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.

RYAN ZINKE, in his official capacity as Secretary of the United States 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

BRIEF OF APPELLANTS CHEROKEE NATION, ONEIDA NATION, QUINAULT INDIAN NATION, AND MORONGO BAND OF MISSION INDIANS

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CERTIFICATE OF INTERESTED PERSONS

Brackeen, et al. v. Ryan Zinke, et al., *and Cherokee Nation*, *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)

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

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

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

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

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

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

s/ Adam H. Charnes
Attorney for Appellants

REQUEST FOR ORAL ARGUMENT

In this case, the district court found unconstitutional a 40-year-old federal law, the Indian Child Welfare Act. Given the importance of the statute to Indian tribes and communities, the decades-long reliance on the statute as a central feature of state-court child-welfare proceedings, and the presumption of constitutionality of congressional enactments, Appellants Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians respectfully request oral argument.

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INTRODUCTION

Forty years ago, Congress enacted the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, to remedy an unconscionable crisis: the prevalence of abusive child-welfare practices by states and private agencies that separated a large percentage of Indian children from their families and tribes. Exercising its plenary power over Indian affairs, and fulfilling its "'moral obligations of the highest responsibility and trust'" to Indians and tribes,[1] Congress adopted "minimum Federal standards," applicable in state courts, "for the removal of Indian children from their families." § 1902.[2] 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.

The district court's decision that ICWA is unconstitutional, if affirmed, will overturn that success. Bypassing binding Supreme Court

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

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

authority, the district court granted Plaintiffs summary judgment on four of their claims. The decision was erroneous. The Individual Plaintiffs lack standing to assert their claims, leaving no plaintiff with standing to assert an equal protection violation. Moreover, the district court's equal protection, commandeering, and non-delegation holdings ignore settled Supreme Court precedent, and its invalidation of the challenged regulations misapplies basic administrative law principles. ICWA is constitutional, and this Court should reverse.

JURISDICTIONAL STATEMENT

The Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians (the "Tribes"), intervenor-defendants below, appeal from the October 4, 2018 final judgment. (ROA.4055.) The Tribes filed a timely notice of appeal on November 19, 2018. (ROA.4458-59.) The Federal Defendants filed a timely notice of appeal on November 30, 2018. (ROA.4762.) This Court has jurisdiction under 28 U.S.C. § 1291. This Court stayed the judgment below.

This action arises under the Constitution and the Administrative Procedure Act ("APA"). The district court had subject-matter jurisdiction. 28 U.S.C. § 1331; 5 U.S.C. §§ 701-706.

ISSUES PRESENTED

1. Do the Individual Plaintiffs have standing in the absence of either an injury-in-fact or redressability?

2. Do ICWA and the regulations issued by the Department of the Interior violate equal protection when Supreme Court precedent has definitively and consistently held that "Indian" is a political, not racial, classification?

3. Does ICWA unconstitutionally commandeer the states when it merely imposes substantive and procedural requirements on state courts, which the Supreme Court has held are not subject to anti-commandeering principles, and alternatively when ICWA's mandates are permissible under the Spending Clause?

4. Does ICWA, which merely reaffirms inherent tribal sovereign authority, violate the Non-Delegation Doctrine even though Congress is permitted to delegate to Indian tribes?

5. Do Interior's regulations violate the APA when the agency possessed statutory authority to promulgate the Final Rule, provided a reasoned explanation for doing so, and is owed deference with respect to its reasonable placement-preference regulation?

STATEMENT OF THE CASE

A. The Indian Child Welfare Act

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). The congressional findings "make[] clear that the underlying principle of [ICWA] is in the best interest of the Indian child." H.R. Rep. No. 95-1386, at 19 (1978) ("House Report"). Congress largely succeeded in crafting a law that protects Indian children, families, and tribes, as ICWA is regarded as the "gold standard" of child-welfare practices.[3]

1. The need to protect Indian children, families, and tribes.

ICWA resulted from years of congressionally commissioned reports and wide-ranging testimony taken from "the broad spectrum of concerned parties, public and private, Indian and non-Indian." House

[3] Casey Family Programs, Comment on BIA Proposed Rule (May 19, 2015), *available at* https://www.regulations.gov/document?D=BIA-2015-0001-1404.

Report at 28. Congress enacted ICWA after determining that state and private child-welfare agencies were removing American Indian children from their families at alarming rates—far disproportionate to those of non-Indian families. Specifically, Congress determined that upwards of *one-third* of Indian children had been removed from their families, *Holyfield*, 490 U.S. at 32, and that these removals were "often unwarranted," § 1901(4); *see* House Report at 10. Approximately 90 percent of Indian children removed from their families were placed in non-Indian homes. *Holyfield*, 490 U.S. at 33. These removals not only harmed the children, who often had serious adjustment problems, but they also unsurprisingly had a devastating impact on parents and tribes. *Id.* Congress was concerned that, should these removals continue, tribes would be unable to continue as self-governing political communities. *Id.* at 34-35.

Congress concluded that "the States and their courts [were] partly responsible for the problem it intended to correct." *Id.* at 45. State courts often removed Indian children without proof that their parents were unfit. Parents were denied fundamental due process when their children were taken by state agencies. In fact, parents were rarely

represented by counsel or given notice of hearings. House Report at 11. Further, in removing Indian children, state officials "fail[ed] … to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future." *Id.* at 19. Child-welfare officials were "at best ignorant of [Indian] cultural values, and at worst contemptful of the Indian way." *Holyfield*, 490 U.S. at 35.

2. ICWA and the Final Rule

ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society … by establishing 'a Federal policy that, where possible, an Indian child should remain in the Indian community.'" *Id.* at 37 (quoting House Report at 23). ICWA is implemented by state courts with the intention "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." § 1902.

ICWA does not apply to every child who is racially Indian. Instead, the law defines "Indian child" as a child who is either (a) an

enrolled member of a federally recognized tribe or (b) eligible for membership in, and is the biological child of a member of, a federally recognized tribe. § 1903(4).

ICWA's provisions apply to four types of state child-custody proceedings: (1) foster-care placement; (2) termination of parental rights; (3) preadoptive placement; and (4) adoptive placement. § 1903(1). ICWA requires notice to parents and the child's tribe, court-appointed counsel to indigent parents, and the testimony of a qualified expert witness before a court can place a child in foster care or terminate parental rights. § 1912(a), (b), (e). ICWA also permits a parent to challenge a voluntary consent to adoption upon a showing of improper removal or fraud, § 1913(d), or a termination of parental rights in violation of ICWA, § 1914. Finally, when children are removed due to an emergency, ICWA mandates their return to their homes once the emergency has passed. § 1922.

Central to ICWA's protections are its placement preferences, which (except when there is good cause to order otherwise) require courts to place Indian children in adoptive or foster-care homes with a member of the child's extended family (whether or not Indian), a

member of the Indian child's tribe, or other Indian families. § 1915(a), (b). Congress enacted these preferences in response to "evidence of the detrimental impact on the children themselves of … placements outside their culture." *Holyfield*, 490 U.S. at 49-50. Congress also contemplated that an Indian child's tribe could establish under tribal law a different order of preference. § 1915(c).

In 2016, the Department of the Interior promulgated ICWA regulations ("Final Rule"). Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778 (June 14, 2016) (codified at 25 C.F.R. pt. 23). Interior intended the Final Rule to bring nationwide consistency to the implementation of ICWA—a goal supported by states, tribes, and child-welfare organizations. *Id.* at 38,782. Interior noted that similarly situated Indian children and their parents in different states received inconsistent treatment, contrary to Congress's goal of "minimum Federal standards." § 1902. The Final Rule clarifies, *inter alia*, when ICWA applies, when a state court is required to provide notice of a child-custody proceeding to parents and the child's tribe, and what constitutes good cause to deviate from the placement preferences. 25 C.F.R. §§ 23.103, 23.111, 23.129-23.132. In many respects, the Final

Rule adopts consensus state approaches as the national standards. 81 Fed. Reg. at 38,779.

B. This litigation.

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. (ROA.43-101.) The Individual Plaintiffs are (1) Chad and Jennifer Brackeen, the adoptive parents of A.L.M., who live in Texas, (2) Nick and Heather Libretti, foster parents of Baby O., who live in Nevada, (3) Altagracia Soccorro Hernandez, birth mother of Baby O., who lives in Nevada, and (4) Jason and Danielle Clifford, foster parents of Child P., who live in Minnesota. A.L.M., Baby O., and Child P. each qualifies as an "Indian child" under ICWA (ROA.580-81), but none is a party to this case.

The Individual Plaintiffs and State Plaintiffs filed a joint second amended complaint ("Complaint") alleging seven claims under the Constitution and the APA. (ROA.579-716.) All Plaintiffs alleged that sections 1901-23 and 1951-52 of ICWA violate the Commerce Clause (ROA.641-44); that ICWA, the Final Rule, and 42 U.S.C. §§ 622(b)(9) and 677(b)(3)(G) violate the Tenth Amendment (ROA.644-51); and that

ICWA's adoptive preferences and provisions governing vacature for fraud and duress violate equal protection (ROA.651-54). The State Plaintiffs alleged that ICWA and the Final Rule violate the Non-Delegation Doctrine. (ROA.660-61.) Plaintiffs also alleged violations of the APA.[4] (ROA.635-41, 654-57.)

