No. 18-11479

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

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

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

RESPONSE OF CHEROKEE NATION, ONEIDA NATION, QUINAULT INDIAN NATION, MORONGO BAND OF MISSION INDIANS, AND NAVAJO NATION TO APPELLEES' PETITIONS FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

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

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

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

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

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

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

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

17. Navajo Nation (Intervenor)

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52. Thomas Schmidt, Hogan Lovells US LLP, counsel for the Navajo Nation

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

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

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

s/ *Adam H. Charnes*
Attorney for Appellants

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INTRODUCTION

In its opinion, the panel unanimously rejected almost every claim advanced by Plaintiffs. The panel unanimously agreed that settled precedent refuted Plaintiffs' contention that the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-63,[1] violates equal protection principles. Similarly, the panel unanimously rejected Plaintiffs' arguments that ICWA exceeds Congress's authority and violates the non-delegation doctrine, and that the ICWA regulations, 81 Fed. Reg. 38,778 (June 14, 2016) (codified at 25 C.F.R. pt. 23) ("Final Rule"), violate the Administrative Procedure Act ("APA"). While Plaintiffs disagree with these holdings, their two petitions for rehearing en banc never explain why these issues satisfy Rule 35's standard for en banc review. Further, as the panel explained, their arguments are simply wrong.

The panel also unanimously agreed that the vast majority of ICWA does not violate the Tenth Amendment's anti-commandeering doctrine. Judge Owen's dissent found a constitutional problem with only three specific provisions of ICWA. But the dissent does not warrant en

[1] Unless noted, all statutory citations are to 25 U.S.C.

banc rehearing because it misapplies the governing commandeering cases and, in any event, any mandate on the states is permissible under the Spending Clause—an issue that the dissent did not address.

The Court should deny the petitions.

STATEMENT OF THE CASE

In 1978, Congress passed ICWA in response to "rising concern … over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Specifically, Congress determined that upwards of *one-third* of Indian children had been removed from their families, *id.*, and that these removals were "often unwarranted," § 1901(4). Approximately 90 percent of Indian children removed from their families were placed in non-Indian homes. *Holyfield*, 490 U.S. at 33. "[T]he Indian child welfare crisis is of massive proportions," Congress concluded, and "Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole." H.R. Rep. No. 95-1386, at 9 (1978).

Exercising its plenary power over Indian affairs, and fulfilling its "'moral obligations of the highest responsibility and trust'" to Indians and tribes,[2] Congress adopted "minimum Federal standards," applicable in state courts, "for the removal of Indian children from their families." § 1902. ICWA dramatically succeeded in improving the lives of Indian children and maintaining their relationships with their families, tribes, and communities. Indeed, child-welfare organizations now consider ICWA's substantive and procedural requirements to represent the "gold standard" for child-welfare practices.[3] In 2016, the Department of the Interior promulgated the Final Rule in order to bring nationwide consistency to certain aspects of ICWA's implementation—a goal supported by states, tribes, and child-welfare organizations. 81 Fed. Reg. at 38,782.

Contrary to the petitions, ICWA does not establish a separate child-welfare system. Rather, ICWA merely promulgates rules applicable in state-court child-custody cases for children who have a political relationship with a sovereign tribal nation. In brief, the statute

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[2] *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011).

[3] Amicus Br. of Casey Family Programs *et al.* 4-6.

creates exclusive tribal jurisdiction over foster care and adoption cases involving Indian children domiciled on reservations and presumptive tribal jurisdiction over such cases for children domiciled outside reservations (if their parents do not object). § 1911. When state courts hear such cases, ICWA mandates enhanced procedural protections to parents, intervention rights for tribes, and heightened burdens of proof requiring clear and convincing evidence before children are involuntarily placed in foster care and proof beyond a reasonable doubt before an involuntary termination of parental rights. §§ 1912-14. ICWA also requires that, absent good cause to the contrary, state courts in adoption proceedings place children with extended family if available (irrespective of whether they are Indians), with families from the child's tribe if not, and otherwise with other Indian families. § 1915(a).

