No. 18-11479

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; and DANIELLE CLIFFORD,
Plaintiffs-Appellees,

v.

DAVID BERNHARDT, Secretary of the U.S. Department of the Interior; TARA SWEENEY, in her official capacity as Assistant Secretary – Indian Affairs; BUREAU OF INDIAN AFFAIRS; UNITED STATES DEPARTMENT OF INTERIOR; UNITED STATES OF AMERICA; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants-Appellants,

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

Appeal from the United States District Court for the Northern District of Texas
No. 4:17-cv-00868-O (Hon. Reed O'Connor)

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CERTIFICATE OF INTERESTED PERSONS

No. 18-11479

Chad Everet Brackeen, et al.
v.
David Bernhardt, et al.

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.

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INTRODUCTION

More than forty years ago, Congress enacted the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 et seq., to stem a nationwide crisis facing Indian tribes and their members: the widespread removal of tribal members' children through abusive practices by state and private agencies. ICWA consequently sets minimum federal standards for child-welfare proceedings involving tribal members and their children. Like "an entire Title of the United States Code (25 U.S.C.)," ICWA's protections are triggered not by any individual's race but rather by the political fact of membership in a federally recognized tribe. *Morton v. Mancari*, 417 U.S. 535, 552 (1974). And like all federal laws enacted in pursuance of the Constitution, ICWA's protections *preempt* conflicting state law.

Myriad courts have sustained ICWA against constitutional challenges. The district court here, however, stepped over the Article III standing deficiencies in Plaintiffs' case to declare the statute unconstitutional on multiple grounds and to set aside its implementing regulations. That decision is contrary to binding Supreme Court precedent, which Plaintiffs have repeatedly resorted to misrepresenting in an attempt to defend the decision. A panel of this Court had no difficulty rejecting Plaintiffs' challenges to ICWA — and did so unanimously with regard to all but three provisions of the statute, which no one disputes are severable. The Court sitting en banc should likewise reverse.

STATEMENT OF JURISDICTION

All parties agree that the appellants timely invoked this Court's jurisdiction under 28 U.S.C. § 1291. *See also* U.S. Opening Brief 1-2.

STATEMENT OF THE ISSUES

1. Whether the district court erred in declaring ICWA unconstitutional on grounds that it (a) denies equal protection, (b) violates the anti-commandeering doctrine of the Tenth Amendment, and (c) effects an unconstitutional delegation of legislative authority.

2. Whether the district court erred in ruling that regulations promulgated in 2016 by the U.S. Department of the Interior (Interior) to implement ICWA are arbitrary, capricious, or contrary to law.

BACKGROUND

The United States' opening brief (pp. 3-15) includes a full statement of the case. A condensed version is set forth here.

A. The United States' political relationship with recognized Indian tribes

"Indian tribes are distinct, independent political communities." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (internal quotation marks omitted). Since "the settlement of our country," those tribes "have been uniformly treated" as political entities by the United States. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10 (1831); *see also* U.S. Const. art. I, § 8, cl. 3 (authorizing Congress

to regulate commerce with "Indian tribes," as well as with "foreign Nations" and among "the several States"); *United States v. Antelope*, 430 U.S. 641, 645 (1977) (observing that the Constitution itself provides for "classifications expressly singling out Indian tribes as subjects of legislation."). In accord with that political reality, the United States currently "recognizes" 573 Indian tribes as political entities that are "eligible for the special programs and services provided by the United States to Indians." 25 U.S.C. § 5131; 84 Fed. Reg. 1200 (Feb. 1, 2019). Recognition of these tribes is a "formal political act . . . institutionalizing the government-to-government relationship between the tribe and the federal government." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008).

More generally, the Supreme Court has consistently recognized Congress's "plenary power" to enact legislation that "deal[s] with the special problems of" both recognized tribes and tribal members. *Mancari*, 417 U.S. at 551-52; *see also, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004) (calling such power "plenary and exclusive"). Indeed, as the Supreme Court has observed, "an entire Title of the United States Code (25 U.S.C.)" is dedicated to laws specially "dealing with Indian tribes and reservations." *Mancari*, 417 U.S. at 552.

B. Abusive practices in state child-custody proceedings

In the mid-1970s, Congress identified a "special problem" calling for protective federal measures: widespread "abusive child welfare practices that

resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). In particular, "an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901(4); *see also* H.R. Rep. No. 95-1386, at 9, 11 (1978); *Holyfield*, 490 U.S. at 32-33. The effects of this "massive removal" on Indian children's individual welfare were acute. *Id.* at 33-34. Also of concern was "the impact on the tribes themselves," whose continued existence as discrete political bodies depends on the continued participation of younger generations in tribal life. *Id.*; *see also* 25 U.S.C. § 1901(3).

Congress ultimately found that state child-welfare agencies and state courts, as well as private agencies, had played a significant role in creating the crisis through unjustified removals of Indian children from their homes and tribal communities and unnecessary termination of tribal members' parental rights. 25 U.S.C. § 1901(4)-(5); *see also Holyfield*, 490 U.S. at 34-35.

C. ICWA

In response to the crisis, Congress enacted ICWA. The statute establishes a two-pronged federal policy "to protect the best interests of Indian children" and "to promote the stability and security of Indian tribes and families" by enacting into

federal law certain protections for tribes, parents, and their children. 25 U.S.C. § 1902. To meet those goals, ICWA enacts "minimum Federal standards" for child-custody proceedings (i.e., those involving foster care, termination of parental rights, and adoption) affecting "Indian children," which standards act as an overlay on otherwise applicable state law. *Id.* ICWA's standards explicitly preempt conflicting state law, except where state law provides a "higher standard of protection." *Id.* § 1921. The term "Indian child" refers to "any unmarried person who is under age eighteen" and who has one of two present-day relationships to a federally recognized Indian tribe: the child must be either (a) "a member of an Indian tribe"; or (b) "eligible for membership in an Indian tribe *and* . . . the biological child of a member." *Id.* § 1903(4) (emphasis added).

ICWA establishes minimum procedural and substantive requirements that apply in such proceedings. Procedurally, ICWA prescribes when proceedings involving an Indian child must be heard in tribal rather than state courts, and (for proceedings that remain in state court) sets certain timing and notice requirements. 25 U.S.C. §§ 1911, 1912. ICWA also includes two federal information-sharing requirements: that state courts provide Interior with copies of any final decree for the adoptive placement of an Indian child, *id.* § 1951(a); and that States maintain a record of Indian-child placements, which "shall be made available at any time" to Interior or to the child's tribe, *id.* § 1915(e).

Substantively, Section 1912 establishes standards that a state court must find satisfied before ordering the removal of an Indian child from his or her parents or before terminating parental rights. 25 U.S.C. § 1912(d), (e), (f). It also establishes non-dispositive "preferences" for adoptive and foster placement of Indian children. *Id.* § 1915(a)-(b). Specifically, Section 1915(a) gives preference to *adoptive* placements with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families" — meaning families containing a person who is "a member" of a federally recognized tribe, *id.* § 1903(3). Section 1915(b) gives preference to *foster* placements with (1) "a member of the Indian child's extended family"; (2) "a foster home 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 Indian child's needs." With regard to both adoptive and foster preferences, the statute specifies "good cause" as a basis for state courts to deviate from the enumerated preferences. *Id.* § 1915(a), (b).

Two related provisions of ICWA are also at issue in this appeal. Section 1913(d) provides that in the event of an Indian parent's voluntary termination of his or her parental rights, the parent of an Indian child may — within two years after an adoption decree is entered — withdraw consent to the adoption upon a showing that

"consent was obtained through fraud or duress." Section 1914 permits an Indian child, the child's parent or Indian custodian, or the child's tribe to petition any court to invalidate either the child's removal from his or her family or the termination of a parent's rights upon a showing that certain protections for tribes, families, and Indian custodians were violated.

ICWA contains an express severability clause: "If any provision of" the statute "or the applicability thereof is held invalid, the remaining provisions . . . shall not be affected thereby." 25 U.S.C. § 1963.

In the 40 years since ICWA's enactment, state courts — the bodies that actually apply ICWA's standards in individual cases — have routinely sustained ICWA against constitutional attack.[1]

D. Interior's 2016 Rule

ICWA expressly authorizes the Department of the Interior to "promulgate such rules and regulations as may be necessary" to carry out the statute's provisions. 25 U.S.C. § 1952. Shortly following ICWA's enactment, Interior determined that it

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[1] *See, e.g.*, *In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *In re Armell*, 550 N.E. 2d 1061, 1067-68 (Ill. App. Ct.), *cert. denied*, 498 U.S. 940 (1990); *In re Marcus S.*, 638 A.2d 1158, 1158-59 (Me. 1994); *In re Phoenix L.*, 708 N.W.2d 786, 799-805 (Neb. 2006); *In re A.B.*, 663 N.W.2d 625, 634-37 (N.D. 2003); *In re Baby Boy L.*, 103 P.3d 1099, 1106-07 (Okla. 2004); *Angus v. Joseph*, 655 P.2d 208, 213 (Or. Ct. App. 1982), *cert. denied*, 464 U.S. 830 (1983); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980); *In re K.M.O.*, 280 P.3d 1203, 1214-15 (Wyo. 2012).

lacked authority to promulgate binding regulations at that time, because it was "not necessary" to promulgate "regulations with legislative effect," given that "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." 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979). Instead, Interior chose to promulgate non-binding guidelines for implementing most provisions of the statute.