The Tribes intervened (ROA.761), and the Federal Defendants and the Tribes filed motions to dismiss, arguing, *inter alia*, that Plaintiffs lacked standing. (ROA.793-94, 861-62.) The district court denied the motions, holding that the Individual Plaintiffs have standing to assert equal protection and APA claims, and that the State Plaintiffs have standing to bring APA, Commerce Clause, Tenth Amendment, and non-delegation claims. (ROA.3749, 3753.)

All parties filed motions for summary judgment. On October 4, 2018, the district court granted summary judgment to Plaintiffs (ROA.4008-54) and entered judgment (ROA.4055). In its Order, the district court declared that ICWA was unconstitutional on three grounds and it also invalidated the Final Rule. First, the court held that

[4] The Individual Plaintiffs also alleged that section 1915 violates substantive due process. (ROA.657-60.) The court granted judgment to Defendants on this claim, and Plaintiffs did not appeal.

ICWA and the Final Rule violate equal protection. The court stated that because a child is an "Indian child" under ICWA if she is enrolled *or* eligible for enrollment in a tribe (when a parent is enrolled), the definition of Indian child "uses ancestry as a proxy for race." Thus, the court held that strict scrutiny applies, and that ICWA cannot survive strict scrutiny. (ROA.4028-36.)

Second, the court held that section 1915(c) of ICWA and section 23.230 of the Final Rule, which allows tribes to change the order of the placement preferences, are unconstitutional delegations of federal legislative authority. (ROA.4036-40.)

Third, the court held that ICWA unconstitutionally commandeers the states "by directly regulat[ing] the State Plaintiffs." (ROA.4040-45.) The court also found, on this basis, that ICWA violated the Indian Commerce Clause.[5] (ROA.4053-54.)

Fourth, the court held that the Final Rule exceeded Interior's authority. (ROA.4046-53.)

[5] Plaintiffs argued that ICWA exceeded Congress's authority under Article I, but the court ruled solely on commandeering.

SUMMARY OF THE ARGUMENT

The Court should reverse the judgment.

First, the Individual Plaintiffs lack standing. The Brackeens have no injury-in-fact. Contrary to the court's holding, ICWA does not impose a longer collateral-attack period than does Texas law, because section 1914 (which incorporates the state limitations period) applies, not section 1913(d). Moreover, the uncertain possibility that someone with standing might collaterally attack their adoption is too speculative to confer standing. The remaining Individual Plaintiffs cannot show redressability because any judgment in this action is not binding in Nevada and Minnesota, and therefore will not benefit them. Because the district court did not find that the State Plaintiffs had standing to assert the equal protection claim, that claim should be dismissed.

Second, ICWA does not violate equal protection. The Supreme Court has consistently held that laws regarding "Indians" make a political, not racial, classification. ICWA's "Indian child" definition is consistent with that precedent. ICWA is thus subject to rational-basis review, which it satisfies. Even if ICWA were subject to strict scrutiny,

it is constitutional because it is narrowly tailored to advance the government's trust obligations toward Indian children and tribes.

Third, ICWA does not unconstitutionally commandeer the states. ICWA imposes substantive and procedural requirements on state *courts*. Anti-commandeering principles apply only to congressional commands to state executive officials and legislatures, not state courts. Alternatively, ICWA represents a condition on federal funding of states' foster-care and adoption programs, which is permissible under the Spending Clause.

Fourth, the State Plaintiffs lack standing to allege that section 1915, which allows tribes to re-order the placement preferences, violates the Non-Delegation Doctrine. The claim is also meritless. Section 1915 recognizes Indian tribes' inherent authority over the domestic relations of their members. In any event, Congress may delegate federal authority to an Indian tribe.

Finally, the Final Rule does not violate the APA. ICWA expressly provided Interior with authority to promulgate regulations. Interior offered a reasoned explanation for why regulations were necessary. Further, the suggestion that states apply a clear-and-convincing

standard to depart from the placement preferences is entitled to *Chevron* deference and is reasonable.

ARGUMENT

The Supreme Court has long recognized that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court] ha[s] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004). The "plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). The Indian Commerce Clause provides that "Congress shall have Power … [t]o regulate Commerce with … the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. "[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The Court has also noted that Congress's plenary authority "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." *Lara*, 541 U.S. at 201.

Further, Congress's plenary authority extends beyond the borders of Indian reservations. Indeed, "Congress possesses the broad power of legislating for the protection of the Indians *wherever* they may be within the territory of the United States." *United States v. McGowan*, 302 U.S. 535, 539 (1938) (emphasis added); *see also Perrin v. United States*, 232 U.S. 478, 482 (1914) (explaining that congressional power extends to Indians "whether upon or off a reservation and whether within or without the limits of a state").

Ignoring Congress's plenary authority and misconstruing the relevant constitutional principles, the district court erred in granting Plaintiffs summary judgment. This Court reviews that order, and the order denying dismissal, *de novo*. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 440 n.8 (5th Cir. 2000).

I. The Individual Plaintiffs Lack Standing.

At the outset, the district court erred in not dismissing all claims by the Individual Plaintiffs for lack of standing. "To establish Article III standing, a plaintiff must show 'an injury-in-fact caused by a defendant's challenged conduct that is redressable by a court.'" *Dep't of Tex., Veterans of Foreign Wars v. Tex. Lottery Comm'n*, 760 F.3d 427,

432 (5th Cir. 2014) (*en banc*). The Brackeens cannot show injury-in-fact, and the other Individual Plaintiffs cannot show redressability.

A. The Brackeens cannot demonstrate injury-in-fact.

When they filed the initial complaint, the Brackeens' adoption of A.L.M. was pending. (ROA.69.) That adoption was finalized in January 2018 (ROA.615)—well before the filing of the Complaint. While the district court found that their effort to adopt "ha[d] been burdened … by the ICWA and the Final Rule" (ROA.3745), the Individual Plaintiffs sought only *prospective* relief (ROA.661-62), requiring them to show a likelihood of *future* injury in order to establish standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Bauer v. Texas*, 341 F.3d 352, 358 (5th Cir. 2003). Since A.L.M.'s adoption was final, the Brackeens suffered no *ongoing* injury when the Complaint was filed.[6] In the absence of injury, they lack standing.

[6] The Brackeens' standing is determined at the time they filed the Complaint. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) ("when a plaintiff … voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction"); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (analyzing standing when the "second amended complaint was filed"). If their standing were determined at the time of the initial complaint, their claims became moot when the adoption was finalized. *See Campbell-Ewald Co. v.*

The district court disagreed, finding that the Brackeens suffered injury because the "adoption of A.L.M. is open to collateral attack for two years under ICWA and the Final Rule," *see* § 1913(d), which is longer than the six-month period under Texas law, *see* Tex. Fam. Code Ann. § 162.012. (ROA.3745-46.) There are two fatal infirmities with this holding: it misreads ICWA and it is too speculative.

First, the district court erred in believing that the period for challenging the Brackeens' adoption was longer under ICWA than state law. As its text indicates, section 1913(d)'s two-year period applies only to a biological parent's challenge to her voluntary consent to adoption.[7] That provision does not apply to the Brackeens' adoption; the biological parents of A.L.M. did *not* consent to the Brackeens' adoption of A.L.M, but instead voluntarily terminated their parental rights to the state, *before* the Brackeens' adoption occurred. (ROA.610, 2684.) Therefore,

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Gomez, 136 S. Ct. 663, 669 (2016). Either way, they present no case or controversy.

[7] Section 1913(d) begins: "After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto …."

the collateral-attack provision applicable to A.L.M. is section 1914,[8] which incorporates the relevant *state* limitations period. *See In re Adoption of Erin G.*, 140 P.3d 886, 889-93 (Alaska 2006); *see also* 81 Fed. Reg. at 38,847 (explaining that section 1913(d)'s two-year statute of limitations does not apply to "actions to invalidate … terminations of parental rights"). Because the same Texas limitations period applies to challenges to the termination of parental rights under state law and ICWA, federal law does not injure the Brackeens.

Second, even if ICWA imposes a longer challenge period, any resulting injury is far too speculative. There is no evidence that A.L.M.'s biological parents or tribe might challenge the termination of parental rights. Indeed, both biological parents supported the Brackeens' adoption of A.L.M. (ROA.612, 2684), and the tribe withdrew its opposition to their adoption (ROA.2686). The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S.

[8] Section 1914 applies to "any parent or Indian custodian from whose custody" is removed an "Indian child who is the subject of any action for … termination of parental rights under State law."

398, 409 (2013) (emphasis added). Here, the possibility of any future challenge "is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" *Id.* at 401.

B. The remaining Individual Plaintiffs cannot demonstrate redressability.

The remaining Individual Plaintiffs lack standing for a different reason: absence of redressability. For standing, "it must be 'likely,' ... that the injury will be 'redressed by a favorable decision.'" *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 606 (5th Cir. 2018). "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself." *Dep't of Tex.,* 760 F.3d at 432. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court…." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). None of the other Individual Plaintiffs satisfy this standard.

