed New Mexico placement. *Id.* ¶ 147–

49. But, before that occurred, the proposed New Mexico placement withdrew their offer to adopt A.L.M., leaving the Brackeens the only party seeking to adopt A.L.M. *Id.* ¶ 150. The Brackeens and A.L.M's guardian ad litem then entered into a settlement agreement to that effect. *Id.* ¶ 150.

In January 2018, the Brackeens successfully petitioned to adopt A.L.M., but under the ICWA and the Final Rule, the Brackeens' adoption of A.L.M. is open to collateral attack for two years. *Id.* ¶ 152. Plaintiffs explain that the Brackeens intend to continue to provide foster care for, and possibly adopt, additional children in need, but they are reluctant, after this experience, to provide foster care for other Indian children in the future. *Id.*¶ 154. Plaintiffs argue that the ICWA and the Final Rule therefore interferes with the Brackeens' intention and ability to provide a home to additional children. *Id.* Additionally, Plaintiffs argue that this legal regime damages Texas by limiting the supply of available, qualified homes necessary to help foster-care children in general, and Indian children, in particular. *Id.*

2. The Librettis and Baby O.

The Librettis are a married couple living in Sparks, Nevada. *Id.* ¶ 156. They sought to adopt Baby O. when she was born in March of 2016. Baby O.'s biological mother, Ms. Hernandez, felt that she would be unable to care for Baby O. and wished to place her for adoption at her birth. *Id.* ¶ 157. Baby O. has significant medical needs but the Librettis welcomed her into their family, along with other adopted children and a biological son. *Id.* ¶ 158. Ms. Hernandez has continued to be a part of

Baby O.'s life and she and the Librettis visit each other regularly. *Id.* ¶ 162.

Baby O.'s biological father, E.R.G., is descended from members of the Ysleta del sur Pueblo Tribe ("Pueblo Tribe"), located in El Paso, Texas. *Id.* ¶ 163. At the time of Baby O.'s birth, E.R.G. was not a registered member of the Tribe. *Id.* Baby O.'s biological paternal grandmother is a registered member of the Pueblo Tribe. The Pueblo Tribe intervened in the Nevada custody proceedings in an effort to remove Baby O. from the Librettis and send her to foster care on Pueblo Tribe reservation in west Texas. *Id.* ¶ 164. To date, the Pueblo Tribe identified thirty-six potential placements, each requiring Nevada to conduct full home studies as an agent of the Pueblo Tribe. *Id.* ¶¶ 165–66. Given Baby O.'s significant medical needs, Nevada found the first seven home studies designated by the tribe unsuitable. Currently, Nevada is in the process of reviewing the additional twenty-nine proposed homes nominated by the Pueblo Tribe to take foster care of Baby O. *Id.* ¶ 167.

Once the Librettis joined the challenge to the constitutionality of the ICWA and the Final Rule, the Pueblo Tribe indicated its willingness to discuss settlement. *Id.* ¶ 168. While the settlement negotiations may result in the Librettis adopting Baby O., Plaintiffs point out that any settlement would still be subject to collateral attack under the ICWA for two years. *Id.* ¶ 168. The Librettis intend to petition to adopt Baby O. as soon as they are able; they are the only people who have indicated an intent to adopt her; and they are the only family she has known. *Id.* ¶ 169. Similar to the Brackeens, the Librettis intend to provide foster care for

and possibly adopt additional children in need. *Id.* ¶ 170. Due to their experiences with the ICWA, the Librettis are "reluctant to provide a foster home for other Indian children in the future." *Id.*

3. The Cliffords and Child P.

The Cliffords live in Minnesota and seek to adopt Child P. *Id.* ¶ 173. Child P. was born in July 2011 and placed in foster care in 2014 when her biological parents were arrested and charged with various drug-related offenses. *Id.* ¶ 171. For two years, Child P. moved between various foster parents and relatives without a stable or permanent home. *Id.* The State of Minnesota attempted to return Child P. to her biological mother, but when her mother relapsed, the state returned Child P. to foster care. *Id.* ¶ 172. Finally, Minnesota terminated the biological mother's parental rights and placed her with the Cliffords in July 2016. *Id.* The Cliffords seek to adopt Child P. and "have continually worked to help her feel that she is a part of their family and community." *Id.* ¶ 173.

Child P.'s maternal grandmother is a registered member of the White Earth Band of Ojibwe Tribe (the "White Earth Band"). *Id.* ¶ 174. When Child P. first entered the state foster care system, her biological mother informed the state court that Child P. was not eligible for tribal membership. *Id.* In the fall of 2014, several months after Child P. entered foster care, the White Earth Band notified the court that Child P. was not eligible for membership. *Id.* Nevertheless, the state court sent notices to the White Earth Band that Child P. was in the custody of the state, as required by the ICWA. *Id.* Then, in January 2017, six months after Child P. was

placed with the Cliffords, the White Earth Band wrote the court and insisted that Child P. was eligible for membership. *Id.* Most recently, the White Earth Band announced that Child P. was not only eligible but was now a member of the White Earth Band for the purposes of the ICWA. *Id.* ¶ 175. The Minnesota state court considered itself bound by this latest pronouncement and concluded that the ICWA must apply to all custody determinations concerning Child P. *Id.*

No other family has moved to adopt Child P. *Id.* ¶ 176. However, because the ICWA placement preferences apply, Minnesota removed Child P. from the Cliffords and placed her in the care of her maternal grandmother in January 2018. *Id.* ¶ 176. According to Plaintiffs, Child P.'s grandmother was previously denied a foster care license by the state. *Id.*

Child P.'s guardian ad litem supports the Cliffords' efforts to adopt her and agrees that this is in Child P's best interest. *Id.* ¶ 177. However, due to the application of the ICWA, the Cliffords and Child P. remain separated and the Cliffords face heightened legal barriers to adopt Child P. *Id.* Just like the other Individual Plaintiffs, if the Cliffords are successful in petitioning for adoption, that adoption may be attacked for two years under the ICWA. 25 U.S.C. § 1915(a).

D. State Plaintiffs

Texas, Louisiana, and Indiana bring this suit in their capacities as sovereign states. *Id.*¶ 178. They claim that the ICWA and the Final Rule harm state agencies charged with protecting child welfare by usurping their lawful authority of the regulation of child custody proceedings and management of child welfare services.

Id. Additionally, the ICWA and the Final Rule jeopardize millions of dollars in federal funding. *Id.* The State Plaintiffs have at least one Indian tribe living within their borders and have regular dealings with Indian child adoptions and the ICWA.[4] *Id.*

Plaintiffs argue that the ICWA and the Final Rule place significant responsibilities and costs on state agencies and courts to carry out federal Executive Branch directives. *Id.* ¶ 187. Texas DFPS, Louisiana Department of Child and Family Services ("DCFS"), and Indiana Department of Child Services ("DCS") each handle several Indian child cases every year. *Id.* ¶ 188.

The State Plaintiffs require their state agencies and courts to act in the best interest of the child in foster care, preadoptive, and adoptive proceedings. *Id.* ¶ 191. But the State Plaintiffs argue that the ICWA and Final Rule require these courts and agencies to apply the mandated placement preferences, regardless of the child's best interest, if the child at issue is an "Indian child." *Id.* ¶¶ 194–95. Additionally, the State Plaintiffs

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[4] Three federally recognized tribes live in Texas—Yselta del Sur Pueblo in El Paso, Texas; the Kickapoo Tribe in Eagle Pass, Texas; and the Alabama-Coushatta Tribe near Livingston, Texas. Both the Kickapoo Tribe and the Alabama-Coushatta Tribe have reservations in Texas. Am. Compl. ¶ 179, ECF No. 35. Four tribes exist in Louisiana—Chitimacha Tribe in Charenton, Louisiana; Coushatta Tribe in Elton, Louisiana; Tunica-Biloxi Tribe in Marksville, Louisiana; and Jena Band of Choctaw Indians in Jena, Louisiana. *Id.* ¶ 180. One federally recognized tribe exists in Indiana: Pokagon Band of Potawatomi Indians. *Id.* ¶ 181. For example, as of December 2017, there were thirty-nine children in the care of Texas DFPS who were verified to be enrolled or eligible for membership in a federally recognized tribe, many of them living in Texas DFPS homes. *Id.* ¶ 189.

argue that the ICWA's requirement that state courts submit their authority to a mandate from the Indian child's tribe violates state sovereignty because the Indian tribe is not an equally-footed sovereign deserving full faith and credit. *Id.* ¶ 196; 25 U.S.C. § 1915(c).