But decades of on-the-ground experience revealed that state courts did not always apply the statute uniformly. *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,782 (June 14, 2016). Interior found that the state-to-state inconsistencies were undermining the statute's purposes. *Id.* at 38,782-84. It accordingly undertook notice-and-comment rulemaking and issued the "2016 Rule" interpreting various statutory terms. *See generally id.* at 38,865-76 (codified principally at 25 C.F.R. §§ 23.101-23.144). On at least one question that had divided state courts, however, Interior declined to issue an authoritative answer: whether the facts establishing "good cause" for deviating from ICWA's placement preferences must be proven (1) by the preponderance of the evidence or (2) by clear and convincing evidence. The rule recommends that state courts "should" use the latter, higher standard, 25 C.F.R. § 23.132(b), but it ultimately "declines to establish a uniform standard of proof," 81 Fed. Reg. at 38,843.

E. The present action

This action was filed in 2017 by the States of Indiana, Louisiana, and Texas, along with seven individuals. ROA.200. Individual Plaintiffs include three couples who have successfully adopted or wish to adopt children meeting ICWA's definition of "Indian child" and one individual who is the biological mother of such a child but who relinquished custody shortly after birth. ROA.585, 2687. The children themselves are not parties to this action, and Individual Plaintiffs do not purport to bring this action on their behalf. *See* ROA.585.

Rather than challenging ICWA's application in the course of state proceedings to which they are or were parties, Plaintiffs jointly mounted a facial challenge to ICWA's constitutionality in federal court. In their operative second amended complaint, all Plaintiffs claimed that Section 1915 of ICWA violates the Fifth Amendment's guarantee of equal protection; that the chapters containing ICWA's substantive and procedural standards violate the Tenth Amendment; that ICWA exceeds Congress's legislative authority under Article I; and that the 2016 Rule violates the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. ROA.635-54. In addition to those joint claims, State Plaintiffs separately claimed that one statutory provision contains an impermissible delegation of legislative authority to tribes. ROA.660-61.

The United States moved to dismiss on jurisdictional grounds, including that no Plaintiff had demonstrated standing to raise an equal-protection challenge. ROA.365-80. The district court denied that motion. ROA.3743-53. On the merits, it declared the 40-year-old Act of Congress unconstitutional on three distinct grounds, in addition to setting aside the 2016 Rule. ROA.4008-55.

First, the district court determined that ICWA violates Fifth Amendment equal-protection principles. ROA.4028-36. The court declined to follow the unbroken line of precedent that federal statutes governing the relationship between the United States and federally recognized Indian tribes and their members draw *political*, rather than *racial*, distinctions and thus are subject only to rational-basis review. ROA.4029-33. The court instead held that the statute draws racial classifications and thus is subject to strict scrutiny, and it concluded that ICWA does not survive strict scrutiny. ROA.4023-33.

Second, the district court concluded that ICWA violates Tenth Amendment anti-commandeering principles. ROA.4040-45. Although the Supreme Court has held that the Tenth Amendment does not prohibit Congress from obliging state courts to apply federal standards when those standards preempt contrary state law, the district court nevertheless concluded that ICWA's imposition of superseding federal standards in child-custody proceedings violates the Amendment. *Id.* The court also concluded that the statute impermissibly requires state agencies to perform

certain administrative tasks, including making a record of an Indian child's placement available to Interior. ROA.4043-44; *see also* ROA.4054 (concluding that Congress lacked Article I authority to enact ICWA solely because the Tenth Amendment "does not permit Congress to directly command the States").

Third, the district court determined that Section 1915(c)'s recognition and incorporation into federal law of any tribal resolution re-ordering ICWA's placement preferences (subject to the good-cause exception) is actually an impermissible delegation of Congress's legislative authority. ROA.4036-40.

On appeal, the panel held that Plaintiffs had standing but reversed in full on the merits. Panel Opinion 2. With regard to equal protection, the panel recognized that ICWA draws classifications based on affiliation with a political entity, not based on race, and therefore must be upheld so long as "the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." *Id.* at 26 (quoting *Mancari*, 417 U.S. at 555). The statute's protections meet that standard in light of "Congress's explicit findings and stated objectives in enacting ICWA." *Id.* With regard to the Tenth Amendment, the panel rejected the argument that ICWA unlawfully "commandeers" state actors by requiring them to follow federal standards over conflicting state standards, recognizing that that result is mandated by Article VI's Supremacy Clause. *Id.* at 27-35. The panel also rejected Plaintiffs' nondelegation and APA arguments. *Id.* at 35-46.

The panel's decision was unanimous with regard to equal protection, non-delegation, and the APA. With regard to anti-commandeering, Chief Judge Owen would have held that three discrete provisions of ICWA — 25 U.S.C. §§ 1912(d), 1912(e), and 1915(e) — impermissibly require state actors to administer, not merely adhere to, federal law. Panel Opinion 47. Chief Judge Owen neither disputed that those provisions are severable from the remainder of the statute, *see* 25 U.S.C. § 1963, nor critiqued any other part of the panel's decision. Panel Opinion at 47-55.

SUMMARY OF ARGUMENT

"Striking down an Act of Congress is the gravest and most delicate duty that [a court] is called on to perform." *Shelby County v. Holder*, 570 U.S. 529, 556 (2013) (internal quotation marks omitted). Yet the district court here declared the bulk of a 40-year-old Act of Congress unconstitutional on its face. That decision is both unprecedented and erroneous, and the en banc Court should reverse.

1. a. This Court should reverse the district court's judgment that ICWA violates the Fifth Amendment. As a threshold matter, the court lacked jurisdiction to consider Plaintiffs' equal-protection claim. Even assuming that the court had jurisdiction, however, its conclusion on the merits was erroneous. The challenged provisions are subject to rational-basis review — not strict scrutiny — because they draw distinctions based on present-day affiliation with a federally recognized Indian tribe. The Supreme Court and this Court have long recognized

that such distinctions are political, rather than racial, and do not offend equal protection so long as they are rationally related to the government's interest in fulfilling its unique obligation toward tribes and their members, as ICWA is. Plaintiffs' attempts to cabin that rule are irreconcilable with binding precedent.

b. The district court's judgment that ICWA violates the Tenth Amendment should also be reversed. The statute is a valid exercise of Congress's plenary power over Indian affairs and accordingly preempts conflicting state law. The obligation of state-court judges to faithfully apply ICWA is a straightforward function of the Supremacy Clause and does not offend the Tenth Amendment. Likewise, it is the Supremacy Clause — not unlawful commandeering — that requires state executive officers to respect the substantive and procedural rights that ICWA affords to individuals. Consequently, the challenged provisions do not commandeer state officers, and they are severable in any event.

c. The district court further erred in holding that Section 1915(c) of ICWA works an impermissible delegation of Congress's authority. That provision delegates no authority at all. Rather, it merely recognizes tribes' pre-existing authority to enact their own preferred order of adoptive placements and foster placements for their members' children and incorporates that order into federal law.

2. Because each of the district court's rationales as to why ICWA itself violates the Constitution is erroneous, the court's decision to set aside the 2016 Rule

for "purport[ing] to implement an unconstitutional statute" should also be reversed. The court identified two other grounds for invalidating that rule, both of which fail.

ARGUMENT

I. ICWA is constitutional.

A. The district court's equal-protection holding should be reversed.

1. Plaintiffs lack Article III standing.

To assert a claim cognizable in federal court, the "irreducible constitutional minimum of standing" requires a plaintiff to demonstrate that he or she suffered an "injury in fact" that is "fairly . . . trace[able]" to the challenged conduct and that is "likely" to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). No Plaintiff has met this burden with regard to the equal-protection claim.