Nick and Heather Libretti live, and seek to adopt Baby O., in Nevada. (ROA.616-18.) Altagracia Socorro Hernandez, who is Baby O.'s biological mother, also lives in Nevada. (ROA.616.) Nevada was not a party to this action, so neither Nevada's child-welfare agencies nor its courts are bound by the judgment. *See Blanton v. N. Las Vegas Mun.*

Court, 748 P.2d 494, 500 (Nev. 1987). Likewise, Danielle and Jason Clifford, who are the foster parents of Child P. and are attempting to adopt her, live in Minnesota. (ROA.619.) As Minnesota also is not a party to this lawsuit, neither its child-welfare agencies nor its courts are bound by the judgment either. *See Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. Ct. App. 2003). The judgment therefore will have no effect on the Librettis' ability to adopt Baby O. or the Cliffords' ability to adopt Child P., and it will not redress any injury they suffer from application of ICWA or the Final Rule by their state courts. "Because … declaratory relief" against Defendants "would not benefit" the Individual Plaintiffs, "any possibility of future injury is not redressable by the court and [they] lack[] standing…." *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375, 382 (5th Cir. 2016).

This Court addressed a similar issue *en banc* in *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001). There, abortion providers sued Louisiana's governor and attorney general, challenging the constitutionality of a state law making abortion providers liable to patients for damages caused by abortions. This Court held that the

plaintiffs failed to show redressability. The statute was enforced by private plaintiffs, the Court explained, so "defendants are powerless to enforce Act 825 against the plaintiffs (or to prevent any threatened injury from its enforcement)." *Id.* at 426-27. Accordingly, "their injury cannot be *redressed* by these defendants—that is, these defendants cannot prevent purely private litigants from filing and prosecuting a cause of action under Act 825 and cannot prevent the courts of Louisiana from processing and hearing these private tort cases." *Id.* at 427. Likewise, Defendants in this case cannot prevent state agencies or state courts in Nevada and Minnesota from complying with ICWA.

The district court sought to avoid this argument in two ways, both meritless. First, the court said that, with a judgment for Plaintiffs, "the obligation to follow these statutory and regulatory frameworks will no longer be applied to the states." (ROA.3748.) As noted above, this is wrong; the judgment does not bind Nevada or Minnesota or their courts. Indeed, the South Dakota Supreme Court recently held that it was not bound by the judgment below. *In re M.D.*, 920 N.W.2d 496, 799 n.4 (S.D. 2018). Nor does the invalidation of the Final Rule apply to courts in those states, as the South Dakota Supreme Court also recognized. *Id.* at

503-04 (following the Final Rule). An agency can decline to acquiesce in a court's decision invalidating its regulations in a court not bound by that decision. *See Indep. Petroleum Ass'n v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996).

Second, the district court held that "[t]he redressability requirement is met if a judgment in plaintiffs' favor 'would at least make it easier for them' to achieve their desired result." (ROA.3748 (quoting *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 521 (5th Cir. 2014)).) The court reasoned that "a declaration of the ICWA's unconstitutionality … would have the 'practical consequence' of increasing 'the likelihood that the plaintiff would obtain relief.'" (ROA.3748 (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)).) This reasoning fails. In both *Evans* and *Duarte*, a favorable judgment would directly benefit the plaintiff through a remedy imposed on the defendants. In *Evans*, a favorable judgment would require the defendant to issue a new census report, increasing the likelihood that Utah would receive an additional congressional seat, *see* 536 U.S. at 463-64; in *Duarte*, a favorable judgment would dramatically increase the number of houses the plaintiff could purchase or rent, *see* 759 F.3d

at 521. A favorable judgment here has no similar *direct* impact on Nevada or Minnesota. "It is well settled that '[a] claim of injury generally is too conjectural or hypothetical to confer standing when the injury's existence depends on the decisions of third parties.'" *Hotze v. Burwell*, 784 F.3d 984, 995 (5th Cir. 2015); *see also Clapper*, 568 U.S. at 413 ("we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment").

The district court seemed to imply that the precedential effect of the judgment might help the Librettis or the Cliffords, but that alone is not enough for standing. As the Tenth Circuit explained:

> [I]t must be the effect of the court's judgment on the defendant that redresses the plaintiff's injury, whether directly or indirectly. … "Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power."

Nova Health Sys. v. Gandy, 416 F.3d 1149, 1159 (10th Cir. 2005) (citations omitted) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring)).

In short, the Individual Plaintiffs lack standing, and the district court should have dismissed their claims.

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

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). Based on this provision, the district court held that ICWA and the Final Rule violate the Fifth Amendment's equal protection guarantee because it purportedly relies on a racial classification and cannot survive strict scrutiny. (ROA.4028-36.) This is wrong for two reasons. First, ICWA establishes a political, not racial, classification, which is subject to rational-basis review. Second, even were it race-based, the classification survives strict scrutiny.

A. No plaintiff has standing to assert an equal protection claim, so that claim should have been dismissed.

"[A] plaintiff must demonstrate standing for each claim he seeks to press." *Davis v. FEC*, 554 U.S. 724, 734 (2008). As explained above, the Individual Plaintiffs lack standing, including standing to assert an equal protection violation. *See supra*, at 15-23. Moreover, the district court excluded the equal protection claim from its holding that the State

Plaintiffs had standing.[9] (ROA.3753.) As no plaintiff has standing to assert an equal protection claim, the Court should reverse the judgment as to that claim.

B. ICWA is based on a political classification.

In any event, the district court's holding that ICWA's definition of Indian child is race-based is wrong. The Supreme Court has definitively held that "Indian" is a political, not racial, classification. ICWA is consistent with this precedent.

1. "Indian" is a political, not racial, classification.

The Supreme Court has consistently held that legislation giving special treatment to "Indians" is based on a political classification subject to rational-basis review. The seminal case is *Morton v. Mancari*. *Mancari* upheld a policy of the Bureau of Indian Affairs ("BIA") that gave hiring preferences to tribal Indians over non-Indians. The

[9] The State Plaintiffs did not cross-appeal this holding, as required for them to challenge it. *See Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015). Further, the holding is correct: "A State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

plaintiffs alleged that the preference constituted invidious racial discrimination. The Court rejected this argument.

The Court explained that this issue "turns on 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." 417 U.S. at 551. The Indian Commerce Clause "singles Indians out as a proper subject for separate legislation." *Id.* at 552. The Court noted that if legislation providing special treatment to Indians "were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased." *Id.*

The Court found that the hiring preference "is not even a 'racial' preference." *Id.* at 553. "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. The Court explained that "[t]he preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, 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 the Indians, such legislative judgments will not be disturbed." *Id.* at 555.

The Court further confirmed that federal legislation relating to members of Indian tribes is not an impermissible racial classification—even when it *burdens* rather than *benefits* Indians—in *United States v. Antelope*, 430 U.S. 641 (1977). *Antelope* concerned enrolled tribal members who were criminally charged in federal court rather than state court under the Major Crimes Act, 18 U.S.C. § 1153. 430 U.S. at 642. The defendants contended that subjecting them to federal charges, simply because they were Indians, constituted unconstitutional racial discrimination. *Id.* at 642-44. Rejecting this claim, the Court conclusively stated that "[t]he decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the

Constitution and supported by the ensuing history of the Federal Government's relations with Indians." *Id.* at 645. Reaffirming *Mancari*, the Court further noted that federal regulation of Indian affairs "is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'" *Id.* at 646.

In short, under *Mancari* and *Antelope*, legislation giving special treatment to "Indians" is based on a political, not racial, classification. Based on these cases, the Court has repeatedly upheld a variety of Indian-specific legislation.[10] Moreover, courts generally use the rational-basis standard when (as here) the power of Congress is plenary. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (rational basis review over "exclusion of foreign nationals"); *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (Territories Clause).

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[10] *See, e.g.*, *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977); *Fisher v. Dist. Court*, 424 U.S. 382 (1976); *see also Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1220 (5th Cir. 1991).

2. Consistent with *Mancari*, ICWA's definition of "Indian child" is a political distinction.

Consistent with *Mancari*, under ICWA "Indian child" is a political, not racial, classification. "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." § 1903(4). And "Indian tribe" is limited to federally recognized tribes. § 1904(8). ICWA thus applies only when a child (1) is already a *citizen* of a federally recognized tribe or (2) has a parent who is a *citizen* of a federally recognized tribe and herself is eligible to become a *citizen*. In short, the statute is triggered by *political affiliation*: enrolled membership (or eligibility for it) in a sovereign nation—not race—is the basis for application of ICWA. The contention that ICWA is premised on a race-based classification is simply wrong.

Indeed, "Indian child" includes children *without* Indian blood. Take appellant Cherokee Nation as an example. Membership in the Cherokee Nation includes descendants of "freedmen," former slaves of tribal citizens who became members after the abolition of slavery. (ROA.3032-33.) The freedmen were African-Americans and had no

Indian blood. Cherokee citizens also include descendants of various categories of "adopted whites." (ROA.3033.)