In every child custody case, the ICWA and Final Rule requires the State Plaintiffs to undertake additional responsibilities, inquiries, and costs. *Id.* ¶ 197. As an example of how the ICWA and the Final Rule affects state procedures, the State Plaintiffs submit the Texas CPS Handbook (the "Texas Handbook"). The Texas Handbook contains Texas DFPS's policies and procedures for compliance with the ICWA and the Final Rule. *Id.* ¶ 198. First, these standards require that, in every case, CPS workers determine if the child or the child's family has Native American ancestry or heritage. *Id.* ¶ 199; Am. Compl., Ex. 1 (Texas Handbook) [hereinafter "Texas Handbook"] § 1225, ECF No. 35. The Texas Handbook instructs agencies how to ascertain if the ICWA and the Final Rule apply, how to comply with it, and warns that failure to comply could result in the final adoption order being overturned. Am. Compl. ¶¶ 200–204. The Texas Handbook also warns that if an Indian child is taken into DFPS custody, "almost every aspect of the social work and legal case is affected." Texas Handbook § 5844, ECF No. 35. If the ICWA applies, the legal burden of proof for removal, obtaining a final order terminating parental rights, and restricting a parent's custody rights is higher. *Id.* Texas DFPS must serve the child's parent, tribe, Indian custodian, and the BIA with a specific notice regarding the ICWA rights, and DFPS and its caseworkers "must make active efforts

to reunify the child and biological Indian family." *Id.* Finally, the child must be placed according to the ICWA statutory preferences; expert testimony on tribal child and family practices may be necessary; and a valid relinquishment of parental rights requires a parent to appear in court and a specific statutory procedure is applied. *Id.*

Indiana and Louisiana have similar requirements in place to assure that their child welfare systems comply with the ICWA and Final Rule. *See* Am. Compl. ¶¶ 209–19. Louisiana DCFS must maintain on-going contact with the Indian child's tribe because each tribe may elect to handle the ICWA differently. *Id.* ¶ 220. They are also required to ensure that the state agencies take "all reasonable steps" to verify the child's status. 25 C.F.R. § 23.124.

The ICWA and the Final Rule require state judges to ask each participant, on the record, at the commencement of child custody proceedings whether the person knows or has reason to know whether the child is an Indian child and directs the parties to inform the court of any such information that arises later. 25 C.F.R. § 23.107(a). If the state court believes the child is an Indian child, it must document and confirm that the relevant state agency: (1) used due diligence to identify and work with all of the tribes that may be connected to the child; and (2) conducted a diligent search to find suitable placements meeting the preference criteria for Indian families. *Id.* §§ 23.107(b), 23.132(c)(5). The ICWA and the Final Rule require the State Plaintiffs' agencies and courts to maintain indefinitely records of placements involving Indian children, and subject those records to

inspection by the Director of BIA and the child's Indian tribe at any time. 25 U.S.C. §§ 1915(e), 1917; 25 C.F.R. §§ 23.140–41. This increases costs for State Plaintiffs' agencies and courts who have to maintain additional records not called for under state law and hire or assign additional employees to maintain these records indefinitely. Am. Compl. ¶ 225, ECF No. 35.

The statutes also affect the State Plaintiffs' rules of civil procedure. ICWA § 1911(c) and the Final Rule dictate that the Indian child's custodian and the child's tribe must be granted mandatory intervention. Texas Rule of Civil Procedure 60 permits Texas courts to strike the intervention of a party upon a showing of sufficient cause by another party, but the ICWA prevents the rule's application to child custody cases involving Indian children. TEX. R. CIV. PRO. 60. In Louisiana, any person with a justiciable interest in an action may intervene. LA. CODE CIV. PROC. ART. 1091. In Indiana, a person may intervene as of right or permissively, similar to the Federal Rules of Civil Procedure. IND. R. TR. PROC. 24. The ICWA, however, eliminates these requirements and provides mandatory intervention for the Indian child's custodian and the child's tribe. Am. Compl. ¶ 231, ECF No. 35.

Finally, the ICWA and the Final Rule override the State Plaintiffs' laws with respect to voluntary consent to relinquish parental rights. *Id.* ¶ 234. Texas law permits voluntary relinquishment of parental rights 48 hours after the birth of the child; Louisiana allows surrender prior to or after birth of the child and surrender of maternal rights five days after the birth of the child; and Indiana permits voluntary termination of

parental rights after birth of the child. TEX. FAM. CODE § 161,103(a)(1); La. CHILD CODE ART. 1130; IND. CODE §31-35-1-6. The ICWA and Final Rule prohibit any consent until ten days after the birth. 25 U.S.C. § 1913(a); 25 C.F.R. § 23.125(e).

The ICWA and Final Rule also affect how long a final adoption decree is subject to challenge. Under the ICWA, state courts must vacate a final adoption decree involving an Indian child, and return the child to the biological parent, anytime within two years if the biological parent withdraws consent on the grounds that it was obtained through fraud or duress. 25 U.S.C. § 1913(d); 25 C.F.R. § 23.136. This directly conflicts with Texas, Louisiana, and Indiana law, which provide that an adoption decree is subject to direct or collateral attack for no more than one year. *See*, TEX. FAM. CODE § 162.012(a) (up to six months); *Goodson v. Castellanos*, 214 S.W.3d 741, 748–49 (Tex. App.—Austin 2007, pet. denied); LA. CHILD. CODE ART. 1263; IND. CODE § 31-19-14-2. It also contradicts the Texas common law principle, as well as Indiana statutory law, which hold that the best interest of the child is served by concluding child custody decisions so that these decisions are not unduly finalized. *In re M.S.*, 115 S.W.3d 534, 548 (Tex. 2003); IND. CODE § 31-19-14-2. The ICWA however permits the invalidation, by any court of competent jurisdiction, of a state court's final child custody order if it fails to comply with the ICWA. 25 U.S.C. § 1914; 25 C.F.R. § 23.137.[5]

Finally, if states fail to comply with the ICWA, they risk losing funding for child welfare services under Title IV-B and Title IV-E of the SSA. Am. Compl. ¶ 243, ECF

[5] *See* note 3, *supra*.

No. 35; 42 U.S.C. §§ 622, 677. Interior and HHS, and Defendants Zinke, Rice, Tahsuda, and Azar, determine if the State Plaintiffs complied with the statutory requirements, making them eligible for continued funding under Title IV-B and Title IV-E funding. Am. Compl. ¶¶ 244–46; 42 U.S.C. § 622(a); 42 U.S.C. § 677(e)(3).

II. LEGAL STANDARD

"Every party that comes before a federal court must establish that it has standing to pursue its claims." *Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013); *see also Barrett Computer Servs., Inc. v. PDA, Inc.*, 884 F.2d 214, 218 (5th Cir. 1989). Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. "The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Raines v. Byrd*, 521 U.S. 811, 820 (1997).

"The doctrine of standing asks 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Cibolo Waste*, 718 F.3d at 473 (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). Standing has both constitutional and prudential components. *See id.* (quoting *Elk Grove*, 542 U.S. at 11) (stating standing "contain[s] two strands: Article III standing . . . and prudential standing"). The Supreme Court has established that the "irreducible constitutional minimum" of standing consists of three elements. *Spokeo*, 135 S. Ct. at 1547; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff must have (1) suffered an injury in fact, (2) that is fairly

traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan*, 504 U.S. at 560–61. But it is not necessary for all Plaintiffs to demonstrate standing; rather, "one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015) (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

"Prudential standing requirements exist in addition to 'the immutable requirements of Article III,' . . . as an integral part of 'judicial self-government.'" *ACORN v. Fowler*, 178 F.3d 350, 362 (5th Cir. 1999) (quoting *Lujan*, 504 U.S. at 560). "The goal of this self-governance is to determine whether the plaintiff 'is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial power.'" *Id.* (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986)). The Supreme Court has observed that prudential standing encompasses "at least three broad principles," including "the general prohibition on a litigant's raising another person's legal rights . . . ." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014); *Cibolo Waste, Inc.*, 718 F.3d at 474 (quoting *Elk Grove*, 542 U.S. at 12); *see also Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 290 (2008) (discussing cases where third-parties sought "to assert not their own legal rights, but the legal rights of others"); *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 773 (2000) (noting "the assignee of a claim has standing to assert the injury in fact suffered by the assignor").

The question of standing implicates subject-matter jurisdiction; therefore, the motion to dismiss standards pursuant to Rule 12(b)(1) apply. *Villas at Parkside Partners v. City of Farmers Branch*, 245 F.R.D. 551, 556 (N.D. Tex. 2007) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). A court determines subject-matter jurisdiction based on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). A challenge to subject-matter jurisdiction can come in one of two ways—a facial attack or a factual attack. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). If the opposing party merely files a Rule 12(b)(1) motion, it is considered a facial attack, and the court takes all pleaded facts as true and looks at the sufficiency of the allegations in the pleadings. *Id.* A factual attack requires the moving party to submit additional evidence, through affidavits or testimony, and the non-moving party must then prove by a preponderance of the evidence that the court has jurisdiction. *Id.*

Article III confines the federal judicial power to "cases" and "controversies." U.S. CONST. art. III, § 2. The case or controversy requirement ensures that the federal judiciary respects "the proper—and properly limited—role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quotation marks omitted). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement [for each claim]." *Rumsfeld*,

547 U.S. at 53 n.2. As the parties invoking jurisdiction, Plaintiffs bear the burden of demonstrating that all of the requirements for standing are satisfied. *See Ramming*, 281 F.3d at 161.