Plaintiffs' choice to bring a facial challenge to ICWA in a federal court, rather than as-applied challenges in state-court proceedings to which they are parties, means that a favorable judgment will not redress their alleged injuries — for the simple reason that a decision by the district court or by this Court will not bind state judges. *See, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997).[2] In

[2] Although a decision by the Supreme Court *would* bind state-court judges, "standing is to be determined as of the commencement of suit," and "redressability clearly did not exist" at that point because "it could certainly not be known that the suit would reach [that] Court." *Defenders of Wildlife*, 504 U.S. at 570 n.5 (plurality opinion).

other words, a state court may still hold Plaintiffs to ICWA's standards regardless of the outcome of the present case. It is immaterial that some or all of the *parties* to the state-court proceedings would be bound by that decision, given that the state courts themselves remain free to apply ICWA without regard to the outcome here. It is likewise immaterial that state courts *might* voluntarily choose to adopt the district court's analysis, or even that one state court "has indicated that it will refrain from ruling" on Plaintiffs' claims pending a ruling from this Court. Panel Opinion 15. If Article III were satisfied by the mere possibility that "independent actors not before the courts" might find an advisory opinion persuasive, *Defenders of Wildlife*, 504 U.S. at 562, standing would *always* exist. To have a justiciable claim, therefore Plaintiffs must present their concerns about ICWA to the courts that actually adjudicate the proceedings in which their concerns arise.

Aside from that overarching redressability problem, Plaintiffs have failed to assert a cognizable injury with regard to the bulk of the provisions that they have challenged. Plaintiffs' complaint sought a declaration that Section 1915's adoptive-placement and foster-placement preferences violate the Fifth Amendment. ROA.654. Their motion for summary judgment additionally requested that Sections 1913(d) and 1914 be invalidated on equal-protection grounds. ROA.2593-2601. Plaintiffs accordingly had a burden to demonstrate an injury stemming from *each* of those provisions — including each of Section 1915's three adoptive-placement

preferences and four foster-placement preferences. *See, e.g.*, *Legacy Community Health Services, Inc. v. Smith*, 881 F.3d 358, 366 (5th Cir. 2018) (citing *Lewis v. Casey*, 518 U.S. 343, 357-58 & n.6 (1996)); *cf. Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1983) ("the 'injury in fact' in an equal protection case . . . is the denial of equal treatment *resulting from the imposition of* the barrier" against the plaintiff (emphasis added)).

To demonstrate such an injury, Plaintiffs needed to show that those provisions are being or will imminently be applied in ongoing proceedings to which they are parties, not merely that they might be subject to those provisions and any associated administrative burdens in the future. *See, e.g.*, *Clapper v. Amnesty International USA*, 568 U.S. 398, 409 (2013) (requiring that plaintiffs show a "certainly impending" injury). With the sole exception of the foster preference for extended family members, no Individual Plaintiff has met that burden.[3]

The United States' opening brief (pp. 20-22) includes a detailed account of the various state proceedings in which the individual Plaintiffs are or have been involved. For present purposes, it is sufficient to summarize that two of the three groups of individual Plaintiffs — the Brackeens and the Libretti/Hernandez plaintiffs

[3] Because States lack standing to raise equal-protection claims against the United States as *parens patriae* on behalf of their citizens, standing to assert such claims must come from one or more of the Individual Plaintiffs, as the district court and panel both recognized. *See* ROA.3753; Panel Opinion 13 n.4; *see also* U.S. Opening Brief 20 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966)).

— have successfully adopted the children that were the subject of the complaint, while this litigation has been pending. ROA.2687; Individual Brief 16, 30 n.5. The third group — the Cliffords — previously fostered Child P. but no longer have physical custody of the child; instead, a Minnesota court upheld the State's decision to move Child P. to live with the child's biological grandmother, a member of the White Earth Nation. ROA.2625-29, 2663-70.

On these facts, Plaintiffs have failed to show an injury from the bulk of the statutory provisions that they challenge. With regard to Sections 1913(d) and 1914, which authorize certain persons to challenge child-custody decisions in limited circumstances, no Plaintiff has demonstrated an injury. The Brackeens and Libretti/Hernandez plaintiffs have successfully adopted children protected by the statute — a precondition of an injury arising from those provisions. 25 U.S.C. § 1913(d), 1914. But they have fallen short of showing that any petition threatening the finality of those adoptions is "certainly impending," as required to satisfy Article III. *Clapper*, 568 U.S. at 409. As discussed above, Sections 1913(d) and 1914 authorize limited collateral attacks on placements, but only in exigent circumstances that no party has alleged here. *See* 25 U.S.C. §§ 1913(d) (authorizing a parent who has consented to an adoption to withdraw that consent "upon the grounds that consent was obtained through fraud or duress"), 1914 (authorizing petitions upon a showing that ICWA's protections were not followed). Moreover,

Section 1913(d) limits the period for challenges to "two years" after an adoption becomes effective — meaning that the Brackeens' adoption will be beyond collateral challenge by the time this case is heard en banc, and the Librettis' adoption will be so less than 11 months after such time. ROA.2688; Individual Brief 16. If petitions under either section were nevertheless filed, the adoptive parents would of course be free to challenge Sections 1913(d) and 1914 on any available grounds, including equal protection. Until that time, however, any possible injury from that section's operation is speculative and does not confer standing. *Accord* Panel Opinion 13-14.

With regard to Section 1915, Plaintiffs have failed to show that the provision's seven distinct adoptive- and foster-placement preferences apply to their ongoing cases. As the Supreme Court has explained, Section 1915's preferences are not relevant in *every* custody proceeding involving an Indian child; instead, they apply only where a preferred person "has formally sought to adopt" the child at issue. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655 (2013). Here, as of the completion of merits briefing, only the Cliffords continued to be involved in proceedings subject to Section 1915 with regard to a child named in the complaint. The Cliffords have alleged that Section 1915's preference for foster placements with family members became pertinent in those proceedings, given that Child P.'s biological grandmother came forward as a competing foster placement. *See* ROA.2663-70. The United States does not dispute that the Cliffords have alleged an injury regarding that

particular preference. But the Cliffords have not alleged that any of Section 1915's remaining preferences have actually been applied in their proceedings. *See* 25 U.S.C. §§ 1915(a)(2), (3), (b)(ii)-(iv).

Nor can the other Plaintiffs demonstrate any present injury from those remaining preferences, given that the child-custody proceedings involving the children named in the complaint are already completed. Any challenges regarding the application of Section 1915's preferences in those completed proceedings are therefore moot.[4] The Brackeens have claimed an additional injury based on ongoing proceedings involving another Indian child, Y.R.J. But standing is assessed at the time the complaint is filed, *e.g.*, *Defenders of Wildlife*, 504 U.S. at 570 n. 5 (plurality op.), and the Brackeens' attempt to adopt Y.R.J. postdates their operative complaint, ROA.4102-09. Moreover, the Brackeens have not demonstrated that any preferred person or entity has actually come forward in Y.R.J.'s proceedings, such that Section 1915's preferences have been or will be triggered. *See* Individual Brief 26-27.

For these reasons, even setting aside the redressability problem that infects Plaintiffs' entire equal-protection claim, Plaintiffs have demonstrated no injury from Sections 1913(d) or 1914 or from the bulk of Section 1915's placement preferences.

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[4] The exception for injuries that are capable of repetition yet evading review, *see* Panel Opinion 15, does not apply here. Although the Brackeens' effort to adopt a child resolved successfully before this litigation ended, the application of ICWA in state child-custody proceedings will not inherently evade review — especially given that parties are free to challenge ICWA's constitutionality *in those very proceedings*.

2. The challenged provisions should be upheld under *Mancari*'s governing test.

Should this Court reach the merits of Plaintiffs' equal-protection challenge, it should uphold the challenged provisions of ICWA under *Mancari*'s governing rational-relationship test. Plaintiffs have never disputed that ICWA satisfies that test. *See* Individual Brief 32-58; State Brief 34-44.

a. *Mancari* governs.

Since 1974, the Supreme Court has repeatedly held that federal statutes providing special treatment based on membership in a federally recognized Indian tribe do not impose suspect *racial* classifications. *Mancari*, 417 U.S. at 554-55; *see also, e.g.*, *Antelope*, 430 U.S. at 645-47; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-80 (1976); *Fisher v. District Court*, 424 U.S. 382, 390-91 (1976); *cf. Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214-16 (5th Cir. 1991). Such provisions instead draw *political* classifications, which are upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

Throughout this appeal, Plaintiffs have attempted to evade the *Mancari* standard by arguing, with no support from the decision itself or its progeny, that *Mancari*'s rule is applicable only to statutes that promote "tribal self-government" or relate to "tribal lands." *See* Individual Brief 44, 48; *cf.* State Brief 34. Even assuming *Mancari* were so limited, the district court's decision to apply strict

scrutiny here would still be erroneous: by promoting continued relationships between tribes and the future members on which they rely to continue existing as autonomous political entities, ICWA *does* promote "tribal self-government and the survival of the tribes." Panel Opinion 21 n.9 (citing 25 U.S.C. § 1901(3)); *accord Holyfield*, 490 U.S. at 34. More fundamentally, however, *Mancari* is *not* so limited.