Conversely, many children who are racially Indian do *not* qualify as Indian children under ICWA. For example, even if a child were entirely Oneida, if neither parent was an enrolled member of the Oneida Nation, she would not meet the definition of "Indian child" and ICWA would not apply. (ROA.3050.) *See, e.g.*, *In re J.L.M.*, 451 N.W.2d 377, 387, 395-97 (Neb. 1990); *In re Smith*, 731 P.2d 1149, 1151-53 (Wash. Ct. App. 1987). Because only 60% of Indians are enrolled members of a tribe,[11] the definition of "Indian child" excludes hundreds of thousands of racially Indian children from ICWA's protections.

Further, a significant segment of the Indian population—well over 100,000 Indians—claim affiliation with tribes that are not federally recognized. *See* 1 Am. Indian Pol'y Rev. Comm'n, Final Report to Congress 461 (1977). Children of such Indians are excluded from ICWA. *See, e.g.*, *In re P.A.M.*, 961 P.2d 588, 588-90 (Colo. Ct. App. 1998); *In re Stiarwalt*, 546 N.E.2d 44, 48 (Ill. Ct. App. 1989).

[11] Changing Numbers, Changing Needs: American Indian Demography & Public Health 108-09 (Gary D. Sandefur, *et al.*, eds., 1996).

Moreover, unlike race, tribal membership is a *voluntary status*, *see Duro v. Reina*, 495 U.S. 676, 694 (1990), and, like U.S. citizenship, *see* 8 U.S.C. § 1484, can be renounced. Tribes generally have rules regarding relinquishment of citizenship. (*See, e.g.*, ROA.3034 (Cherokee Nation).)

Therefore, the definition of "Indian child" is political and race-neutral.

3. The district court's distinguishing of *Mancari* and reliance on *Rice* are error.

Instead of applying *Mancari*, the district court attempted to distinguish it on grounds that cannot withstand scrutiny. *First*, the court was flat wrong that *Mancari* is a "decision uniquely tailored to that particular set of facts." (ROA.4031.) It is true that *Mancari* mentioned BIA's "unique" role, but the Court subsequently applied *Mancari* in areas unrelated to BIA, including state taxes, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-81 (1976), and federal criminal law, *Antelope*, 430 U.S. at 645-47; *see also Peyote Way*, 922 F.2d at 1220.

Second, the district court erred when it contended that *Mancari* is distinguishable because that case applied only to members of federally

recognized tribes. (ROA.4031.) The district court concluded that because the definition of "Indian child" includes children "simply *eligible* for membership who have a biological Indian parent," the definition is based on blood and is not political. (ROA.4032.) This reasoning is quite wrong. First, the district court misapprehended the significance of the fact that the child eligible for membership must be the "biological child of a *member of an Indian tribe*." § 1903(4) (emphasis added). This provision requires an Indian child to have a political connection to a tribal sovereign. *See Means v. Navajo Nation*, 432 F.3d 924, 934 (9th Cir. 2005) ("formal enrollment in a tribe is not an 'absolute' requirement for Indian status"). Sovereigns—including the U.S.—commonly determine eligibility for citizenship based on ancestry.[12]

Moreover, the district court overlooked the context of ICWA. ICWA applies to children, including those only days old. *See* § 1913(a) (consent to termination of parental rights invalid if given within 10 days after birth). No tribe grants automatic membership to eligible

[12] *See* 8 U.S.C. §§ 1431, 1433 (children born to citizens abroad); Nick Petree, *Born in the USA: An All-American View of Birthright Citizenship and International Human Rights*, 34 Houston J. Int'l L. 147, 154 n.49 (2011) (other countries).

newborns or children;[13] those eligible for membership must apply, which can be a lengthy and detailed process. To apply for membership in appellant Cherokee Nation, for example, the applicant must complete a detailed application and submit (*inter alia*) copies of a birth certificate and citizenship documents for an immediate relative who is a member or, if none, certified state birth and death records documenting lineage back to the Dawes Rolls. *See Citizenship*, Cherokee Nation, http://www.cherokee.org/Services/Tribal-Citizenship/Citizenship (last visited Jan. 6, 2019). It is impossible for this paperwork to be completed and approved for a newborn. The extension of ICWA's requirements to a child who is eligible for tribal membership, and whose parent is a member, furthers ICWA's goals; otherwise thousands of parents could lose their parental rights before ICWA even applies—undermining Congress's purpose. Congress drafted ICWA with these considerations in mind, concluding that "[t]he constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to

[13] *See* Angelique EagleWoman & G. William Rice, *American Indian Children and U.S. Indian Policy*, 16 Tribal L.J. 1, 11 (2016).

hinge upon the cranking into operation of a mechanical process established under tribal law." House Report at 17.

The district court also ignored cases finding no constitutional difficulty when application of federal Indian statutes turned on political affiliation short of membership. In *United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (*en banc*), for example, the Ninth Circuit held that the Major Crimes Act was triggered by criteria including, in addition to tribal membership, receipt of government benefits by someone "eligible to become" a member and even "social recognition" of affiliation with a recognized tribe. *Id.* at 1114. *Mancari*'s reach is far broader than supposed by the district court.

Third, contrary to the district court's view (ROA.4031), *Mancari* is not limited to preferences applicable only on or near Indian reservations. Indeed, the Indian preference upheld in *Mancari* was not limited to employment on or near a reservation. 417 U.S. at 537-38, 553 n.24; *see also Peyote Way*, 922 F.2d at 1212, 1214-16. And, as explained above, Congress's plenary authority over Indians extends to "*wherever* they may be within the territory of the United States." *McGowan*, 302 U.S. at 539 (emphasis added).

Finally, the district court also erred when it held (ROA.4032) that ICWA "mirrors the impermissible racial classification in *Rice* [*v. Cayetano*, 528 U.S. 495 (2000)]." In *Rice* the challenged law allowed only members of a particular racial group (persons of Hawaiian descent) to vote for members of a state agency charged with overseeing state property. *Id.* at 509-10. After a lengthy discussion of the history and purpose of the 15th Amendment, *id.* at 511-14, the Court explained that sometimes "[a]ncestry can be a proxy for race," *id.* at 514. On the unique facts of *Rice*, the Court found that Hawaii "used ancestry as a racial definition and for a racial purpose," *id.* at 515, because—expressly rejecting the analogy to tribal Indians—"the elections … are elections of the State, not of a separate quasi sovereign," *id.* at 522. Further, *Rice* expressly reaffirmed *Mancari*, explaining that the Indian hiring preference there "was not directed towards a racial group consisting of Indians, but rather only to members of federally recognized tribes. In this sense, the Court held, the preference was political rather than racial in nature." *Id.* at 519-20 (cleaned up) (quoting *Mancari*, 417 U.S. at 553 n.24); *see also United States v. Wilgus*, 638 F.3d 1274, 1287 (10th Cir. 2011) (*Rice* "reaffirm[ed] the core holding of [*Mancari*]");

Kahawaiolaa v. Norton, 386 F.3d 1271, 1279 (9th Cir. 2004) (same). Courts therefore have continued to apply *Mancari* after *Rice*. *See, e.g.*, *EEOC v. Peabody W. Coal Co.*, 773 F.3d 977, 986-88 (9th Cir. 2014); *United States v. Garrett*, 122 F. App'x 628, 631-33 (4th Cir. 2005).

C. ICWA has a rational basis.

Because ICWA makes a political classification, a rational basis will uphold it. *Mancari*, 417 U.S. at 555. ICWA clearly has a rational basis: to protect the vital interest of Indian tribes in their children, to stop the wholesale removal of Indian children from their homes, and to protect tribes and Indian communities. § 1901(1)-(5); House Report at 9-11; *see Peyote Way*, 922 F.2d at 1220. Courts have thus repeatedly rejected equal protection challenges to ICWA. *See, e.g.*, *In re Appeal in Pima Cty. Juvenile Action No. S-903*, 635 P.2d 187, 193 (Ariz. Ct. App. 1981); *In re Armell*, 550 N.E.2d 1060, 1067-68 (Ill. App. Ct. 1990); *In re Adoption of Child of Indian Heritage*, 529 A.2d 1009, 1010 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 543 A.2d 925 (N.J. 1988); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980).

D. ICWA survives strict scrutiny.

Even if this Court concludes that ICWA is race-based, it is still constitutional because it survives strict scrutiny. The district court's holding otherwise (ROA.4033-36) is wrong.

In order to survive strict scrutiny, "racial classifications … must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). The government may use race-based classifications to respond to the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country." *Id.* at 237. As the Tribes argued below (ROA.4548-50), the classification here is narrowly tailored to serve a compelling governmental interest.

The government has a compelling interest based on the "general trust relationship between the United States and the Indian people," *United States v. Mitchell*, 463 U.S. 206, 225 (1983), under which the United States "'has charged itself with moral obligations of the highest responsibility and trust.'" *Jicarilla Apache Nation*, 564 U.S. at 176. Pursuant to those obligations, the federal government is responsible

"for the protection and preservation of Indian tribes." § 1901(2). The protection of Indian children is essential to protecting tribes. § 1901(3). Therefore, it is the public policy of the United States to protect the best interests of Indian children and tribes. § 1902. Indeed, Congress documented the large-scale and unwarranted removal of Indian children from their families and tribes, a problem states had failed to correct. § 1901(4)-(5); House Report at 9-11, 19. Those interests are compelling. *See McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 473 (5th Cir. 2014); *Wilgus*, 638 F.3d at 1284-87; *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000) (*per curiam*).

