**No. 18-11479**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

**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, ACTING 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***

**Appeal from the United States District Court for the Northern District of Texas, Case No. 4:17-CV-00868-O**

# SUPPLEMENTAL EN BANC BRIEF OF APPELLANTS CHEROKEE NATION, ONEIDA NATION, QUINAULT INDIAN NATION, AND MORONGO BAND OF MISSION INDIANS

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## CERTIFICATE OF INTERESTED PERSONS

*Brackeen, et al. v. Bernhardt, et al.*, No. 18-11479.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Cherokee Nation (Intervenor-Defendant)
2. Oneida Nation (Intervenor-Defendant)
3. Quinault Indian Nation (Intervenor-Defendant)
4. Morongo Band of Mission Indians (Intervenor-Defendant)
5. Chad Everet and Jennifer Kay Brackeen (Plaintiffs)
6. Frank Nicholas and Heather Lynn Libretti (Plaintiffs)
7. Altagracia Socorro Hernandez (Plaintiff)
8. Jason and Danielle Clifford (Plaintiffs)
9. State of Texas (Plaintiff)
10. State of Louisiana (Plaintiff)
11. State of Indiana (Plaintiff)
12. United States of America (Defendant)

13. Bureau of Indian Affairs and its Director, Bryan Rice (Defendants)

14. John Tahsuda III, Bureau of Indian Affairs Principal Assistant Secretary for Indian Affairs (Defendant)

15. United States Department of the Interior and its Secretary, Ryan Zinke (Defendants)

16. United States Department of Health and Human Services and its Secretary, Alex Azar (Defendants)

17. Navajo Nation (Intervenor)

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46. Jeffrey H. Wood, Acting Assistant Attorney General, counsel for Federal Defendants

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52. Maria Wyckoff Boyce, Hogan Lovells US LLP, counsel for the Navajo Nation

53. Paul Spruhan, Assistant Attorney General, Navajo Nation Department of Justice, counsel for the Navajo Nation

54. Hon. Reed O'Connor, United States District Judge, Northern District of Texas

s/ *Adam H. Charnes*
Attorney for Appellants

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## INTRODUCTION

More than forty years ago, Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, to remedy longstanding practices that resulted in "an alarmingly high percentage of Indian families [being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies" and an "alarmingly high percentage of such children [being] placed in non-Indian foster and adoptive homes and institutions." § 1901(4).[1] These practices were the result, in large part, of states' persistent "fail[ure] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." § 1901(5). Tribes, States, and the Trump Administration agree that over the last four decades, ICWA has proven a tremendous success in helping Indian children to maintain relationships with their families, tribes, and communities. Plaintiffs seek to reverse that progress and subject Indian children to state foster care systems—like the one in Texas, where children "almost uniformly leave State custody more

[1] All statutory citations are to 25 U.S.C., and all regulatory citations to 25 C.F.R., unless otherwise noted.

damaged than when they entered." *M.D. v. Abbott*, 152 F. Supp. 3d 684, 828 (S.D. Tex. 2015), *aff'd in part, rev'd in part sub nom M.D. ex rel. Stuckenberg v. Abbott*, 907 F.3d 237 (5th Cir. 2018); *see also M.D. ex rel. Stuckenberg v. Abbott*, No. 2:11-CV-0084, 2019 WL 5842946, at *12 (S.D. Tex. Nov. 7, 2019) (holding Texas officials in contempt for failing to take court ordered remedial measures to protect children in the State's foster care system and imposing a fine of $50,000 per day for the State's ongoing non-compliance).

The district court's ruling that this overwhelmingly successful federal remedial statute and its implementing regulations are unlawful is—as a panel of this Court recognized in largely unanimous fashion—erroneous. As an initial matter, the district court should not have reached the merits of claims brought by the Individual Plaintiffs, all of whom lack standing. Likewise, the State Plaintiffs lack standing for their equal protection and non-delegation claims. Notwithstanding these jurisdictional defects, the district court, disregarding settled Supreme Court precedent, erred by holding that ICWA's definition of "Indian child" employs a racial rather than political classification, by applying strict scrutiny rather than rational basis review, and by

holding that ICWA violates equal protection. The court's analysis of Plaintiffs' non-delegation and commandeering claims also misapplied settled and controlling authority, and its holding that ICWA's 2016 implementing regulations[2] (the Final Rule) violate the APA misconstrued basic principles of administrative law. ICWA is constitutional, the panel correctly reversed the lower court's decision, and this *en banc* Court should do the same.

## RELEVANT BACKGROUND

The Tribes' opening brief set forth the factual and procedural background before the panel opinion. (Tribes' Br. 4-11.) Very briefly, Plaintiffs alleged that certain provisions of ICWA and the Final Rule (1) violate equal protection, (2) commandeer the states in violation of the Tenth Amendment, (3) improperly delegate federal legislative authority to Indian tribes, and (4) violate the APA. The district court granted summary judgment to Plaintiffs on these four claims.[3] It held that

[2] Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (codified at 25 C.F.R. pt. 23).

[3] The district court granted summary judgment to Defendants on one claim—a substantive due process claim alleged by the Individual Plaintiffs—and that judgment was not appealed. Additionally, the district court did not address Plaintiffs' argument that ICWA exceeds

ICWA and the Final Rule are based on a racial, rather than political, classification, are thus subject to strict scrutiny, and do not survive such scrutiny. (ROA.4028-36.) It further held that provisions of ICWA and the Final Rule unconstitutionally commandeer the states and that ICWA exceeds congressional authority. (ROA.4040-45.) Finally, the court below held that the Final Rule exceeds Interior's authority in violation of the APA. (ROA.4045-53.)

The panel reversed on all issues, unanimously on most. Specifically, the panel unanimously held that: (1) Plaintiffs lacked standing to bring an equal protection challenge to ICWA sections 1913-14[4] (Op. 13-14); (2) ICWA and the Final Rule employ a political, rather than race-based, classification, and survive the resulting rational basis review (Op. 20-26); (3) ICWA does not exceed congressional authority or violate the non-delegation doctrine (Op. 32-38); and (4) the Final Rule

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Congress's authority under Article I of the Constitution, and Plaintiffs failed to raise that issue via cross-appeal. *See infra*, p. 48.

[4] The panel agreed with the district court that at least one Plaintiff had standing for the remaining claims, including an equal protection challenge to sections 1915(a)-(b) of ICWA and Final Rule sections 23.129-32, (Op. 12-16), a holding with which the Tribes respectfully disagree in part.

does not violate the APA (Op. 38-46). The panel majority also held that ICWA and the Final Rule do not violate the Tenth Amendment anti-commandeering doctrine. (Op. 26-32.) Judge Owen agreed with "much of the majority opinion," but dissented in part based on her conclusion that a handful of provisions—specifically sections 1912(d)-(e) and 1915(e) of ICWA and section 23.141 of the Final Rule—violate the anti-commandeering doctrine. (Op. 47.)

## ARGUMENT

### I. Plaintiffs Lack Standing to Assert Equal Protection and Non-Delegation Claims.

"To have Article III standing, a plaintiff must show an injury in fact that is fairly traceable to the challenged action of the defendant and likely to be redressed by the plaintiff's requested relief." *Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs seeking declaratory and injunctive relief must demonstrate a redressable, continuing injury or threatened future injury in order to meet this requirement. *Stringer*, 942 F.3d at 720. "The redressability requirement limits the relief that a plaintiff may seek to that which is likely to remedy the plaintiff's alleged injuries." *Id.* To constitute an injury in fact, a threatened future

injury must be (1) suffered by the plaintiff, not someone else or the general public; (2) concrete and particularized; and (3) actual or imminent, as opposed to hypothetical or conjectural. *Id.* at 720-21. Individual Plaintiffs have identified no injury that is redressable in this litigation, and at least the Brackeens have no injury in fact. Accordingly, the Individual Plaintiffs lack standing to assert any of their claims. The State Plaintiffs have demonstrated no injury in fact giving rise to standing for their equal protection and non-delegation claims. The district court lacked jurisdiction to adjudicate the claims for which no party has standing, and its judgment should be vacated as to those claims.

