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, Secretary, U.S. Department of the Interior; TARA SWEENEY, in her official capacity as 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

EN BANC BRIEF OF INDIVIDUAL PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

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,

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

Intervenor Defendants-Appellants.

Pursuant to Local Rule 28.2.1, the undersigned counsel of record certifies that the following list of persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate potential 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. Navajo Nation (Intervenor)

6. Chad Everet and Jennifer Kay Brackeen (Plaintiffs)

7. Frank Nicholas and Heather Lynn Libretti (Plaintiffs)

8. Altagracia Socorro Hernandez (Plaintiff)

9. Jason and Danielle Clifford (Plaintiffs)

10. State of Texas (Plaintiff)

11. State of Louisiana (Plaintiff)

12. State of Indiana (Plaintiff)

13. United States of America (Defendant)

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

15. John Tahsuda III, Bureau of Indian Affairs Principal (Defendant)

16. Tara Sweeney, Assistant Secretary for Indian Affairs (Defendant)

17. United States Department of the Interior and its Secretary, David Bernhardt (Defendants)

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

19. Adam H. Charnes, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

20. Christin J. Jones, Kilpatrick Townsend & Stockton LLP, counsel for Intervenor-Defendants

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26. David J. Hacker, Office of the Attorney General, counsel for State Plaintiffs

27. Jeff Landry, Attorney General of Louisiana

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41. JoAnn Kintz, U.S. Department of Justice, counsel for Federal Defendants

42. Jeffrey Bossert Clark, Assistant Attorney General, U.S. Department of Justice, counsel for Federal Defendants

43. Eric Grant, Deputy Assistant Attorney General, U.S. Department of Justice, counsel for Federal Defendants

44. William B. Lazarus, U.S. Department of Justice, counsel for Federal Defendants

45. Rachel Heron, U.S. Department of Justice, counsel for Federal Defendants

46. Steven Miskinis, U.S. Department of Justice, counsel for Federal Defendants

47. Christine Ennis, U.S. Department of Justice, counsel for Federal Defendants

48. Ragu-Jara "Juge" Gregg, U.S. Department of Justice, counsel for Federal Defendants

49. Amber Blaha, U.S. Department of Justice, counsel for Federal Defendants

50. John Turner, U.S. Department of Justice, counsel for Federal Defendants

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

52. Samuel C. Alexander, Section Chief, Indian Resources Section, counsel for Federal Defendants

53. Sam Ennis, United States Department of the Interior, Solicitor's Office, of-counsel for Federal Defendants

54. Paul Spruhan, Navajo Nation Department of Justice, counsel for Intervenor

55. Kandis Martine, Navajo Nation Department of Justice, counsel for Intervenor

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

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STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled Oral Argument for January 22, 2020.

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INTRODUCTION

There are two child-welfare systems in Texas: One that is generally applicable to children under the State's jurisdiction, and an entirely different one for "Indian children," which is mandated by the Indian Child Welfare Act ("ICWA") and related regulations.

The former is governed by state law and geared toward identifying and protecting the best interests of each child. ICWA, on the other hand, makes a categorical judgment that "the best interests of Indian children" should be "protect[ed]" by placement in homes that "reflect the unique values of Indian culture." 25 U.S.C. § 1902. ICWA thus replaces individualized consideration of an Indian child's best interests under state law with a dizzying array of federal mandates that state agencies and courts must apply to effectuate a transparently race-based federal policy of keeping "Indian children" within the "Indian community." H.R. Rep. 95-1386, at 23 (1978). At the core of ICWA's mandates are its placement preferences, which compel state courts to prefer *any* "Indian family"—which is to say, a family in *any* one of 573 federally recognized Indian tribes—over *all* non-Indian families, such as the Individual Plaintiffs here.

Race discrimination in child-placement proceedings—including a policy of placing children with parents of the same race—is presumptively unconstitutional. *See Palmore v. Sidoti*, 466 U.S. 429 (1984). And classifications of "Native Americans" are racial classifications subject to strict scrutiny. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 207-08, 214 (1995). It follows that a federal policy of directing Native American children to Native American households must be subject to strict scrutiny. The question here is whether a different result obtains with regard to ICWA's classifications of "Indian children" and their potential placements.

The Supreme Court recently observed that ICWA's placement regime raises serious "equal protection concerns," *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655-56 (2013), but Defendants refuse to acknowledge them. Defendants contend that because ICWA's classifications are tethered to membership in a federally recognized Indian tribe, the classifications are "political" rather than "racial" under the Supreme Court's decision in *Morton v. Mancari*, which upheld the Bureau of Indian Affairs' hiring preference for tribal members. 417 U.S. 535, 552 (1974). But in

the decades since, the Supreme Court has recognized that *Mancari* established only a "limited exception" and that there would be instances in which tribal classifications operated impermissibly as a proxy for race—another proposition that Defendants refuse to acknowledge. *See Rice v. Cayetano*, 528 U.S. 495, 520 (2000); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("distinctions based on Indian or tribal status can" constitute "racial classifications subject to strict scrutiny").

ICWA's classifications cannot be sustained under *Mancari*'s "limited exception." Unlike the hiring preference in *Mancari*, ICWA's classification of "Indian child" sweeps in children who are *not* tribal members. To adopt Defendants' position, this Court would thus need to ***extend*** *Mancari* to justify a classification that on its face includes non-tribal members. Moreover, ICWA's "Indian child" definition has an explicit "biological" component, which the committee report explains was included because "[b]lood relationship is the very touchstone" of tribal membership. H.R. Rep. 95-1386, at 20. This strongly suggests that, in drawing the classification of "Indian child," Congress legislated with a racial purpose rather than a political one.

Nor can ICWA's classification of parental placements be justified as "political" under *Mancari*. *Mancari*'s classification of tribal members was deemed political because, in the "sui generis" context of the Bureau of Indian Affairs ("BIA"), its hiring preference could be said to advance tribal self-government by ensuring that tribal members had a role in BIA's governance of tribal affairs. 417 U.S. at 554. ICWA's placement preferences do not similarly advance tribes' self-government. Indeed, ICWA's preference for placement of a tribal-member child with members of *other* tribes cannot seriously be said to advance tribal government *at all*. Instead, it reflects Congress's clearly expressed racial objective that "Indian children" be routed to the "Indian community."

Recognizing that ICWA imposes race-based classifications will not undermine ICWA's salutary objective of preventing the break-up of Indian families, much less will it topple all of Title 25, as the government suggests. Congress can continue to grant tribal courts exclusive jurisdiction over child-placement proceedings involving children domiciled on tribal lands, as Section 1911(a) of ICWA provides. And regulations of "tribal Indians living on or near reservations" likewise can continue to be sustained under *Mancari*. 417 U.S. at 552; *see also Rice*, 528 U.S. at 519

(collecting cases). But "the limited exception of *Mancari*" should not be "extend[ed]" to the "new and larger dimension" of directly disadvantaging non-Indians in "critical state affairs," such as state-court proceedings. *Id.* at 520, 522. The notion of divergent legal standards applying based on eligibility for tribal membership, which itself depends on lineal "biological" descent, is flatly contrary to the Constitution's promise of equal protection of the laws.

But that is not ICWA's only constitutional flaw. As the State Plaintiffs elaborate, ICWA's regulation of state child-custody proceedings both exceeds Congress's enumerated powers and impermissibly commandeers the machinery of state government. Individual Plaintiffs join those arguments in full.

Additionally, the Department of Interior's regulations are unlawful. For 37 years, Interior disclaimed authority to regulate state courts and agencies in their implementation of ICWA. Interior's new claim of regulatory authority is not entitled to deference, and a straightforward reading of ICWA's text makes clear that Interior has no authority to regulate state courts and agencies in their administration of child-placement proceedings, because ICWA gives Interior no role in those proceedings. And,

in important respects, the substance of those regulations contradict the statute. For example, though ICWA does not specify a standard of proof to demonstrate "good cause" to depart from ICWA's placement preferences, Interior's new regulations further stack the deck against non-Indian families such as Individual Plaintiffs by requiring "clear-and-convincing evidence." But it is black-letter law that preponderance of the evidence is the default standard of proof in civil litigation, and statutory "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof." *Grogan v. Garner*, 498 U.S. 279, 286 (1991). Even if ICWA were constitutional, Interior's new regulations still should be vacated as contrary to law.

Finally, Defendants' attacks on Individual Plaintiffs' Article III standing have no merit. Individual Plaintiffs have been and continue to be concretely injured by ICWA and the Final Rule, and a judgment declaring them unconstitutional would reduce or eliminate the burdens they impose. Individual Plaintiffs thus have Article III standing for each of their claims.

The judgment of the district court should be affirmed.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. ICWA segregates "Indian children" into a separate legal regime that is designed to route Indian children to Indian families. Do ICWA's classifications of "Indian children" and their potential placements impermissibly discriminate on the basis of race?

2. ICWA dictates how state agencies and courts must regulate the placement of Indian children. Does ICWA exceed Congress's Article I power to "regulate Commerce with … Indian Tribes" or otherwise violate the anti-commandeering doctrine?

3. For 37 years after ICWA's enactment, Interior maintained that it lacked statutory authority to issue regulations that are binding on state agencies and state courts. In 2016, Interior issued regulations that, among other things, impose a heightened standard of proof of "good cause" that appears nowhere in the statute. Does Interior's 2016 rule exceed its statutory authority?