ICWA is narrowly tailored to those interests. It applies only to citizens of Indian tribes and children eligible for citizenship. ICWA is therefore constitutional under strict scrutiny.

E. To the extent that the inclusion of eligible, non-member children violates equal protection, that part of the "Indian child" definition should have been severed.

The inclusion in the definition of "Indian child" of children who are eligible for membership, with a parent who is a member, was the only basis for the district court's conclusion that ICWA "relies on racial classifications." (ROA.4032-33.) Even were this conclusion correct, the

district court erred in invalidating virtually all of ICWA on that basis. ICWA contains a severability clause. § 1963 ("If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.") The district court was therefore required to "take special care to attempt to honor the legislature's policy choice to leave the statute intact." *Veasey v. Abbott*, 830 F.3d 216, 269 (5th Cir. 2016). Rather than invalidate the entire statute on equal protection grounds, the court simply should have limited the definition of "Indian child" to tribal members.

III. ICWA Does Not Unconstitutionally Commandeer the States.

The district court held that ICWA unconstitutionally commandeers the states by "requiring the States to apply federal standards to state created claims" and, as a result, "ICWA regulates states." (ROA.4041, 4043.) This holding is error. ICWA and the Final Rule impose substantive and procedural requirements on state *courts*, and the Supreme Court has held that Tenth Amendment anti-commandeering principles apply only to federal commands to state executive officials and legislatures. In any event, ICWA represents a

condition on federal funding of states' foster-care and adoption programs that is permissible under the Spending Clause.[14]

A. The anti-commandeering principle does not apply to congressional commands to state courts.

"[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). As the Court explained, "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018).

This principle applies to federal commands to both state legislatures and state executive-branch officials. In *Printz*, the Brady Handgun Act required state law-enforcement officials to perform a background check on prospective handgun purchasers. 521 U.S. at 903. The Court invalidated this requirement, holding that the Constitution does not permit Congress to "conscript[] the State's officers." *Id.* at 935. Nor can Congress commandeer the state legislature. In *Murphy*, a federal statute "prohibit[ed] state authorization of sports gambling."

[14] For these same reasons, the district court erred in holding (ROA.4053-54) that ICWA violated the Indian Commerce Clause.

138 S. Ct. at 1478. The statute was unconstitutional, the Court held, because it "unequivocally dictates what a state legislature may and may not do." *Id.*

The Court has acknowledged, however, that the anti-commandeering principle has a significant exception: it does not restrict federal dictates to state *courts*. *Printz* 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 appropriate for the judicial power." 521 U.S. at 907; *see* The Federalist No. 82, at 494 (Hamilton) (Clinton Rossiter ed., 1961) ("[T]he national and State [judicial] systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union…"). "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); *see* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; … shall be the supreme Law of the Land; and *the*

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.") (emphasis added). Put simply, "Congress ha[s] the power to require that state adjudicative bodies adjudicate federal issues and to require that States … follow federally mandated procedures." *South Carolina v. Baker*, 485 U.S. 505, 514 (1988).

B. ICWA's mandates apply to state courts, not state executive-branch officials.

The district court's commandeering holding is erroneous for a simple reason: ICWA and the Final Rule impose obligations on state *courts* and, therefore, are immune from a commandeering challenge. Take the example mentioned in the district court's order: the placement preferences in section 1915, which the court contended are "a direct command from Congress to the states." (ROA.4043.) Those preferences govern the substantive adjudicative decision with respect to adoptive, pre-adoptive, and foster-care placements made by state *judges*; they are not mandates requiring that state executive-branch employees enforce federal law. The same is true of the other challenged provisions of ICWA and the Final Rule.

The Complaint alleges that sections 1911, 1912, 1913, 1917, and 1951 impermissibly "command" the states. (ROA.645-47.) Like section 1915, each of these provisions is directed at procedural rules followed and substantive law applied by state *courts*. Section 1911(b) and (c) both begin with the phrase "[i]n any State court proceeding" and address when a court must transfer a case and allow intervention by specified parties. Section 1911(d) requires that state courts accord full faith and credit to child-custody proceedings of an Indian tribe. Section 1912 provides procedures to be followed in specified 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. Section 1913 governs the validity in court of consents for foster care or voluntary termination of parental rights and collateral attack in court of adoption decrees. Section 1917 directs courts to provide certain information to the person subject to an adoption proceeding. Section 1951(a) requires state courts to provide the Secretary of the Interior with the adoption decree and other information. Similarly, the Final

Rule exclusively imposes requirements on state courts. *See* 25 C.F.R. §§ 23.107(a)-(b), 23.111, 23.120, 23.132(c)(5), 23.138-23.141.

To be sure, a few provisions of ICWA as written could appear to impose obligations on parties to court proceedings—which sometimes (though not always) are state agencies—rather than the courts. Specifically, section 1912(a) imposes a notice requirement on "the party seeking the foster care placement of, or termination of parental rights to, an Indian child"; section 1912(d) requires "[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law" to "satisfy the court" that they engaged in "active efforts … to prevent the breakup of the Indian family"; and section 1915(c) requires "the agency or court" effecting a placement to comply with a tribe's placement preferences. These provisions do not commandeer for two reasons. First, these generally applicable requirements apply to private parties and state agencies alike. They therefore do not unconstitutionally commandeer. *See Murphy*, 138 S. Ct. at 1478 ("The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.").

Second, in *substance* these provisions are properly read—and, pursuant to the constitutional-doubt canon,[15] *must* be read—as conditions that must occur before *the court* may order a foster-care placement or termination of parental rights.[16] ICWA does not subject state officials to a freestanding obligation to provide the specified notice, engage in active efforts, or adhere to the placement preferences—instead, unless those things occur, the *court* cannot approve the placement or termination. Indeed, each of these provisions is specifically tied to a pending state-court proceeding. In this way, ICWA functions entirely differently from the Brady Act in *Printz*, which "direct[ed] state law enforcement officers to participate … in the

[15] *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) ("It is … incumbent upon us to read the statute to eliminate [constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress.").

[16] This reading is consistent with the Final Rule, which places the burden on the *court*. *See* 25 C.F.R. § 23.111(a) ("the court must ensure"); *id.* § 23.120(a) ("the court must conclude"); *id.* § 23.130(c) ("The court must … also consider").

administration of a federally enacted regulatory scheme." 521 U.S. at 904. That simply is not the case here.[17]

Nor is ICWA a unique federal intrusion into state child-welfare courts. Federal law imposes numerous mandates on state courts in the context of adoption and custody. *See* International Child Abduction Remedies Act, 22 U.S.C. § 9003; Intercountry Adoption Act of 2000, 42 U.S.C. § 14932. Indeed, Congress pervasively regulates state child-welfare systems through Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679c, which incorporates such laws as the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997). The district court focused on ICWA's placement preferences for Indian children. But Congress has altered the state-law placement preferences for *all* foster-care cases. 42 U.S.C. § 671(a)(19). Plaintiffs complain about ICWA's requirement that active efforts to prevent the breakup of an Indian family occur before a foster-care placement or termination of parental rights. But Congress has overridden state law and required reasonable efforts to "preserve and reunify families" for *all* foster-care

[17] To the extent that any provision commandeers unconstitutionally, that provision should be severed from the statute. *Veasey*, 830 F.3d at 269.

cases. *Id.* § 671(a)(15)(B). Plaintiffs complain about ICWA's notice requirement. But Congress has required specific notice in *all* foster-care cases. *Id.* § 675(5)(G). If affirmed, the commandeering holding would destroy the entire edifice of federal law intended to protect vulnerable children.

C. Congress is permitted to modify state law.

The district court never directly addressed the fact that the commandeering rule does not apply to requirements imposed on state courts. Instead, the court contended that this principle was inapplicable because "Congress directs state courts to implement the ICWA by incorporating federal standards that modify *state created* causes of action." (ROA.4042.) "[R]equiring the States to apply federal standards to state created claims," the court believed, "contradicts the rulings in *Murphy*, *Printz*, and *New York*." (ROA.4041.)

This holding is error, plain and simple. *Murphy*, *Printz*, and *New York* did not involve federal statutes that modified state-created claims, and those cases say *nothing* of relevance to that situation. Nor have the Tribes located any other case supporting the district court's position. In fact, the law is directly contrary.