### A. Individual Plaintiffs' claims are non-justiciable.

Individual Plaintiffs challenge four provisions of ICWA—sections 1913(d), 1914, and 1915(a)-(b)—and related provisions of the Final Rule on equal protection grounds.[5] They contend, in short, that, as non-

[5] The challenged provisions allow an Indian child's parent to petition a court to vacate a final decree of adoption on the grounds that parental consent was obtained through fraud or duress (section 1913(d)), allow certain individuals or an Indian child's tribe to challenge an Indian child's removal from his or her Indian parent or custodian (section 1914), provide placement preferences for the adoptive or foster care of

Indians, their attempts to adopt Indian children face obstacles and burdens not faced by Indians, and that this constitutes racial discrimination that violates equal protection. As set forth in detail in the panel briefing, none of the Individual Plaintiffs has standing to assert these claims through this lawsuit, owing to lack of injury, lack of redressability, or both. (Tribes' Br. 15-23; Tribes' Reply 3-7; Fed. Br. 20-24.) And even assuming, *arguendo*, that they had standing at some point, the Brackeens' and Librettis' claims are now moot.

### 1. The Brackeens, at least, present no injury in fact or live controversy.

The Brackeens, at least, have no injury in fact justifying their requested relief nor any live controversy allowing their case to proceed.[6] (*See* Tribes' Br. 16-19; Tribes' Reply 2-7.) A.L.M., the Indian child whom the Brackeens have now adopted, was placed in foster care with the Brackeens in 2016. (ROA.2684.) A.L.M.'s biological parents agreed to have their rights terminated by a Texas court in May 2017, and the

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Indian children (sections 1915(a)-(b)), and explain and clarify those placement preferences (Final Rule sections 23.129-32).

[6] The Federal Defendants correctly note additional injury in fact problems that extend beyond the Brackeens' equal protection claims. (Fed. Br. 21-24.)

Brackeens subsequently petitioned to adopt him. (ROA.2684-85.) While the Brackeens' adoption of A.L.M. was pending when they filed their initial complaint, it was finalized in January 2018, nearly two years ago and prior to the filing of the operative second amended complaint. (ROA.2687.) The adoption is now final under state law. (*Id.*) The Brackeens do not allege that any attempt to challenge or reopen their adoption of A.L.M. has been filed or even threatened. (*See* ROA.2683-87.)

The timing of the Brackeens' adoption of A.L.M. prevents them from establishing an injury in fact. Standing is assessed as of the time of filing of the operative complaint. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) ("[W]hen a plaintiff … voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (assessing plaintiffs' standing "at the time the second amended complaint was filed"); *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008); *Mink v. Suthers*, 482 F.3d 1244, 1255 (10th Cir. 2007). When the Brackeens filed the second amended complaint, their adoption of A.L.M. was final and not subject to any

pending or threatened challenge. In short, the Brackeens faced neither an ongoing injury nor a substantial risk of any immediately threatened injury from the application of ICWA or the Final Rule. They thus lacked standing to bring suit.[7]

The Individual Plaintiffs attempt to avoid the effects of the Brackeens' failure to present a live controversy or imminently threatened injury by arguing that: (1) ICWA creates an ongoing risk of collateral challenge to their adoption of A.L.M. that would not exist under state law; and (2) ICWA impedes their ongoing effort to adopt A.L.M.'s sister, Y.R.J. (Individual Pls.' Br. 24-28.) Neither argument has merit.

The Individual Plaintiffs' first argument, that ICWA subjects the Brackeens' adoption of A.L.M. to collateral attack not otherwise available under state law, is based on a flawed understanding of ICWA. Section 1913(d)'s two-year limitations period, upon which the Individual

[7] The same result would follow even if the Brackeens' standing were assessed as of the filing of the initial complaint, before the finalization of A.L.M.'s adoption. In that scenario, while the Brackeens might have alleged a live, ongoing injury at the outset of the case, the completion of the adoption would have rendered their claim moot. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016).

Plaintiffs base their argument, applies only to a biological parents' withdrawal of consent to an adoption under limited circumstances. It has no application where, as here, the Indian child's biological parents did *not* consent to the adoption, but instead had their parental rights terminated before the adoption took place. (ROA.610, 2684.) To the extent that the Individual Plaintiffs rely on section 1914, which does apply to termination proceedings, that provision makes no reference to an extended limitations period and has been held to incorporate whatever limitations period applies under state law.[8] *In re Adoption of Erin G.*, 140 P.3d 886, 889-93 (Alaska 2006); *see also* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,847 (June 14, 2016) (codified at 25 C.F.R. pt. 23) (explaining that section 1913(d)'s extended, two-year limitations period does not apply to "actions to invalidate … terminations of parental rights"). Because Texas's (expired) limitations period applies to any potential challenge to the termination of the rights of A.L.M.'s biological parents' rights under state law or ICWA, the

[8] Even if section 1914 incorporated a two-year limitations period—and there is no indication whatsoever that it does—A.L.M.'s biological parents' rights were terminated in May 2017, (ROA.2684), more than two years ago, making any claim that the Brackeens seek to ground on section 1914 moot.

Brackeens face no prospect of injury from ICWA's application to A.L.M.'s adoption.

Even if ICWA did give rise to a hypothetical possibility of a collateral attack on the Brackeens' adoption of A.L.M. that would not exist under state law, the Brackeens have not alleged that such an attack has occurred or even been threatened. (ROA.2683-87.) An ostensibly increased risk of hypothetical future harm does not constitute an injury in fact supporting standing; instead, the "threatened injury must be certainly impending to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983); *In re Gee*, 941 F.3d 153, 164 (5th Cir. 2019) (per curiam) ("Article III requires more than theoretical possibilities."). The panel unanimously and correctly held that any harm resulting from a potential future collateral challenge to A.L.M.'s adoption was too speculative to establish standing for the Brackeens—or any other Individual Plaintiffs—to challenge sections 1913-14. (Op. 13-14.)

The Individual Plaintiffs try to sidestep this problem by arguing that they are injured by the mere fact that ICWA creates different

standards for the adoption of Indian children and non-Indian children. (Individual Pls.' Br. 25.) But the mere (alleged) existence of a racial classification, as opposed to the application of such a standard to a particular plaintiff, does not give rise to a concrete and particularized injury that is a necessary precondition of standing. *See Moore v. Bryant*, 853 F.3d 245, 249 (5th Cir. 2017); *Carroll v. Nakatani*, 342 F.3d 934, 946 (9th Cir. 2003). Because there is no present or future risk of ICWA being applied to the Brackeens' adoption of A.L.M., its alleged creation of a racial classification does not cause them an injury in fact.