4. Individual Plaintiffs are being injured by ICWA and the 2016 Rule through their application in ongoing state-court proceedings. Do they have standing to challenge ICWA and its related regulations?

STATEMENT OF THE CASE

I. Statutory And Regulatory Framework

A. State Law and the Indian Child Welfare Act

The "regulation of domestic relations," including adoption, "has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). In child-placement proceedings, state law makes the "best interest of the child" the "primary consideration." *E.g.*, Tex. Fam. Code § 153.002; *In re Adoption of L.M.R.*, 884 N.E.2d 931, 938 (Ind. Ct. App. 2008). This "best interest of the child" framework, which places paramount importance on an individualized determination of a child's situation and needs, however, does not apply to "Indian children," as defined by the Indian Child Welfare Act of 1978 ("ICWA").

In the mid-1970s, Congress became concerned that "abusive child welfare practices" in certain states were "result[ing] in the separation of large numbers of Indian children from their families and tribes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). "Children"

were being "forcibly removed from Indian homes" by state officials "and sent off-reservation to live with white foster families." *Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction*: Hearings Before the Subcommittee on Indian Affairs, 93rd Cong. 95 (1974). Congress enacted ICWA to end those abuses, to protect "the rights of the Indian community and tribe in retaining its children in its society," *Holyfield*, 490 U.S. at 37, and to "preserve the cultural identity and heritage of Indian tribes," *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655 (2013). Accordingly, ICWA "establish[ed] a Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37.

To achieve this goal, however, Congress did not establish a focused remedy tailored to the identified problem. Instead, ICWA imposes an array of federal mandates on state courts and agencies in any child-welfare or placement proceeding involving an "Indian child," broadly defined by ICWA as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

25 U.S.C. § 1903(4). The state court must, "in the absence of good cause to the contrary," place the child with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *Id.* § 1915(a). Similar preferences apply to the foster care or pre-adoptive placement of an Indian child. *Id.* § 1915(b). These preferences apply throughout the United States, but *only* to children that do *not* reside on reservations: Indian tribes have "exclusive" jurisdiction over any proceeding involving an Indian child "who resides or is domiciled within the reservation," 25 U.S.C. § 1911(a), and ICWA's preference regime does not apply to those proceedings, 25 C.F.R. § 23.103.

ICWA does not define the term "good cause" or otherwise specify the circumstances sufficient to depart from Section 1915's placement preferences. The committee report explained that "good cause" was "designed to provide State courts with a degree of flexibility in determining the disposition of a placement proceeding involving an Indian child." S. Rep. No. 95-597, at 17 (1977).

B. The 1979 Guidelines

The year after ICWA was enacted, the BIA published *Guidelines for State Courts; Indian Child Custody Proceedings* ("1979 Guidelines"),

44 Fed. Reg. 67,584 (Nov. 26, 1979). These Guidelines were "not intended to have binding legislative effect." *Id.* at 67,584-85. BIA recognized Congress's "inten[t]" that the "Department [not] exercise supervisory control over state … courts," and that the "[p]rimary responsibility" for interpreting and implementing ICWA instead "rests with the courts that decide Indian child custody cases." *Id.*

In the years that followed, state courts often held that the "good cause" exception to ICWA's placement preferences required consideration of the child's best interests, including bonds or attachments formed with the child's foster family. *See*, *e.g.*, *In re Adoption of Baby Girl B.*, 67 P.3d 359, 370-75 (Okla. Civ. App. 2003). Other state courts, concerned by the racial discrimination that would arise from applying ICWA based solely on ancestral connection to an Indian tribe, applied the Act only when the child had some significant political or cultural connection to the tribe. *See*, *e.g.*, *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715-23 (Cal. Ct. App. 2001). This was known as the Existing Indian Family doctrine.

C. The 2016 Final Rule

In 2016, BIA asserted that it "no longer agree[d] with statements it made in 1979 suggesting that it lacks the authority to issue binding regulations," and promulgated rules to "promote[] nationwide uniformity." *Indian Child Welfare Act Proceedings* ("Final Rule"), 81 Fed. Reg. 38,778, 38,786, 38,779 (June 14, 2016) (codified at 25 C.F.R. pt. 23). The Final Rule "set[s] binding standards for Indian child-custody proceedings in State courts" that claim "force of law." *Id.* at 38,785.

The Final Rule sharply limits non-Indian parents' ability to adopt Indian children by restricting what may constitute "good cause" to depart from ICWA's placement preferences. Explaining that the "good cause" inquiry should *not* be a "'best interests' determination," 81 Fed. Reg. at 38,847, BIA's regulations dictate that a finding of "good cause" may be based only on five factors. 25 C.F.R. § 23.132(c). The Final Rule expressly forbids applying the Existing Indian Family doctrine, 81 Fed. Reg. at 38,802-03, and prohibits consideration of the child's cultural, social, religious, or political connection to a tribe. 25 C.F.R. § 23.103(c). The Final Rule also decrees that non-Indian prospective parents "bear the burden of proving *by clear and convincing evidence* that there is 'good

cause' to depart from the placement preferences." *Id*. § 23.132(b) (emphasis added). As BIA acknowledged, this heightened standard of proof "is not articulated in section 1915." 81 Fed. Reg. at 38,843.

II. Factual Background

A. The Brackeens, A.L.M., and Y.R.J.

A.L.M. was born in New Mexico in the fall of 2015. ROA.2683. His biological mother is a member of the Navajo Nation and his biological father is a member of the Cherokee Nation. ROA.2683. When A.L.M. was 10 months old, Texas officials removed him from his mother and placed him in the Brackeens' foster care. ROA.2684. A.L.M.'s biological parents voluntarily terminated their parental rights, and the Brackeens petitioned to adopt A.L.M., with the support of both biological parents and the child's guardian ad litem. ROA.2684-85. At A.L.M.'s adoption hearing, the Navajo Nation was designated A.L.M.'s tribe, and it identified an alternative placement for A.L.M. with non-family tribal members in New Mexico. ROA.2684-85. The state court ultimately concluded that the Brackeens had failed to establish good cause to depart from the placement preferences by clear and convincing evidence and, on that ground, denied their petition to adopt A.L.M. ROA.2707.

Days later, a Texas official notified the Brackeens that A.L.M. imminently would be removed from their care and transferred to the Navajo family. The Brackeens obtained an emergency stay of A.L.M.'s removal and filed this action. The Navajo Nation's proposed placement then withdrew, and the Texas court granted the Brackeens' adoption petition in January 2018. ROA.614-15.

ICWA nevertheless continues to hinder the Brackeens' attempts to foster and adopt children. The Brackeens now are engaged in Texas state court proceedings to adopt A.L.M.'s half-sister, Y.R.J., who was born in June 2018 to A.L.M.'s biological mother. ROA.4102-09; *In re: Y.R.J.*, No. 323-107644-18 (Tarrant County Dist. Ct.). The Navajo Nation opposes Y.R.J.'s placement with the Brackeens on the basis of ICWA's placement preferences. To demonstrate that Y.R.J. is an "Indian child," the Navajo Nation submitted a "Certificate of Navajo Indian Blood" certifying that she is of one-half degree "Navajo Indian Blood." Mot. for Judicial Notice, Ex. 1 (Feb. 25, 2019). Those proceedings are ongoing. *See In re Y.J., a child*, No. 02-19-235-CV, 2019 WL 6904728, at *1 (Tex. App.—Ft. Worth Dec. 19, 2019) (remanding for further proceedings).

B. The Cliffords and Child P.

After years of moving from one placement to another, Child P. was placed with Jason and Danielle Clifford in July 2016. ROA.480. She flourished in their care, and the Cliffords began the process of adoption, which was supported by Minnesota state officials and Child P.'s guardian ad litem. ROA.481, 2627.

In January 2017, the White Earth Band of Ojibwe, to which Child P.'s maternal grandmother, R.B., belongs, announced that Child P. had been enrolled as a member of the Band. ROA.480-81, 485, 488, 2659. Two years after she came to the Cliffords, Minnesota officials, on the basis of ICWA's placement preferences, removed Child P. and placed her with R.B. ROA.2628. Child P. "cr[ied] uncontrollably" the entire time of her removal. ROA.2629.

The state trial court concluded that the Cliffords did not "establish[] good cause" to deviate from ICWA's preferences by "clear and convincing evidence." ROA.2668-69. The Minnesota Court of Appeals affirmed. ROA.2676; *Matter of Welfare of Child of S.B.*, No. A19-0225, 2019 WL 6698079, at *6 (Minn. Ct. App. Dec. 9, 2019). Unless Child P. is formally adopted, the Cliffords may petition for a change in custody based on

changed circumstances. While the court has approved *placement* of the child, it has not yet approved the adoption, which is still subject to a post-placement assessment to determine the suitability of the placement. *See* Minn. Stat. § 259.53. The Cliffords have the right to petition for adoption again if the adoption is not approved. *See* Minn. Stat. § 260C.607.

C. The Librettis and Baby O.

Baby O. was born in Nevada in March 2016 to Plaintiff Altagracia Hernandez and E.R.G. ROA.2695. Ms. Hernandez decided to have Nick and Heather Libretti adopt Baby O., a decision that E.R.G. supported. ROA.2695-96. Baby O. went home with the Librettis three days after her birth. ROA.2689.