Courts repeatedly have held that Congress may change state procedural or substantive rules in service of federal interests.[18] As far back as *Stewart v. Kahn*, 78 U.S. 493 (1870), the Court upheld Congress's authority to extend state statutes of limitations applicable to state claims during the Civil War. More recently, the Court rejected arguments that the supplemental jurisdiction statute, 28 U.S.C. § 1367(d), which modifies state limitations periods for state claims, exceeds Congress's authority "because it violates principles of state sovereignty." *Jinks v. Richland Cty.*, 538 U.S. 456, 464-65 (2003). Likewise, in *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176 (2d Cir. 2002), the Second Circuit upheld the Superfund Amendments, which dictated to state courts when a state statute of limitations began to run, *id.* at 196, concluding that they did not exceed Congress's authority under the Tenth Amendment, *id.* at 203-05. The court explained that the challenged provision "requires no action by a state's legislative or executive officials, but only the application of federal law by the courts…." *Id.* at 205. And the Supreme Court has repeatedly held that

[18] Congress has done so often. *See, e.g.*, 11 U.S.C. §§ 108(c), 362(a); 15 U.S.C. § 6606(e)(4); 23 U.S.C. § 409; 50 U.S.C. §§ 3931-3938.

Congress may change state divorce laws as applied in state courts to federal pay or benefits. *See, e.g.*, *McCarty v. McCarty*, 453 U.S. 210 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *see also City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396-97 (2d Cir. 2008) (rejecting commandeering challenge to federal statute requiring state courts to dismiss state-law actions).

D. Alternatively, ICWA is authorized by the Spending Clause.

The Spending Clause grants Congress the power to "pay the Debts and provide for the … general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. "Congress may use this power 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. Sebelius*, 567 U.S. 519, 576 (2012) ("*NFIB*") (opinion of Roberts, C.J.) (citation omitted). Through such conditions, Congress may "encourage a State to regulate in a particular way" and may "hold out incentives to the States as a method of influencing a State's policy choices." *New York*, 505 U.S. at 166. Conditions on federal spending are constitutional when the state "'voluntarily and knowingly accepts the terms of the "contract."'" *NFIB*, 567 U.S. at 577 (opinion of

Roberts, C.J.). "But when 'pressure turns into compulsion,' the legislation runs contrary to our system of federalism." *Id.* at 577-78 (citation omitted).

As the Tribes argued below (ROA.4554-56), ICWA represents a permissible condition on federal spending. 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. Title IV-B conditions funding on "a plan for child welfare services" that describes "the specific measures taken by the State to comply with [ICWA]." 42 U.S.C. § 622(a)-(b). If "the Secretary determines" that the state's compliance plan is inadequate, the state's funding would be reduced. 45 C.F.R. § 1355.36. Similarly, to receive full Title IV-E funding, states must certify compliance with ICWA. 42 U.S.C. § 677(b); 45 C.F.R. § 1355.34(b). The Complaint alleges that in Fiscal Year 2018, Texas was appropriated $410 million in such funding, Louisiana $64 million, and Indiana $189 million. (ROA.598.) Indeed, the district court held the possible loss of such funding provided the State Plaintiffs with standing. (ROA.3752.)

Plaintiffs have never proven—or even alleged—that the requirement that the states comply with ICWA to receive their full appropriation of Title IV-B and IV-E funding crosses the line from "'pressure … into compulsion.'" *NFIB*, 567 U.S. at 577 (opinion of Roberts, C.J.). In *NFIB*, the Court invalidated the Affordable Care Act's Medicaid expansion because the penalty imposed on a state that refused to comply with federal policy was so large—20% of the state's overall budget—that it represented "a gun to the head." *Id.* at 581. Here, by contrast, Congress has not "indirectly coerce[d]," *id.* at 578, the State Plaintiffs to comply with ICWA, because the penalty for non-compliance is tiny compared to that in *NFIB*. *See* 45 C.F.R. § 1355.36(b)(5) (penalty begins at 1% of foster care and adoption grants). Accordingly, ICWA does not exceed Congress's authority under the Tenth Amendment.

IV. Section 1915 Does Not Violate the Non-Delegation Doctrine.

In section 1915, Congress set default placement preferences for children under ICWA. However, Congress also recognized that because of factors unique to each tribe, flexibility is essential. So Congress expressly mandated that placements must be made with consideration

of "the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." § 1915(d). Congress also understood that a tribe may need to set different preferences from ICWA's default. ICWA therefore permits a tribe—exercising inherent governmental authority—to enact a law that reorders the placement preferences. § 1915(c). Section 1915(c) requires state courts to "follow such order" but only if "the placement is the least restrictive setting appropriate to the particular needs of the child." Moreover, section 1915(c) also requires that the placement preference of the Indian child and parent should be "give[n] weight … in applying the preferences." *Id.* This unremarkable provision ensures flexible application of ICWA.

The district court ignored this context and held that section 1915 violated the Non-Delegation Doctrine. First, the court concluded that an Indian tribe is "like a private entity" and since it is "not part of the [federal] Government at all," it "cannot exercise … governmental power." (ROA.4039 (alterations in original) (internal quotations omitted).) Second, the court ruled that tribes departing from the default

placement order was an exercise of authority that "can only be described as legislative" and therefore a violation of the Non-Delegation Doctrine.[19] (ROA.4038.) Both holdings are wrong. Moreover, the State Plaintiffs lack standing to assert this claim.[20]

A. The State Plaintiffs lack standing to assert the non-delegation claim.

The non-delegation claim was asserted by the State Plaintiffs alone. (ROA.660-61.) They have not established injury-in-fact for this claim. There is no evidence that any tribe's change to the order of preferences impacted even a single child-placement decision in Texas, Indiana, or Louisiana, or that such an impact is "certainly impending," *Clapper*, 568 U.S. at 409. In the absence of such injury-in-fact, they lack standing and the claim should be dismissed.

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[19] A default rule from which another governmental body can depart is hardly unusual. For example, while the Clean Water Act provides default rules concerning water quality standards, it permits states and tribes to establish more stringent standards. *See Wisconsin v. EPA,* 266 F.3d 741, 744 (7th Cir. 2001).

[20] For the same reasons, the district court's invalidation of 25 C.F.R. § 23.130(b) on non-delegation grounds should be reversed.

B. Section 1915 recognizes inherent tribal authority over domestic relations matters.

The district court ignored the inherent sovereign authority of tribes in evaluating whether section 1915(c) is constitutional. An Indian tribe is not analogous to a private entity. The Court instructed in *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164 (1973), that tribal sovereignty "provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172. Before the founding of the United States, "tribes were self-governing sovereign political communities." *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Today tribes "remain separate sovereigns … [and] unless and until Congress acts, the tribes retain their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (internal quotations and citations omitted). Indian tribes therefore "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).

Moreover, the Court has confirmed that 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, 424 U.S. at 390 (holding that tribe had exclusive jurisdiction in child-custody proceedings); *Cohen's Handbook of Federal Indian Law* 216 (2012 ed.) ("*Cohen*") ("One area of extensive tribal power is domestic relations among tribal members.").

Accordingly, section 1915(c) is properly viewed as congressional confirmation of inherent tribal power over the proper placement of Indian children and, at most, "relax[es] restrictions on the bounds of the inherent tribal authority." *Lara*, 541 U.S. at 207; *see Holyfield*, 490 U.S. at 42. Moreover, if Congress—as it did in the statute reviewed in *Lara*—could recognize inherent tribal criminal jurisdiction over non-members, *a fortiori* Congress can recognize a tribe's authority over placement of its children. In this sense, section 1915(c), like the statute in *Lara*, is not a delegation at all. *See also United States v. Long*, 324 F.3d 475, 482 (7th Cir. 2003) (finding that the Menominee Restoration Act was a confirmation of preexisting governmental powers instead of a delegation).

C. If this Court finds section 1915 is a delegation, it is permissible under well-settled law.

The district court nevertheless concluded that a tribe is "like a private entity" and thus "not part of the [federal] Government at all,

which would necessarily mean that it cannot exercise … governmental power." (ROA.4039 (internal quotations omitted) (ellipsis in original).) This is error. It is indisputable that Congress can delegate federal authority to an Indian tribe. In *United States v. Mazurie*, 419 U.S. 544 (1975), the Court upheld Congress's delegation to an Indian tribe to control the introduction of alcoholic beverages into the tribal community. *Id.* at 557. Writing for a unanimous Court, then-Justice Rehnquist explained that, while the "Court has recognized limits on the authority of Congress to delegate its legislative power," such "limitations are … less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Id.* at 556-57. The Court pointed out that the "important aspect of this case" is that it addresses a delegation to Indian tribes, "unique aggregations possessing attributes of sovereignty over both their members and their territory." *Id.* at 557. Tribal governmental powers are particularly substantial "over matters that affect the internal and social relations of tribal life." *Id.* Accordingly, the Court concluded, "the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its

own authority." *Id.*; *see also Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1213 (9th Cir. 2001) (*en banc*) (affirming congressional delegation to tribes over non-Indian lands); *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287-92 (D.C. Cir. 2000) (affirming Congress's delegation to tribes to establish air quality standards under Clean Air Act); *Cohen* at 216 ("tribes are governments capable of exercising legislative powers delegated by Congress"). The district court cited not a single instance when any court has invalidated a congressional delegation to a tribe.[21]

Finally, Congress adequately legislates when the statute sets forth an "intelligible principle"—not a demanding requirement.