Individual Plaintiffs' second argument, that ICWA will impermissibly complicate the Brackeens' efforts to adopt Y.R.J., fares no better. Y.R.J. is not mentioned anywhere in the Complaint (or any of its prior iterations); evidence pertaining to the Brackeens' intent to adopt her was first introduced *after* final judgment. (ROA.4085-4109.) Standing is assessed as of the filing of the operative complaint, *see supra* p. 8, making the Brackeens' post-complaint efforts to adopt Y.R.J. irrelevant. Moreover, *any* evidence first tendered after the entry of final judgment is irrelevant on appeal. *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009) (declining to consider evidence of standing

tendered after the entry of final judgment). That the district court allowed the Individual Plaintiffs to supplement the record with information regarding their efforts to adopt Y.R.J. and that the panel took judicial notice of these proceedings (Joint Reply ISO Reh'g 4) are irrelevant to the question at hand; the fact remains that those proceedings were not ongoing at the time of the operative complaint, when standing must be assessed. The Individual Plaintiffs present no evidence of a concrete and particularized injury to the Brackeens, nor have they established a substantial risk of any imminent injury. The Brackeens thus lack standing.

### 2. The Individual Plaintiffs' alleged injuries are not redressable.

The Individual Plaintiffs also suffer a redressability problem. Standing exists only where it is "likely … that the injury will be redressed by a favorable decision." *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 606 (5th Cir. 2018) (internal quotations omitted). Redressability exists when a plaintiff "shows that a favorable decision will relieve a discrete injury to himself." *Dep't of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 432 (5th Cir. 2014) (*en banc*). No Individual Plaintiff meets this standard.

The Individual Plaintiffs' alleged injuries arise from the application of ICWA and the Final Rule in state court adoption proceedings to which they are or were parties. (ROA.579-84.) But a judgment from any federal court other than the Supreme Court is not binding on state courts. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997) (criticizing "a remarkable passage" in which a panel of the Ninth Circuit suggested that its ruling on a question of federal law was binding in state court proceedings); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) ("While Texas courts may certainly draw upon the precedents of the Fifth Circuit … they are *obligated* to follow only higher Texas courts and the United States Supreme Court." (emphasis in original)). Accordingly, even if this Court were to rule in the Individual Plaintiffs' favor, its ruling would not bind the state courts that are applying (or have applied) ICWA to their adoption proceedings, and thus would not redress the alleged injuries.

This problem is particularly pronounced for the Cliffords, who live in Minnesota, and the Librettis and Ms. Hernandez, who live in Nevada. (ROA.616-19.) Neither of those states is a party to this lawsuit,

so its resolution would be non-binding not only on their state courts, but also on their child welfare agencies and officials.[9] *See Blanton v. N. Las Vegas Mun. Court*, 748 P.2d 494, 500 (Nev. 1987) ("Even an *en banc* decision of a federal circuit court would not bind Nevada …."), *aff'd*, 489 U.S. 538 (1989); *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. Ct. App. 2003) (similar); Tribes' Br. 19-23; Fed. Br. 18-19.

To the extent that the Individual Plaintiffs contend that a ruling of this Court likely would persuade state courts and officials to disregard any provisions of ICWA that this Court finds unlawful, the mere possibility that an advisory opinion might prove persuasive does not meet the bar of redressability. (Tribes' Br. 22-23.) As Justice Scalia explained, writing for a plurality of the Court in *Lujan*, if redress of an alleged injury requires action by non-parties who will not be bound by the court's ruling, that injury does not suffice to confer standing. 504 U.S. at 570-71; *see also Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part) (criticizing the plurality's

[9] Notably, Minnesota is one of twenty-one states that joined an *amicus* brief to the Court arguing that ICWA is constitutional and seeking reversal of the district court's decision. *See* States' Amicus Br.

redressability analysis, relied upon in *Allstate Insurance Co. v. Abbott*, 495 F.3d 151, 159 n.19 (5th Cir. 2007) (Individual Pls.' Br. 30), and explaining: "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* …." (emphases in original)).

The Individual Plaintiffs' reliance (Ind. Pl. Br. 29) on *Duarte ex rel. Duarte v. City of Lewisville, Texas*, 759 F.3d 514 (5th Cir. 2014), to support the alleged redressability of their injury is misplaced. *Duarte* held that striking a city ordinance—enacted by the defendant—regulating where registered sex offenders could live likely would make it easier for the Duartes to find housing in the city, so their alleged injury was redressable. *Id.* at 521. Rather than finding that its ruling would influence non-parties to treat the Duartes differently, this Court explicitly grounded its redressability holding on the fact that invalidating the ordinance by itself would redress the alleged injury. *Id.* The Individual Plaintiffs can make no such showing here.

A judgment in this case simply will not control the application of ICWA or the Final Rule in the state court proceedings giving rise to the injuries alleged by the Individual Plaintiffs. Those injuries thus are not redressable in this lawsuit, and the Individual Plaintiffs lack standing.

**3. The Brackeens' and Librettis' claims are moot.**

Assuming, *arguendo*, that the Brackeens and Librettis could establish standing, their claims remain non-justiciable because they were mooted by the finalization of the adoptions at issue.[10] The panel recognized the mootness issue, but held that the Brackeens' claim remained justiciable under the theory that their alleged injury is capable of repetition yet evading review because (1) they were unable to fully litigate their ICWA challenge before A.L.M.'s adoption became final and (2) they established a reasonable likelihood that they will again be subject to ICWA's ostensibly unlawful regulatory burdens in connection with the adoption of Y.R.J. (Op. 14-15.) Respectfully, the Brackeens' case does not fall within the purview of this narrow exception to the mootness doctrine.

[10] The Librettis recently completed their adoption of Baby O. (Individual Pls.' Br. 16.) There is no evidence that the Librettis are involved in the adoption of another Indian child.

The capable of repetition yet evading review exception to the mootness doctrine "applies only in exceptional situations," *Lyons*, 461 U.S. at 109, where (1) the challenged action is necessarily too short in duration to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that the *same* complaining party will be subjected to the same action again in the future. *Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010). Even if the Brackeens' evidence of their efforts to adopt Y.R.J. were properly before the Court *and* satisfied the second prong of the test, the Brackeens' claim is not too short in duration to be litigated prior to its expiration.

While the Brackeens completed their adoption of A.L.J. before this case was fully litigated, they could have challenged ICWA's constitutionality in state court in the context of the adoption proceedings. Had they done so, their claim would have been fully litigated before the conclusion of those proceedings. And should the Brackeens, or anyone else, believe that ICWA is unconstitutionally burdening any future attempt to adopt an Indian child, they will have the opportunity to fully litigate their challenge to ICWA in the course of those state-court proceedings. Because the challenged action—the

applicability of certain ICWA provisions in state-court adoption proceedings—could be fully litigated in state court, the capable of repetition yet evading review doctrine does not apply.[11] *See, e.g.*, *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 481-82 (1990) (holding that the doctrine did not apply where plaintiff could challenge allegedly unconstitutional action in the future); *Bayou Liberty Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 217 F.3d 393, 398-99 (5th Cir. 2000) (holding that the doctrine did not apply because, while plaintiff's current claim was moot, "there [we]re methods available" for plaintiff to fully litigate a similar claim in future cases); *Steere Tank Lines, Inc. v. I.C.C.*, 667 F.2d 490, 491 (5th Cir. 1982) (holding that the issue was capable of repetition, but did not evade review where it could be fully litigated in other proceedings). Stated differently, while the Brackeens' claim and those of similarly situated individuals might be capable of repetition,

[11] The panel appeared to hold that because the Brackeens were unable to fully litigate their ICWA challenge prior to the conclusion of A.L.J.'s adoption, the "evading review" portion of the test was satisfied. (Op. 15.) The panel did not appear to consider whether it might be possible for the Brackeens, or any other party, to fully litigate a challenge to ICWA in a future case, as the doctrine requires.

they do not evade review. The Brackeens' and Librettis' claims are non-justiciable.