Although not a tribal member when Baby O. was born, E.R.G. is descended from members of the Ysleta del sur Pueblo Tribe, which intervened in Baby O.'s custody proceedings. ROA.478, 2692, 2696. The Tribe then identified dozens of potential Indian-family placements, and the Librettis' adoption of Baby O. was delayed as Nevada—because of the Final Rule's requirement that state agencies "diligent[ly] search" for ICWA-preferred placements, 25 C.F.R. § 23.132(c)(5)—methodically studied each placement. ROA.2692. After the Librettis joined this lawsuit, the

Tribe relented and the Librettis finalized their adoption of Baby O. on December 19, 2018. The adoption, however, remains open to collateral attack until at least December 2020. *See* 25 U.S.C. § 1913(d).

III. Procedural Background

Plaintiffs brought this action raising claims under the Constitution and the Administrative Procedure Act ("APA"). ROA.579. Defendants sought dismissal on various non-merits grounds, which the district court denied. ROA.3721-61. The parties then cross-moved for summary judgment, and the district court granted in part and denied in part Plaintiffs' motion. ROA.4008-55.

The district court held that ICWA classifies children according to their race and violates equal protection, ROA.4017, 4028-36, impermissibly commandeers the States' regulatory authority within the field of child custody and placement, and exceeds Congress's Article I powers, ROA.4021, 4036-40, 4040-45, 4053-54. The district court also held that the Final Rule violates the APA because it implements an unconstitutional statute and exceeds BIA's statutory authority. ROA.4045-53.

SUMMARY OF ARGUMENT

I. ICWA discriminates on the basis of race in violation of equal protection. That statute creates a parallel regime for adoption proceedings involving "Indian children" and replaces the traditional best-interests-of-the-child analysis with a racial hierarchy designed to ensure "Indian child[ren] … remain in the Indian community." *Holyfield*, 490 U.S. at 37. ICWA's sorting mechanism classifies both adoptive children and adoptive parents based on their biological ancestry. Given that "[a]ncestry can be a proxy for race," *Rice*, 528 U.S. at 514, and discrimination "solely because of … ancestry" "is racial discrimination," *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987), ICWA's adoption regime is subject to and fails strict scrutiny.

ICWA's placement preferences cannot be construed as a "political" classification under *Morton v. Mancari*, 417 U.S. 535 (1974). First, unlike the preferences in *Mancari*, ICWA regulates not just tribal members but also children who are merely *eligible* for membership. Second, Congress may regulate tribal Indians as a "political" group only when dealing with tribal land, tribal self-governance, or distributing benefits to Indian tribes. But ICWA does not regulate tribal self-government, nor does it

deal with the federal government's relationship with tribal lands or tribal benefits. Instead, ICWA regulates *States* in the operation of their own agencies and courts. And the Supreme Court has held that *Mancari*'s rule cannot be "extende[d]" to encompass "critical state affairs" such as state-court proceedings. *Rice v. Cayetano*, 528 U.S. 495, 520 (2000). Because ICWA's classifications have nothing to do with regulation of Indian tribes or their land, but instead regulate critical state affairs and apply to every child with the requisite quantum of "Indian blood," the classifications are not "political." They are racial.

Indeed, the racial nature of ICWA's classifications is made plain by ICWA's placement preferences, which relegate non-Indian families to fourth-tier status behind not just members of the child's family or Indian tribe, but also *any other Indian family*, regardless of tribe. ICWA's preference for *any* Indian family over *all* non-Indian families demonstrates beyond doubt that ICWA is suffused with a racial purpose, as demonstrated by the Supreme Court's recent observation that the preferences raise serious "equal protection concerns." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655-56 (2013).

ICWA's racial classifications cannot survive strict scrutiny. ICWA is not narrowly tailored to advance any interest identified in ICWA. Indeed, ICWA's command that States administer a parallel child-placement regime is so plainly at odds with the notion of equal protection of the laws that it fails even rational-basis review.

II. ICWA exceeds Congress's Article I authority to regulate commerce with the Indian tribes because children are not chattels in commerce and ICWA regulates state child-custody proceedings, not commercial interactions with Indian tribes. ICWA also unconstitutionally commandeers state courts and executive agencies to implement the federal policy of keeping Indian children with Indian families.

III. Even apart from ICWA's many constitutional flaws, the Final Rule violates the APA and was properly vacated. The Final Rule exceeds the agency's authority under ICWA and contradicts the understood meaning of the statutory text it purports to clarify.

IV. Finally, the district court and panel correctly concluded that Individual Plaintiffs have Article III standing to bring each of their

claims for relief. The United States now challenges only Plaintiffs' standing to challenge ICWA's provisions on equal-protection grounds. But Individual Plaintiffs each currently are injured by ICWA's provisions.

STANDARD OF REVIEW

"[T]he constitutionality of a federal statute" is reviewed "de novo," *United States v. Rasco*, 123 F.3d 222, 226 (5th Cir. 1997), as is the question whether an agency "determination was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" *Adkins v. Silverman*, 899 F.3d 395, 401 (5th Cir. 2018) (quoting 5 U.S.C. § 706(2)(A)). Standing is also reviewed de novo, but "[f]acts expressly or impliedly found by the district court in the course of determining jurisdiction are reviewed for clear error." *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 721 (5th Cir. 2007).

ARGUMENT

I. ICWA's Separate Child-Placement Regime For "Indian Children" Violates The Constitution's Guarantee Of Equal Protection Of The Laws.

When a child comes into contact with a state child-welfare system, one of the first—and, as the Individual Plaintiffs' cases vividly illustrate,

also one of the most consequential—things that happens is that a determination is made whether the child is an "Indian child" within the meaning of ICWA. If not, state law applies and the child's placement will be governed primarily by her best interests. If she is an "Indian child," however, ICWA dictates the application of an entirely different regime that treats a child as a "resource" of an Indian tribe, 25 U.S.C. § 1901(3), and is geared to place "Indian children" with the "Indian community," H.R. Rep. 95-1386, at 23 (1978). This is accomplished through Section 1915's placement preferences, which categorically prefer placement with any "other Indian famil[y]" over all non-Indian families such as Individual Plaintiffs. 25 U.S.C. § 1915(a).

ICWA thus poses two separate equal-protection issues: The first is its requirement that states maintain and administer a separate child-placement regime for "Indian children"—a requirement that appears today to be *sui generis* in a civil-justice system founded on the principle of equal protection of the laws. The second, nested within ICWA's parallel regime, is the placement preference accorded to Indian families over non-Indian families.

Defendants argue that ICWA's classifications of Indian children and Indian families are linked to membership in a federally recognized Indian tribe and that the classifications must be regarded as "political rather than racial in nature" and subjected only to rational basis review. *See Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). Generally speaking, a classification based on tribal status *is* a *racial* classification. *See St. Francis Coll. v. Al-Khazaraji*, 481 U.S. 604, 611, 613 (1987) (observing that definitions of "race" include "tribe" and holding that discrimination based on "ancestry or ethnic characteristics" "is racial discrimination"); *see also* 25 C.F.R. § 83.11(e) (establishing as prerequisite for federal recognition that a tribe's "membership consists of individuals who descend from a historical Indian tribe"); U.S. Supp. Br. 31 n.8 (acknowledging that federally recognized tribe must trace back to a "historical tribal entity"). But *Mancari* recognized that, while a classification based on membership in a federally recognized tribe could target "a discrete racial group," it also could identify "members of quasi-sovereign tribal entities" in furtherance of "a legitimate, non-racially based goal." 417 U.S. at 554. In *Mancari*, the Court concluded BIA's hiring preference for members of federally recognized tribes legitimately "further[ed] the cause of Indian

self-government" by providing "participation by the governed in the governing agency." *Id.* At the same time, the Court "rather pointed[ly]" noted, *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 18 (1st Cir. 2012), it would raise an "obviously more difficult question" if Congress were to establish "a blanket exemption for Indians from all civil service examinations," *Mancari*, 417 U.S. at 554. The key question here is whether ICWA's classifications are justified by *Mancari*, as Defendants urge.