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[21] The district court purported to quote the Court as stating "Congress 'cannot delegate its exclusively legislative authority at all,'" citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156 (1980), and *White Mountain Apache Tribe v. Arizona Department of Game & Fish*, 649 F.2d 1274, 1281 (9th Cir. 1981). (ROA.4038.) But this language does not appear in either case. And neither case supports the court's assertion. *Confederated Tribes* addressed whether, absent a federal statute, state taxation of cigarette sales to non-Indians was preempted. 447 U.S. at 160-61. The Court expressly noted that "the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so." *Id.* at 156. Similarly, *White Mountain Apache* explained that "Congress has manifested no intent whatsoever to delegate to tribes" the power at issue. 649 F.2d at 1281.

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001). As Justice Scalia explained:

> In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition."

Id.

The "intelligible principle" test is satisfied here. The power recognized in section 1915(c) is a narrow one. It merely provides that tribes are able to reorder the congressionally selected placements to better fit their communities. This is nothing close to the "authority to regulate the entire economy" mentioned in *Whitman*. Moreover, reordering of placements can occur only when a tribal sovereign enacts a law. § 1915(c). Further, the reordering must be followed in a particular case only "so long as the placement is the least restrictive setting appropriate to the particular needs of the child," and the court must consider "the preference of the Indian child or parent" for any placement. *Id*. And, even if a tribe reorders the placement preferences, a "court would still have the power to determine whether 'good cause'

exists to disregard the tribe's order of preference." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655 n.11 (2013). In short, if section 1915(c) is a delegation of congressional authority, the intelligible principles test is met.

The ruling that section 1915(c) violates the Non-Delegation Doctrine should be reversed.

V. The Final Rule Does Not Violate the APA.

The district court held that the Final Rule violates the APA for two reasons. First, because Interior failed to explain its change from its 1978 view about its authority to issue regulations, "those regulations remain not *necessary* to carry out the ICWA." (ROA.4047-49.) Second, even if Interior could issue regulations, the court held that the suggestion that "good cause" should be established by clear and convincing evidence is contrary to the statute and therefore not entitled to *Chevron* deference. (ROA.4050-53.) The district court is wrong on both points.[22]

[22] As explained, the court's holding (ROA.4046) that the Final Rule violated the APA because it implements an unconstitutional statute is wrong.

A. Interior possessed statutory authority to promulgate the Final Rule.

ICWA provides Interior with express authority to promulgate the Final Rule: "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." § 1952. As explained in the Final Rule and the opinion issued by the Solicitor of Interior, section 1952 is substantively identical to other statutes that courts have repeatedly confirmed provide broad delegations of rulemaking authority. 81 Fed. Reg. at 38,785; Memorandum M-37037 from Solicitor of Interior to Sec'y of Interior on Implementation of the Indian Child Welfare Act by Legislative Rule 15 (June 8, 2016) ("Solicitor's Opinion"), *available at* www.doi.gov/sites/doi.gov/files/uploads/m-37037.pdf.

City of Arlington v. FCC, 569 U.S. 290 (2013), relied upon in both the Final Rule and the Solicitor's Opinion, is instructive. There, the Supreme Court affirmed that a grant of statutory authority to "prescribe such rules and regulations as may be necessary in the public interest" authorized the FCC to impose deadlines on states and local governments to process siting applications for wireless facilities. *Id.* at 293, 307. The Court held that *Chevron, U.S.A., Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837 (1984), applies to an agency's determination of its own jurisdiction. 569 U.S. at 301. The Court explained that there was not "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *Id.* at 306.

Here, Interior explained in detail why the Final Rule was necessary. Drawing on its expertise in directly providing child-welfare services to tribes, its delivery of technical assistance to state social workers and courts, and its expertise in Indian affairs, Interior reasonably concluded that the Final Rule was necessary to carry out ICWA. 81 Fed. Reg. at 38,784-85. In particular, the agency emphasized the need to provide uniform federal standards for certain ICWA provisions. 81 Fed. Reg. at 38,782; Solicitor's Opinion at 10. Interior highlighted that state courts themselves had noted courts' inconsistency in applying key provisions of ICWA. 81 Fed. Reg. at 38,782; Solicitor's Opinion at 10 nn.78, 80. Interior concluded that the current variation among states was contrary to Congress's intent, undermined ICWA, and was inconsistent with *Holyfield*. 81 Fed. Reg. at 38,782. Comments

from states, tribes, national child welfare organizations and professionals, and the public affirmed the need for regulations to provide uniform standards to carry out ICWA. The Tribes are not aware of a single state or child-welfare agency that disputed the need for regulations during the rulemaking process.

In addition to uniform standards, Interior also concluded that the lack of binding guidelines hindered the necessary protection of tribal citizens living outside of Indian country. *Id.* at 38,782-83. Noting that Native children were still disproportionally overrepresented in the foster-care system, Interior believed that regulations would help reunify children with their parents. *Id.* at 38,783-84; Solicitor's Opinion at 9-10.

Ignoring these explanations, the district court relied on *Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018). The court read *Chamber* to say that Interior's interpretation is not due deference because Interior's position changed over time. (ROA.4048-49.) But *Chamber* is inapposite. The *Chamber* court held that rule under review was not entitled to deference since it was outside the congressional mandate and conflicted with the statutory text. 885

F.3d at 369. Interior here had express statutory authority for issuing the Final Rule.

B. Interior provided a reasoned explanation of its change in position and the Final Rule was within Congress's delegation of authority in section 1952.

The district court erred in concluding that Interior "does not explain its change in position" from its 1978 guidance. (ROA.4049.) Because an agency "must consider … the wisdom of its policy on a continuing basis," *Chevron*, 467 U.S. at 863-64, the APA does not subject an agency's change in position to a more searching review. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). An agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Id*. at 515. Rather, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id.*

Here, Interior did not ignore its 1978 guidance. Rather, it discussed the previous guidance in both the Final Rule and the Solicitor's Opinion, carefully explaining why its previous position that regulations were unnecessary was no longer correct. First, Interior

explained that decades of "real-world ICWA application have thoroughly disproven [its prior position] and underscored the need for … regulation." 81 Fed. Reg. at 38,786; Solicitor's Opinion at 18. Second, Interior explained that at the time of its prior guidance it did not have the benefit of *Holyfield*, which affirmed Congress's intent that ICWA have nationwide uniform application and that ICWA's provisions were not dependent on state law. 81 Fed. Reg. at 38,786-87; Solicitor's Opinion at 18-19. Third, Interior specifically addressed those parts of its earlier guidance questioning whether section 1952 allowed regulations applicable in state courts. 81 Fed. Reg. at 38,788-89; Solicitor's Opinion at 19-22. Finally, Interior carefully analyzed its authority to issue the Final Rule. 81 Fed. Reg. 38,785-90.

In sum, the record demonstrates that Interior explained that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Fox*, 556 U.S. at 515. Interior's reasoned analysis therefore satisfies the APA.

C. The Final Rule is entitled to *Chevron* deference.

Plaintiffs argued below that the Final Rule's clarification of the meaning of "good cause" and the imposition of a "clear and convincing"

evidentiary standard are not entitled to *Chevron* deference. The district court ruled that the "clear and convincing" evidence standard in section 23.132(b) was not entitled to *Chevron* deference and was contrary to law. (ROA.4051-53.)

This ruling is wrong in two respects. First, the good-cause regulation is entitled to *Chevron* deference. Second, Interior appropriately concluded that what constitutes "good cause" to depart from ICWA's placement preferences under ICWA was ambiguous and that the "clear and convincing" evidentiary standard was appropriate.

First, *Chevron* established a familiar two-part test. First, where "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. However, where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

The district court held that the good-cause regulation failed at *Chevron* step one because Congress intended a preponderance of the evidence standard to govern departures from the placement

preferences. The court reasoned that, because "other portions of the ICWA specifically included heightened evidentiary burdens," while section 1915 is silent, Congress intended the preponderance standard to apply to section 1915. (ROA.4052.) But this *expressio unius* reasoning has been expressly rejected in the APA context. "The *expressio unius* canon operates differently in our review of agency action than it does when we are directly interpreting a statute." *Van Hollen v. FEC*, 811 F.3d 486, 493 (D.C. Cir. 2016). As the D.C. Circuit explained:

> When interpreting statutes that govern agency action, we have consistently recognized that a congressional mandate in one section and silence in another often "suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion." Silence, in other words, may signal permission rather than proscription. For that reason, that Congress spoke in one place but remained silent in another … "rarely if ever" suffices for the "direct answer" that *Chevron* step one requires.

Catawba Cty. v. EPA, 571 F.3d 20, 36 (D.C. Cir. 2009) (citations omitted). *Chevron* deference applies.

Second, the good-cause regulations are reasonable. Interior closely examined the issue of what constitutes "good cause." Finding ambiguities, Interior then set forth five factors upon which a good cause finding may be based and discussed each factor in detail. 81 Fed. Reg.

at 38,838-40, 38,843-47. This guidance effectuated Congress's intent that good cause be a limited exception rather than a broad category that swallows the rule. *Id.* at 38,839. Interior expressly provided for flexibility, moreover, explaining that "the final rule says that good cause 'should' be based on one of the five factors, but leaves open the possibility that a court may determine, given the particular facts of an individual case, that there is good cause to deviate from the placement preferences because of some other reason." *Id.* at 38,839, 38,847.