Despite ICWA's remarkable success, Texas, Louisiana, and Indiana ("State Plaintiffs") and seven Individual Plaintiffs brought this action seeking to declare key sections of ICWA unconstitutional and invalidate the Final Rule. The district court granted summary judgment as to Plaintiffs (ROA.4008-55), found ICWA unconstitutional on three grounds, and also invalidated the Final Rule. A panel of this

Court reversed the district court. Judge Owen, joining the majority in almost all respects, dissented on the narrow ground that three specific provisions of ICWA violated the anti-commandeering doctrine.

ARGUMENT

I. The Court Should Deny The Petitions, As The Panel Correctly Rejected Plaintiffs' Claims.

In their petitions, Plaintiffs contend that en banc review is warranted because the panel incorrectly decided four separate issues of constitutional and administrative law. But Plaintiffs largely ignore the requirement of this Court's rules that they explain "why [the issues] are contended to be worthy of en banc consideration." Fifth Cir. R. 35.2.7. Plaintiffs apparently believe that this standard is satisfied simply because this case involves the constitutionality of a federal statute. That is not correct. Plaintiffs' failure to show how they satisfy the en banc standard is justification alone for denying the petitions. Regardless, the panel correctly held that ICWA does not violate the Constitution and that the Final Rule does not violate the APA.

A. The panel's equal protection holding is correct.

ICWA applies to proceedings involving an "Indian child"—which the statute defines as "either (a) a member of an Indian tribe or (b) [a

person who] is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." § 1903(4). In its opinion, the panel *unanimously* held that this definition is a political—not racial—classification and thus subject to rational basis review, which is satisfied. (Op. 20-26.) The panel noted that this is consistent with not only *Morton v. Mancari*, 417 U.S. 535 (1974), but also this Court's opinion in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991). (Op. 23-24.)

Plaintiffs contend that this holding conflicts with three Supreme Court decisions—*Mancari*; *Rice v. Cayetano*, 528 U.S. 495 (2000); and *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). (Indiv. Pls.' Pet. 4-14; States' Pet. 8.) Plaintiffs are wrong.

First, Plaintiffs misread *Mancari*. *Mancari* upheld a policy of the Bureau of Indian Affairs ("BIA") that gave hiring preferences to tribal Indians over non-Indians. In a unanimous decision, the Court rejected the argument that the preference constituted invidious racial discrimination, because, "as applied, [it] is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities…." 417 U.S. at 554. For this reason, the Court explained, "the

preference is political rather than racial in nature." *Id.* at 553 n.24. This was so even though the definition of "Indian" required "one-fourth or more degree Indian blood." *Id.* The Court concluded that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed." *Id.* at 555.

Plaintiffs contend that, under *Mancari*, preferences for Indians constitute a political classification "only when the differential treatment is closely tied to tribal self-government." (Ind. Pls.' Pet. 7.) But while one purpose of the hiring preference in *Mancari* was related to Indian self-government, the Court found the preference justified by other governmental interests similar to those animating ICWA—"to further the Government's trust obligation toward the Indian tribes" and "to reduce negative effect of having non-Indians administer matters that affect Indian tribal life." 417 U.S. at 541-42. Although the preference applied to *individual* Indians, the Court found them justified by "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress … to legislate on behalf of federally recognized Indian tribes." *Id.* at 551.

Indeed, this Court has recognized this broad interpretation of *Mancari*, holding that it applies when legislation allowed peyote use by Indians, and only Indians, because "peyote use is rationally related to the legitimate governmental objective of preserving Native American culture." *Peyote Way*, 922 F.2d at 1216. And the Supreme Court has applied *Mancari* in areas unrelated to tribal self-government, including state taxes, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-81 (1976), and federal criminal law, *United States v. Antelope*, 430 U.S. 641, 645-47 (1977). Plaintiffs' narrow view of *Mancari*, which they claim the panel erred in not adopting, has simply never been followed by any court.

Second, *Rice* does not apply here. The statute in *Rice* allowed only Hawaiians to vote for certain state offices, effectively "fenc[ing] out whole classes of its citizens from decisionmaking in critical state affairs." 528 U.S. at 522. ICWA presents nothing remotely comparable to that 15th Amendment violation.