Critically important to that analysis is the Supreme Court's decision in *Rice v. Cayetano*. 528 U.S. 495 (2000). *Rice* characterized *Mancari* as a "limited exception"—"confined to the authority of the BIA, an agency described as '*sui generis*'"—and declined to "extend" its exception to the "new and larger dimension" of a state "voting scheme that limits the electorate … to a class of tribal Indians." *Id.* at 520. In *Rice*, Hawaii and the United States urged that Native Hawaiians were on the same footing as federally recognized Indian tribes and argued that Hawaii's special voting regime "fit[] the model of *Mancari*," because the regime was designed to "afford Hawaiians a measure of self-governance." *Id.* The Court assumed it could "treat Hawaiians or native Hawaiians as tribes." *Id.* at 519; *see also id.* at 524 (Breyer, J., concurring in result)

(majority "assumes without deciding that the State could 'treat Hawaiians or Native Hawaiians as tribes'"). But the Court held it "does not follow from *Mancari* … that Congress may authorize 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.* at 520. Rather than "the internal affair of a quasi-sovereign," the elections at issue in *Rice* "are the affair of the State of Hawaii." *Id.*; *see id.* at 522 ("the elections for OHA trustee are elections of the State, not of a separate quasi sovereign"). "To extend *Mancari* to this context," the Court concluded, "would be to permit a State, ***by racial classification***, to fence out whole classes of its citizens from decisionmaking in critical state affairs." *Id.* (emphasis added).[1]

[1] The United States argues that the classification at issue in *Rice* "is not comparable to ICWA's *federal* protections based on a direct, present-day nexus to a recognized tribe," U.S. Supp. Br. 31, but the Court in *Rice* assumed that Native Hawaiians could be treated as a federally recognized tribe under *Mancari*. *See* 528 U.S. at 519. Indeed, the United States in *Rice* urged precisely that. U.S. Amicus Br. 22, *Rice*, 528 U.S. 495, 1999 WL 569475 ("The classification is ... political in the same sense as *Mancari*."); *id*. at 30 ("Because the OHA election law is authorized by Congress, it is subject to the same standard of review as legislation enacted by Congress that singles out a distinct indigenous group for favorable treatment.").

The United States claims that the "limit on *Mancari* articulated in *Rice* … simply has no relevance to ICWA." U.S. Supp. Br. 25. But *Rice* establishes beyond doubt that tribal classifications can operate as "racial classifications." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("As *Rice* illustrates, an 'Indian tribe' may be classified as a 'racial group' in particular instances," and "distinctions based on Indian or tribal status can" constitute "racial classifications subject to strict scrutiny."). Defendants all fail to grapple with that fundamental proposition, but this Court cannot ignore it. Nor can it ignore *Rice*'s holding that the classification there—assumed to be a tribal classification in the same sense as in *Mancari*—was a "racial classification" because it operated in an election that is an "affair of the State" rather than an internal affair of the tribe. Defendants' refrain that "*Mancari* controls" this case (Tribes Supp. Br. 25) disregards the holding and reasoning of both *Mancari* and *Rice*.

Under *Rice*, because both of ICWA's classifications operate on "critical state affairs," 528 U.S. at 522, they cannot be characterized as political in nature. Moreover, like the classification in *Rice*, the text of ICWA's classifications and contemporaneous legislative history demonstrate that Congress was identifying racial groups, rather than members of quasi-

sovereign entities. ICWA's classifications are subject to strict scrutiny, which Defendants cannot satisfy. ICWA's parallel child-placement regime therefore is unconstitutional. Recognizing the unconstitutionality of ICWA's parallel state-court child placement regime, however, does not call into question Congress's power to grant tribal courts exclusive jurisdiction over children domiciled on Indian land, nor does it call into question other provisions of Title 25. Just as *Rice* did not spell doom for the dozens of statutes that single out Native Hawaiians for special treatment, Congress may continue to "enact[] legislation dedicated to [Indian tribes'] circumstances and needs." *Rice*, 528 U.S. at 519.

A. ICWA's Classification of "Indian Children" Cannot Be Characterized As "Political."

ICWA defines "Indian child" capaciously as any minor that is "either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). For two reasons, ICWA's definition of "Indian child" cannot be characterized as "political" under *Mancari*. First, and most obviously, it is not limited to members of a federally recognized tribe and thus does not even arguably fit within *Mancari*. Instead it expressly sweeps in biologically related non-members. ICWA's definition thus is

expressly based on lineal descent, which is to say it is based on race. Second, even if the definition were limited to tribal members, it still would operate in the "state affair" of state-court proceedings, rather than tribes' internal affairs. *Rice* makes clear that *Mancari*'s "limited exception" cannot be extended to this "new and larger dimension." 528 U.S. at 520. Indeed, the very notion of a parallel civil-justice program for a particular group—even without a suspect classification—is flatly contrary to the concept of equal protection of the laws.[2]

1. The hiring preference in *Mancari* "applie[d] only to members of 'federally recognized' tribes." 417 U.S. at 553 n.24. ICWA's definition of "Indian child" goes beyond tribal members to include also non-member children who are eligible for membership in a tribe and "the biological child of a member of an Indian tribe." 25 U.S.C. §1903(4)(b). That

[2] The United States claims that "Plaintiffs did not ask the district court to declare the definition of 'Indian child' unconstitutional," U.S. Supp. Br. 28, but Individual Plaintiffs challenged Sections 1913(d), 1914, and 1915 of ICWA on the basis that their classifications of "Indian child" impermissibly discriminate on the basis of race. *See*, *e.g.*, ROA.580; ROA.591; ROA.609; ROA.636; ROA.651-52. Those provisions, of course, incorporate ICWA's definition of "Indian child" in Section 1903(4).

ICWA's "Indian child" definition encompasses non-members is significant for two reasons.

First, and most obviously, it means that ICWA's "Indian child" classification does not even arguably fit within *Mancari*'s "limited exception" (*Rice*, 528 U.S. at 520) for certain classifications that "appl[y] only to members of 'federally recognized' tribes" (*Mancari*, 417 U.S. at 553 n.24). Indeed, because ICWA's class of Indian children are not all "members of [a] quasi-sovereign entity," *Rice*, 528 U.S. at 520—*i.e.*, the *polity*—the classification cannot properly be characterized as "political." For this Court to deem ICWA's "Indian child" classification political thus necessarily requires an extension of *Mancari*'s reasoning, even though *Rice* rejected calls to "extend" it. *Id*.

Defendants suggest that ICWA's inclusion of non-members in the definition of "Indian child" is legally insignificant, arguing that "imputing a biological parent's political affiliation to a child" is no different from "extend[ing] United States citizenship to children who are born abroad to United States citizens." U.S. Supp. Br. 29. This argument lacks merit for two reasons: First, while U.S. law provides for citizenship for certain children born abroad, *see* 8 U.S.C. §§ 1431, 1433, it does not anywhere

allow a non-citizen eligible for citizenship to be treated as if she were a citizen, which is what ICWA does. Second, if tribal membership is to be analogized to nationality, then ICWA's "Indian child" definition would be based on "national origin" and be subject to strict scrutiny for that reason. *Seoane v. Ortho Pharm., Inc.*, 660 F.2d 146, 149 (5th Cir. 1981); *see also Hernandez v. Texas*, 347 U.S. 475, 479 (1954).

Noting that "[m]embership in an Indian tribe is generally not conferred automatically upon birth," the United States also argues that the second prong of ICWA's "Indian child" definition operates as a proxy for "the child's not-yet-formalized tribal affiliation." U.S. Supp. Br. 30. But quite unlike U.S. law, which requires a naturalization application on behalf of a child born abroad to be made by a person with "legal and physical custody" of the child, 8 U.S.C. § 1433(a)(4), ICWA's definition applies even in spite of both parents' express wishes *not* to enroll their child in a tribe. This allows Indian tribes to "claim[]" any "children who are related by blood to such a tribe … solely on the basis of their biological heritage." *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527 (Cal. Ct. App. 1996). This is exactly what happened to Baby O. Plaintiff Altagracia Hernandez, who is not Native American, had no intention of enrolling her in the tribe.

ROA.2696. Nevertheless, ICWA applied to Baby O. and delayed Hernandez's adoption plan for months, all because the baby's non-custodial father happened to become a tribal member who, even if he had the right under tribal law to enroll Baby O., made no attempt to do so and instead supported her adoption by non-members. ROA.617; ROA.2692; ROA.2696. *See also Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 561 (S.C. 2012) (applying ICWA based on non-custodial parent's membership in tribe to frustrate non-Indian custodial mother's adoption plan), *rev'd*, 570 U.S. 637 (2013). ICWA's inclusion of non-members cannot be justified as reaching only inchoate enrollments.[3]

Second, the definition's limitation of eligible children to those that are "biological" children of tribal members is an explicit lineal descent requirement and demonstrates a clear tie to race. Congress could have

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[3] The Tribes deny that a child may "'automatically' become[] a member of the Navajo or Cherokee Nation within the meaning of ICWA," explaining that "applications may automatically be approved … but are still required." Tribes Supp. Br. 35. What the Tribes do not say is that such applications need not be made by a custodial parent and, indeed, can be made by the Tribes themselves, even over the objection of the custodial parent, and even if neither parent is a tribal member; this apparently is what happened to Child P., who, lacking a biological parent who is a tribal member, needed to be enrolled in a Tribe for ICWA to apply. ROA.627; ROA.2669.

included in its definition of "Indian child" any child eligible for membership in a tribe—including a non-biological child of a tribal member—but the committee that drafted the legislation rejected that approach, choosing instead to include only those that are the "*biological*" children of tribal members. It explained that decision as follows: "Blood relationship is the very touchstone of a person's right to share in the cultural and property benefits of an Indian tribe." H.R. Rep. 95-1386, at 20. That explodes Defendants' myth that ICWA's "Indian child" definition sought to reach those with "not-yet-formalized" enrollments. U.S. Supp. Br. 30. Congress limited ICWA's application to children of the same race as an enrolled member.

This Court should not extend *Mancari* to approve a classification that includes members of federally recognized Indian tribes and their lineal descendants. Neither the Supreme Court nor any Court of Appeals has ever extended *Mancari* in any remotely analogous way. And with good reason, because the "ancestral inquiry" that such an extension would permit "implicates the same grave concerns as a classification specifying a particular race by name." *Rice*, 528 U.S. at 517.