Regarding the application of the "clear and convincing" evidence standard to a determination of good cause to depart from the placement preferences, Interior noted that, unlike other sections of ICWA, a burden of proof standard was not articulated in section 1915. *Id.* at 38,843. Accordingly, Interior examined the statute, legislative history, and state cases and found that "[state] courts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress's intent in ICWA to maintain Indian families and Tribes intact." *Id.* Interior found the analysis of these state decisions convincing. Finally, while Interior opined that "the clear and convincing

standard 'should' be followed," it expressly declined to "categorically require that outcome." *Id.*

Accordingly, the judgment on Plaintiffs' APA claim should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this response contains 12,973 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

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

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 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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ADDENDUM

CHAPTER 21 INDIAN CHILD WELFARE

§ 1901. Congressional findings

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

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

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

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non Indian foster and adoptive homes and institutions; and

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

[1] So in original. Probably should be capitalized.

(Pub. L. 95 608, § 2, Nov. 8, 1978, 92 Stat. 3069.)

SHORT TITLE

Pub. L. 95 608, § 1, Nov. 8, 1987, 92 Stat. 3069, provided: ''That this Act [enacting this chapter] may be cited as the 'Indian Child Welfare Act of 1978'.''

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

(Pub. L. 95 608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

§ 1903. Definitions

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

(1) ''child custody proceeding'' shall mean and include

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

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

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

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

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

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

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

(4) ''Indian child'' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the

biological child of a member of an Indian tribe;

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

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

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

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

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

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

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

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

(Pub. L. 95 608, §4, Nov. 8, 1978, 92 Stat. 3069.)

SUBCHAPTER I CHILD CUSTODY PROCEEDINGS

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

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

(b) Transfer of proceedings; declination by tribal court

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

(c) State court proceedings; intervention

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

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

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

(Pub. L. 95 608, title I, §101, Nov. 8, 1978, 92 Stat. 3071.)

§ 1912. Pending court proceedings

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

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such ap

pointment is in the best interest of the child. Where State law makes no provision for ap pointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

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

(d) Remedial services and rehabilitative programs; preventive measures

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

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

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

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

No termination of parental rights may be or dered in such proceeding in the absence of a de termination, supported by evidence beyond a reasonable doubt, including testimony of quali fied expert witnesses, that the continued cus tody of the child by the parent or Indian custo dian is likely to result in serious emotional or physical damage to the child.

(Pub. L. 95 608, title I, §102, Nov. 8, 1978, 92 Stat. 3071.)

§ 1913. Parental rights; voluntary termination

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

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

(b) Foster care placement; withdrawal of consent

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

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

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

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

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

(Pub. L. 95 608, title I, §103, Nov. 8, 1978, 92 Stat. 3072.)

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

Any Indian child who is the subject of any ac tion for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

(Pub. L. 95 608, title I, §104, Nov. 8, 1978, 92 Stat. 3072.)

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

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

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or pre adoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed with in reasonable proximity to his or her home, tak ing into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

(Pub. L. 95 608, title I, §105, Nov. 8, 1978, 92 Stat. 3073.)

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

(Pub. L. 95 608, title I, §106, Nov. 8, 1978, 92 Stat. 3073.)

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

(Pub. L. 95 608, title I, §107, Nov. 8, 1978, 92 Stat. 3073.)

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a), the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a), the Secretary shall publish no tice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall re assume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a), the Secretary shall provide such technical assistance as may be necessary to en able the tribe to correct any deficiency which the Secretary identified as a cause for dis approval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

(Pub. L. 95 608, title I, §108, Nov. 8, 1978, 92 Stat. 3074.)

REFERENCES IN TEXT

Act of August 15, 1953, referred to in subsec. a , is act Aug. 15, 1953, ch. 505, 67 Stat. 588, as amended, which en acted section 1162 of Title 18, Crimes and Criminal Pro cedure, section 1360 of Title 28, Judiciary and Judicial Procedure, and provisions set out as notes under sec tion 1360 of Title 28. For complete classification of this Act to the Code, see Tables.

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respect ing care and custody of Indian children and ju risdiction over child custody proceedings, in cluding agreements which may provide for or derly transfer of jurisdiction on a case by case basis and agreements which provide for concur rent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' writ ten notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

(Pub. L. 95 608, title I, §109, Nov. 8, 1978, 92 Stat. 3074.)

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child cus tody proceeding before a State court has im properly removed the child from custody of the parent or Indian custodian or has improperly re tained custody after a visit or other temporary relinquishment of custody, the court shall de cline jurisdiction over such petition and shall forthwith return the child to his parent or In dian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

(Pub. L. 95 608, title I, §110, Nov. 8, 1978, 92 Stat. 3075.)

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law appli cable to a child custody proceeding under State or Federal law provides a higher standard of pro tection to the rights of the parent or Indian cus todian of an Indian child than the rights pro vided under this subchapter, the State or Fed eral court shall apply the State or Federal standard.

(Pub. L. 95 608, title I, §111, Nov. 8, 1978, 92 Stat. 3075.)

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the res ervation, from his parent or Indian custodian or the emergency placement of such child in a fos ter home or institution, under applicable State law, in order to prevent imminent physical dam age or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent phys ical damage or harm to the child and shall expe ditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the ap propriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appro priate.

(Pub. L. 95 608, title I, §112, Nov. 8, 1978, 92 Stat. 3075.)

§ 1923. Effective date

None of the provisions of this subchapter, ex cept sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for fos ter care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after No vember 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

(Pub. L. 95 608, title I, §113, Nov. 8, 1978, 92 Stat. 3075.)

SUBCHAPTER II INDIAN CHILD AND FAMILY PROGRAMS

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establish

ment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non Federal matching share in connection with funds provided under titles IV B and XX of the Social Security Act [42 U.S.C. 620 et seq., 1397 et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under titles IV B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

(Pub. L. 95 608, title II, § 201, Nov. 8, 1978, 92 Stat. 3075.)

REFERENCES IN TEXT

The Social Security Act, referred to in subsec. b , is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Titles IV B and XX of the Social Security Act are classified generally to part B § 620 et seq. of subchapter IV and subchapter XX § 1397 et seq. of chapter 7 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off reservation Indian child and family service programs which may include, but are not limited to

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

(Pub. L. 95 608, title II, § 202, Nov. 8, 1978, 92 Stat. 3076.)

§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: *Provided*, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

(Pub. L. 95 608, title II, § 203, Nov. 8, 1978, 92 Stat. 3076; Pub. L. 96 88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

CHANGE OF NAME

''Secretary of Health and Human Services'' and ''Department of Health and Human Services'' substituted for ''Secretary of Health, Education, and Welfare'' and ''Department of Health, Education, and Welfare'', respectively, in subsec. a pursuant to section 509 b of Pub. L. 96 88, which is classified to section 3508 b of Title 20, Education.

§ 1934. "Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term ''Indian'' shall include persons defined in section 1603(c)[1] of this title.

(Pub. L. 95 608, title II, § 204, Nov. 8, 1978, 92 Stat. 3077.)

REFERENCES IN TEXT

Section 1603 c of this title, referred to in text, was redesignated section 1603 13 of this title by Pub. L. 111 148, title X, § 10221 a , Mar. 23, 2010, 124 Stat. 935.

SUBCHAPTER III RECORDKEEPING, INFORMATION AVAILABILITY, AND TIME TABLES

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

(Pub. L. 95 608, title III, § 301, Nov. 8, 1978, 92 Stat. 3077.)

[1] See References n Text note below

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

(Pub. L. 95 608, title III, § 302, Nov. 8, 1978, 92 Stat. 3077.)

SUBCHAPTER IV MISCELLANEOUS PROVISIONS

§ 1961. Locally convenient day schools

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

(Pub. L. 95 608, title IV, § 401, Nov. 8, 1978, 92 Stat. 3078; Pub. L. 96 88, title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

CHANGE OF NAME

''Department of Health and Human Services'' substituted for ''Department of Health, Education, and Welfare'' in subsec. b , pursuant to section 509 b of Pub. L. 96 88 which is classified to section 3508 b of Title 20, Education.

Select Committee on Indian Affairs of the Senate redesignated Committee on Indian Affairs of the Senate by section 25 of Senate Resolution No. 71, Feb. 25, 1993, One Hundred Third Congress.

Committee on Interior and Insular Affairs of the House of Representatives changed to Committee on Natural Resources of the House of Representatives on Jan. 5, 1993, by House Resolution No. 5, One Hundred Third Congress.

§ 1962. Copies to the States

Within sixty days after November 8, 1978, the Secretary shall send to the Governor, chief justice of the highest court of appeal, and the attorney general of each State a copy of this chapter, together with committee reports and an explanation of the provisions of this chapter.

(Pub. L. 95 608, title IV, § 402, Nov. 8, 1978, 92 Stat. 3078.)

§ 1963. Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

(Pub. L. 95 608, title IV, § 403, Nov. 8, 1978, 92 Stat. 3078.)