### B. The State Plaintiffs lack standing to assert equal protection and non-delegation claims.

The State Plaintiffs' lack of standing to bring an equal protection claim is readily apparent. (Tribes' Reply 7-10; Fed Br. 20.) States, as such, have no rights under the Fifth Amendment. *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). While they may, under appropriate circumstances, represent the rights of their citizens as *parens patriae*, it is well settled that states may not bring such a suit against the United States to prevent the application of federal law to their citizens. *Id.* at 324; *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) ("A state does not have standing as *parens patriae* to bring an action against the Federal Government."); *see also Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (a state lacks standing "to protect her citizens from the operation of federal statutes"). The panel's unanimous holding that the State Plaintiffs lack standing to bring an equal protection claim was correct. (Op. 13 n.4.)

The district court apparently agreed, as equal protection is conspicuously absent from its holding that

> [T]he 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).

(ROA.3753.) The State Plaintiffs' failure to cross-appeal the lower court's determination that they lacked standing for their equal protection claim bars this Court from considering that claim on appeal. *BNSF Ry. Co. v. Alstom Transp., Inc.*, 777 F.3d 785, 791 (5th Cir. 2015); *In re Whitaker Constr. Co.*, 288 Fed. App'x 153, 158 (5th Cir. 2008).

State Plaintiffs also lack standing to assert their claim that section 1915(c) of ICWA and section 23.130 of the Final Rule violate the non-delegation doctrine. (Tribes' Reply 10-12.) Together, these provisions allow Indian tribes to establish a different order of ICWA's child placement preferences and require state courts to follow the tribally-ordered preferences. The State Plaintiffs introduced no evidence that tribal preferences have affected any child placement in any of the Plaintiff States, (*see* Tribes' Br. 53), nor is there evidence of a "certainly

impending" effect on any child placement decision. *Clapper*, 568 U.S. at 409. Accordingly, the State Plaintiffs have failed to establish any existing or ongoing injury.

Instead of submitting evidence of injury incurred, the State Plaintiffs contend that they face a threat of injury because (1) tribes can change their ICWA placement preferences at any time and (2) one tribe, the Alabama-Coushatta Tribe of Texas, has already done so, and ICWA may eventually require the State Plaintiffs to give effect to that tribe's decision. (States' Br. 21.) These factual averments simply do not establish, as Article III requires, that the State Plaintiffs "'ha[ve] sustained or [are] immediately in danger of sustaining some direct injury' as the result of" section 1915(c) or the Final Rule. *Lyons*, 461 U.S. at 101-02.

The State Plaintiffs have not shown, for example, that the Alabama-Coushatta Tribe's preferences have been applied to change the placement of any child, nor do they cite any pending case where it is possible that such a change might occur. They simply posit the possibility that a case might someday arise where the Alabama-Coushatta Tribe's preferences—or the yet-to-be-adopted preferences of

some other tribe—might possibly affect a child's placement. Such conjecture falls far short of meeting the State Plaintiffs' burden of establishing a "real and immediate threat" that an allegedly threatened injury will occur. *Lyons*, 461 U.S. at 105; *see Stringer*, 942 F.3d at 720-21. If a case ever arises in which a tribe's placement preferences are likely to affect a child's placement in Texas, Louisiana, or Indiana, the state in which that proceeding takes place may have standing to bring a non-delegation challenge at that time. The State Plaintiffs have identified no such case here, and they thus lack standing to bring this claim.

## II. ICWA and the Final Rule Do Not Violate Equal Protection.

Even if one or more Plaintiff(s) had standing to bring an equal protection claim, ICWA and the Final Rule do not violate equal protection. ICWA establishes rules applicable to child custody proceedings involving an "Indian child," which the statute defines as any child who 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."[12] § 1903(4). The district court held that this definition establishes a racial classification and that ICWA and the Final Rule cannot withstand the resulting strict scrutiny. (ROA.4028-36.) Both holdings are incorrect.

The panel correctly held that the district court erred on the first point, unanimously agreeing that ICWA employs a political rather than racial classification and easily survives the resultant rational basis review. (Op. 19-26.) And even if ICWA were race-based, it would survive strict scrutiny.[13]

### A. ICWA makes a political, not racial, classification.

The panel rightly concluded that ICWA's definition of "Indian child" is a political classification. (Op. 22-26.) The Supreme Court has consistently held, for more than a century, that congressional exercises of power over the United States' relations with Indian tribes are political in nature, *see Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903), and its decisions "leave no doubt that federal legislation with respect to

[12] The statute limits its definition of "Indian tribe" to federally recognized tribes. § 1903(8).

[13] Having unanimously held that ICWA is subject to rational basis review (Op. 20-26), the panel did not reach this issue.

Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645 (1977). As the Court explained in the leading case of *Morton v. Mancari*, 417 U.S. 535 (1974), if legislation singling out Indian tribes for special treatment 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.* at 552.

As the Tribes and Federal Defendants explained in their panel briefing (Tribes' Br. 25-36; Fed. Br. 25-37; Tribes' Reply 12-20; Fed. Reply 6-15), and as the panel unanimously held (Op. 20-22), *Mancari* controls this case. Emphasizing "the unique legal status of Indian tribes under federal law and … the plenary power of Congress … to legislate on behalf of federally recognized Indian tribes," 417 U.S. at 551, *Mancari* rejected an equal protection challenge to hiring preferences for members of federally recognized tribes at the Bureau of Indian Affairs (BIA). The Court determined that the preference, which was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities," was "political rather than racial in nature."

*Id.* at 553-54 & n.24. In fact, because it applied only to members of federally recognized Indian tribes—and thus necessarily excluded "many individuals who are racially to be classified as 'Indians'"—the preference was "not even a 'racial' preference." *Id.* at 553 & n.24. As a political classification, the hiring preference was not subject to strict scrutiny and did not violate equal protection so long as it "can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." *Id.* at 555.

ICWA's definition of Indian child, like the hiring preference in *Mancari*, rests on a political, not racial, classification. ICWA applies only to children who themselves are members of a federally recognized Indian tribe or who are eligible for such membership *and* the biological child of an enrolled member of such a tribe. § 1903(4). It does not apply to all children who are racially Indian, and not all children to whom it applies are racially Indian. (Tribes' Br. 29-31.) It thus "operates to exclude many individuals who are racially to be classified as 'Indians,'" *Mancari*, 417 U.S. at 553 n.24, while including many individuals who are not. Its applicability hinges on a child's political affiliation with a sovereign tribal nation and is "political rather than racial in nature." *Id.*

Any argument that ICWA's definition of Indian child is an impermissible racial classification is irreconcilable with *Mancari* and its progeny, and simply wrong.

Plaintiffs make several such arguments, however. The Individual Plaintiffs assert, for example, that *Mancari* was overruled by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and is no longer good law. (Individual Pls.' Br. 41-42.) But *Adarand* never refers to *Mancari*, much less overrules it, and numerous post-*Adarand* decisions of the Supreme Court and lower federal appellate courts have continued to refer to and apply *Mancari* as good law. *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495 (2000) (extensively discussing and distinguishing *Mancari* in the context of holding unconstitutional a law that only allowed native Hawaiians to vote for certain state offices); *United States v. Zepeda*, 792 F.3d 1103, 1112-13 (9th Cir. 2015) (*en banc*) (extensively discussing and relying on *Mancari* in a case involving application of the Indian Major Crimes Act); *United States v. Wilgus*, 638 F.3d 1274, 1286-88 (10th Cir. 2011) ("[W]e remain on safe ground, based on the Supreme Court's conclusion that federally-recognized tribes are political—rather than religious or racial—in nature." (citing *Mancari*)); *Am. Fed'n of Gov't*

*Emps., AFL-CIO v. United States*, 330 F.3d 513, 520-21 (D.C. Cir. 2003) (recognizing *Mancari*'s post-*Adarand* vitality). *Mancari* remains good law, and binding on this Court.