2. Even if ICWA's definition of "Indian child" were limited to tribal members, it still would not be properly regarded as "political" because the classification operates on state affairs rather than those internal to the tribe. Just as it would have been unconstitutional for Congress to "authorize a State to establish a voting scheme" limited to tribal Indians, *Rice*, 528 U.S. at 520, so, too, is it unconstitutional for Congress to command States to administer a child-placement system specific to tribal Indians.

Mancari concluded that BIA's hiring preference was not a "racial preference" because it was "designed to further the cause of Indian self-government" by providing for "participation by the governed in the governing agency," analogizing the preference to a requirement that a legislator reside in the district or State that he or she represents. 417 U.S. at 553-54. The voting scheme in *Rice* similarly "afford[ed] Hawaiians a measure of self-governance" by ensuring that the officials were chosen by the constituents they were being elected to serve. *Rice*, 528 U.S. at 520. The voting scheme thus "fit[] the model of *Mancari*," but the Supreme Court nevertheless struck it down, concluding that *Mancari* could not be extended to state elections. *Id.*

The state child-placement proceedings governed by ICWA, of course, are not "the internal affair of a quasi sovereign." *Rice*, 528 U.S. at 520. State-court proceedings, like the elections at issue in *Rice*, indisputably are "the affair of the State." *Id.* But quite unlike the elections in *Rice*, the state-court proceedings governed by ICWA do not even remotely "fit[] the model of *Mancari*," in that they do not afford the subject of the classification—"Indian children"—any "measure of self-governance." *Id.* The United States argues that ICWA does promote tribal self-government "by promoting continued relationships between tribes and the[ir] future members," U.S. Supp. Br. 21, but that is quite far removed from the selection of persons actually involved in governance, which was at issue in both *Mancari* and *Rice*. Thus, even if one viewed ICWA as advancing tribal self-governance in some roundabout, indirect way, approving ICWA's classification of "Indian children" would still require a greater extension of *Mancari* than was rejected by the Supreme Court in *Rice*.[4]

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[4] Echoing the panel opinion, the Tribes attempt to distinguish *Rice* on the surprising basis that ICWA does not "exclude classes of individuals

This Court should not take that step. Defendants have identified no historical analogue for ICWA's apparently unique requirement that States administer a separate civil-justice system for a particular class of persons identified by a common genetic heritage. That itself is a "most telling indication" of a "severe constitutional problem." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010). Indeed, the very notion of a single jurisdiction maintaining separate systems of justice for particular classes of people is antithetical to the concept of equal protection of the laws.

3. Defendants' remaining arguments lack merit. The Tribes contend (at 26) that ICWA's ancestral classifications cannot be a proxy for race because ICWA "does not apply to all children who are racially Indian, and not all children to whom it applies are racially Indian." But

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from critical state affairs." Tribes Supp. Br. 33; *see also Rice*, 528 U.S. at 522 ("To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs."). If the Tribes' point is that state-court proceedings are not adequately "critical," that is clearly incorrect. Such proceedings implicate and vindicate state interests "of the highest order." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). If the point instead is that Indian children are not being "exclude[d]," that also is wrong. Indian children are being excluded from the generally applicable child-placement regime under state law that looks primarily to the best interests of those children as individuals.

the government unsuccessfully made the very same underinclusive/overinclusive argument in *Rice*. There, the government contended that the classification of "native Hawaiians" was not racial because ethnic Polynesians whose ancestors did not reside in the island in 1778 did not qualify to vote, while non-ethnic Polynesians whose ancestors had migrated to the island by 1778 did qualify. 528 U.S. at 514. The Court squarely "reject[ed] this line of argument." *Id.* *Rice* establishes that "a class defined by ancestry" is not race-neutral simply because it is slightly overinclusive, or "does not include all members of the race." *Id.* at 516-17.

Defendants also claim that this Court's decision in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), forecloses Plaintiffs' argument that ICWA's classifications are racial. That decision, of course, pre-dates the Supreme Court's decision in *Rice*, and it is not binding on the en banc court in any event. Yet even on its own terms, the exemption at issue there was "political" only because the church's "membership [was] limited to Native American members of federally recognized tribes." *Id.* at 1216. ICWA's classification of "Indian children" is not similarly limited. Moreover, in *Peyote Way*, this Court found that "most" of the church's members lived on a reservation, and

each chapter was "incorporated" by a tribe. *Id.* at 1212, 1215. The exemption thus possibly could be justified as a regulation of tribes' internal affairs, rather than an "affair of the State." *Rice*, 528 U.S. at 520. ICWA's classification of "Indian child," on the other hand, operates exclusively in state-court proceedings, which undeniably are an "affair of the State." ICWA's "Indian child" classification accordingly cannot, consistent with *Rice*, be characterized as a political classification.

Finally, Defendants criticize the district court's reliance on the Supreme Court's observation in *Adoptive Couple* that ICWA raises "equal protection concerns," 570 U.S. at 656, with the Tribes claiming the Supreme Court's most recent decision on ICWA "has no applicability to this lawsuit." Tribes Br. 36. In *Adoptive Couple*, the Court observed that allowing a tribal member to invoke ICWA "to override the mother's decision and the child's best interests" "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian" and thus "raise equal protection concerns." 570 U.S. at 655-56. The Court concluded that ICWA did not allow the tribal member in that case—the noncustodial birth father who had relinquished his parental rights—to invoke ICWA, and thus the constitutional concerns

were avoided. *Id.* at 656. But those equal-protection concerns are front and center here because what the Supreme Court hypothesized is precisely what happened to A.L.M. and Baby O., and now is happening to Y.R.J.—a mother's wishes being overridden by a non-custodial tribal member's invocation of ICWA. And ICWA allows it to happen solely because these children have a biological parent who is a tribal member. When ICWA was being debated in Congress, the Department of Justice itself cautioned that applying the statute based on "the blood connection between the child and a biological but noncustodial" tribal member "may constitute racial discrimination." H.R. Rep. 95-1386, at 39; *see id.* at 37. The Supreme Court's warning of "equal protection concerns" raised by ICWA cannot be now so easily dismissed.[5]

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[5] The United States thus is wrong to assert that the Supreme Court's flagging of "equal protection concerns" arises from "facts not presented here." U.S. Supp. Br. 26. The government's further suggestion that the Court meant only that such an application of ICWA might fail rational-basis scrutiny under *Mancari* is irreconcilable with the government's contention (at 32) that ICWA's placement regime rationally supports the "continued existence and integrity of Indian tribes." If that regime satisfies equal protection, it is difficult to see what "concerns" would have been raised by ICWA's overriding of a "mother's decision and a child's best interests." *Adoptive Couple*, 570 U.S. at 655.

B. ICWA's Placement Preferences Do Not Draw Political Classifications.

Six years after ICWA's enactment, the Supreme Court made clear that state courts may not use racial considerations in child-custody determinations. *See Palmore*, 466 U.S. at 433-34. Eleven years later, the Court held that a contracting preference for, among others, "Native Americans," was subject to "strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 207-08, 227 (1995). It follows that Congress could not require the States to place Native American children with Native American families without satisfying strict scrutiny. Congress cannot, in furtherance of a stated policy of placing "Indian children" within the "Indian community," H.R. Rep. 95-1386, at 23, evade strict scrutiny simply by limiting the preferred class to "members of federally recognized Tribes." Still, then, persons (like Individual Plaintiffs here) that are not "'[Ind]ian' in terms of the statute," *Rice*, 528 U.S. at 499, are denied the "[]ability to compete on an equal footing" in the adoption process. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). And the reason Individual Plaintiffs cannot possibly get on equal footing is that they do not meet the blood-quantum

or ancestral requirements for membership in the preferred federally recognized tribes. That is, Individual Plaintiffs are the wrong *race*. Thus, under ICWA, "the race, not the person, dictates" the placement. *Palmore*, 466 U.S. at 432. *Palmore* forbids that result.

Section 1915's placement preferences for members of federally recognized Indian tribes cannot be regarded as a political classification. Because every federally recognized Indian tribe *must* have a lineal-descent membership requirement, *see* 25 C.F.R. § 83.11(e), Individual Plaintiffs are precluded on the basis of *their race* from joining a federally recognized tribe's political unit. *See also* Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 Colum. J. Gender & L. 1, 27 (2008) ("[T]he context of tribal rules that condition membership on the existence of tribal blood … shows that biology, above all else, makes a person Indian under ICWA."). For example, had the Librettis attempted to accelerate Baby O.'s adoption by seeking membership in the Yselta del Sur Pueblo Tribe, they would have been rejected not on the basis of any political disagreement, but instead because of the Tribe's requirement of "Indian blood." *See* Pub. L. No. 112-157, 126 Stat. 1213 (2012).