Mancari itself involved a Bureau of Indian Affairs (BIA) hiring preference for members of federally recognized tribes with "one-fourth or more degree Indian blood." 417 U.S. at 553 n.24. Non-Indians contended that the preference constituted "invidious racial discrimination," *id.* at 551, but a unanimous Supreme Court disagreed, *id.* at 551-55. The Court explained that the preference was enacted against the "unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Id.* at 551. Against that background, federal laws singling out tribes and members are not suspect: to the contrary, "[l]iterally 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." *Id.* at 552.[5] If all such laws "were

[5] The district court read this sentence to mean that the hiring preference "provided special treatment only to Indians living on or near reservations." ROA.4031. The preference eligibility criteria are reproduced in the *Mancari* opinion and contain no requirement that an applicant live on or near a reservation. *See* 417 U.S. at 553 n.24.

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.* Instead, as long as a federal statute's "special treatment can be *tied rationally* to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555 (emphasis added).

Turning to the particular hiring preference at issue, *Mancari* explained that the preference for members of federally recognized tribes "does not constitute 'racial discrimination'" because "it is not even a 'racial' preference"; instead, it targets individuals for special treatment based on their affiliation with "quasi-sovereign tribal entities whose lives and activities are governed by" the federal agency offering the preference. *Id.* at 553-54. That preference was permissible because it was "reasonably and directly related" to a "legitimate, nonracially based goal" — in that case, making the BIA more responsive to tribal needs. *Id.* at 554.

Plaintiffs would turn *Mancari*'s description of the BIA hiring preference into a requirement that statutes drawing distinctions based on tribal affiliation may *only* (and in a narrow sense) further tribal self-government — or, alternatively, regulate on-reservation activities. But that argument misreads *Mancari* at two levels. One, *Mancari* deemed the BIA hiring preference political rather than racial not because of its subject matter, but because of whom it covered: not "individuals who are

racially to be classified as 'Indians,' " but rather "members of quasi-sovereign tribal entities." *Id.* at 553 n.24, 554; *accord Antelope*, 430 U.S. at 646; *Peyote Way*, 922 F.2d at 1215. That the preference promoted tribal self-government was relevant only to the subsequent inquiry whether that political classification was "tied rationally" to fulfilling Congress's responsibilities toward the tribes. *Mancari*, 417 U.S. at 555. Two, even at that second step of the inquiry, *Mancari* made clear that promoting Indian self-government was only *one* "legitimate, nonracially based goal" that would satisfy the test. *Id.* at 554-55.

Mancari's progeny do not support, let alone compel, Plaintiffs' cramped view of that decision. Indeed, the various laws that have been upheld by the Supreme Court and by this Court do not all fit into Plaintiffs' proffered categories. These statutes include the exemption for peyote use by members of the Native American Church — "most" *but not all* of whom lived on reservations — which this Court upheld without any inquiry into whether that exemption furthered the self-government of particular tribes or affected tribal land. *Peyote Way*, 922 F.2d at 1212-16; *see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (upholding treaty authorizing tribal members to fish *off* reservation).

Plaintiffs' reading of *Mancari*, moreover, would have the broad and startling result that *Mancari* expressly understood its rational-relationship test to *avoid* —

"effectively eras[ing]" an "entire Title of the United States Code." 417 U.S. at 552. Congress has long enacted statutes that single out members of Indian tribes while having no direct connection to tribal self-government or regulation of Indian lands. To name just a few examples, Congress makes special healthcare benefits available to individual Indians, including those who reside off-reservation. *E.g.*, 25 U.S.C. §§ 1603(28), 1651 et seq. Congress has made special economic development loans available to individual Indians, again regardless of residence. *Id.* §§ 1461 et seq. Congress has created special exemptions from various federal laws for individual Indians and Alaska Natives, regardless of residence, including the peyote-use exemption that this Court upheld in *Peyote Way*. *See also* 16 U.S.C. § 1539(e) (exempting subsistence hunting by Alaska Natives from liability under the Endangered Species Act); *id.* § 1371(b) (exempting take by Alaska Natives from liability under the Marine Mammal Protection Act). There is no sound basis for adopting Plaintiffs' position and thereby calling these laws (and many others) into doubt, when *Mancari* itself certainly does not call them into doubt.

Rather than reckoning with that conflicting precedent, Plaintiffs have argued that the Supreme Court's decision in *Rice v. Cayetano*, 528 U.S. 495 (2000), fundamentally rewrote *Mancari* along Plaintiffs' preferred lines. Not so. *Rice* involved a state statute that limited the right to vote in certain elections for state office to those whose distant ancestors had lived in Hawaii. *Id.* at 509. *Rice* held

that the state statute violated the Fifteenth Amendment's specific prohibition of discrimination based on race in voting. The Court cited *Mancari* approvingly but recognized that the Hawaii statute was fundamentally different from the hiring preference at issue in *Mancari* because it drew distinctions based on ancestry alone, rather than based on current-day affiliation with a political entity. *Id.* at 518-20. Indeed, the Court noted that whether Congress has granted Native Hawaiians a status like that of Indian Tribes or delegated to the State authority to enact special rules regarding that group are undecided and fraught questions. *Id.* at 518. *Rice* declined to extend the "limited exception of *Mancari*" to that "new and larger dimension." *Id.* at 520. Even assuming arguendo that Congress had delegated to the States to treat native Hawaiians as tribes, the Court reasoned, it "does not follow from *Mancari* . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens." *Id.*

The hypothetical limit on *Mancari* articulated in *Rice* — that under the Fifteenth Amendment, legislatures may not bar non-Indians from voting in state elections — simply has no relevance to ICWA. ICWA does not concern voting and does not bar any person — tribal member or otherwise — from participating in child-custody proceedings to which it does apply. To the contrary, many provisions of ICWA work to *prevent* States from excluding persons and tribes from those

proceedings. *E.g.*, 25 U.S.C. § 1912(a). *Rice* accordingly does not alter the rule of *Mancari*; it simply addresses circumstances entirely unlike those presented here.

Nor does the Supreme Court's 2013 decision in *Adoptive Couple* support a narrow recasting of *Mancari*. That decision observes that certain provisions of ICWA (not at issue here) "would raise equal protection concerns" if read to apply to a child whose only tribal-member parent had already legally severed his relationship with the child. 570 U.S. at 655-56. But that language merely reflects a concern that such a reading — again, of a provision not at issue here, on facts not presented here — might fail *Mancari*'s rational-relationship test, not an indication that *Mancari* does not apply to ICWA.[6]

For these reasons, *Mancari* provides the governing test, and this Court is bound to apply it.

b. Under *Mancari*, the challenged provisions draw political, not racial, classifications.

Under *Mancari*, none of the three challenged sections of ICWA draws suspect racial classifications because the only distinctions drawn are based on membership in a federally recognized tribe. *See Mancari*, 417 U.S. at 554-55. The district court erred in concluding otherwise.

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[6] Likewise, *Mancari*'s recognition that a government-wide preference for tribal members would present a closer constitutional question speaks to the possible relative difficulty of satisfying *Mancari*'s test — *not* whether that test applies. *See* 417 U.S. at 554.

We begin with Section 1915's adoptive- and foster-placement preferences. Both the first adoptive placement and the first foster placement — the only ones that Plaintiffs have shown apply to them, *see supra* pp. 16-19 — grant special status to prospective placements based on an existing familial relationship with the child. 25 U.S.C. §§ 1915(a)(1), (b)(i) (both according preference to "a member of the child's extended family"). Distinctions based on a present-day familial relationship are typically not suspect racial classifications. To the contrary, they are a longtime mainstay of child-custody, probate, and other law — including under the laws of the States that bring this challenge. *See* U.S. Opening Brief 28-29.

Section 1915's remaining adoptive preferences — for "other members of the Indian child's tribe," 25 U.S.C. § 1915(a)(2), and for "other Indian families," *id.* § 1915(a)(3) — both accord special treatment based on a prospective adopter's membership in a federally recognized Indian tribe. *See id.* § 1903(3) (defining "Indian" as used in the statute not as a person who is of Indian *race or ancestry* but as a "person who is a member of an Indian tribe" recognized by the United States). In that respect, the preferences are indistinguishable from the preference upheld by the Supreme Court in *Mancari*, 417 U.S. at 554-55, and by this Court in *Peyote Way*, 922 F.2d at 1214-16. Section 1915's remaining foster preferences — for foster homes "licensed, approved, or specified by the Indian child's tribe"; "Indian foster home[s] licensed or approved" by a non-Indian authority; and other institutions

"approved by an Indian tribe or operated by an Indian organization," *id.* § 1915(b)(ii)-(iv) — likewise draw political distinctions. Each accords special status based on a placement's affiliation with a federally recognized tribe or tribal organization — either because that political entity has approved the placement, *id.* § 1915(b)(ii), (iv); or because a foster parent is a member of that entity, *id.* § 1915(b)(iii); 25 C.F.R. § 23.2.