Here, Defendants filed their motion to dismiss as a facial attack based on Plaintiffs' lack of standing. Defs.' Br. Supp. Mot. Dismiss [hereinafter "Defs.' Br. Dismiss"] 8, ECF No. 57. Therefore, when ruling on Defendants' motion to dismiss for lack of standing, the Court accepts "as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

III. ANALYSIS

Defendants move to dismiss Plaintiffs' complaint for failure to establish subject-matter jurisdiction. Defs.' Br. Dismiss 1, ECF No. 57. Defendants argue that: (1) neither the Individual nor the State Plaintiffs have standing to bring their claims; (2) the requested relief will not redress any alleged injury; (3) the claims against HHS are not ripe; (4) Minnesota and Nevada are necessary and indispensable parties under Rule 19; (5) the *Younger* abstention doctrine should apply; (6) and the State Plaintiffs waived their ability to challenge the Final Rule by not objecting to it during the notice and comment period. *Id.* at 1–2. The State and Individual Plaintiffs respond separately. *See* State Pls.' Comb. Resp., ECF No. 72; Indiv. Pls.' Comb. Resp., ECF No. 79. The Individual Plaintiffs respond that they are objects of the regulations at issue and have suffered an injury-in-fact due to the challenged provisions. Indiv. Pls.' Resp. Defs.' Mot. Dismiss Br. Supp. Mot. Summ. J.

[hereinafter "Indiv. Pls.' Br. Resp."] 18, ECF No. 80. The State Plaintiffs respond that they have standing because the ICWA and the Final Rule pressures them "to relinquish control over powers reserved to them by the Constitution, to reevaluate their own laws, and to incur substantial costs in the process." State Pls.' Resp. Defs.' Mot. Dismiss Br. Supp. Mot. Summ. J. [hereinafter "State Pls.' Br. Resp."] 12, ECF No. 74. The Court will address standing for each of these challenges separately.

B. Individual Plaintiffs

1. Injury-in-Fact

The Individual Plaintiffs assert first, that they are "plainly subject to ICWA and the Final Rule, which govern their adoption efforts because they are seeking to adopt or place for adoption (or, in the case of the Brackeens, have adopted) an 'Indian child.'" Indiv. Pls.' Br. Resp. 19, ECF No. 80. Defendants argue that foster parents are not the object of either the ICWA or the Final Rule, therefore neither regulation provides an injury-in-fact. Defs.' Reply Indiv. Pls.' Opp. [hereinafter "Defs.' Reply Indiv."] 1, ECF No. 116. Defendants also argue that the Brackeens' claims are moot because their adoption has been finalized. Defs.' Br. Dismiss 10, ECF No. 57.

Injury-in-fact must be both particularized and concrete, actual or imminent, not conjectural or hypothetical. *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). For an injury to be particularized, it "must affect the plaintiff in a personal and individual way." *Id.* Finally, the injury must actually exist. *Id.* Under *Lujan*, a type of a concrete and particularized injury generally exists if the "plaintiff is himself an

object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury. . . .” *Lujan*, 504 U.S. at 561–62.

The Supreme Court has explained that a party is the object of a regulation if “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). When the Fifth Circuit applied this concept, it held that if legislation targets a party, that party ordinarily has standing. *Duarte ex rel. Duarte v. City of Lewisville, Tex.*, 759 F.3d 514, 518 (5th Cir. 2014). Further, it held that “an increased regulatory burden typically satisfies the injury in fact requirement [of standing].” *Contender Farms, LLP v. USDA*, 779 F.3d 258, 264 (5th Cir. 2015). When determining if someone is an object of the regulation, the Fifth Circuit uses “a flexible inquiry rooted in common sense.” *Id.* In *Duarte*, the court held that the daughter and wife of the sex offender had standing to object to the ordinance that restricted where sex offenders could live because they were held to be within the “zone-of-interest” for the ordinance. *Duarte*, 759 F.3d at 515; *see also Ass’n of Am. R.R.s v. Dep’t of Trans.*, 38 F.3d 582 (D.C. Cir. 1994) (finding standing when the challengers of the regulation asserted they were harmed by two sets of regulations rather than one).

Applying the standards established in *Duarte* and *Contender Farms*, it is clear that the Individual Plaintiffs are objects of the ICWA and the Final Rule. The language of the Final Rule and the ICWA

anticipates that there will be non-Indian parents seeking to adopt Indian children. *See* 25 C.F.R. § 23.130 (detailing the placement preferences for foster care or adoption, anticipating the possibility of non-Indian parents only if no preferred options were available). Individual Plaintiffs are burdened by the additional regulations and requirements as long as they are attempting to adopt an Indian child. *See Contender Farms, LLP*, 779 F.3d at 264; *cf, Lujan*, 504 U.S. at 561 (holding standing did not exist without concrete plans to be subject to the regulation).

The Individual Plaintiffs' attempts to adopt Indian children have been burdened, at the very least, by the ICWA and the Final Rule. *See Duarte*, 759 F.3d at 519 (finding standing for the wife and child of a man registered as a sex offender because the regulation interfered with their lives in "a concrete and personal way"). In this case, the Individual Plaintiffs attempted to adopt Indian children and, because they themselves were not Indian, faced heightened burdens to adoption. *See Contender Farms, LLP*, 779 F.3d at 264. The ICWA and the Final Rule target those adults seeking to adopt Indian children even if those adults are not members of an Indian tribe. *See* 25 U.S.C. §§ 1915(a)–(b); 25 C.F.R. § 23.130; *Duarte*, 759 F.3d at 519.

The Court finds the Individual Plaintiffs to be objects, therefore, it next examines whether the Individual Plaintiffs have alleged a concrete and particularized injury. First, the Brackeens' adoption of A.L.M. is open to collateral attack for two years under

the ICWA and the Final Rule.[6] Indiv. Br. Resp. 37, ECF No. 80. Next, despite Baby O.'s biological mother supporting them, the Librettis have faced additional regulatory burdens as they seek to adopt her because she is eligible for membership in an Indian tribe.[7] *Id.* 38–39. And finally the Cliffords saw Child P. removed from their home because of the ICWA placement preferences. *See supra* Part II.C. Even if the Court only considered the injuries alleged by the Cliffords—that Child P. has been removed from their home because of the ICWA and the Final Rule placement preferences—this would constitute concrete and particularized injury. But, as stated above, the Librettis and Brackeens have also stated injuries due to application of the ICWA and the Final Rule. This constitutes being the "object of the regulation," which is a particularized and concrete injury that satisfies the injury-in-fact requirements for standing. *Contender Farms, LLP*, 779 F.3d at 264.

2. Traceability

The second prong of the standing analysis requires the alleged injury be "fairly traceable to the defendant[s'] allegedly unlawful conduct." *Lujan*, 504

[6] Defendants argue that the Brackeens' claims are moot because their adoption of A.L.M. has been finalized. Defs.' Br. Dismiss, 19, ECF No. 57. But the Brackeens also claim injury from the two-year time frame for collateral attack on their adoption that has not yet run.

[7] Defendants also argue that the Librettis are not injured by the ICWA or the Final Rule because Baby O. has not been taken away from them, nor have they faced an unusually long delay. Defs.' Br. Dismiss 24, ECF No. 57. But the Librettis have taken "concrete steps" to adopt Baby O. and additional barriers, due to the ICWA and the Final Rule, have delayed it. *Duarte*, 759 F.3d at 518.

U.S. at 590. Tracing an injury is not the same as seeking "proximate cause." *Bennett v. Spear*, 520 U.S. 154, 169 (1997). Instead, the Fifth Circuit has held that traceability is satisfied if the defendant "significantly contributed to the plaintiff's alleged injuries." *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010). The Supreme Court held that while traceability is not satisfied when the injury results from actions by a third party not before the court, this "does not exclude injury produced by determinative or coercive effect upon the action of someone else." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 (1991).

The Federal Defendants argue that traceability is not shown here because the Federal Defendants are not the cause of the Individual Plaintiffs' injuries. Defs.' Br. Dismiss 19, ECF No. 57. Instead, the Federal Defendants argue the alleged injury is caused by state courts that enforce the ICWA. *Id.* at 20. This argument ignores the fact that the injury complained of exists *because* of the ICWA and Final Rule. As explained below, the state courts only follow these requirements because the ICWA and the Final Rule require them. The ICWA and the Final Rule are therefore fairly traceable to the alleged injury because the pleading demonstrates the injury complained of results from the ICWA and the Final Rule. *See Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 368 (5th Cir. 2018). Federal Defendants also argue that the Individual Plaintiffs' alleged injuries are not traceable to the federal government because "ICWA specifies no enforcement role for Defendants, and neither Interior or HHS or any

of their respective officers have enforced or are threatening to enforce ICWA." Defs.' Br. Dismiss 28–29, ECF No. 57. But the Final Rule, by its own terms, requires states to comply or face loss of funds by the Defendants.