This points to why it is problematic for a tribal classification to operate on an "affair of the State," but less so when it is applied with respect to "the internal affair of a quasi sovereign." *Rice*, 528 U.S. at 520. When a tribal classification is applied in a state affair, it generally affects non-Indians who are racially precluded from joining the tribe, possibly disadvantaging them. On the other hand, when a tribal classification is applied only to a tribe's internal affairs, it generally will affect only members of the tribe and impose no direct harm on non-Indians. Legislation according "'special treatment [to] a constituency of tribal Indians'" "dedicated to their circumstances and needs" is less problematic in that scenario because non-Indians are disadvantaged, if at all, only in a very attenuated and indirect way. *Rice*, 528 U.S. at 519 (quoting *Mancari*, 417 U.S. at 552). And it is precisely because BIA's hiring preference was not strictly an internal affair of a tribe that *Rice* recognized that *Mancari* "presented [a] somewhat different issue" that resulted in a "limited exception," "confined to the authority of the BIA, an agency described as '*sui generis*.'" 528 U.S. at 519-20.

Like the classification in *Rice*, ICWA's placement preferences operate in an "affair of the State," 528 U.S. at 520, and indeed, one that implicates state interests "of the highest order," *Palmore*, 466 U.S. at 433. And there can be no doubt that ICWA's placement preferences substantially disadvantage non-Indians in their efforts to obtain placement of Indian children. At the same time, ICWA's placement preferences do not regulate the internal affairs of tribes at all. Indeed, while ICWA grants tribal courts "exclusive" jurisdiction whenever an Indian child "resides or is domiciled within the reservation," 25 U.S.C. § 1911(a), ICWA's preferences do not apply in tribal court proceedings, 25 C.F.R. § 23.103(b)(1). ICWA's preferences apply *only* in state-court proceedings. Under *Rice*, when a tribal classification operates on "critical state affairs" to the direct detriment of non-Indians, it is properly regarded as a "racial classification." 528 U.S. at 522.

That conclusion is bolstered here by ICWA's third placement preference, which prefers *every* non-Indian placement over *any* "other Indian famil[y]," 25 U.S.C. § 1915(a)(3), which is to say any family from any one of 573 federally recognized tribes, *Indian Entities Recognized*, 83 Fed.

Reg. 34,863 (July 23, 2018). While ICWA cites an interest in safeguarding a tribe's children as a "resource … vital to the continued existence and integrity of Indian tribes," 25 U.S.C. § 1901(3), placing a tribal child with a *different* Indian tribe does not even conceivably advance the continued existence and integrity of the child's tribe. Indeed, ICWA's "any Indian" placement preferences treat Indian tribes as fungible, "regardless of cultural, political, economic, or religious differences between" them. Maldonado, *supra*, at 25. This demonstrates that when Congress invoked a policy of keeping Indian children "in the Indian community," H.R. Rep. 95-1386, at 23, it was referring to the "Indian community" as a *race*. Like the descendancy requirement in *Rice*, ICWA uses tribal membership "as a racial definition and for a racial purpose." *Rice*, 528 U.S. at 515. Against that background, ICWA's placement preferences cannot be regarded as race-neutral "political classifications." *Rice* establishes that tribal membership can be a proxy for race, and "[i]t is that proxy here." *Id.* at 514.[6]

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[6] The government asserts that "the third adoptive preference was not properly before the court," U.S. Supp. Br. 35-36, but that misconceives

C. ICWA's Placement Preferences And Collateral-Attack Provisions Cannot Survive Strict Scrutiny, Or Even Rational-Basis Review.

Defendants claim that ICWA's race-based classifications survive strict scrutiny. Because they did not make this argument below, it is waived. *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007); *see also* ROA.4034 (government did not "attempt to prove" a compelling interest) (emphasis omitted). The argument also lacks merit.

Under strict scrutiny, the government's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). And the problem Congress sought to remedy cannot be historical; it must persist in the present. *Shelby County v. Holder*, 570 U.S. 529, 553 (2013); *United States v. Cannon*, 750 F.3d 492, 510 (5th Cir. 2014) (Elrod, J., concurring).

Individual Plaintiffs' equal-protection challenge. Plaintiffs challenge the entirety of ICWA's placement preferences, because that regime—requiring them to prove "good cause" to overcome *any* preferred placement—disadvantages them vis-à-vis state law on the basis of their race and the race of the children they are attempting to adopt. That there has not yet been an "any Indian" placement proposed is of no moment. The existence of a preference for any "Indian family" establishes that ICWA's *entire* placement preference regime is based on race.

When Congress enacted ICWA, it asserted interests in safeguarding "the continued existence and integrity of Indian tribes" and "protecting Indian children." 25 U.S.C. § 1901(3). Assuming that these interests remain salient—Defendants have not suggested that any tribe is today endangered, and they offer no basis to believe States today would return to the abuses of 50 years ago—ICWA's placement preferences and collateral-attack provision fail because they are not remotely tailored to Congress's identified interests. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

On the one hand, Section 1915's placement preferences have no application at all to children who reside on Indian land, 25 C.F.R. § 23.103(b) ("ICWA does not apply to: (1) A Tribal court proceeding."); so they are massively underinclusive with respect to the stated objective of protecting Indian children. On the other hand, in the state proceedings where they do apply, they accord a preference to members of *other* tribes, so it poorly fits the objective of keeping children within their tribes. Because an Indian family "from anywhere in the country enjoys an absolute preference over other citizens based solely on their race," it is "obvious that [the] program is not narrowly tailored." *City of Richmond*

v. J.A. Croson Co., 488 U.S. 469, 508 (1989). Even more so, here, because there is no evidence that, prior to enacting ICWA, Congress "considered [race-neutral] alternatives" such as using the Spending Power to address deficiencies in state child-placement processes in a race-neutral manner. *Parents Involved*, 551 U.S. at 735; *see also Walker v. City of Mesquite*, 169 F.3d 973, 983 (5th Cir. 1999) (a "race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives—particularly race neutral ones—have been considered and tried").

Defendants make no effort to show that Section 1913(d)'s Section 1914's collateral-attack provisions are narrowly tailored to ICWA's asserted interests, and they are not. Indeed, there is no evidence that even suggests that the collateral-attack period now afforded by the laws of the various States is insufficient to protect Indian children from fraudulent adoptions. Sections 1913(d) and 1914 cannot satisfy strict scrutiny.

Finally, ICWA's placement preferences and collateral-attack provision fail even Defendants' preferred standard of review. ICWA's mandate that States administer a segregated child-placement regime—with the express purpose of delivering different results—is antithetical to the very

concept of equal protection of the laws. And that is so even if the segregation is based on a non-suspect classification. The ends Congress identified were undeniably important, but the means Congress chose to effectuate them are so deeply at odds with, and corrosive of, the concept of even-handed administration of civil-justice, that they cannot be regarded as a rational choice.[7]

D. ICWA's Unconstitutionality Does Not Doom Efforts To Protect Indian Families Or Any Other Part Of Title 25.

The Tribes argue (at 1) that Individual Plaintiffs' arguments would "reverse th[e] progress" ICWA has made addressing the problem, salient in 1978, of Indian families being "broken up by the removal, often unwarranted, of their children." 25 U.S.C. § 1901(4). The United States goes

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[7] The government (at 14, 36) makes much of the fact that Plaintiffs have made a facial challenge to ICWA, but that does not affect the lawfulness of the policy. *Ramos v. Town of Vernon*, 353 F.3d 171, 174 n.1 (2d Cir. 2003). "[T]he distinction between facial and as-applied challenges" goes only "to the breadth of the remedy employed by the Court." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). And when a provision impermissibly discriminates on the basis of race, it is invalid on its face. *See Croson*, 488 U.S. at 509 (plurality) (striking down racial preference even though a preference could have been granted to "identified victims" of past racial discrimination); *id.* at 526-27 (Scalia, J., concurring in the judgment) (same). And in any event, plaintiffs have also challenged ICWA and the Final Rule as applied to them. *See* ROA.511-15.

even further, saying (at 23-24) that accepting Plaintiffs' equal-protection argument would effectively erase all of Title 25. Neither statement is true. Recognizing that ICWA's classifications of "Indian child" and "Indian family" are racial when they operate in state proceedings will leave Congress ample room to continue to take action to protect Indian families, and certainly will not tear down all of Title 25.

Critically, the holding that Individual Plaintiffs urge would leave intact Congress's power to provide that tribal members domiciled on Indian lands are subject to the exclusive jurisdiction of tribal courts. *Cf.* 25 U.S.C. § 1911(a). There, a classification of tribal members would operate only on the tribes' internal affairs, and thus would fit comfortably in the heartland of the cases that *Rice* described approvingly as addressing "legislation dedicated to [tribes'] circumstances and needs." 528 U.S. at 519 (citing, *inter alia*, *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont.*, 484 U.S. 382, 390-91 (1976) (per curiam) (exclusive tribal-court jurisdiction over tribal adoptions)). This provision alone would ensure that the worst abuses catalogued in ICWA's legislative history, involving state social workers removing children from existing families residing on Indian lands, would not be repeated. And Congress certainly can deploy

its vast Spending Power in various ways to ensure that rights and interests of Indian children and parents are protected, *see* 25 U.S.C. § 1912(b) (providing for payment of counsel fees and expenses), and to fund service programs for Indian families, *id.* §§ 1931-1933. And of course Congress could take any number of steps to improve outcomes for vulnerable families on a race-neutral basis. A holding that ICWA's placement preferences are unconstitutional thus certainly would not "reverse" "progress" made since 1978, and would leave Congress with numerous tools to further protect Indian families.