Plaintiffs also argue that *Mancari*'s holding is exceedingly narrow, applying only to statutes involving tribal self-government or the regulation of Indians on or near Indian lands. (States' Br. 36-39; Individual Pls.' Br. 42-45.) Neither *Mancari* nor any subsequent authority imposes such limitations. While one purpose of the hiring preference in *Mancari* was related to Indian self-government, the Court found the preference justified by other governmental interests similar to those animating ICWA—"to further the Government's trust obligation toward the Indian tribes" and "to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." 417 U.S. at 541-42. Although the hiring preference applied to *individual* Indians, the Court found it justified by "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. ICWA is likewise justified as a way of "recognizing the

special relationship between the United States and Indian tribes and their members and the Federal responsibility to Indian people." § 1901.

Nor did *Mancari* limit its holding to laws regulating Indian affairs on or near reservations. Indeed, the very hiring preference at issue there applied to positions at BIA offices in Washington, D.C., and Nashville, Tennessee—cities far from the nearest Indian reservation—just as it did to those on or near reservations.[14] In fact, *Mancari*'s own summation of its holding, which includes neither of the limitations urged by Plaintiffs, refutes Plaintiffs' narrow reading: "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555.

Numerous post-ICWA decisions read and apply *Mancari* broadly. This Court, in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), applied *Mancari* to uphold legislation that allowed peyote use by Indians, and only Indians. *Id.* at 1216. The laws at issue in *Peyote Way* were not tied to Indian self-government; they were

[14] The district court's unsupported statement that the hiring preference in *Mancari* "provided special treatment only to Indians living on or near reservations" (ROA.4031) is simply wrong.

"rationally related to the legitimate governmental objective of preserving Native American culture." *Id.* And the holding in *Peyote Way* did not turn on geographical considerations; the regulation it upheld applied equally in every locale, permitting the religious use of peyote by a member of the Native American Church (NAC) residing in Manhattan just as surely as it did members residing in Texas or California. *See* 21 C.F.R. § 1307.31. Plaintiffs' assertion to the contrary, based on this Court's passing observation that "most" of the NAC's 250,000 members lived on reservations (Joint Reply ISO Reh'g 5-6 (quoting the word "most" from *Peyote Way*, 922 F.2d at 1212)), is entirely unfounded.

More recently, the D.C. Circuit upheld a provision of an appropriations act that granted a nationwide defense contracting preference to firms with at least 51% Native American ownership. *Am. Fed'n*, 330 F.3d at 516. Rejecting the plaintiffs' request to apply strict scrutiny, the D.C. Circuit explained that "the Supreme Court has made it clear enough that legislation for the benefit of recognized Indian tribes is not to be examined in terms applicable to suspect racial classifications." *Id.* at 521 (citing *Mancari* and other cases). Applying the appropriate rational basis standard, the court held that the

contracting preference was lawful because it was related to the legitimate federal purpose of "promoting the economic development of federally recognized Indian tribes (and thus their members)." *Id.* at 522-23. Like this Court in *Peyote Way*, the D.C. Circuit made no mention of geographic limitations or a need to find that the statute in question was tied to the promotion of Indian self-government. Other courts have reached similar results. *See, e.g.*, *Rupert v. Dir., U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 34-36 (1st Cir. 1992) (rejecting equal protection challenge to geographically unrestricted statute allowing Indians, and only Indians, to possess eagle feathers for religious purposes); *United States v. Decker*, 600 F.2d 733, 740 (9th Cir. 1979) (rejecting equal protection challenge to laws allowing Indians to fish for salmon on days where non-Indian fishing was restricted and citing *Mancari* for the proposition that "[t]he propriety of preferential treatment for Indians … is rooted in the constitution").

The Supreme Court, too, has applied *Mancari* in areas unrelated to tribal self-government, including state taxes, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-81 (1976), and federal criminal law, *Antelope*, 430 U.S. at 645-47. In short,

far from adopting the narrow view urged by Plaintiffs, courts have repeatedly affirmed *Mancari*'s broad applicability.

Plaintiffs also contend that the Tribes' reading of *Mancari*, which the panel unanimously shared, conflicts with *Rice* and with the Supreme Court's more recent opinion in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). (Individual Pls.' Br. 42-43; States' Br. 39-40.) Plaintiffs are again wrong.

*Rice* in no way undercuts the panel's reading of *Mancari*. The state statute in *Rice* allowed only native Hawaiians—defined as "those persons who are descendants of people inhabiting the Hawaiian Islands in 1778"—to vote for certain state offices. 528 U.S. at 499. It relied exclusively on ancestry, requiring no current tie to a modern day political entity such as a federally recognized Indian tribe—indeed, the very purpose of the statute was to use ancestry as a proxy for race to ensure that only members of a particular race would be able to vote for the relevant offices. *Id.* at 515. Extending *Mancari* to such a situation, the Supreme Court noted, would allow a state "by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs." *Id.* at 522.

ICWA presents nothing remotely comparable to the 15th Amendment violation rejected in *Rice*. It does not, as the panel noted, threaten to exclude classes of individuals from critical state affairs such as elections to statewide office.[15] (Op. 24-26.) Nor does ICWA use ancestry as a proxy for race; rather, as explained *supra* p. 26, ICWA hinges on an Indian child's political affiliation (or eligibility for such affiliation combined with a parent's affiliation) with a federally recognized Indian tribe, and the classes of children covered by ICWA and racially Indian children vary considerably. And ICWA, unlike the state statute in *Rice*, is a federal law enacted pursuant to Congress's plenary power over Indian affairs and in fulfillment of Congress's special and unique trust obligations concerning "the protection and preservation of Indian tribes and their resources," one of the most basic of which is their "continued existence and integrity." § 1901(1)-(3). In the context of such laws, *Rice* neither rejects nor displaces *Mancari*.

[15] The *Rice* Court emphasized this point, distinguishing a law preventing a portion of the state's citizenry from voting for a statewide office from permissible laws preventing non-Indians from voting in tribal elections on the grounds that "such elections are the internal affairs of a quasi sovereign." 528 U.S. at 520. So too are questions regarding "the best interests of Indian children and ... the stability and security of Indian tribes and families …." § 1902.

The Ninth Circuit recently rejected an argument analogous to the one Plaintiffs advance, explaining that *Rice* "rested on the historical and legislative context of the particular classification at issue, not on the categorical principle that all ancestral classifications are racial classifications." *Davis v. Guam*, 932 F.3d 822, 834 (9th Cir. 2019). The Ninth Circuit cited *Mancari* as *rejecting* a "categorical equivalence between ancestry and racial categorization" *Id.* at 837. Indeed, the court observed that, "[s]ince *Mancari*, the Supreme Court and our court have reaffirmed ancestral classifications related to American Indians without suggesting that they constitute racial classifications." *Id.* The panel was correct to do the same.

The Plaintiffs nevertheless argue that *Rice*, not *Mancari*, governs, because ICWA allegedly applies "even if the child has *no* connection to a reservation or tribe" and thus is necessarily race-based rather than a political classification. (Joint Reply ISO Reh'g 6 (emphasis in original).) This is patently wrong. ICWA on its face applies only to children who are members of a tribe or who are eligible for membership *and* have a parent who is an enrolled member. § 1903(4). Only children with significant connections to tribes—members and membership-eligible

children of members—are Indian children under ICWA. Plaintiffs nevertheless contend that "many tribes," including the Navajo Nation and Cherokee Nation, dilute this requirement by automatically deeming certain newborns to be tribal members even if their parents are not. (Joint Reply ISO Reh'g 6-7.) Plaintiffs are again wrong. While the Tribes cannot speak for all tribes, no one "automatically" becomes a member of the Navajo or Cherokee Nation within the meaning of ICWA without applying to do so. *See* Navajo Nation Reply Br. 19-20 (explaining that applications may automatically be approved under certain circumstances, but still are required); *Nielson v. Ketchum*, 640 F.3d 1117, 1123-24 (10th Cir. 2011) (explaining that a provision of Cherokee law conferring temporary citizenship on certain newborns for 240 days following their birth does not make those newborns tribal members for purposes of ICWA). ICWA's definition of Indian child fits comfortably within the rule of *Mancari*.