We turn then to Section 1913(d), which authorizes an Indian child's biological parent to petition a state court to vacate a consented-to adoption where that parent's consent was obtained through fraud or duress. That provision draws no distinctions based on race *or* tribal membership; it applies regardless of whether the child is adopted by Indian or non-Indian parents. The same is true of Section 1914, which governs foster-care placement and termination of parental rights. Both provisions do, of course, draw distinctions based on the identity of the *child* in question — specifically, whether that child meets ICWA's definition of "Indian child." 25 U.S.C. §§ 1903(4), 1913(d), 1914. But no Indian child is a party to this action, and Plaintiffs did not ask the district court to declare the definition of "Indian child" unconstitutional on equal-protection grounds (and, in any event, lacked standing to so ask). *See* ROA.654, 2458-64, 2593-2601.

Nevertheless, the district court applied strict scrutiny based on its conclusion that one prong of ICWA's definition of "Indian child," 25 U.S.C. § 1903(4)(b),

draws a race-based classification. ROA.4029-33. That conclusion was erroneous. The definition extends protections to unmarried minors with one of two present-day connections to a federally recognized tribe: (a) the child himself or herself must be a member of the tribe, or (b) the child must be both eligible for membership *and* the biological child of a member. 25 U.S.C. § 1903(4). Both prongs of that definition are political under *Mancari*.

The first prong is plainly based on a child's own status as a member of a federally recognized Indian tribe, just like the provisions at issue in *Mancari* and its progeny. *See, e.g.*, *Mancari*, 417 U.S. at 554-55; *Peyote Way*, 922 F.2d at 1214-16. The district court did not contend otherwise.

Instead, the district court focused on the second prong, but that prong is *also* based on membership, namely, that of the child's parent. The definition thereby ensures that all tribal-member parents and their children benefit from ICWA's protections — including provisions specifically protecting parental rights, *see, e.g.*, 25 U.S.C. §§ 1911-1913 — based on the political fact of the parent's membership. The district court made much of the fact that the children covered by the second prong are not themselves members of a tribe. But imputing a biological parent's political affiliation to a child is familiar from federal statutes that, for instance, extend United States citizenship to children who are born abroad to United States citizens. *See, e.g.*, 8 U.S.C. § 1433.

Moreover, the second prong serves as a proxy for a child's own political relationship to a tribe, even though not based strictly on the child's enrollment status. Membership in an Indian tribe is generally not conferred automatically upon birth. *See* H.R. Rep. No. 95-1386, at 17. Instead, an eligible child (or, under many tribes' rules, the child's parents) must take affirmative steps to enroll the child. *See id.*; 81 Fed. Reg. at 38,783. For this reason, many infants and young children born to tribal members are not immediately enrolled as tribal members, although they may be eligible for membership. *See id.*; H.R. Rep. No. 95-1386, at 17.[7] Given this reality, Congress recognized that covering only children who are already enrolled members would make ICWA's protections largely illusory, because they would provide little protection against improper removal of children from their tribal communities during the earliest years of life, before enrollment occurs. In this context, the second definition's requirements — eligibility for membership plus a member parent, 25 U.S.C. § 1903(4) — are proxies for the child's not-yet-formalized *tribal affiliation*, rather than proxies for *race*.

The district court reached a contrary conclusion by relying primarily on *Rice*. But as discussed above (pp. 24-26), *Rice* deemed racial a state statutory provision that restricted the franchise to "persons who are descendants of people inhabiting the

[7] Whether some handful of the 573 federally recognized tribes may register children automatically upon birth is immaterial; such children would plainly be protected by the first prong of the Indian child definition.

Hawaiian Islands in 1778." 528 U.S. at 499. That provision is not comparable to ICWA's *federal* protections based on a direct, present-day nexus to a recognized tribe, for the reasons already discussed. Children do not meet the second definition merely because they descend from persons with Indian heritage: at least one of their parents must *choose* to enroll in a tribe (or at least choose to remain a member of a tribe in which he or she was enrolled as a child), thereby entitling parent and child to the statute's protections (assuming the child is also eligible for enrollment). *See* 25 U.S.C. § 1903(4).

True, tribes have authority to set their own membership criteria, which may be based in part on biology or descent. *See Santa Clara*, 436 U.S. at 72 n.32.[8] But tribes themselves are "distinct, independent *political* communities," *Santa Clara*, 436 U.S. at 55 (emphasis added), and expressly recognized as such in the United States Constitution, *e.g.*, art. I, § 8, cl. 3. *Mancari* and its progeny consequently recognize that the federal government's relationship with tribes — and its special treatment of a tribe's members *qua* members — is political, even though membership itself may be based in part on ancestry. *See Mancari*, 417 U.S. at 554; *see also, e.g.*, *Antelope*, 430 U.S. at 645-47; *Moe*, 425 U.S. at 479-80; *Peyote Way*,

[8] Although tribes seeking formal recognition from the federal government must demonstrate a connection between their present membership and a historical tribal entity, 25 C.F.R. §§ 83.2, 83.11(e), the relevant regulation does not displace a recognized tribe's authority to set its own membership criteria.

922 F.2d at 1214-16. The operative test is not whether a federal statutory classification has any relationship to Indian ancestry, as the district court assumed. *See Mancari*, 417 U.S. at 554. Instead, the test is whether the classification is based on ancestry alone or is instead based on affiliation with a tribal government that, as a matter of its own prerogatives, has chosen to base its membership criteria in part on the tribal membership of the person's ancestors. *See Santa Clara Pueblo*, 436 U.S. at 72 n.32; *cf. Rice*, 528 U.S. at 519-20 (recognizing that the *Mancari* preference "had a racial component" but was not "directed towards a 'racial' group").

For the reasons set forth above, all of the relevant provisions of ICWA, like the classifications at issue in *Mancari* and *Peyote Way*, fall into the latter category. Accordingly, they must be reviewed under *Mancari*'s rational-relationship test, not under strict scrutiny.

c. The challenged provisions satisfy *Mancari*.

Neither Plaintiffs nor the district court (nor any member of the panel) have disputed that the challenged provisions of ICWA satisfy *Mancari*'s rational-relationship test. As explained in greater detail in the United States' opening brief (pp. 34-37), those provisions do satisfy that test, because each directly furthers one or both of ICWA's twin goals of protecting Indian children and promoting the "continued existence and integrity of Indian tribes" — goals that directly further Congress's "unique obligation toward the Indians." 25 U.S.C. § 1901(3); *Mancari*,

417 U.S. at 555. The challenged provisions should therefore be upheld under *Mancari*, and the district court's contrary decision should be reversed.

3. Even under strict scrutiny, the district court's analysis was flawed.

Should this Court nevertheless apply strict scrutiny, it should still reverse. To justify a classification under the two-pronged "strict scrutiny" standard applied by the district court, the government must first "demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial" (i.e., that the classification serves a "compelling" interest) and, second, that its use of the classification is "necessary . . . to the accomplishment of its purpose" (i.e., that its methods are "narrowly tailored"). *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2208 (2016). Moreover, application of any heightened standard to this case would need to take into account that, even assuming arguendo that the challenged provisions of ICWA are not purely political, they nevertheless are directly related to tribal affiliation of the child or parent and thus are not purely ancestry-based either.

For the reasons stated in the United States' opening brief (pp. 38-43), if this Court concludes that strict scrutiny should be applied, it would be appropriate to remand for a full opportunity to address the application of this standard, which the district court did not afford. *See* ROA.4033-36. In any event, this Court may reverse because the district court erred in its strict-scrutiny analysis.

In considering what compelling interests are served by ICWA, the district court overlooked the two purposes expressly stated in ICWA's declaration of policy: "to protect the best interests of Indian children" while simultaneously "promot[ing] the stability and security of Indian tribes." 25 U.S.C. § 1902; *see also* ROA.3629. Those congressionally declared interests are indeed compelling. The first promotes the welfare of vulnerable Indian children, which is a core area of tribal and federal concern, *see Santa Clara Pueblo*, 436 U.S. at 56 ("domestic relations"), and a frequent subject of federal treaties and legislation, *see*, *e.g.*, Treaty with the Chippewa, art. 6, 7 Stat. 290, 291 (Aug. 5, 1826) (schools for "the improvement of Indian youths"); 25 U.S.C. § 184 (rights of children born of certain Indian women). And the second goes directly to tribes' continued ability to act as autonomous political units. Children are the lifeblood of a tribe, and Congress specifically found that "no resource . . . is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3).

As stated above, each of the challenged provisions of ICWA directly furthers one or both of the statute's twin compelling interests. The district court concluded, however, that in three respects ICWA "burden[s] more children than necessary" to achieve ICWA's goals. ROA.4035-36. The district court was wrong in each respect.