Nor would adopting Plaintiffs' equal-protection argument erase all—or even any other part—of Title 25. The Ninth Circuit has suggested that *Mancari* applies "only" to "statutes that affect uniquely Indian interests," such as "preferences or disabilities directly promoting Indian interests in self-government" or legislation "deal[ing] with life in the immediate vicinity of Indian land." *Williams v. Babbitt*, 115 F.3d 657, 664-65 (9th Cir. 1997). The latter limitation is derived from *Mancari* itself, which made the point that, at least as of that time, "[l]iterally every piece of legislation dealing with Indian tribes and reservations … singled out for special treatment a constituency of tribal Indians *living on or near*

reservations." 417 U.S. at 552 (emphasis added); *see also Morton v. Ruiz*, 415 U.S. 199, 230-31 (1974) (approving federal benefits for Indians "on or near" reservations). Indeed, all of the Supreme Court cases cited by Defendants fit comfortably within the categories identified by the Ninth Circuit in *Williams*. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (implementing treaty for preferential fishing rights to "Indian tribes"); *Fisher*, 424 U.S. at 385, 390-91 (exclusive tribal jurisdiction "over adoptions involving tribal members residing on the reservation"); *United States v. Antelope*, 430 U.S. 641, 645-47 & n.7 (1977) (federal jurisdiction over crimes committed by "enrolled members," "within the confines of Indian country"). The plain fact is "the vast majority of statutes by which Congress fulfills its obligations to the Indian tribes … regulate[] activities only on Indian lands." *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 734 (9th Cir. 2003).

But this Court need not go as far as the Ninth Circuit—or even now attempt to identify the precise point at which a tribal classification ceases to be political. To resolve this case, it is sufficient to hold that a tribal classification is not political when it operates on "critical state affairs,"

such as state-court proceedings, to the detriment of non-Indians. *Rice*, 528 U.S. at 522. That holding would implicate no other provision of Title 25 because ICWA's requirement that States administer a parallel child-placement regime in which non-Indians are pervasively disadvantaged is apparently unique in the entire U.S. Code. Indeed, none of the handful of provisions of Title 25 identified by the United States even remotely implicates state affairs in the manner of ICWA. Whether Congress "makes special healthcare benefits" or "economic development loans" to off-reservation Indians, U.S. Supp. Br. 24, simply does not impose burdens on non-Indians as ICWA does, nor do they operate in an area, such as (especially) court proceedings, where all are supposed to stand equally before the law.

II. ICWA Exceeds Congress's Enumerated Powers and Unconstitutionally Commandeers States.

The placement preferences are also unconstitutional because they exceed Congress's enumerated powers, trenching on "an area that long has been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). And even if Congress had the power to regulate the placement of Indian children, it could not exercise that

power by directing state courts in the administration of state-law causes of action.

First, although Congress has authority "[t]o regulate *Commerce* … with the Indian *tribes*," U.S. Const. Art. I, § 8, cl. 3 (emphases added), ICWA's placement preferences do not regulate "commerce"—that is, "channels," "instrumentalities," and activities with a "substantial relation" to trade with the Indians, *United States v. Bird*, 124 F.3d 667, 673 (5th Cir. 1997); *see also* Robert Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201, 210, 215 (2007). Instead, they regulate state-court proceedings involving children. State-court proceedings are not chattels or objects of commerce under the Constitution, and neither, certainly, are children. *Cf.* U.S. Const. amend. XIII.

Moreover, ICWA does not regulate commerce with Indian "*tribes*"; rather, the placement preferences govern relations between "Indian children" (including non-tribal-members) outside of reservations and prospective adoptive parents. But the Indian Commerce Clause "does not give Congress the power to regulate commerce with all Indian *persons* any more than the Foreign Commerce Clause gives Congress the power

to regulate commerce with all foreign nationals traveling within the United States." *Adoptive Couple*, 570 U.S. at 660 (Thomas, J., concurring). Because ICWA "involve[s] neither 'commerce' nor 'Indian tribes,' there is simply no constitutional basis for Congress's assertion of authority over such proceedings." *Id*. As the DOJ explained, while imposing requirements "on State courts exercising jurisdiction over reservation Indians" "might" be permissible, the "Federal interest in the off-reservation context is so attenuated"—and Congress' power over "nonreservation Indian children and parents" so limited—that Congress cannot "override the significant State interest in regulating ... what is a traditionally State matter." H.R. Rep. 95-1386, at 39-40 (emphases added). Indeed, the "regulation of domestic relations" is the "virtually exclusive province of the States," *Sosna*, 419 U.S. at 404, and Congress lacks regulatory power in this sphere, under either its authority over commerce "among the several States," or over commerce "with the Indian Tribes." *See* U.S. Const. Art. I, § 8, cl. 3.

Additionally, ICWA unconstitutionally commandeers states by dictating to state courts the substantive law to apply in *state-law* causes of

action. That is tantamount to Congress rewriting state law, which it cannot do. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1476-78 (2018). *Testa v. Katt* holds that state courts cannot "deny jurisdiction" to hear *federal causes of action*. 330 U.S. 386, 394 (1947). But ICWA's placement preferences do not create a cause of action. Indeed, there is no federal jurisdiction over "child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). ICWA's placement preferences instead rewrite the substantive standards to be applied in state-law causes of action, which has the same effect as Congress legislating state law. The forcible application of Congress's own placement preferences to state-law adoption petitions unlawfully "reduc[es]" state courts "to puppets of a ventriloquist Congress." *Printz v. United States*, 521 U.S. 898, 928 (1997). If Congress can do this, it could prescribe sentences that state courts must apply to state-law crimes. The anti-commandeering doctrine does not permit Congress to wrest control of *state* law.

ICWA's placement preferences cannot be justified as a form of federal preemption because they are not "best read as [a law] that regulates private actors." *Murphy*, 138 S. Ct. at 1479-80. Section 1915 does not

"impose[] restrictions or confer[] rights on private actors." On the contrary, it repeatedly dictates what *state agencies* and *courts* "shall" do to effectuate child placements. *See*, *e.g.*, 25 U.S.C. § 1915 ("shall be given"; "shall be placed"; "shall follow"; "shall be maintained"). That is not a valid form of preemption.

For these reasons and all the reasons given in the States' brief, *see* Fed. R. App. P. 28(i), Congress lacked the constitutional authority to enact ICWA.

III. The Final Rule Violates the APA.

Because of ICWA's numerous constitutional defects, the district court correctly held that the Final Rule must be set aside as "arbitrary and capricious" and "contrary to law." ROA.4046, 4052. The BIA lacked statutory authority to enact the regulations, and the Final Rule's new interpretation of the "good cause" requirement is contrary to the statute.

A. The Final Rule's Reversal On The Scope Of Its Statutory Authority Was Arbitrary And Capricious.

BIA has the power to make only those rules that are "necessary to carry out" ICWA. 25 U.S.C. § 1952. The 1979 Guidelines properly interpreted that authority as limited to those "portions" of ICWA that "ex-

pressly delegate to the Secretary of the Interior responsibility for interpreting statutory language," and as not extending to the majority of ICWA's substantive provisions, including Section 1915. 44 Fed. Reg. at 67,584. BIA recognized that it "does not have" authority to issue binding regulations because Congress did not "intend[] th[e] Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters." *Id*. "For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step," fundamentally "at odds" with "federalism" and the "separation of powers." *Id.*

After 37 years, the Department suddenly announced that it "no longer agrees … that it lacks the authority to issue binding regulations." 81 Fed. Reg. at 38,786. It then severely constrained state courts' power to find "good cause" to depart from the placement preferences, specifying certain criteria for departure that must be proved by "clear and convincing evidence." 81 Fed. Reg. at 38,839; 25 C.F.R. § 23.132(b), (c). But because BIA took "forty years to 'discover'" this regulatory authority, its "novel interpretation" is not entitled to deference. *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 380 (5th Cir. 2018).

And because Interior has no role in "carry[ing] out" ICWA's child-placement mandates—they are, by design, carried out only by States—Interior's supplementation of Congress's legislation cannot possibly be described as "necessary." The Final Rule seeks to justify its regulations based on the fact that state courts have reached divergent outcomes in ICWA cases. *See* 81 Fed. Reg. at 38,782. But that is a feature, not a bug. Given the individualized, fact-intensive nature of child-custody proceedings, Congress gave state courts a degree of flexibility in how to apply ICWA's dictates to any particular case. The standardization of state-court outcomes that Interior's Final Rule attempts to impose thus is not only "[un]necessary to carry out" ICWA's provisions; it defies those provisions. BIA had no statutory authority to promulgate the Final Rule, and it is therefore invalid in its entirety.

B. The Final Rule's "Good Cause" Regulations Contradict ICWA.

Congress intended Section 1915's "good cause" standard for departing from Section 1915's placement preferences to provide state courts with "flexibility." S. Rep. No. 95-597, at 17 (1977); 44 Fed. Reg. at 67,584 ("the term 'good cause' was designed to provide state courts with flexibility"); U.S. Br. at 14 n.2, *Adoptive Couple*, No. 12-399, 2013 WL 1099169

(U.S. Mar. 15, 2013) ("good cause" standard is a "safety-valve"). Yet the Final Rule imposes a fixed definition of "good cause," limiting state courts to five enumerated factors, and then provides that "[t]he party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." 25 C.F.R. § 23.132(b)-(c).