Moreover, *Rice*, acknowledging that sometimes "[a]ncestry can be a proxy for race," *id.* at 514, held that the challenged law indeed was a proxy for race. But as the panel found, that is not what ICWA does.

ICWA's definition of Indian child is triggered solely by *political affiliation*: enrolled membership (or eligibility for it) in a sovereign nation. Indeed, "Indian child" includes children without Indian blood, such as descendants of freedmen (former slaves of tribal citizens who became members after the abolition of slavery). And many children who are racially Indian do *not* qualify as Indian children under ICWA (*i.e.*, if neither parent is an enrolled member of a federally recognized Indian tribe). This illustrates that it is the political connection to a tribal sovereign—not race—that is the basis of ICWA.

The Ninth Circuit recently rejected an analogous reliance on *Rice*, explaining that *Rice* "rested on the historical and legislative context of the particular classification at issue, not on the categorical principle that all ancestral classifications are racial classifications." *Davis v. Guam*, 932 F.3d 822, 834 (9th Cir. 2019). The Ninth Circuit cited *Mancari* as *rejecting* a "categorical equivalence between ancestry and racial categorization," *id.* at 837—the very argument Plaintiffs advance in the petitions. Indeed, the court observed that, "[s]ince *Mancari*, the Supreme Court and our court have reaffirmed ancestral classifications

related to American Indians without suggesting that they constitute racial classifications." *Id*.

Finally, Plaintiffs' reliance on dicta in *Adoptive Couple* (Indiv. Pls.' Pet. 13-14) is a red herring. The Supreme Court did not make any equal protection holdings in *Adoptive Couple*, nor did it overrule or limit *Mancari*. There was thus no need for the panel to mention *Adoptive Couple*, much less find that it applied here.

B. The panel majority correctly held ICWA does not violate the 10th Amendment.

"[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997). The panel held ICWA does not violate this anti-commandeering doctrine because (1) ICWA applies to *state courts*, and under the Supremacy Clause Congress can issue commands to state judges; (2) it applies equally to both state agencies and private parties; and (3) it preempts inconsistent state laws. (Op. 28-35.) In dissent, Judge Owen agreed that most of ICWA does not violate the anti-commandeering doctrine. But she found that three limited provisions (and a related regulation) did violate the doctrine: § 1912(d) (requiring a party seeking to effect foster care

placements of an Indian child to satisfy the court that efforts were made to prevent the breakup of the Indian family); § 1912(e) (prohibiting foster care placement without evidence from a qualified expert that continued custody of the Indian child by the parents or custodian would result in emotional or physical harm to the child); and § 1915(e) (requiring state courts to keep records showing compliance with certain provisions of ICWA). (Op. 47.)

In their petitions, Plaintiffs ignore the limited nature of Judge Owen's dissent and instead argue that all of ICWA violates the anti-commandeering doctrine. (Ind. Pls.' Pet. 16-18; States' Pet. 5-8, 10-11.) Plaintiffs are wrong for several reasons.

First, ICWA represents a condition on federal funding of states' foster-care and adoption programs that is permissible under the Spending Clause, U.S. Const. art. I, § 8, cl. 1.[4] The Spending Clause authorizes Congress to "grant federal funds to the States, and may condition such a grant upon the States' 'taking certain actions that Congress could not require them to take.'" *Nat'l Fed'n of Indep. Bus. v.*

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

Sebelius, 567 U.S. 519, 576 (2012) (opinion of Roberts, C.J.) (citation omitted). And ICWA does just that. Federal funding under Title IV-B (grants for child-welfare services) and Title IV-E (funding for foster and adoptive families and related programs) of the Social Security Act is conditioned on a state's compliance with ICWA.[5] The State Plaintiffs specifically alleged that Congress appropriated, and they accepted, funds under these provisions. (ROA.598.) And they never alleged or argued that conditioning the funding on ICWA compliance crosses the line from "'pressure … into compulsion.'" *NFIB*, 567 U.S. at 577 (opinion of Roberts, C.J.). ICWA thus represents a permissible condition on federal funding and categorically does not violate the Tenth Amendment.