First, the district court stated that the second provision of the ICWA's definition of "Indian child" is over-inclusive because it applies to what that court

called "*potential* Indian children," who may "never be members of their ancestral tribe." *Id.* But no party asked the court to invalidate that definition or purported to represent such children in this proceeding. ROA.654, 2458-64, 2593-2601. In any event, Congress determined that children who are "eligible for membership" are "vital" to tribes' continued existence. 25 U.S.C. § 1901(3). Given that infants and young children are generally dependent on the action of a parent or guardian to formally enroll them in the tribe, *see* H.R. Rep. No. 95-1386, at 17; 81 Fed. Red. at 38,783, extending protection to children who are not yet enrolled members is not over-inclusive but rather specifically targeted to ICWA's goals.

Second, the court suggested that Section 1915's preference for placement with family members "who may not be tribal members at all" is not necessary "to accomplish the goal of ensuring children remain with their tribes." ROA.4036. But keeping children in their tribal community is not ICWA's sole purpose: the statute also explicitly seeks to promote "the best interests of Indian children." 25 U.S.C. § 1902. Congress was justified in finding that placing children with relatives is presumptively the best option, regardless of tribal connection, given the widely recognized benefits of extended family placements. *See* U.S. Opening Brief 35-36.

Third, the district court concluded that Section 1915's third adoptive preference, for placement with other Indian families, is not narrowly tailored. ROA.4035-36. As explained above, the third adoptive preference was not properly

before the court. *See supra* pp. 16-19. But in any event, the preference is not merely a preference for "generic 'Indianness,'" as the district court suggested. ROA.4036. To the contrary, the preference reflects the reality that many tribes have deep historic and cultural connections with other tribes, and that many Indian children may be eligible for membership in more than one tribe. *See* U.S. Opening Brief 36-37. Placing a child with members of a connected tribe would foster a child's relationship with his or her own tribe, and therefore promote both of ICWA's goals.

Critically, moreover, the third preference is not a categorical requirement that a child always be placed with a family meeting the preference's requirements; like all of Section 1915's preferences, it is subject to a state court's express authority to deviate for "good cause." 25 U.S.C. § 1915(a). That good-cause exception ensures that application of the preference is narrowly tailored because it provides for an assessment of an individual child's particular circumstances, with the preference to be applied only if it furthers ICWA's compelling goals and where countervailing considerations do not call for a different outcome. For the purposes of the *facial* challenge in this case, it is sufficient that ICWA on its face requires an individualized inquiry keyed to the facts of a specific case. Any as-applied challenge would properly be raised in a particular foster-placement or adoptive proceeding where the third preference is actually applied, not in this action (where it is not).

Therefore, the district court's equal-protection ruling should be reversed. If this Court were to find some constitutional infirmity in the three provisions of the statute at issue, it should confine its holding to those individual provisions or their application in identified circumstances, consistent with ICWA's severability clause. *See* 25 U.S.C. § 1963; *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685-86 (1987).

B. The challenged provisions comport with the Tenth Amendment.

This Court should also reverse the district court's holding that ICWA violates the Tenth Amendment's prohibition against "commandeering" state actors. The district court concluded that ICWA impermissibly commandeers state actors by requiring state courts to apply federal standards in child-custody proceedings, and by enacting certain requirements that all parties to such proceedings — including state participants — must follow in those proceedings. *See* ROA.4041-45. Both conclusions were incorrect, as the twenty-one States that filed an amicus brief in favor of reversal agree. *See* Brief of Amicus States California, et al. 9-14.

1. ICWA's substantive standards do not commandeer state courts.

The Supreme Court's anti-commandeering decisions hold that Congress may not " 'commandeer' the *legislative* processes of the States by directly compelling" or forbidding them to enact certain legislation. *New York v. United States*, 505 U.S. 144, 161, 175-76 (1992) (emphasis added); *see also Murphy v. NCAA*, 138 S. Ct.

1461, 1478 (2018). Nor may Congress enlist state *executive* officers into carrying out federal regulatory schemes. *Printz v. United States*, 521 U.S. 898, 925-33 (1997). Those decisions are uniformly careful to note, however, that the doctrine does not disturb "the well established power of Congress to pass laws enforceable in state courts," which those courts must then apply. *New York*, 505 U.S. at 178. As the Supreme Court has explained: "Federal statutes enforceable in state courts 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" and does not violate the Tenth Amendment. *Id.* at 178-79; *accord Printz*, 521 U.S. at 928-29; *Murphy*, 138 S. Ct. at 1479.

Unlike the statutes struck down in *New York* and *Murphy*, ICWA does not compel States to enact or refrain from enacting any statutes as a matter of the State's own child welfare law. Instead, ICWA establishes substantive standards for the treatment of Indian children as a matter of *federal* law — a prerogative that Congress enjoys in light of its plenary authority to regulate in the field of Indian affairs, including in the area of tribal members' domestic relationships. 25 U.S.C. § 1902; *Mancari*, 417 U.S. at 551-52; *Lara*, 541 U.S. at 200; *Santa Clara Pueblo*, 436 U.S. at 55-56. As is true of countless other federal statutes, ICWA's minimum federal standards *preempt* conflicting state law. *See* 25 U.S.C. § 1921. But preemption obviously does not offend the Tenth Amendment. *New York*, 505 U.S. at 178; *Printz*,

521 U.S. at 928-29; *Murphy*; 138 S. Ct. at 1479. A contrary conclusion would convert countless unexceptional applications of the Supremacy Clause into impermissible commandeering.

To be sure, the district court did attempt to cabin its holding, reasoning that ICWA's commands are different because they preempt the law that would otherwise apply in *state-law* causes of actions. *See* ROA.4041-42. But under the Supremacy Clause, that distinction is immaterial because "the Judges in every State shall be bound" by any "Laws of the United States" made pursuant to the U.S. Constitution, notwithstanding "anything in the Constitution or Laws of any State to the Contrary." U.S. Const. art. VI, cl. 2. The Supreme Court has repeatedly recognized that federal law may permissibly preempt the state law that applies in state-law causes of action, *e.g.*, *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190, 1196-99 (2017) (state subrogation law), including in areas of domestic concern like probate and marital property, *e.g.*, *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 143 (2001) (state probate law); *Boggs v. Boggs*, 520 U.S. 833, 835-36 (1997) (state community property law).

Although States play an important role in the regulation of domestic relations, Indian tribes likewise have a significant sovereign interest in the domestic relations of their members and their members' children, whether on or off reservation. *See Santa Clara Pueblo*, 436 U.S. at 55-56. There is nothing inherently suspect in

Congress's crafting federal rules governing treatment of Indian children to further its obligations to those tribes. *See* H.R. Rep. No. 95-1386, at 14-15. Indeed, Congress's decision to set (minimum) federal standards but to leave jurisdiction with state courts reflects a respect for those courts and for federalism more generally, where the alternative would be to shift jurisdiction to the federal courts.

In their briefs to the panel, Plaintiffs offered two reasons why the fundamental constitutional precept of preemption should not apply to ICWA: (1) that Congress lacked Article I authority to enact ICWA in the first place; and (2) that ICWA conflicts with *Murphy* by regulating the States themselves, rather than individuals. Both arguments lack merit.

First, Congress plainly has authority to address the massive removal of children from tribal communities; Plaintiffs' arguments to the contrary would radically undermine Supreme Court precedent and cast into doubt myriad laws stretching back to this Nation's earliest days. The Supreme Court has stated consistently and unequivocally that Congress's authority to legislate "Indian affairs" is plenary. *E.g.*, *Lara*, 541 U.S. at 200 ("The Constitution grants Congress broad general powers to legislate in respect to Indian tribes . . . that we have consistently described as 'plenary and exclusive.'"); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979) (referring to Congress's "plenary and exclusive power over Indian affairs"); *Mancari*, 417 U.S.

at 551 (recognizing Congress's "plenary power . . . to deal with the special problems of Indians").[9] That authority stems in part from the Indian Commerce Clause, art. I, § 8, cl. 3, but also from other sources, including the Treaty Clause, art. II, § 2, cl. 2, and "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government," *Lara*, 541 U.S. at 201; *see also United States v. Kagama*, 118 U.S. 375, 384-85 (1886).