Federal Defendants promulgated the Final Rule, setting "binding standards for Indian child-custody proceedings in State courts" that have the force of law. 81 Fed. Reg. at 38,782; *see* 25 C.F.R. § 23.132 (describing how a determination of good cause to depart from placement preferences is made). Accordingly, the traceability requirements are met.

3. Redressability

The final requirement—redressability—requires a plaintiff to show "a 'favorable decision will relieve a discrete injury to himself,' but not necessarily 'that a favorable decision will relieve his *every* injury.'" *Air Evac EMS, Inc. v. Texas*, 851 F.3d 507, 514 (5th Cir. 2017) (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)). The Court must be able to structure relief to redress plaintiff's injury. The Individual Plaintiffs request the Final Rule be declared invalid and set aside; the ICWA and the related SSA provisions be declared unconstitutional; and Federal Defendants enjoined from enforcing the statutes. Defendants argue that this requested relief would not redress Plaintiffs' alleged injuries because "a declaratory judgment addressing the constitutionality of ICWA would not bind state courts." Defs.' Br. Dismiss 23, ECF No. 57.

The Court finds that the Individual Plaintiffs have satisfied the redressability requirement of constitutional standing. The redressability requirement is met if a

judgment in plaintiffs' favor "would at least make it easier for them" to achieve their desired result. *Duarte*, 759 F.3d at 521. In this case, a declaration of the ICWA's unconstitutionality or the invalidity of the Final Rule would have the "practical consequence" of increasing "the likelihood that the plaintiff would obtain relief." *Evans*, 536 U.S. at 464. If the Federal Defendants are enjoined from applying the ICWA and the Final Rule, then the obligation to follow these statutory and regulatory frameworks will no longer be applied to the states. Nor would the placement preferences and the two-year collateral attack period be imposed. The Brackeens' injury, at the very least, would be redressed by a favorable decision, allowing their adoption of A.L.M. to be finalized after six months, as provided by Texas state law, rather than two years, as required by the ICWA and the Final Rule. *See* Part I.D. The redressability requirement for the Individual Plaintiffs is therefore met.

4. Prudential Standing

Finally, a court should analyze prudential standing only "if the Article III standing requirements are met." *Wyoming v. U.S. Dep't of the Interior*, 674 F.3d 1220, 1231 (10th Cir. 2012). Because the Individual Plaintiffs alleged Article III standing, the Court now considers whether the prudential principles of standing require dismissal.

Prudential standing requires that the plaintiff generally "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*,

454 U.S. 464, 474 (1982). Federal courts must refrain from "adjudicating 'abstract questions of wide public significance,' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Id.* at 474–75. Finally, plaintiffs must fall within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 475. If the three requirements of constitutional standing are met, and the party is championing his own rights, "the basic practical and prudential concerns underlying the standing doctrine are generally satisfied." *Duke Power Co. v. Carolina Evntl. Study Grp., Inc.*, 438 U.S. 59, 80–81 (1978). Because the Individual Plaintiffs are the "objects of the regulations" at issue, they are also within the zone of interests regulated by the statutes in question. *Valley Forge Christian Coll.*, 454 U.S. at 475.

For the above reasons, the Court finds that the Individual Plaintiffs have met the constitutional and prudential standing requirements to bring their claims. Accordingly, the Individual Plaintiffs have standing to bring Count Four (addressing the constitutionality of §§ 1915(a)–(b), Count Six (alleging §§ 1915(a)–(b) violate the equal protection clause of the Fifth Amendment), and parts of Counts One and Five (challenging the Final Rule as not in accordance with the law). The Individual Plaintiffs have alleged standing to challenge the parts of the Final Rule implementing the challenged portions of the ICWA.

B. State Plaintiffs

1. Standing

Defendants also contend that the State Plaintiffs do not have standing to bring this suit in *parens patriae* and that they fail to allege a fiscal injury because they plead no facts demonstrating they have been financially harmed by the ICWA or the Final Rule. Defs.' Br. Dismiss 18, ECF No. 57. According to Defendants, the State Plaintiffs may not represent the interests of children within their custody or their resident parents who wish to foster or adopt a child. *Id.* While it is generally true that states may not represent their citizens against the federal government—that is not what is happening here. *See Massachusets v. Mellon*, 262 U.S. 447, 485–86 (1923). The State Plaintiffs assert that their standing is based primarily on a federal intrusion into a quasi-sovereign realm of state law, through the ICWA, the Final Rule, and the compliance requirements found in the SSA Title IV-B and IV-E. State Pls.' Br. Resp. 16, ECF No. 74. They also argue they have standing under *Lujan*, as they are "objects" of the ICWA and Final Rule. *Id.* at 20.

When analyzing if a state has standing to challenge a statute, a court must ask if the state is entitled to "special solicitude." *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). When a state sues for injuries sustained in its capacity as quasi-sovereign, the state has "an interest independent of and behind the titles of its citizens." *Id.* at 520 (quoting *George v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). In *Massachusetts*, the Supreme Court identified two considerations that entitled the state to special solicitude. First, that the Clean Air Act created a

procedural right to challenge the EPA's decision, and second, that the EPA's decision affected Massachusetts's quasi-sovereign interest in its territory. *Id*. at 520.

The Fifth Circuit applied the *Massachusetts* standard to Texas's right to challenge the Department of Homeland Services' ("DHS") implementation of the deferred action program for alien children ("DACA"), particularly the 2014 expansion to parents of the DACA recipients ("DAPA"). *Texas v. United States*, 809 F.3d 134, 152 (5th Cir. 2015) [hereinafter *Texas DHS*]. While DACA did not contain the same procedural rights as the EPA statute in *Massachusetts*, the Fifth Circuit found that the Administrative Procedures Act's (the "APA") general authorization for challenges to "final agency action" satisfied the first *Massachusetts* consideration. *Texas DHS*, 809 F.3d at 152. Second, the court also found that DAPA affected the states' quasi-sovereign interest by imposing substantial pressure on the state to change its laws. *Id.*

The same considerations apply in this case. First, as in *Texas DHS*, the State Plaintiffs are challenging the Final Rule as not in accordance with law under the APA. Second, it is well-established that domestic affairs fall within the traditional police powers of the individual states.[8] *Sosna v. Iowa*, 419 U.S. 393 (1975). Third, as

[8] The Fifth Circuit has also found that "States have a sovereign interest in the 'power to create and enforce a legal code.'" *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)). From that basis, the Fifth Circuit held that states may have standing based on: (1) federal assertions or authority to regulate matters the States believe they control, (2)

DAPA pressured Texas to change their laws, the ICWA and the Final Rule pressures the State Plaintiffs to change their domestic relations laws as they relate to adoptions of Indian children. The ICWA and the Final Rule usurp state civil procedure rules by requiring different procedure framework for an Indian child adoption proceeding. *See supra*, Part II.D. Finally, the State Plaintiffs have standing to challenge federal assertions of authority to regulate matters they believe they control. *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999). Here, the State Plaintiffs have stated a sufficient injury-in-fact in Defendants' intrusion upon their interests as quasi-sovereigns to control the domestic affairs within their states. Am. Compl. ¶ 17, ECF No. 35.

The second injury-in-fact the State Plaintiffs claim is related to funding under Title IV-B and Title IV-E, which is contingent on complying with the ICWA. Am. Compl. ¶¶ 23–25, 53, 263, ECF No. 35. Defendants argue that the State Plaintiffs have not alleged a fiscal injury because they have not "alleged any concrete fiscal impact to State funds, or that Federal Defendants either have withheld, or threatened to withhold." Defs.' Br. Dismiss 19, ECF No. 57. In *Texas v. United States* (2007), Defendants raised a similar argument. 497 F.3d 491, 496 (5th Cir. 2007) [hereinafter *Texas 2007*]. There

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federal preemption of state law, and (3) federal interference with the enforcement of state law, at least where the "state statute at issue regulate[s] behavior or provides for the administration of a state program and does not simply purport to immunize state citizens from federal law." *Id.* Those intrusions are analogous to pressure to change state law. *Id.*

Defendants claimed that Texas's challenge amounted to an alleged injury from the mere existence of the regulation because it had not yet been applied against the state. *Id.*

The regulations at issue in *Texas 2007* involved the approval of Class III gaming licenses involving Indian tribes and states that invoked sovereign immunity. *Id.* at 494. If a state invoked sovereign immunity and refused to bargain with the Indian tribes regarding proposed licensing regulation, then the Class III Gaming Procedures, 25 C.F.R. pt. 291 ("Secretarial Procedures"), would apply. *Id.* These procedures would allow the Department of the Interior to either approve the proposed plan by the Indian tribe without the state's input, or consider an alternative plan put forth by the state. *Id.* at 495. Texas challenged this regulation and argued it created an invalid administrative process. *Id.* at 496. The Fifth Circuit found that Texas had standing to challenge the regulation because Texas was forced to either participate in the allegedly invalid process or forfeit its only opportunity to object to the proposed gaming plan, "a forced choice that is itself sufficient to support standing." *Id.* at 497; *see Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 582 (1985) (recognizing "the injury of being forced to choose between relinquishing [the benefit of an unlawful adjudicatory process] . . . or engaging in an unconstitutional adjudication").