These mandates are contrary to ICWA. When Congress enacted ICWA, "'[g]ood cause' ha[d] a well-known meaning at common law," which "refer[red] to a remedial purpose and [wa]s to be applied with discretion to prevent a manifest injustice or to avoid a threatened one." *PharmFlex, Inc. v. Div. of Emp't Sec.*, 964 S.W.2d 825, 830 (Mo. Ct. App. 1997); *see McRae v. Lamb*, 233 S.W.2d 193, 196 (Tex. Ct. App.—San Antonio 1950) ("good cause" standard demands that "each case must be judged upon its particular facts in the light of equitable principles, and the chancellor must be satisfied that the best interests of the child" are served by the outcome). The Final Rule is therefore contrary to law because it deviates from this established common-law meaning of "good cause" without Congress "dictat[ing]" such a departure. *Nationwide Mut.*

Ins. Co. v. Darden, 503 U.S. 318, 322 (1992); *see also Chamber of Commerce*, 885 F.3d at 369-70.

The Final Rule's mandate that "good cause" be proved by "clear and convincing evidence" is even more plainly contrary to the statute. The Department acknowledged that its new "burden of proof standard is not articulated in section 1915." 81 Fed. Reg. at 38,843. But that statutory "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof." *Grogan v. Garner*, 498 U.S. 279, 286 (1991). Preponderance is the default standard of proof in civil cases, and in the absence of textual evidence that Congress intended a heightened standard, the default standard of preponderance must apply. *See id*.

Indeed, far from indicating a heightened standard of proof for "good cause," ICWA contains textual indicators that Congress did ***not*** intend a heightened standard. Elsewhere in the statute, ICWA does provide for heightened standards of proof. *See* 25 U.S.C. § 1912(e)-(f). Congress's decision to include heightened standards of proof in Section 1912 but not in Section 1915 "is presumed" to be "intentional[]." *Chamber of Commerce*, 885 F.3d at 373.

The United States does not dispute that preponderance is the default standard and that, under *Grogan*, it applies where Congress is silent as to the standard of proof. It asserts that the Final Rule's "good cause" regulation "contains no *requirement*" that good cause be proved by clear-and-convincing evidence—only that the heightened standard "should" be applied. U.S. Supp. Br. 54. That is a strange argument given the Rule's stated purpose of imposing "uniformity" on state courts. 81 Fed. Reg. at 38,779. In fact, "should" often is "used to create mandatory standards." *Should*, Garner's Dictionary of Legal Usage (3d ed. 2011). And the state courts hearing Plaintiffs' cases certainly have not viewed the Final Rule as merely suggestive. *See*, *e.g.*, ROA.2707 (finding that the Brackeens failed to show "good cause" because they "did not meet their burden under 25 C.F.R. § 23.132"); ROA.2668 ("Although the Cliffords have arguably alleged facts that suggest there may be good cause to deviate from the § 1915(a) preferences, they have not established good cause by clear and convincing evidence."). That third parties have "taken the [regulation] at face value," interpreting it as a command, "tends to make the document binding as a practical matter." *Iowa League of Cities v. EPA*, 711 F.3d 844, 864 (8th Cir. 2013) (holding that

agency letter stating certain actions "should not be permitted" is "the type of language we have viewed as binding because it speaks in mandatory terms").

In any event, Interior has no statutory authority even to *suggest* to state courts that they act in a manner that is contrary to the statute. If Interior has authority to regulate here, it is only to "carry out" the statute. Thus, if imposing a clear-and-convincing standard is contrary to Section 1915, so is Interior's directive that the heightened standard "should" be applied.

IV. All Of Plaintiffs' Claims Are Justiciable.

This Court should reject Defendants' twice-rejected argument that Individual Plaintiffs lack Article III standing. *See* Indiv. Pls.' Panel Br. 21-32.

As Defendants concede, State Plaintiffs have standing to raise their Commerce-Clause and anti-commandeering claims and also to challenge the Final Rule under the APA. PFREB Opp. 19-20. That "is sufficient to satisfy Article III's case-or-controversy requirement," as to those claims. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52

n.2 (2006). The only dispute is whether Individual Plaintiffs have Article III standing to raise their equal-protection challenge to ICWA.

As a threshold matter, unless the Court vacates the Final Rule in its entirety on a non-equal-protection ground, this Court will have to resolve Individual Plaintiffs' equal-protection arguments in connection with their challenge to the Final Rule as "not in accordance with law" and "contrary to constitutional right" under the APA. *See* 5 U.S.C. § 706(2). Individual Plaintiffs also each independently have standing to challenge ICWA's provisions on equal-protection grounds because each currently is suffering an injury-in-fact redressable by a decision from this Court.

The Cliffords. Defendants "do[] not dispute" that the Cliffords—who lost custody of Child P. because of ICWA's placement preferences and remain mired in litigation to adopt her—have suffered injury-in-fact. U.S. Supp. Br. 18-19. And redressability is satisfied because the "practical consequence" of a ruling in the Cliffords' favor by this Court would "amount to a significant increase in the likelihood that the[y] would obtain relief." *Utah v. Evans*, 536 U.S. 452, 464 (2002); *see also Allstate Ins. v. Abbott*, 495 F.3d 151, 159-60 & n.19 (5th Cir. 2007) (injury redressable

because state courts "could be expected to amend their conduct in response to a [federal] court's declaration"); *Duarte ex rel. Duarte v. City of Louisville*, 759 F.3d 514, 521 (5th Cir. 2014) (the relevant question is whether it is "likely that a judgment [here] would at least make it easier for" plaintiffs to achieve their desired result); *Texas v. United States*, --- F.3d ---, No. 19-10011, 2019 WL 6888446, at *16 (5th Cir. Dec. 18, 2019) (plaintiffs have standing if "the challenged law would cause third parties to behave in predictable ways"). And, of course, if the Supreme Court affirmed, all courts would be bound by that decision.[8]

The Brackeens. The Brackeens have standing to challenge the placement preferences because they are seeking to adopt A.L.M.'s sibling Y.R.J. in state court, where the Navajo Nation insists that ICWA's preferences bar that placement. *See In re Y.J.*, No. 02-19-235-CV, 2019 WL 6904728 (Tex. App.—Ft. Worth Dec. 19, 2019). The Tribes protest (at 12-

[8] The United States' contrary argument that "Plaintiffs must present their concerns about ICWA to the courts that actually adjudicate the proceedings in which their concerns arise," U.S. Supp. Br. 15, points powerfully to ICWA's commandeering of the machinery of state government. The government's claim that a person to whom ICWA is being applied cannot obtain redress in federal court rests entirely on the notion that the federal government has no role in the administration of the statute.

13) that Y.R.J. is not referenced in the complaint. But the complaint stated that the Brackeens "intend to provide foster care for, and possibly adopt, additional children." ROA.444; *see also* ROA.476 ("any future foster or adoption placement involving a child who may be an Indian child could subject them and the child to years of delay and litigation"). The district court also supplemented the record with information about Y.R.J.'s adoption because it was "relevant to [ongoing] subject matter jurisdiction." ROA.4314 n.3 (citing *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 536 (6th Cir. 2011), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)). And this Court took judicial notice of the proceedings. Order (Mar. 11, 2019). There is no serious dispute that the Brackeens currently are injured by ICWA's placement preferences. If anything, their standing to challenge ICWA's placement preferences is even more plain now—when placement proceedings over Y.R.J. are ongoing—than at the time of the complaint, when those preferences were interfering with their intention to adopt children in the future.

The Librettis. The Librettis have standing to challenge ICWA's collateral-attack provisions. *See* 25 U.S.C. §§ 1913(d), 1914. Their adoption of Baby O. remains subject to collateral attack under Section 1913(d) until January 2021, and under Section 1914 possibly until Baby O. turns 18. The government argues that it is speculative whether anyone might collaterally attack Baby O.'s adoption, U.S. Supp. Br. 17, but that misses the point. These provisions hold the Libretti's adoption of Baby O. "unequally before the law," and "no further showing of suffering based on that unequal positioning is required for purposes of standing." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012); *see also Ne. Fla. Chapter of Associated Gen. Contractors*, 508 U.S. at 666 ("[un]equal treatment" itself constitutes injury).[9]

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[9] The Brackeens also have standing to challenge ICWA's collateral-attack provisions. Though nearly two years has elapsed since their adoption of A.L.M., they remain subject to potential attack under Section 1914. And, as the panel correctly concluded (at 15), their injuries arising from these provisions are obviously "capable of repetition, yet evading review," as there is, in view of their efforts to adopt Y.R.J., at least a "'reasonable expectation' that the challenged illegality will reoccur." *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 422 (5th Cir. 2014).

* * *

The Individual Plaintiffs have been subjected to unequal treatment because they do not share the racial background of their adoptive children. A federal court order vacating the Final Rule and declaring ICWA unconstitutional would remedy their injury. That is enough to satisfy Article III's requirements.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: January 7, 2020

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)(i) because this Brief contains 12,942 words, excluding the 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 New Century Schoolbook 14-point font using Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 7, 2020, I filed the foregoing Brief using the Court's ECF system. Service on all counsel of record for all parties was accomplished electronically using the Court's CM/ECF system.

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