Plaintiffs' reliance on a passing reference to equal protection in *Adoptive Couple* dicta is a red herring. (States' Br. 34; Individual Pls.' Br. 54-55.) The Supreme Court did not hold, as Plaintiffs imply, that ICWA violates equal protection. If it had, the instant case would not

exist. The Court made no equal protection holdings in *Adoptive Couple*, and it certainly did not overrule or limit *Mancari*. *Adoptive Couple* has no applicability to this lawsuit. This Court should reverse the district court's equal protection holding, apply rational basis review, and uphold ICWA and the Final Rule.

### B. Even if strict scrutiny applied, ICWA survives it.

The unanimous panel properly applied rational basis review in holding that ICWA's definition of Indian child does not violate equal protection, (Op. 26), so it did not consider whether ICWA would survive the strict scrutiny applicable to a purely racial classification. It would. (Tribes' Br. 37-38; Tribes' Reply 20-21; Fed. Br. 38-43; Fed. Reply 15-17.)

In brief, the compelling interests served by ICWA are set forth in the statute itself: fulfilling the United States' solemn trust obligations to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." § 1902; *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011); *United States v. Mitchell*, 463 U.S. 206, 225 (1983). And ICWA is narrowly tailored to accomplish these goals by recognizing a tribe's role

in the foster and adoptive placement of Indian children and establishing preferences for making those placements with Indian families while still allowing state courts to override or deviate from those preferences in individual cases where there is good cause to do so. § 1915(a). Plaintiffs have not identified any viable, less restrictive measure by which Congress could have accomplished the important goals of ICWA. Accordingly, while they need not, ICWA and the Final Rule would survive strict scrutiny.[16]

## III. ICWA Does Not Violate the Anti-Commandeering Doctrine.

This Court should reverse the district court's anti-commandeering holding. The anti-commandeering doctrine provides that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997). The district court held that ICWA violates this doctrine by "directly requir[ing] states to adopt and administer comprehensive federal standards in state created causes of action."

[16] To the extent that the Court determines that strict scrutiny applies and that any specific provisions of ICWA are insufficiently tailored, the appropriate remedy is to sever and strike only those provisions pursuant to section 1963. (Tribes' Br. 38-39.) The district court's failure to do so was error.

(ROA.4045.) The panel disagreed, holding that ICWA does not improperly commandeer the states because: (1) ICWA applies to *state courts*, and the Supremacy Clause allows Congress to issue commands to state judges; (2) ICWA applies equally to both state agencies and private parties; and (3) ICWA preempts inconsistent state laws. (Op. 28-35.) In dissent, Judge Owen agreed that most of ICWA does not violate the anti-commandeering doctrine. But she found that three provisions (and a related regulation) do violate the doctrine: section 1912(d) (requiring a party seeking to effect foster care placements of an Indian child to satisfy the court that efforts were made to prevent the breakup of the Indian family); section 1912(e) (prohibiting foster care placement without evidence from a qualified expert that continued custody of the Indian child by the parents or custodian would result in emotional or physical harm to the child); and section 1915(e) (requiring state courts to keep records showing compliance with certain provisions of ICWA). (Op. 47.)

### A. The anti-commandeering doctrine is inapplicable to state courts.

As the panel correctly held, the anti-commandeering principle does not apply to congressional commands to state courts. (Op. 28-29.)

In *Printz*, the Supreme Court invalidated a requirement that state law enforcement officials conduct background checks on prospective handgun purchasers, reasoning that the Constitution does not permit Congress to "conscript[] the State's officers." *Printz*, 521 U.S. at 935. In *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), the Supreme Court applied the anti-commandeering doctrine to invalidate a federal law that forbade state legislatures from passing laws authorizing sports betting, explaining that Congress may not "dictate[] what a state legislature may and may not do." *Id.* at 1478. The Supreme Court has never, however, applied the anti-commandeering doctrine to prevent Congress from issuing mandates to state courts. As *Printz* explained, "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." 521 U.S. at 907. So, while "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them," "this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York v. United States*, 505 U.S. 144, 178-79 (1992). Based on these holdings, the panel unanimously and correctly

held that "to the extent provisions of ICWA and the Final Rule require state courts to enforce federal law, the anticommandeering doctrine does not apply." (Op. 29.)

The overwhelming majority of the dictates set forth in ICWA and the Final Rule apply exclusively to state courts.[17] For example, the child placement preferences in section 1915, which Plaintiffs argue violate the Tenth Amendment, merely establish federal law governing the substantive adjudication decisions made by *state judges*; they are not mandates requiring that state executive branch employees enforce federal law or directing state legislatures to change their own law. Other provisions of ICWA that Plaintiffs attack—sections 1911, 1912, 1913, 1917, and 1951—are similarly directed at procedural rules followed and substantive law applied by state courts, not at state executive or legislative officials.[18] (Tribes' Br. 43-44.)

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[17] Even the district court acknowledged "[t]hat this case primarily involves state courts, rather than legislative bodies or executive officers." (ROA.4043.) It simply, and erroneously, found this fact immaterial. (*Id.*)

[18] To the extent that the State Plaintiffs object that ICWA forces their courts to apply federal law that is inconsistent with their own state laws, the preemption of state laws by federal laws is entirely

Plaintiffs' only response to the Tribes' argument (and the panel's holding) that the anti-commandeering doctrine does not apply to state courts is to latch onto the district court's novel conclusion that Congress cannot compel state courts to apply federal standards to state law causes of action. (ROA.4041-44; States' Br. 27-29; Individual Pls.' Br. 63.) As the Tribes have shown, that conclusion is meritless. (Tribes' Br. 47-49; Tribes' Reply 21-24.) The district court's holding that ICWA's directives to state courts violate the anti-commandeering doctrine was error, and this Court should reverse it.

### B. ICWA does not impermissibly commandeer state officials.

In addition to its erroneous holding that ICWA impermissibly commandeers state courts, the district court held, without specifying any offending provisions, that "ICWA requires [state] executive agencies to carry out its provisions." (ROA.4043.) The panel correctly reversed, holding that ICWA did not impermissibly commandeer the states because the relevant provisions: (1) even-handedly regulate activities in which both states and private individuals engage, as

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appropriate under the Supremacy Clause. (*See* Op. 28-29; Tribes' Br. 48-49; Fed. Reply 17-24.)

permitted by *Murphy*, 138 S. Ct. at 1478; or (2) merely require states to take administrative action to comply with federal standards governing child custody proceedings involving Indian children, as permitted under *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988), and other cases. (Op. 30-32.) Although Judge Owen acknowledged these exceptions to the anti-commandeering doctrine, she concluded that a handful of ICWA's provisions and one section of the Final Rule nonetheless impermissibly commandeer state officials. (Op. 47 & 53-55.)