This case calls for a similar result. Either the State Plaintiffs abide by the regimes enacted by the ICWA and the Final Rule, or they face forfeiture of their child welfare benefits. *See* 42 U.S.C. §§ 622, 677. Accordingly,

the State Plaintiffs have alleged a sufficient injury-in-fact. The traceability and redressability requirements are satisfied as well. The injury the State Plaintiffs claim are directly traceable to the application of the ICWA and the Final Rule to the domestic authority of the state. Texas has alleged sufficient facts to show that it has been forced to create alternate laws and requirements for its DFPS if an adoption proceeding involves an Indian child. For these reasons, the State Plaintiffs have standing to challenge the Final Rule as not in accordance with law under the APA (Count One); the ICWA, §§ 1901–23 and 1951–52 violates the Commerce Clause and the Tenth Amendment (Counts Two and Three), and §§ 1915(c) and § 23.130(b) of the Final Rule violate Article 1, §§ 1 and 8 of the Constitution (Count Seven).

2. Ripeness

Defendants challenge the State Plaintiffs claims against HHS, Azar, and the United States (the "HHS Defendants") on the grounds that these claims are not ripe. Defs.' Br. Dismiss 28, ECF No. 57. Defendants argue that the State Plaintiffs are alleging merely a possible injury. State Plaintiffs respond that they are currently injured and have suffered hardship because of the ICWA and the Final Rule compliance requirements found under §§ 622 and 677 of the SSA. State Pls.' Br. Resp. 25, ECF No. 74. The statutes require such compliance or warn that the HHS Defendants will reduce child-welfare funding to the states. *Id.*; *see supra* Part II.B. For these reasons, the State Plaintiffs argue they have alleged both standing and ripeness. State Pls.' Br. Resp. 25, ECF No. 74.

The purpose of the ripeness doctrine is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and to protect the agencies from judicial interference until the administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *Abbott Labs. v. Gardner,* 387 U.S. 136, 148–49 (1967). When evaluating if a case is ripe for review, the court must consider also (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *See id.* at 149. Fitness and hardship must be balanced and a "case is generally ripe if any remaining questions are purely legal ones." *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 296 (5th Cir. 1998); *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987). "A challenge to administrative regulations is fit for review if (1) the questions presented are 'purely legal one[s],' (2) the challenged regulations constitute 'final agency action,' and (3) further factual development would not 'significantly advance [the court's] ability to deal with the legal issues presented.'" *Texas v. United States*, 497 F.3d 491, 498–99 (5th Cir.2007) (citing *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812).

The Court finds that State Plaintiffs' case is ripe for review. Here, the question is a legal one—whether the ICWA and Final Rule compliance requirements under the SSA provisions are violations of constitutional principles of federalism. Additional facts would not help the Court make its decision. To be eligible to receive federal funding under Title IV-B and IV-E, the State

Plaintiffs must submit a plan in conformity with the ICWA and the Final Rule. *See supra* Part II.B. The Fifth Circuit has held that the kinds of hardships considered in a ripeness analysis include—"the harmful creation of legal rights or obligations; practical harms on the interests advanced by the party seeking relief; and the harm of being forced to modify one's behavior in order to avoid future adverse consequences." *Texas 2007*, 497 F.3d at 499 (internal quotation marks omitted). Similar to *Texas 2007*, either the State Plaintiffs must comply with the ICWA and the Final Rule or risk their funding under Title IV-B and IV-E. Defendants seem to imply that instead the State Plaintiffs should take a wait-and-see approach, suggesting that the State Plaintiffs violate the SSA requirements by not complying with the ICWA, and see if the federal government will enforce the statute. *See id.*; Defs.' Br. Dismiss 28, ECF No. 57.

Here, the ICWA and the Final Rule require additional regulations and obligations from the State Plaintiffs if they wish to continue to receive federal funding under Title IV-B and IV-E. This is the harm of "being forced to modify one's behavior in order to avoid future adverse consequences." *Id.* (quoting *Oh. Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998)). For these reasons, the claims the State Plaintiffs bring against the HHS Defendants are ripe for adjudication.

C. Sovereign Immunity

Defendants assert that the HHS Defendants and the United States should be dismissed because they have not waived sovereign immunity. Defs.' Br. Dismiss 31, ECF No. 57. All Plaintiffs respond that sovereign immunity has been waived for both the administrative and

constitutional actions under the APA and Supreme Court precedent. State Pls.' Br. Resp. 27, ECF No. 74; Indiv. Pls.' Br. Resp. 35–36, ECF No. 80.

First, the APA allows for claims "seeking relief other than money damages" against the United States. 5 U.S.C. § 702. When a person suffers a "legal wrong" or is "adversely affected" by agency action," he is entitled to judicial review. *Id.* Here, all Plaintiffs challenged Interior and BIA's Final Rule, as well as the HHS Defendants SSA ICWA and Final Rule compliance requirements, as agency actions that adversely affects State Plaintiffs' domestic relation laws and subjects Individual Plaintiffs to an additional regulatory scheme. State Pls.' Br. Dismiss 26, ECF No. 74.

Second, all other claims come under a challenge to the constitutionality of the ICWA or SSA. The Supreme Court held that if the United States exceeds its constitutional limitations, sovereign immunity cannot shield it from suit. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949). Under *Larson*, suits for prospective relief are permitted when the statute authorizing the challenged actions is itself beyond constitutional authority. *Id.*; *Anibowei v. Sessions*, No. 3:16-CV-3495-D, 2018 WL 1477242, at *2 (N.D. Tex. Mar. 27, 2018); RICHARD H. FALLON, Jr. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 895 (7th ed. 2015) ("Hart and Wechsler") ("[I]f the officer acted within the conferred statutory limits of the office, but his or her conduct allegedly offended a provision of the Constitution, then sovereign immunity will be lifted.") (internal quotation marks and citation omitted).

In this case, all Plaintiffs bring a valid APA challenge to the Final Rule under § 702 and a constitutional challenge to the ICWA, the Final Rule, and HHS's application of the challenged rule and statute through the SSA. For these reasons, sovereign immunity does not act as a bar to Plaintiffs claims in this case.

D. *Younger* Abstention

Defendants also argue that the Court should abstain from hearing this case under *Younger*. Defs.' Br. Dismiss 32, ECF No. 57. Since Plaintiffs seek declaratory and injunctive relief to preclude application of the ICWA and the Final Rule to ongoing state-court child-custody proceedings, Defendants argue this Court should abstain from exercising jurisdiction. *Id.* (citing *DeSpain v. Johnston*, 731 F.3d 1171, 1178 (5th Cir. 1984)). Plaintiffs respond that Defendants' argument is based on "outdated authority, all but ignoring the Supreme Court's most recent decision . . . on the limited application of *Younger*." Indiv. Pls.' Br. Resp. 36, ECF No. 80 (citing *Sprint Comms., Inc. v. Jacobs*, 571 U.S. 69 (2013)). In 2013, the Supreme Court decided *Sprint* and clarified the three categories of the *Younger* abstention doctrine. *Sprint*, 571 U.S. at 78. Specifically, the *Younger* exception applies to only "three 'exceptional' categories of state proceedings: ongoing criminal prosecutions, certain civil enforcement proceedings akin to criminal prosecutions, and pending 'civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.*

Since *Sprint*, courts have declined to invoke *Younger* in adoption proceedings unless the case involved "state-initiated proceedings." *Sprint*, 571 U.S. at 79.