Plaintiffs nevertheless have argued that, under their reading of the Indian Commerce Clause, art. I, § 8, cl. 3, the Constitution grants authority only to regulate "trade" with tribes themselves, not to legislate with respect to individual Indians. Plaintiffs can point to no controlling precedent to support that view. To the contrary, as stated, Congress's authority regarding tribes stems not only from that Clause but also from other clauses and "preconstitutional powers." *Lara*, 541 U.S. at 201. In any event, the Supreme Court itself has admonished against treating Congress's Indian Commerce Clause and Interstate Commerce Clause authorities as equivalent. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

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[9] *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977), which Plaintiffs cited for the proposition that Congress's power in this area is "plenary" but "not absolute," is not to the contrary. *See* State Brief 31. *Weeks* merely held that laws passed by Congress to aid Indians are not immune from judicial review. 430 U.S. at 84. The standard of review specified by *Weeks* imposed no limits on the subject matter that Congress may address; rather, it echoed *Mancari*'s broad rule that a federal statute is constitutional if it is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.* at 85.

Nor has Congress understood its authority to be limited to regulating *trade* with *tribes*. To the contrary, one of the earliest statutes enacted under the new Constitution rendered invalid the sale of land by tribes *or individual Indians* to any person or State. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138; *see also* Act of Mar. 1, 1793, ch. 19, § 8, 1 Stat. 329, 330; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469, 472; Act of Mar. 3, 1799, ch. 46, § 12, 1 Stat. 743, 746; Act of Mar. 30, 1802, ch. 13, § 12, 2 Stat. 139, 143; *see also* Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730 (targeting only sales by tribes); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 418 (1865) (recognizing Congress's right to regulate commerce with "any Indian tribe, or any person who is a member of such tribe"). Since the nineteenth century, Congress has also provided for the exercise of federal criminal jurisdiction in Indian country, even though prosecuting *crimes* against *individual* Indians is far afield from regulating *trade* with Indian *tribes*. 18 U.S.C. §§ 1152, 1153. More contemporary examples of legislation that frustrate Plaintiffs' imagined limits on Congress's authority are also plentiful. *See, e.g., supra* p. 24.

The Supreme Court has routinely upheld Indian-related federal statutes that regulate activity other than trade with tribes or internal tribal affairs. The Court has upheld a conviction of a non-Indian under a federal statute that prohibited sales of alcohol to individual Indians on or off reservations. *Perrin v. United States*, 232 U.S. 478, 480-81 (1914). The Court has also recognized that federal treaties and

other agreements ratified by Congress may preclude States from applying fish and game laws to individual Indians' activities outside of reservations. *E.g.*, *Fishing Vessel*, 443 U.S. at 684-85; *Antoine v. Washington*, 420 U.S. 194, 204 (1975). The Court has also recognized Congress's power to authorize the acquisition of privately held land within a State's boundaries in trust "for Indians." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220-21 (2005); *see also Arenas v. United States*, 322 U.S. 419, 433-34 (1944) (enforcing statute authorizing allotments of land to individual Indians).

The clear thrust of that history and precedent is that Congress's authority in the realm of Indian affairs is, indeed, plenary — just as the Supreme Court has stated. The contention that Congress may not enact federal law to protect tribes and their members from the unjustified removal of their children accordingly lacks merit.

Second, ICWA is consistent with *Murphy*. That decision struck down a federal statute that explicitly prohibited states from enacting *state* laws legalizing sports betting. 138 S. Ct. at 1477-78. ICWA, by contrast, guarantees minimum substantive and procedural protections to individual Indian children, their families, and tribes as a matter of *federal* law. In so doing, it supplies through the Supremacy Clause a valid "rule of decision" in child-custody proceedings. *Id.* at 1479.

To be sure, ICWA affects state actors participating in those proceedings — just as it affects all other actors (private and tribal) likewise participating in those

proceedings. But that is true of any federal statute that preempts state laws: it affects state actors participating in proceedings where that statute applies. Federal law does not offend the Tenth Amendment merely because the rights or protections that it grants to individuals may thereby constrain States. *See New York*, 505 U.S. at 178-79; *see also, e.g.*, *Washington*, 443 U.S. at 684-85 (recognizing that federal treaty securing tribal right to fish prevented State from applying certain regulations); *Antoine*, 420 U.S. at 204, 207 (same regarding tribal hunting); *Deer Park Independent School District v. Harris County*, 132 F.3d 1095, 1099 (5th Cir. 1998) (upholding federal statute granting exemption from state tax). Indeed, the Supreme Court in *Murphy* specifically distinguished on these very grounds the anti-commandeering principle applied there from permissible preemption of state laws. *See* 138 S. Ct. at 1479-81.

Turning to the challenged provisions of ICWA, each falls on the permissible side of the line drawn by *Murphy*, because each grants protections to private citizens that state actors in turn must respect, rather than directly regulates States. For example, ICWA bestows on parents of Indian children a right not to have their children removed or placed in foster care absent certain showings, and accordingly state courts may not order the removal of children based on lesser proof. *See* 25 U.S.C. § 1912(d). ICWA similarly enshrines general limits on how long Indian children may be subject to extended emergency placements without court

involvement, which States may not disregard. *See id.* § 1922. Likewise, ICWA guarantees that participants in proceedings involving an Indian child receive certain procedural protections, which state courts may not abridge. *See id.* §§ 1912(a) (notice and timing requirements), 1912(b) (appointment of counsel), 1917 (release of case information to Indian child reaching adulthood); *cf.* 25 C.F.R. § 23.139 (setting notice requirements when the adoption of an Indian child is vacated). The requirement that state actors not infringe on the protections afforded to private citizens under federal law is no different from the requirement that state actors not infringe on the fishing and hunting rights at issue in *Washington*, 443 U.S. at 684-85, and in *Antoine*, 420 U.S. at 204, 207, or the requirement that States not tax exempt entities in *Deer Park*, 132 F.3d at 1099.

The panel agreed with the foregoing — except that Chief Judge Owen would have found that three provisions of the statute, 25 U.S.C. §§ 1912(d), 1912(e), and 1915(e), do directly regulate States. Panel Opinion 54; *cf. id.* at 47-55 (not disputing that Congress has authority to legislate to protect Indian children or disagreeing with any part of the majority's equal-protection, nondelegation, or APA holdings). None of these provisions offends controlling precedent. Even if any is impermissible, moreover, each is severable. *See* 25 U.S.C. § 1963.

Two of those provisions secure rights to individual Indian children and to their parents: specifically, the right not to be placed in foster care or have parental rights

terminated (1) without proof that "active efforts have been made to provide remedial services and rehabilitative programs" and (2) without an expert determination that leaving the child with their parent will likely cause serious harm. 25 U.S.C. § 1912(d), (e). Certainly, those federally conferred rights constrain when a state court may order removal of a child (and by extension may constrain state child-protection agencies that desire the court to order a removal). But as explained above, the ordinary operation of the Supremacy Clause is not commandeering. *See Deer Park*, 132 F.3d at 1099. This is so even assuming that state agencies are the primary or only entities that seek to remove children from their homes and thus the primary entities constrained by the statutes. *See id.* (describing situation in which only States and their subdivisions were burdened by permissible federal tax exemption).

The third provision simply requires States to make a record of an Indian child's placement available to the federal government. 25 U.S.C. § 1915(e). The Supreme Court has declined to hold that information-sharing requirements, as distinguished from "forced participation . . . in the actual administration of a federal program," offend the Tenth Amendment. *Printz*, 521 U.S. at 918; *see also id.* at 936 (O'Connor, J., concurring). Such a requirement is particularly warranted with respect to the placement of tribally associated Indian children, for whom the Constitution empowers Congress to afford special vigilance.

For the foregoing reasons, ICWA permissibly preempts state law, and the Supremacy Clause thus requires state judges to apply that law faithfully. The Tenth Amendment does not mandate otherwise. *New York*, 505 U.S. at 178-79.

2. ICWA's procedural requirements do not commandeer state executive officers.

The district court also concluded that State Plaintiffs had "indisputably demonstrated" that ICWA requires state "executive agencies to carry out its provisions." ROA.4043. That was error, for largely the same reasons already stated: the provisions at issue do not issue commands to state executive officers, but merely enact preempting federal rights which those officers may not infringe.

Of the eight statutory requirements that Plaintiffs have argued commandeer state officers, *see* State Brief 24-26, one sets limits on when a court may terminate parental rights or order that an Indian child be placed in foster care, 25 U.S.C. § 1912(d); and one sets limits on how long an emergency placement of an Indian child may last, absent court involvement, *id.* § 1922.[10] Those provisions are arguably phrased as directives to state agencies, but as explained above, they are in substance federal rules governing the rights of Indian children and their parents — rules that simply preempt conflicting state rules and consequently pose no anti-

[10] Plaintiffs also challenge numerous provisions of the 2016 Rule that allegedly place additional administrative burdens on state agencies and courts. ROA.2448-49. But requirements appearing only in the regulation do not affect the constitutionality of the statute itself.

commandeering problem. *Cf. Murphy*, 138 S. Ct. at 1480 ("This language might appear to operate directly on the States, but it is a mistake to be confused by the way in which a preemption provision is phrased."). The same is true of the four requirements setting minimum procedural rules in judicial proceedings involving an Indian child. *See* 25 U.S.C. §§ 1912(a), 1912(b), 1917. These provisions are also appropriate uses of Congress's authority and consequently preempt contrary state law under the Supremacy Clause. *See Jinks v. Richland County*, 538 U.S. 456, 461-65 (2003); *FERC v. Mississippi*, 456 U.S. 742, 770-71 (1982).