The panel majority correctly held that, to the minimal extent that ICWA applies to state officials rather than state courts, it does not unconstitutionally commandeer them because it applies equally to private parties and state agencies. *See Murphy*, 138 S. Ct. at 1478; *Reno v. Condon*, 528 U.S. 141, 150-51 (2000). In her dissent, Judge Owen concluded that while sections 1912(d) and 1912(e) are facially applicable to states and private parties alike, they apply only to the states in practice because "[f]oster care placement is not undertaken by private individuals or private actors."[19] (Op. 49-51.) With respect, the dissent

[19] Judge Owen would have remanded for further fact finding to see if the requirements imposed by section 1912(d) *de facto* fall exclusively upon states, but she was clearly skeptical. (Op. 51.)

was mistaken. ICWA defines "foster care placement" as "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* …." § 1903(1)(i) (emphasis added). Actions to appoint guardians and conservators are typically *private* actions, not involving the state as a party.[20] ICWA's provisions relating to foster-care placements thus apply to private parties and state actors both facially and in practice, and, as a result, they do not violate the anti-commandeering doctrine. *See Reno*, 528 U.S. at 151 (law regulating the disclosure of personal information from state DMVs did not violate anti-commandeering because it regulated the handling of such information by states and private parties).

Nor do section 1915(e) and 25 C.F.R. § 23.141, which require states to provide limited information to the federal government and to maintain certain records, impermissibly commandeer the states. As the

[20] *See, e.g.*, *J.W. v. R.J.*, 951 P.2d 1206, 1212-13 (Alaska 1998); *Empson-Laviolette v. Crago*, 760 N.W.2d 793, 799 (Mich. Ct. App. 2008); *In re Custody of A.K.H.*, 502 N.W.2d 790, 793 (Minn. Ct. App. 1993); *In re Guardianship of Ashley Elizabeth R.*, 863 P.2d 451, 453 (N.M. Ct. App. 1993); *In re Guardianship of J.C.D.*, 686 N.W.2d 647, 649 (S.D. 2004); *In re Custody of S.B.R.*, 719 P.2d 154, 155-56 (Wash. Ct. App. 1986).

panel majority explained (Op. 30-31), Congress may require states to perform certain administrative actions to comply with federal standards. *See, e.g.*, *Baker*, 485 U.S. at 514-15; *City of New York v. United States*, 179 F.3d 29, 36-37 (2d Cir. 1999) (holding the 10th Amendment does not prohibit laws requiring local and state officials to provide the federal government with information); *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 213-14 (4th Cir. 2002); *see also Condon*, 528 U.S. at 150-51 (upholding a federal law "requir[ing] time and effort on the part of state employees"). Indeed, such laws are common.[21]

*Printz* noted the existence of "a number of federal statutes … which require only the provision of information to the Federal Government" and distinguished such statutes from laws that

[21] *See, e.g.*, 15 U.S.C. § 2224 (requiring states, through their governors, to submit to FEMA and periodically update a list of covered public accommodations); 20 U.S.C. § 4013 (requiring state governors to maintain records regarding the presence of asbestos in school buildings and to annually submit a list of candidates for asbestos abatement activities); 23 U.S.C. § 402(a) (requiring states to implement federally approved highway safety programs); 34 U.S.C. § 41307 (requiring state and local law enforcement agencies to report missing children to DOJ's National Crime Information Center); 42 U.S.C. 11133(b) (requiring state medical examination boards to report certain information to the federal government).

impermissibly force state executives to participate in the administration of federal programs. 521 U.S. at 917-18. But, as the dissent noted, *Printz* declined to address the validity of such statutes on the grounds that none were before it. (Op. 52.) Judge Owen concluded that "the principles set forth in *Printz*" compel the conclusion that section 1915(e) and 25 C.F.R. § 23.141 unlawfully commandeer the states. (Op. 52.) Specifically, she interpreted *Printz* to indicate 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," 521 U.S. at 932 (emphasis in original), such a law cannot stand even if the administrative burdens it imposes are minimal or temporary. (Op. 52.) With respect, directing state executives is not the "whole object" of ICWA, for reasons set forth above. And to the extent that Judge Owen would set aside the object of ICWA as a whole, and focus merely on the specific object of section 1915(e)—requiring the maintenance of records demonstrating compliance with federal laws that the panel unanimously held to be constitutional—her approach effectively would nullify any provision of federal law requiring states to provide documentation or information to the United States. The anti-

commandeering doctrine, which prevents the federal government from "requiring the States to address particular problems, [or] command[ing] the States' officers … to administer or enforce a federal regulatory program," *Printz*, 521 U.S. at 935, does not reach so far. *See Freilich*, 313 F.3d at 214. The panel correctly held that section 1915(e) and section 23.141 do not violate the anti-commandeering doctrine.[22]

### C. Alternatively, the Spending Clause authorizes ICWA.

Even if certain, limited provisions of ICWA and the Final Rule imposed obligations on the states inconsistent with anti-commandeering principles, ICWA would nevertheless be permissible as an exercise of congressional authority under the Spending Clause, U.S. Const. art. I, § 8, cl. 1.[23] It is hornbook law that Congress, under the Spending Clause, can "grant federal funds to the States, and may condition such a grant upon the States' 'taking certain actions that Congress could not require them to take.'" *Nat'l Fed'n of Indep. Bus. v.*

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[22] To the extent that the Court determines that the record-keeping provisions of ICWA impermissibly commandeer the states, the appropriate remedy is to sever and strike only those provisions pursuant to section 1963. (Tribes' Br. 38-39.)

[23] The panel majority acknowledged, but did not reach, this argument because it found that ICWA was constitutional on other grounds (Op. 27 n.13), and Judge Owen did not address it.

*Sebelius*, 567 U.S. 519, 576 (2012) ("*NFIB*") (opinion of Roberts, C.J.) (citation omitted). Conditions placed on federal spending are constitutional when a state "voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* at 577. To the extent that ICWA imposes upon the states any obligation that Congress could not independently require them to take, the Spending Clause justifies that imposition. (Tribes' Br. 49-51; Tribes' Reply 24-25.)

Federal funding under Title IV-B (grants for child welfare services) and Title IV-E (funding for foster and adoptive families and related programs) of the Social Security Act is conditioned on a state's compliance with ICWA.[24] The State Plaintiffs specifically alleged that Congress appropriated, and they accepted, funds under these provisions. (ROA.598.) And they never alleged or argued that they did not "knowingly and voluntarily accept" the conditioning of funding on compliance with ICWA or that such conditioning crosses the line from "'pressure … into compulsion.'" *NFIB*, 567 U.S. at 577 (opinion of Roberts, C.J.). Plaintiffs belatedly assert that the Spending Clause is

[24] *See* 42 U.S.C. §§ 622(a)-(b), 677(b); 45 C.F.R. §§ 1355.34(b), 1355.35(d)(4), 1355.36(e)(2)(i).

irrelevant because ICWA would apply regardless of federal funding (Joint Reply ISO Reh'g 9, n.2), but this is irrelevant, even if true: the State Plaintiffs do not deny that they accepted federal funding conditioned on ICWA compliance, nor do they deny that they are bound by that condition. That arrangement categorically does not violate the Tenth Amendment.

## IV. Congress Has the Authority to Enact ICWA.

Plaintiffs incorrectly assert that ICWA exceeds congressional authority because, they contend, ICWA (1) does not regulate commerce (Individual Pls.' Br. 58-61; States' Br. 30-32) and (2) improperly delegates congressional authority to Indian tribes (States' Br. 44-47). The panel unanimously rejected both arguments. (Op. 33-38.)

### A. ICWA does not exceed congressional authority.

According to Plaintiffs, because ICWA does not regulate commerce, it exceeds Congress's constitutional power to legislate in the area of Indian affairs. The panel unanimously, and correctly, rejected this argument. (Op. 33-35.) More importantly, the district court declined to rule on this argument, and Plaintiffs' failure to cross-appeal that declination means that it is not properly before this Court. *BNSF*, 777 F.3d at 791; *Whitaker Constr.*, 288 Fed App'x at 158 (holding that it

lacked jurisdiction to consider issue that was not addressed by district court and not cross-appealed).