Defendants rely on *Moore v. Sims* as an example of *Younger* abstention in an adoption context. Defs.' Br. Dismiss 32, ECF No. 57. But in *Moore*, the proceedings were "in aid of and closely related to criminal statutes." *Id*. *Sprint* explained *Moore* as involving "a state-initiated proceeding to gain custody of children allegedly abused by their parents." *Sprint*, 571 U.S. at 79. Unlike *Moore*, there are no criminal statutes at issue in the state-court adoption proceedings in this case, nor are there state initiated proceedings at issue here. The cases Defendants rely on either pre-date the Supreme Court's decision in *Sprint*, or deal with distinguishable facts. *See Catanach v. Thomson*, 718 F. App'x 595, 598 n.2 (10th Cir. 2017) (clarifying the changes to the *Younger* doctrine found in *Sprint*). When the Fifth Circuit applied *Sprint*, it found that, while *Younger* has been expanded beyond the purely criminal context, abstention is not required in every context with parallel state-court proceedings. *Google, Inc. v. Hood*, 822 F.3d 212, 222 (5th Cir. 2016). If a case fits into one of the *Sprint* categories, then the three *Middlesex* factors are evaluated before invoking *Younger* abstention. *See Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

The first *Sprint* category does not apply here, as no party alleges there is an ongoing criminal prosecution. Neither does the third category, proceedings uniquely aiding the state court judicial function, apply. *See*, *Sprint*, 571 U.S. at 78 (referencing *Pennzoil Co. v. Texaco, Inc*., 481 U.S. 1, 4 (1987) as an example of the third *Sprint* category). Defendants attempt to place this case into the second category, claiming that because

there is an ongoing state-court adoption proceeding, *Younger* must apply. Defs.' Br. Dismiss 33, ECF No. 57. *Sprint* describes the second category as "akin to criminal prosecutions" because they are "characteristically initiated to sanction the federal plaintiff . . . for some wrongful act." *Sprint*, 571 U.S. at 279. The Fifth Circuit has applied the second category to an enforcement action before a civil rights commission, a bar disciplinary proceedings, and state-instituted public nuisance proceedings. *See Google, Inc.*, 822 F.3d at 222 (citing *Ohio Civil Rights Comm'n v. Dayton Christian Schs. Inc.*, 477 U.S. 619, 623 28 (1986); *Middlesex*, 457 U.S. at 432–35; *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 595–97 (1975)). None of these apply here. Accordingly, the *Younger* abstention doctrine does not apply in this case.

E. Failure to Join an Indispensable Party

Defendants also argue that Nevada and Minnesota are necessary parties to the Librettis' and Cliffords' claims and that they should be joined or the claims dismissed. Defs.' Br. Dismiss 45, ECF No. 57. If Plaintiffs obtain the relief they are seeking, Defendants argue, this Court's decision would necessarily bind the Nevada and Minnesota state courts and their executive agencies. *Id.* Plaintiffs respond that they are not asking to bind state courts; instead they seek "to declare that a federal regulation and a federal statute are unconstitutional and otherwise invalid, and to enjoin the federal government from implementing or administering them." Indiv. Pls.' Br. Resp. 54, ECF No. 80.

When a party is primarily challenging the constitutionality of a federal statute and not state statutes or rules, states are not an indispensable party.

Romero v. United States, 784 F.2d 1322, 1325 (5th Cir. 1986). Since Plaintiffs seek to nullify a federal statute and regulation, Nevada and Minnesota are not indispensable parties. *Bermudez v. U.S. Dep't of Agric.*, 490 F.2d 718, 724 (D.C. Cir. 1973). Rather than binding the state courts to an affirmative action, a favorable decision for the Plaintiffs here would remove a federal mandate on the state courts. Therefore, Nevada and Minnesota are not necessary parties and this argument is overruled.

F. Waiver to Challenge the Final Rule

Defendants' final argument is that the State Plaintiffs "waived their APA arguments challenging the Final Rule in Count One by not presenting their objections to BIA during the notice and comment period." Defs.' Br. Dismiss 47, ECF No. 57. The State Plaintiffs respond that they have standing under statutory and Supreme Court precedent to challenge the Final Rule under the APA. State Pls.' Br. Resp. 43–4, ECF No. 74. They also argue that "neither the text of the APA, nor the Fifth Circuit precedent require a party aggrieved by an agency rule to comment first on the proposed rule or risk waiving a later legal challenge to that rule." *Id.* at 45.

In *City of Seabrook v. EPA*, defendants made a similar argument. 659 F.2d 1349, 1360–61 (5th Cir. 1981).[9] In that case, the Fifth Circuit declined to require

[9] "The rule urged by EPA would require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the Federal Register, but a psychic ability to predict the possible changes that could be made in the proposal when the rule

anyone who wishes to challenge a regulation to first have commented on it during the administrative process. It distinguished *L.A. Tucker Truck Lines, Inc.* and *Merchants Fast Motor Lines, Inc.*, both of which found a party waived the right to initiate legal challenges to an agency decision, because the plaintiffs in both of these cases participated in the underlying administrative hearing and failed to appeal the decision. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952); *Merchants Fast Motor Lines, Inc. v. ICC*, 528 F.2d 1042 (5th Cir. 1976); *City of Seabrook*, 659 F.2d at 1360 n.17. *City of Seabrook* concluded these cases did not apply because there had been no underlying adversarial proceeding. *Id.*

Defendants argue *City of Seabrook* does not control because more recent Fifth Circuit decisions have undermined it. Defs.' Br. Dismiss 47, ECF No. 57; *BCCA Appeal Group v. EPA*, 355 F.3d 817, 829 n.10 (5th Cir. 2003); *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933 n.7 (5th Cir. 1998). While there has been disagreement about the applicability of *City of Seabrook*, no Supreme Court decision or Fifth Circuit en banc decision has overruled it. Therefore, *City of Seabrook* remains binding law on district courts. Accordingly, Defendants' argument that *City of Seabrook* does not control fails. *City of Seabrook*, 659 F.2d at 1349; *see also*, *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 295 (5th Cir. 1998) (citing *City of Seabrook*'s rule that failure to comment does not preclude a challenge to the APA statute). At this time, it appears the Fifth Circuit requires a party that

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is finally promulgated. This is a fate this court will impose on no one." *City of Seabrook, Tex.*, 659 F.2d at 1360-61.

participates in an administrative process to appeal an adverse ruling or waive its right to later challenge the decision. But if a party has not participated in the agency process, a subsequent challenge is not waived. *Compare L.A. Tucker Truck Lines, Inc.*, 344 U.S. at 35, *with Fleming Companies, Inc. v. U.S. Dep't of Agric.*, 322 F. Supp. 2d 744, 754 (E.D. Tex. 2004).

Accordingly, the State Plaintiffs did not waive their right to challenge the Final Rule in this case. *See City of Seabrook*, 659 F.2d at 1360–61.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Federal Defendants' Motion to Dismiss (ECF No. 56) and Tribal Defendants' Motion to Dismiss (ECF No. 58) should be and are hereby **DENIED**.

SO ORDERED on this **24th day** of **July**, **2018**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

APPENDIX G

Relevant Provisions of the United States Constitution

Article I, Section 1 provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 8 provides, in relevant part:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

The Fifth Amendment provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Fourteenth Amendment, section 1, provides, in relevant part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

Relevant Provisions of the Indian Child Welfare Act of 1978 25 U.S.C.

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes1" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and 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;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them 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; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is 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 from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "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;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual

subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe:

Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like

manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, 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.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

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

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, that where a consenting

parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody

proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a), the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

* * *

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show--

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the

enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, 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.

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

APPENDIX I

Relevant Provisions of the Final Rule
25 C.F.R.

§ 23.106 How does this subpart interact with State and Federal laws?

(a) The regulations in this subpart provide minimum Federal standards to ensure compliance with ICWA.

(b) Under section 1921 of ICWA, where applicable State or other Federal law provides a higher standard of protection to the rights of the parent or Indian custodian than the protection accorded under the Act, ICWA requires the State or Federal court to apply the higher State or Federal standard.

§ 23.107 How should a State court determine if there is reason to know the child is an Indian child?

(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.

(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:

(1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of

the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member and the child is eligible for membership); and

(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;

(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;

(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;

(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;

(5) The court is informed that the child is or has been a ward of a Tribal court; or

(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

(d) In seeking verification of the child's status in a voluntary proceeding where a consenting parent evidences, by written request or statement in the record, a desire for anonymity, the court must keep relevant documents pertaining to the inquiry required under this section confidential and under seal. A request for anonymity does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an "Indian child." A Tribe receiving information related to this inquiry must keep documents and information confidential.

§ 23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?

(a) The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.

(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination

regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.

(c) The State court may rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an "Indian child." An example of documentation indicating membership is a document issued by the Tribe, such as Tribal enrollment documentation.

§ 23.109 How should a State court determine an Indian child's Tribe when the child may be a member or eligible for membership in more than one Tribe?

(a) If the Indian child is a member or eligible for membership in only one Tribe, that Tribe must be designated as the Indian child's Tribe.

(b) If the Indian child meets the definition of "Indian child" through more than one Tribe, deference should be given to the Tribe in which the Indian child is already a member, unless otherwise agreed to by the Tribes.

(c) If an Indian child meets the definition of "Indian child" through more than one Tribe because the child is a member in more than one Tribe or the child is not a member of but is eligible for membership in more than one Tribe, the court must provide the opportunity in any involuntary child-custody proceeding for the Tribes to determine which should be designated as the Indian child's Tribe.

(1) If the Tribes are able to reach an agreement, the agreed-upon Tribe should be designated as the Indian child's Tribe.