Second, the anti-commandeering principle does not apply to congressional commands to state courts. In *Printz*, the Supreme Court explained that "the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters

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

appropriate for the judicial power." 521 U.S. at 907. "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them," the Court has recognized, "but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York v. United States*, 505 U.S. 144, 178-79 (1992).

ICWA's mandate applies to state courts, not state executive-branch officials. For example, the State Plaintiffs argue the placement preferences in section 1915, which govern with whom Indian children must be placed, violate the Tenth Amendment. (States' Pet. 6-7.) But these preferences govern the substantive adjudication decisions made by *state judges*; they are not mandates requiring that state executive-branch employees enforce federal law or that states change their own law. And the other provisions of ICWA that Plaintiffs attack—sections 1911, 1912, 1913, 1917, and 1951—are similarly directed at procedural rules followed and substantive law applied by state courts. *E.g.*, § 1911(d) (requiring state courts to accord full faith and credit to child-custody proceedings of an Indian tribe); § 1912 (providing procedures to be followed in specific court proceedings, including requisite notice, appointment of counsel, the types of evidence required before a court

can issue certain orders, and the standard to be applied in considering foster-care and parental-rights termination orders).

Third, to any minimal extent that ICWA does apply to state officials, it does not unconstitutionally commandeer them because it applies to private parties and state agencies alike. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018) ("The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage."). In her dissent, Judge Owen concluded that sections 1912(d) and 1912(e) apply only to the states, because "[f]oster care placement is not undertaken by private individuals or private actors." (Op. 49-51.) But, with respect, the dissent was mistaken. Under ICWA, "foster care placement" is defined as "any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or *the home of a guardian or conservator* …." § 1903(1)(i) (emphasis added). Actions to appoint guardians and conservators are typically *private* actions, not

involving the state as a party.[6] Therefore, provisions relating to foster-care placements apply equally to both private parties and state actors.

Finally, contrary to the dissent, section 1915(e) and 25 C.F.R. § 23.141, which require states to provide limited information to the federal government and to maintain certain records, do not violate the 10th Amendment. *See, e.g.*, *City of New York v. United States*, 179 F.3d 29, 36-37 (2d Cir. 1999) (holding the 10th Amendment does not prohibit laws requiring local and state officials to provide the federal government with information); *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 213-14 (4th Cir. 2002); *see also Reno v. Condon*, 528 U.S. 141, 150-51 (2000) (upholding a federal law "requir[ing] time and effort on the part of state employees"). Indeed, *Printz* specifically declined to apply the anti-commandeering doctrine to laws "which

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

require only the provision of information to the Federal Government." 521 U.S. at 918. And such laws are common.[7]

C. The panel correctly held that ICWA does not exceed congressional authority.

Plaintiffs further contend that en banc review is warranted because Congress lacked the constitutional authority to enact ICWA. (Ind. Pls.' Pet. 14-15; States' Pet. 9-13.) According to Plaintiffs, because ICWA does not regulate commerce, it exceeds Congress's power under the Indian Commerce Clause. The panel unanimously, and correctly, rejected this argument.

First, the district court rejected Plaintiffs' claim that ICWA exceeds Congress's legislative powers, and they failed to cross appeal. This Court therefore lacks jurisdiction over this claim. *See Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015).

Nonetheless, Plaintiffs' argument, which relies solely on concurring opinions by Justice Thomas (Ind. Pls.' Pet. 14-15), ignores binding precedent.[8] The Supreme Court repeatedly has held that the

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[7] *See, e.g.*, 15 U.S.C. § 2224; 23 U.S.C. § 402(a); 42 U.S.C. §§ 5779(a), 6991c, 11133(b).

[8] It is also inconsistent with the original understanding of the Constitution. *See* Amicus Br. of Professor Gregory Ablavsky 4-21.