The misleading, cobbled together quotation in Plaintiffs' latest brief notwithstanding (Joint Reply ISO Reh'g 10), the district court's only holding regarding congressional authority to enact ICWA was that Congress did not have the authority to commandeer the states, regardless of the source of authority on which it relied. (ROA.4053-54.) The district court did not decide whether ICWA's ostensible lack of tie to commerce removed it from the ambit of Congress's constitutional authority to legislate with respect to Indian affairs. It simply held that the putative anti-commandeering violation rendered that question irrelevant. (*Id.*) This is an important distinction, as the ostensible unconstitutionality of ICWA under the district court's holding is necessarily limited to those provisions that impermissibly commandeer, while Plaintiffs' Article I argument challenges the validity of the entire statutory scheme. "'[A]n appellee who does not cross-appeal may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *BNSF*, 777 F.3d at 791 (quoting *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015)).

Because Plaintiffs seek to do exactly that, they were required to cross-appeal the district court's failure to address their constitutional authority argument in order to bring the issue before this Court.

Even if it were properly presented, Plaintiffs' argument, which relies principally on concurring opinions by Justice Thomas (Individual Pls.' Br. 59-61; States' Br. 30-32), ignores binding precedent.[25] Congressional authority to legislate with respect to Indian affairs is not, and never in the nation's history has been, strictly limited to matters involving commerce.[26] The Supreme Court repeatedly has held that the "Constitution grants Congress *broad general powers* to legislate in respect to Indian tribes, powers that we have consistently described as '*plenary and exclusive*.'" *United States v. Lara*, 541 U.S. 193, 200 (2004) (emphasis added); *see Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832) ("The treaties and laws of the United States contemplate … that *all intercourse* with [Indians] shall be carried on exclusively by the

[25] Plaintiffs' argument is also inconsistent with the original understanding of the Constitution. (*See* Amicus Br. of Professor Gregory Ablavsky 4-21.)

[26] For these reasons, cases applying the Interstate Commerce Clause are inapposite.

government of the union." (emphasis added)). Contrary to Plaintiffs' assertions, congressional authority is not just based on the Indian Commerce Clause, but "rest[s] in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'" *Lara*, 541 U.S. at 201 (citations omitted); *see also United States v. Kagama*, 118 U.S. 375 (1886); *Decker*, 600 F.2d at 740 n.14 ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.").

Moreover, Plaintiffs are simply incorrect that ICWA is not a "tribal matter." (Individual Pls.' Br. 61.) Congress recognized in ICWA that "[r]emoval of Indian children from their cultural setting seriously impacts a long-term *tribal survival*," and for this reason the Court concluded "[t]he protection of this *tribal interest* is at the core of the ICWA." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50, 52 (1989) (emphasis added & internal quot. omitted). And, in any event, Congress's power extends beyond tribal matters such as self-

government; as this Court previously found in *Peyote Way*, Congress had authority to exempt only Indians—no matter where they lived—from the criminal prohibition of peyote use, a law that had no relation to tribal self-government. 922 F.2d at 1214; *see also Am. Fed'n*, 330 F.3d at 522-23 (recognizing Congress's authority to enact a nationwide defense contracting preference for majority Indian-owned businesses in order to promote the economic development of federally recognized Indian tribes and their members). Congress acted comfortably within its constitutional authority in enacting ICWA.

Plaintiffs have also contended that congressional authority is restricted to regulating activity on or near the reservation. This argument directly contravenes settled law. "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." *United States v. McGowan*, 302 U.S. 535, 539 (1938) (citation omitted); *see also Morton v. Ruiz*, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions."); *Perrin v. United States*, 232 U.S. 478, 482 (1914) (explaining that congressional power extends

"whether upon or off a reservation and whether within or without the limits of a state"); *Kagama,* 118 U.S. at 384-85 (holding that, with respect to the "power of the general government" over Indian affairs, "the theater of its exercise is within the geographical limits of the United States"). And Congress has routinely exercised this authority to pass laws applicable to Indians without regard to their location on or near any reservation.[27]

### B. ICWA does not unlawfully delegate congressional authority.

As discussed *supra* pp. 21-23, State Plaintiffs lack standing to litigate their non-delegation claim. But even if they had standing, the claim fails on the merits.

Plaintiffs' non-delegation argument is based on section 1915(c), which permits tribes to exercise their inherent governmental authority to enact a law establishing a different order of placement preferences for children that are members or eligible children of members. (States' Br. 44-47.) As an initial matter, section 1915(c) is not a delegation of

[27] *See, e.g.*, Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a; Snyder Act, 25 U.S.C. §§ 13, 13b; American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996a.

authority at all. Rather, as the panel unanimously held, it is an incorporation of the law of another sovereign into federal law. (Op. 36-38.) It is well settled that Congress may incorporate the law of another sovereign, even in a continuing manner, into federal law without running afoul of the non-delegation doctrine. *See United States v. Mazurie*, 419 U.S. 544, 556-67 (1975); *United States v. Sharpnack*, 355 U.S. 286, 293-94 (1958); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 205-08 (1824). Section 1915(c) does just that. (Fed. Br. 48-50; Tribes' Br. 54-55.)

Nor can there be any question that tribes are sovereigns with the inherent authority to make laws such as those that section 1915(c) incorporates. Indian tribes "exercise inherent sovereign authority over their members and territories," *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991), including the "inherent power … to regulate domestic relations among members." *Montana v. United States*, 450 U.S. 544, 564 (1981); *see Fisher v. Dist. Court*, 424 U.S. 382, 390 (1976) (holding that tribe had exclusive jurisdiction in child-custody proceedings). Tribes' inherent power over domestic relations among their members encompasses the authority to determine the most appropriate adoption and foster care placement for

their children. As the unanimous panel found, section 1915(c) is properly viewed as congressional confirmation of that power.

Finally, even if section 1915(c) constituted a delegation of federal authority to tribes, the Supreme Court has held that Congress can make such delegations. *See Mazurie*, 419 U.S. at 556-57. This congressional prerogative is limited only by the requirement that the statute in question set forth an "intelligible principle" governing the delegee's discretion. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001). This is not a high bar, and section 1915 easily clears it, as it merely confers tribal authority to change the order of a congressionally established list of child placement preferences. (Tribes' Br. 57-59.)

## V. The Final Rule Does Not Violate the APA.

As the unanimous panel held, Plaintiffs' assertion that the Final Rule violates the APA is meritless. (Op. 38-46.) To the extent that Plaintiffs assert that the Final Rule is invalid because it implements an unconstitutional law, their argument fails for reasons discussed *supra*. (*Id.* 33-38.) The argument that Interior lacked the statutory authority to promulgate the Final Rule ignores the plain language of section 1952. (*Id.* 40-43; Tribes' Br. 60-63; Tribes' Reply 31-32.) The assertion that the

Final Rule improperly construes section 1915 and represents an impermissible and unjustified shift in Interior's position disregards BIA's cogent and explicit statement of the rationale for both its current interpretation and its departure from its prior position. (Op. 41-43; Tribes' Br. 61-68; Tribes' Reply 32-34.) The Final Rule is a proper exercise of Interior's authority and does not violate the APA.

## CONCLUSION

For the foregoing reasons, and as explained in the Tribes' panel briefs, this Court should reverse the district court's judgment.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this response contains 11,136 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Century Schoolbook 14-point font using Microsoft Word 2016.

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## CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2019, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

DATED: December 6, 2019

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