(2) If the Tribes are unable to reach an agreement, the State court designates, for the purposes of ICWA, the Indian Tribe with which the Indian child has the more significant contacts as the Indian child's Tribe, taking into consideration:

(i) Preference of the parents for membership of the child;

(ii) Length of past domicile or residence on or near the reservation of each Tribe;

(iii) Tribal membership of the child's custodial parent or Indian custodian; and

(iv) Interest asserted by each Tribe in the child-custody proceeding;

(v) Whether there has been a previous adjudication with respect to the child by a court of one of the Tribes; and

(vi) Self-identification by the child, if the child is of sufficient age and capacity to meaningfully self-identify.

(3) A determination of the Indian child's Tribe for purposes of ICWA and the regulations in this subpart do not constitute a determination for any other purpose.

§ 23.110 When must a State court dismiss an action?

Subject to 25 U.S.C. 1919 (Agreements between States and Indian Tribes) and § 23.113 (emergency proceedings), the following limitations on a State court's jurisdiction apply:

(a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over

child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental-rights proceeding is an Indian child, the court must ensure that:

(1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and

(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to:

(1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (see § 23.105 for information on how to contact a Tribe);

(2) The child's parents; and

(3) If applicable, the child's Indian custodian.

(c) Notice must be sent by registered or certified mail with return receipt requested. Notice may also be sent via personal service or electronically, but such alternative methods do not replace the requirement for notice to be sent by registered or certified mail with return receipt requested.

(d) Notice must be in clear and understandable language and include the following:

(1) The child's name, birthdate, and birthplace;

(2) All names known (including maiden, married, and former names or aliases) of the parents, the parents' birthdates and birthplaces, and Tribal enrollment numbers if known;

(3) If known, the names, birthdates, birthplaces, and Tribal enrollment information of other direct lineal ancestors of the child, such as grandparents;

(4) The name of each Indian Tribe in which the child is a member (or may be eligible for membership if a biological parent is a member);

(5) A copy of the petition, complaint, or other document by which the child-custody proceeding was initiated and, if a hearing has been scheduled, information on the date, time, and location of the hearing;

(6) Statements setting out:

(i) The name of the petitioner and the name and address of petitioner's attorney;

(ii) The right of any parent or Indian custodian of the child, if not already a party to the child-custody proceeding, to intervene in the proceedings.

(iii) The Indian Tribe's right to intervene at any time in a State-court proceeding for the foster-care placement of or termination of parental rights to an Indian child.

(iv) That, if the child's parent or Indian custodian is unable to afford counsel based on a determination of indigency by the court, the parent or Indian custodian has the right to court-appointed counsel.

(v) The right to be granted, upon request, up to 20 additional days to prepare for the child-custody proceedings.

(vi) The right of the parent or Indian custodian and the Indian child's Tribe to petition the court for transfer of the foster-care-placement or termination-of-parental-rights proceeding to Tribal court as provided by 25 U.S.C. 1911 and § 23.115.

(vii) The mailing addresses and telephone numbers of the court and information related to all parties to the child-custody proceeding and individuals notified under this section.

(viii) The potential legal consequences of the child-custody proceedings on the future parental and custodial rights of the parent or Indian custodian.

(ix) That all parties notified must keep confidential the information contained in the notice and

the notice should not be handled by anyone not needing the information to exercise rights under ICWA.

(e) If the identity or location of the child's parents, the child's Indian custodian, or the Tribes in which the Indian child is a member or eligible for membership cannot be ascertained, but there is reason to know the child is an Indian child, notice of the child-custody proceeding must be sent to the appropriate Bureau of Indian Affairs Regional Director (see www.bia.gov). To establish Tribal identity, as much information as is known regarding the child's direct lineal ancestors should be provided. The Bureau of Indian Affairs will not make a determination of Tribal membership but may, in some instances, be able to identify Tribes to contact.

(f) If there is a reason to know that a parent or Indian custodian possesses limited English proficiency and is therefore not likely to understand the contents of the notice, the court must provide language access services as required by Title VI of the Civil Rights Act and other Federal laws. To secure such translation or interpretation support, a court may contact or direct a party to contact the Indian child's Tribe or the local BIA office for assistance in locating and obtaining the name of a qualified translator or interpreter.

(g) If a parent or Indian custodian of an Indian child appears in court without an attorney, the court must inform him or her of his or her rights, including any applicable right to appointed counsel, right to request that the child-custody proceeding be transferred to Tribal court, right to object to such transfer, right to request additional time to prepare for the child-custody proceeding as provided in § 23.112, and right (if the

parent or Indian custodian is not already a party) to intervene in the child-custody proceedings.

§ 23.112 What time limits and extensions apply?

(a) No foster-care-placement or termination-of-parental-rights proceeding may be held until at least 10 days after receipt of the notice by the parent (or Indian custodian) and by the Tribe (or the Secretary). The parent, Indian custodian, and Tribe each have a right, upon request, to be granted up to 20 additional days from the date upon which notice was received to prepare for participation in the proceeding.

(b) Except as provided in 25 U.S.C. 1922 and § 23.113, no child-custody proceeding for foster-care placement or termination of parental rights may be held until the waiting periods to which the parents or Indian custodians and to which the Indian child's Tribe are entitled have expired, as follows:

(1) 10 days after each parent or Indian custodian (or Secretary where the parent or Indian custodian is unknown to the petitioner) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(2) 10 days after the Indian child's Tribe (or the Secretary if the Indian child's Tribe is unknown to the party seeking placement) has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111;

(3) Up to 30 days after the parent or Indian custodian has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the parent or Indian custodian has requested up to 20 additional days to prepare for the

child-custody proceeding as provided in 25 U.S.C. 1912(a) and § 23.111; and

(4) Up to 30 days after the Indian child's Tribe has received notice of that particular child-custody proceeding in accordance with 25 U.S.C. 1912(a) and § 23.111, if the Indian child's Tribe has requested up to 20 additional days to prepare for the child-custody proceeding.

(c) Additional time beyond the minimum required by 25 U.S.C. 1912 and § 23.111 may also be available under State law or pursuant to extensions granted by the court.

§ 23.113 What are the standards for emergency proceedings involving an Indian child?

(a) Any emergency removal or placement of an Indian child under State law must terminate immediately when the removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(b) The State court must:

(1) Make a finding on the record that the emergency removal or placement is necessary to prevent imminent physical damage or harm to the child;

(2) Promptly hold a hearing on whether the emergency removal or placement continues to be necessary whenever new information indicates that the emergency situation has ended; and

(3) At any court hearing during the emergency proceeding, determine whether the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(4) Immediately terminate (or ensure that the agency immediately terminates) the emergency

proceeding once the court or agency possesses sufficient evidence to determine that the emergency removal or placement is no longer necessary to prevent imminent physical damage or harm to the child.

(c) An emergency proceeding can be terminated by one or more of the following actions:

(1) Initiation of a child-custody proceeding subject to the provisions of ICWA;

(2) Transfer of the child to the jurisdiction of the appropriate Indian Tribe; or

(3) Restoring the child to the parent or Indian custodian.

(d) A petition for a court order authorizing the emergency removal or continued emergency placement, or its accompanying documents, should contain a statement of the risk of imminent physical damage or harm to the Indian child and any evidence that the emergency removal or placement continues to be necessary to prevent such imminent physical damage or harm to the child. The petition or its accompanying documents should also contain the following information:

(1) The name, age, and last known address of the Indian child;

(2) The name and address of the child's parents and Indian custodians, if any;

(3) The steps taken to provide notice to the child's parents, custodians, and Tribe about the emergency proceeding;

(4) If the child's parents and Indian custodians are unknown, a detailed explanation of what efforts have been made to locate and contact them, including contact

with the appropriate BIA Regional Director (see www.bia.gov);

(5) The residence and the domicile of the Indian child;

(6) If either the residence or the domicile of the Indian child is believed to be on a reservation or in an Alaska Native village, the name of the Tribe affiliated with that reservation or village;

(7) The Tribal affiliation of the child and of the parents or Indian custodians;

(8) A specific and detailed account of the circumstances that led the agency responsible for the emergency removal of the child to take that action;

(9) If the child is believed to reside or be domiciled on a reservation where the Tribe exercises exclusive jurisdiction over child-custody matters, a statement of efforts that have been made and are being made to contact the Tribe and transfer the child to the Tribe's jurisdiction; and

(10) A statement of the efforts that have been taken to assist the parents or Indian custodians so the Indian child may safely be returned to their custody.

(e) An emergency proceeding regarding an Indian child should not be continued for more than 30 days unless the court makes the following determinations:

(1) Restoring the child to the parent or Indian custodian would subject the child to imminent physical damage or harm;

(2) The court has been unable to transfer the proceeding to the jurisdiction of the appropriate Indian Tribe; and

(3) It has not been possible to initiate a "child-custody proceeding" as defined in § 23.2.