The remaining two requirements simply require States to provide minimal information regarding Indian-child proceedings to the federal government. *See* 25 U.S.C. §§ 1915(e), 1951(a). As explained, the Supreme Court has declined to hold that information-sharing requirements offend the Tenth Amendment. *See Printz*, 521 U.S. at 918.

Accordingly, the district court's declaration that ICWA violates the Tenth Amendment should be reversed, as should that court's conclusion (derived entirely from its anti-commandeering holding, ROA.4054) that Congress lacked Article I authority to enact ICWA. Moreover, to the extent that any of the above provisions did pose an anti-commandeering issue, the appropriate remedy would be to sever such provision and leave the remainder of the statute intact. *See* 25 U.S.C. § 1963; *Alaska Airlines*, 480 U.S. at 685-86.

C. ICWA contains no improper delegation.

This Court should also reverse the district court's declaration that Section 1915(c) violates the "nondelegation doctrine." ROA.4036-40. As explained below, that provision contains no delegation of congressional authority whatsoever, let alone an unlawful one.

Section 1915(c) provides that, where a tribe has instituted adoptive-placement and foster-placement preferences via tribal resolution that differ from those in ICWA, the tribally established order shall apply in state-court proceedings involving a child of that tribe. The district court deemed that provision an impermissible delegation of Congress's authority to legislate regarding Indian children. ROA.4036-40. But tribes already have their *own* sovereign authority to legislate on matters related to members and their children. *Santa Clara Pueblo*, 436 U.S. at 55-56. Consequently, Congress had no need to "delegate" that authority to them, and Section 1915(c) does not so delegate. Rather, it merely establishes as a matter of federal law that laws enacted under tribes' own independent legislative authority will apply in covered proceedings.

Such federal directives to utilize legal standards established by other sovereigns is commonplace. A familiar example is the Federal Tort Claims Act, which generally makes the United States liable in tort "in accordance with the [state] law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); *see*

also, e.g., Assimilative Crimes Act, 18 U.S.C. § 13(a) (imposing criminal liability for any act in a federal enclave that "would be punishable if committed . . . within the jurisdiction of the State, Territory, Possession, or District in which such place is situated"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983) (describing the Lacey Act, which makes it a federal crime to import species taken in violation of tribal law). These incorporations do not offend the nondelegation doctrine. *See, e.g., United States v. Sharpnack*, 355 U.S. 286, 293-97 (1958) (upholding Assimilative Crimes Act); *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) (upholding Lacey Act). The Supreme Court has even applied the principle in the specific context of a law enacted by an Indian tribe. *See United States v. Mazurie*, 419 U.S. 544, 556-58 (1975) (upholding statute respecting tribal government's authority to regulate on-reservation sale of alcoholic beverages); *see also, e.g., Wisconsin v. EPA*, 266 F.3d 741, 748 (7th Cir. 2001) (observing that under Clean Water Act, EPA may authorize tribes to regulate off-reservation discharges).

Moreover, the Supreme Court has held that measures challenged on nondelegation grounds must be sustained so long as they "lay down by legislative act an intelligible principle" to which the delegated party must conform. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Any delegation here is constrained by an express "intelligible principle," for the reasons stated in the United States' opening brief (pp. 48-51).

Therefore, Section 1915(c) does not violate the nondelegation doctrine. Even if it did, that provision would be severable, and any infirmity would not affect the remainder of ICWA. *See* 25 U.S.C. § 1963; *Alaska Airlines*, 480 U.S. at 685-86.

In sum, ICWA is consistent with the Constitution, and the district court erred in declaring to the contrary.

II. The 2016 Rule is valid.

The district court also erred in invalidating Interior's 2016 Rule implementing ICWA. The court offered three grounds for so doing, none of which survives scrutiny. First, the court concluded that the rule is invalid because it "purports to implement an unconstitutional statute." ROA.4046. As demonstrated in Part I above, that conclusion is wrong. We briefly address the other two grounds below.

A. ICWA expressly grants Interior authority to issue regulations with the force of law.

The district court concluded that when the Department of the Interior "promulgated regulations with *binding* rather than advisory effect, it exceeded the statutory authority Congress granted to it to enforce the ICWA." ROA.4049. But ICWA's plain text authorizes Interior to "promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." 25 U.S.C. § 1952. As Interior explained in the preamble to the 2016 Rule, that statement is classic language empowering the issuance of binding regulations. *See* 81 Fed. Reg. at 38,785 (collecting cases); *cf. United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

The district court rejected this authority on the ground that Section 1952 authorizes only those regulations that are "necessary," but Interior had determined that binding regulations were "*not necessary*" in 1979, when it issued its original ICWA guidelines. ROA.4047 (quoting 44 Fed. Reg. at 67,584). That reasoning is flawed. To be sure, Interior did conclude in 1979 that it lacked authority to promulgate regulations carrying the force of law, because it determined at the time that state and tribal courts charged to apply ICWA's standards were "fully capable" of complying with the statute "without being under the direct supervision of" Interior. 44 Fed. Reg. at 67,584. It is beyond dispute, however, that an agency may change its view, so long as it provides a reasoned explanation. *E.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Interior did just that in 2016.

Specifically, in the preamble to the 2016 Rule, Interior expressly recognized its 1979 position. 81 Fed. Reg. at 38,782. Interior then explained why nearly four decades of experience and the intervening Supreme Court decision in *Holyfield* had caused it to change its view. Interior explained that in practice, "state courts and agencies have interpreted the Act in different, and sometimes conflicting, ways," and Interior provided concrete examples of interstate conflicts that had arisen. *Id.* The resulting state-by-state conflict "can lead to arbitrary outcomes, and can threaten the rights that the statute was intended to protect." *Id.* (citing *Holyfield*, 490 U.S. at 46, in which "the Court concluded that the term 'domicile' in ICWA must have a

uniform Federal meaning"). Interior determined that the interstate conflict would continue — "with potentially devastating consequences for the children, families, and Tribes that ICWA was designed to protect" — unless and until Interior promulgated authoritative federal standards. *Id.* For that reason, Interior concluded that regulations were now necessary and thus authorized under 25 U.S.C. § 1952.

Despite the foregoing, the district court held that Interior failed to "explain its change in position" in the 2016 Rule. ROA.4049. According to the court, the 2016 Rule conveyed Interior's "frustration with *how* state courts and agencies are applying the ICWA," not *why* Interior's view of its authority had changed. ROA.4048. But as Interior explained, the inconsistency in state courts' application of ICWA is *itself* the reason for Interior's determination that authoritative federal regulations are now necessary, to avoid undermining the statute's purpose. *See* 81 Fed. at Reg. 38,782. Interior thus determined that establishing uniform definitions is "necessary" to carry out ICWA's purposes — even if it did not appear so in 1979 without the benefit of experience. 25 U.S.C. § 1952.

B. The district court's critique of the good-cause evidentiary standard misreads the 2016 Rule's plain text.

The district court identified only one other asserted problem with the 2016 Rule: its recommendation that facts giving rise to "good cause" justifying deviation from ICWA's placement preferences "should" be established by clear and convincing evidence. 25 C.F.R. § 23.132(b). The court believed that a clear-and-

convincing evidence requirement is inconsistent with the statute, which it interpreted to allow good cause to be established by a less demanding standard. ROA.4050-52.

The problem with that analysis is that the 2016 Rule contains no *requirement* that state courts use the clear-and-convincing standard. Section 23.132(b) provides merely that the facts giving rise to good cause "should" be established by that standard. Many state courts had already so interpreted ICWA prior to the 2016 Rule's issuance. *See* 81 Fed. Reg. at 38,843 (citing cases). But the 2016 Rule does not purport to resolve the dispute among the States, and so it does not change the law in States that have not adopted a clear-and-convincing standard. *See id.* (Interior "*declines* to establish a uniform standard of proof on this issue" (emphasis added)). There is thus no basis for setting aside the 2016 Rule on the view that it forces Plaintiffs to meet the clear-and-convincing standard. Again, to the extent the good-cause evidentiary discussion contains any infirmity, it is expressly severable from the remainder of the rule. 25 C.F.R. § 23.144.

In sum, the 2016 Rule is valid, and the district court erred in setting it aside.

CONCLUSION

For all of these reasons, the judgment of the district court should be reversed.

Dated: December 6, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on December 6, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Rule 32(f), it contains 13,000 words.

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