"Constitution grants Congress *broad general powers* to legislate in respect to Indian tribes, powers that we have consistently described as '*plenary and exclusive*.'" *United States v. Lara*, 541 U.S. 193, 200 (2004) (emphasis added). Contrary to Plaintiffs' assertions, congressional authority is not just based on the Indian Commerce Clause, but "rest[s] in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'" *Id.* at 201 (citations omitted). Moreover, Plaintiffs are simply incorrect that ICWA is not a "tribal matter." Congress recognized in ICWA that "[r]emoval of Indian children from their cultural setting seriously impacts a long-term *tribal survival*," and for this reason the Court concluded "[t]he protection of this *tribal interest* is at the core of the ICWA." *Holyfield*, 490 U.S. at 50, 52 (emphasis added). And, in any event, Congress's power extends beyond tribal matters such as self-government; as this Court previously found in *Peyote Way*, Congress had authority to exempt only Indians—no matter where they lived—from the criminal

prohibition of peyote use, a law that had no relation to tribal self-government. 922 F.2d at 1214.

D. The panel correctly rejected the non-delegation claim.

Section 1915(c) does not violate the non-delegation doctrine. Section 1915(c) permits a tribe to exercise its inherent governmental authority to enact a law that reorders the ICWA's placement preferences for children that are members or eligible children of members. This is not an impermissible delegation of power to a private party. Indian tribes "exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Indian tribes fully "retain their inherent power … to regulate domestic relations among members." *Montana v. United States*, 450 U.S. 544, 564 (1981); *see Fisher v. Dist. Court*, 424 U.S. 382, 390 (1976) (holding that tribe had exclusive jurisdiction in child-custody proceedings). As the unanimous panel found, section 1915(c) is properly viewed as congressional confirmation of inherent tribal power over the proper placement of Indian children. Nevertheless, the Supreme Court has

held that Congress can delegate federal authority to an Indian tribe. *See United States v. Mazurie*, 419 U.S. 544, 556-57 (1975).

E. The panel correctly held that ICWA does not violate the APA.

Finally, Plaintiffs argue that the panel erred in holding that the Final Rule does not violate the APA. (Ind. Pls.' Pet. 18-19.) Plaintiffs never explain why this routine APA claim warrants en banc review. In any case, their argument is wrong. Plaintiffs complain that the panel failed to acknowledge *Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018). But *Chamber* is inapposite. The *Chamber* court held that the rule under review was not entitled to deference since it was outside the congressional mandate and conflicted with the statutory text. *Id.* at 369. By contrast, Interior here had *express* statutory authority for issuing the Final Rule. § 1952. And, in any event, as the panel recognized, the challenged regulation was merely a *suggestion* to state courts, and did not impose "a uniform standard of proof." (Op. 44 (citing 81 Fed. Reg. at 38,843).)

II. <u>En Banc Review Is Not Warranted Because The Plaintiffs Lack Standing.</u>

The Court should also deny the petitions for an additional reason: the Individual Plaintiffs lack standing for all claims, and the State

Plaintiffs lack standing to raise any claim other than their Tenth Amendment and APA challenges. Although the panel found standing, the en banc Court would need to reconsider this issue because it goes to subject-matter jurisdiction.

Each of the Individual Plaintiffs lack standing because either they lack an injury-in-fact (the Brackeens and Librettis) or because there is an absence of redressability (the Cliffords). The Brackeens' adoption of A.L.M and the Librettis' adoption of Baby O. are now finalized and they have no likelihood of future injury. *See In re Gee*, No. 19-30353, 2019 WL 5274960, at *8 (5th Cir. Oct. 18, 2019) (per curiam) ("Article III requires more than theoretical possibilities."). The Brackeens' impending adoption of Y.R.J. cannot create standing, as she is not mentioned in the complaint and they did not begin adoption efforts until six months after filing the amended complaint. *See Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005). Moreover, the Cliffords' injury is not redressable in this action; they live in Minnesota, which is not a party to this action and thus its courts are not bound by the judgment. *See Okpalobi v. Foster*, 244 F.3d 405, 426-27 (5th Cir. 2001) (en banc).

Further, the State Plaintiffs lack standing to assert the non-delegation claim because they lack an injury-in-fact. There is no evidence that any tribe has changed the order of preferences in a manner that impacted even a single child-placement decision in Texas, Indiana, or Louisiana. Finally, the State Plaintiffs lack standing to bring an equal protection claim. *See South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

CONCLUSION

The Court should deny the petitions.

Respectfully submitted,

s/ Adam H. Charnes

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this response contains 3,873 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

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

DATED: October 23, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2019, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Fifth Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

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