§ 23.114 What are the requirements for determining improper removal?

(a) If, in the course of any child-custody proceeding, any party asserts or the court has reason to believe that the Indian child may have been improperly removed from the custody of his or her parent or Indian custodian, or that the Indian child has been improperly retained (such as after a visit or other temporary relinquishment of custody), the court must expeditiously determine whether there was improper removal or retention.

(b) If the court finds that the Indian child was improperly removed or retained, the court must terminate the proceeding and the child must be returned immediately to his or her parent or Indian custodian, unless returning the child to his parent or Indian custodian would subject the child to substantial and immediate danger or threat of such danger.

§ 23.115 How are petitions for transfer of a proceeding made?

(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.

(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

§ 23.116 What happens after a petition for transfer is made?

Upon receipt of a transfer petition, the State court must ensure that the Tribal court is promptly notified in writing of the transfer petition. This notification may request a timely response regarding whether the Tribal court wishes to decline the transfer.

§ 23.117 What are the criteria for ruling on transfer petitions?

Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:

(a) Either parent objects to such transfer;

(b) The Tribal court declines the transfer; or

(c) Good cause exists for denying the transfer.

§ 23.118 How is a determination of "good cause" to deny transfer made?

(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.

(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.

(c) In determining whether good cause exists, the court must not consider:

(1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;

(2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;

(3) Whether transfer could affect the placement of the child;

(4) The Indian child's cultural connections with the Tribe or its reservation; or

(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.

(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

§ 23.119 What happens after a petition for transfer is granted?

(a) If the Tribal court accepts the transfer, the State court should expeditiously provide the Tribal court with all records related to the proceeding, including, but not limited to, the pleadings and any court record.

(b) The State court should work with the Tribal court to ensure that the transfer of the custody of the Indian child and of the proceeding is accomplished smoothly and in a way that minimizes the disruption of services to the family.

§ 23.120 How does the State court ensure that active efforts have been made?

(a) Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.

(b) Active efforts must be documented in detail in the record.

§ 23.121 What are the applicable standards of evidence?

(a) The court must not order a foster-care placement of an Indian child unless clear and convincing evidence is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(b) The court must not order a termination of parental rights for an Indian child unless evidence beyond a reasonable doubt is presented, including the testimony of one or more qualified expert witnesses, demonstrating that the child's continued custody by the child's parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(c) For a foster-care placement or termination of parental rights, the evidence must show a causal relationship between the particular conditions in the home and the likelihood that continued custody of the child will result in serious emotional or physical damage

to the particular child who is the subject of the child-custody proceeding.

(d) Without a causal relationship identified in paragraph (c) of this section, evidence that shows only the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not by itself constitute clear and convincing evidence or evidence beyond a reasonable doubt that continued custody is likely to result in serious emotional or physical damage to the child.

§ 23.122 Who may serve as a qualified expert witness?

(a) A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.

(b) The court or any party may request the assistance of the Indian child's Tribe or the BIA office serving the Indian child's Tribe in locating persons qualified to serve as expert witnesses.

(c) The social worker regularly assigned to the Indian child may not serve as a qualified expert witness in child-custody proceedings concerning the child.

* * *

§ 23.124 What actions must a State court undertake in voluntary proceedings?

(a) The State court must require the participants in a voluntary proceeding to state on the record whether the child is an Indian child, or whether there is reason to believe the child is an Indian child, as provided in § 23.107.

(b) If there is reason to believe the child is an Indian child, the State court must ensure that the party seeking placement has taken all reasonable steps to verify the child's status. This may include contacting the Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) to verify the child's status. As described in § 23.107, where a consenting parent requests anonymity, a Tribe receiving such information must keep relevant documents and information confidential.

(c) State courts must ensure that the placement for the Indian child complies with §§ 23.129-23.132.

§ 23.125 How is consent obtained?

(a) A parent's or Indian custodian's consent to a voluntary termination of parental rights or to a foster-care, preadoptive, or adoptive placement must be executed in writing and recorded before a court of competent jurisdiction.

(b) Prior to accepting the consent, the court must explain to the parent or Indian custodian:

(1) The terms and consequences of the consent in detail; and

(2) The following limitations, applicable to the type of child-custody proceeding for which consent is given, on withdrawal of consent:

(i) For consent to foster-care placement, the parent or Indian custodian may withdraw consent for any reason, at any time, and have the child returned; or

(ii) For consent to termination of parental rights, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of termination and have the child returned; or

(iii) For consent to an adoptive placement, the parent or Indian custodian may withdraw consent for any reason, at any time prior to the entry of the final decree of adoption, and have the child returned.

(c) The court must certify that the terms and consequences of the consent were explained on the record in detail in English (or the language of the parent or Indian custodian, if English is not the primary language) and were fully understood by the parent or Indian custodian.

(d) Where confidentiality is requested or indicated, execution of consent need not be made in a session of court open to the public but still must be made before a court of competent jurisdiction in compliance with this section.

(e) A consent given prior to, or within 10 days after, the birth of an Indian child is not valid.

§ 23.126 What information must a consent document contain?

(a) If there are any conditions to the consent, the written consent must clearly set out the conditions.

(b) A written consent to foster-care placement should contain, in addition to the information specified in paragraph (a) of this section, the name and birthdate of the Indian child; the name of the Indian child's Tribe; the Tribal enrollment number for the parent and for the Indian child, where known, or some other indication of the child's membership in the Tribe; the name, address, and other identifying information of the consenting parent or Indian custodian; the name and address of the person or entity, if any, who arranged the placement; and the name and address of the prospective foster parents, if known at the time.

§ 23.127 How is withdrawal of consent to a foster-care placement achieved?

(a) The parent or Indian custodian may withdraw consent to voluntary foster-care placement at any time.

(b) To withdraw consent, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(c) When a parent or Indian custodian withdraws consent to a voluntary foster-care placement, the court must ensure that the Indian child is returned to that parent or Indian custodian as soon as practicable.

§ 23.128 How is withdrawal of consent to a termination of parental rights or adoption achieved?

(a) A parent may withdraw consent to voluntary termination of parental rights at any time prior to the entry of a final decree of termination.

(b) A parent or Indian custodian may withdraw consent to voluntary adoption at any time prior to the entry of a final decree of adoption.

(c) To withdraw consent prior to the entry of a final decree of adoption, the parent or Indian custodian must file a written document with the court or otherwise testify before the court. Additional methods of withdrawing consent may be available under State law.

(d) The court in which the withdrawal of consent is filed must promptly notify the person or entity who arranged any voluntary preadoptive or adoptive placement of such filing, and the Indian child must be returned to the parent or Indian custodian as soon as practicable.

§ 23.129 When do the placement preferences apply?

(a) In any preadoptive, adoptive, or foster-care placement of an Indian child, the placement preferences specified in § 23.130 and § 23.131 apply.

(b) Where a consenting parent requests anonymity in a voluntary proceeding, the court must give weight to the request in applying the preferences.

(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under § 23.132 exists to not apply those placement preferences.

§ 23.130 What placement preferences apply in adoptive placements?

(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under

paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) Other members of the Indian child's Tribe; or

(3) Other Indian families.

(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.

(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

§ 23.131 What placement preferences apply in foster-care or preadoptive placements?

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that:

(1) Most approximates a family, taking into consideration sibling attachment;

(2) Allows the Indian child's special needs (if any) to be met; and

(3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;

(3) An Indian foster home licensed or approved by an authorized non–Indian licensing authority; or

(4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

§ 23.132 How is a determination of "good cause" to depart from the placement preferences made?

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the

record or in writing and should be based on one or more of the following considerations:

(1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) The presence of a sibling attachment that can be maintained only through a particular placement;

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

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that

flowed from time spent in a non-preferred placement that was made in violation of ICWA.

* * *

§ 23.140 What information must States furnish to the Bureau of Indian Affairs?

(a) Any State court entering a final adoption decree or order in any voluntary or involuntary Indian-child adoptive placement must furnish a copy of the decree or order within 30 days to the Bureau of Indian Affairs, Chief, Division of Human Services, 1849 C Street NW, Mail Stop 3645 MIB, Washington, DC 20240, along with the following information, in an envelope marked "Confidential":

(1) Birth name and birthdate of the Indian child, and Tribal affiliation and name of the Indian child after adoption;

(2) Names and addresses of the biological parents;

(3) Names and addresses of the adoptive parents;

(4) Name and contact information for any agency having files or information relating to the adoption;

(5) Any affidavit signed by the biological parent or parents asking that their identity remain confidential; and

(6) Any information relating to Tribal membership or eligibility for Tribal membership of the adopted child.

(b) If a State agency has been designated as the repository for all State-court adoption information and is fulfilling the duties described in paragraph (a) of this

section, the State courts in that State need not fulfill those same duties.

§ 23.141 What records must the State maintain?

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.