No. 18-11479

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

v.

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

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

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

FEDERAL APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

No. 18-11479

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

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

1. Private Parties: Chad Everet Brackeen; Jennifer Kay Brackeen; Altagracia Socorro Hernandez; Jason Clifford; Frank Nicholas Libretti; Heather Lynn Libretti; and Danielle Clifford.

2. Counsel of Record and Other Persons:

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d. Attorneys of record for movant-intervenor-defendants Navajo Nation: Hogan Lovells US LLP; Maria Wyckoff Boyce; Catherine Bratic; Katherine C. Belzowski; Paul Wesley Spruhan; and Preston Randolph Mundt.

e. Amici curiae appearing in the district court and their attorneys of record: Goldwater Institute; Matthew R. Miller; State of Ohio; Daniel P. Norakov; Frost Brown Todd LLC; State of California; Christina McClurg Riehl; Gila River Indian Community; Akin Gump Strauss Hauer & Feld LLP; Brennan Holden Meier; Jayant Kartik Tatachar; Pratik A. Shah; Indian Law Scholars; Susan E. Hutchinson; Hutchison & Stoy PLLC; National Congress of American Indians; Dentons US LLP; Native American Rights Fund; Richard D. Salgado; Daniel David Lewerenz; Erin C. Dougherty; Rose Nimkiins Petoskey; Samuel Daughety; Association on American Indian Affairs; National Indian Child Welfare Association; State of Alaska; State of Montana; State of New Mexico; State of Oregon; State of Utah; and State of Washington.

s/ Eric Grant
ERIC GRANT

Attorney of Record for Federal Appellants

STATEMENT REGARDING ORAL ARGUMENT

This appeal arises out of a district court judgment declaring a decades-old Act of Congress unconstitutional on multiple grounds. Striking down a federal statute is among the most sensitive actions that a court may take. Federal Defendants-Appellants accordingly believe that oral argument will prove both appropriate and helpful to the Court in ensuring full deliberation of the issues presented.

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INTRODUCTION

Four decades ago, widespread abusive practices by States and private agencies toward children affiliated with Indian tribes spurred Congress to pass the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 et seq. ICWA sets minimum federal standards for child-welfare proceedings involving children affiliated with a federally recognized Indian tribe. Myriad courts have sustained ICWA against constitutional challenges.

The district court upended decades of settled law and practice when it declared ICWA unconstitutional on equal-protection, anti-commandeering, and non-delegation grounds. Each ground is unprecedented and in conflict with binding authority. Moreover, the court struck down provisions that no party had standing to challenge and that were severable from the remainder of the statute's protections, despite ICWA's express severability clause. The court's decision that ICWA's implementing regulations are invalid is incorrect as well. This Court should reverse.

STATEMENT OF JURISDICTION

The district court generally had subject matter jurisdiction under 28 U.S.C. § 1331. The court lacked jurisdiction, however, over Plaintiffs' Fifth Amendment claim, because Plaintiffs lacked standing. *See infra* Section I.A.1 (pp. 18-24).

The district court entered final judgment on October 4, 2018. ROA.4055. The intervenor defendants and the federal defendants timely filed separate notices of

appeal on November 19 and November 30, respectively. ROA.4458, 4762; *cf.* Fed. R. App. P. 4(a)(1)(B)(i). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in declaring virtually all of ICWA unconstitutional.

a. With regard to Fifth Amendment equal-protection principles, whether the court erred in (i) concluding that Plaintiffs had standing to challenge each statutory provision at issue; (ii) treating the challenged provisions as suspect racial classifications, notwithstanding the Supreme Court's holding in *Morton v. Mancari*, 417 U.S. 535 (1974), that statutory distinctions based on tribal membership are political rather than racial; and (iii) deciding that the statute would fail the more stringent test for racial classifications based on a truncated recitation of ICWA's purposes.

b. With regard to the Tenth Amendment, whether the court erred in concluding that ICWA impermissibly "commandeers" States merely by setting forth minimum federal standards for child-welfare proceedings that preempt contrary state law under the Supremacy Clause, or by imposing information-sharing requirements.

c. Whether the court erred in concluding that a provision which incorporates certain tribal resolutions into federal law is an unconstitutional delegation of legislative authority.

2. Whether the district court erred in concluding that the Interior Department's 2016 regulations implementing ICWA are arbitrary, capricious, or contrary to law.

STATEMENT OF THE CASE

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

"Indian tribes are distinct, independent political communities." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (internal quotation marks omitted). Since "the settlement of our country," those tribes have been treated as political entities by the United States. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 10 (1831); *see also* U.S. Const. art. I, § 8, cl. 3 (authorizing Congress to regulate commerce with "Indian tribes," as well as with "foreign Nations" and among "the several States"). Subject to limitations imposed by Congress, tribes retain "the power of regulating their internal and social relations," including "domestic relations" among members. *Santa Clara Pueblo*, 436 U.S. at 55-56 (internal quotation marks omitted).

The United States currently "recognizes" more than 570 Indian tribes as political entities that are "eligible for the special programs and services provided by the United States to Indians." 25 U.S.C. § 479a-1; 83 Fed. Reg. 4235 (Jan. 30, 2018). Recognition of these tribes is a "formal political act . . . institutionalizing the government-to-government relationship between the tribe and the federal government." *California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263

(D.C. Cir. 2008). The United States has a trust relationship with those tribes, the contours of which are defined by Congress. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011).

The Supreme Court has consistently recognized Congress's "plenary power" to enact legislation that "deal[s] with the special problems of" both recognized tribes and tribal members. *Mancari*, 417 U.S. at 551-52; *see also, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004) (calling such power "plenary and exclusive"). Throughout the nation's history, Congress has legislated in response to "special problems" encountered by tribes and individual Indians — providing healthcare services to Indians, 25 U.S.C. § 1621b; imposing federal penalties for crimes involving Indians in Indian country, 18 U.S.C. §§ 1152-1153; and many others. Indeed, as the Supreme Court has observed, "an entire Title of the United States Code (25 U.S.C.)" is dedicated to laws specially "dealing with Indian tribes and reservations." *Mancari*, 417 U.S. at 552.

B. Abusive practices in state child-custody proceedings

In the mid-1970s, Congress identified another "special problem" calling for protective measures by the United States: widespread "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

Senate hearings revealed "that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901(4); *see also Holyfield*, 490 U.S. at 32. The evidence before Congress showed that 25-35% of all Indian children were being removed from their families, often based on standards different from those applied to non-Indian families, and often through the use of abusive or misleading methods to coerce Indian parents into giving up their rights. *Id.* (citing legislative history); H.R. Rep. No. 95-1386, at 9, 11 (1978). Those Indian children tended to be placed without consideration of whether a placement was available with relatives, or within their tribal community. *See* 25 U.S.C. § 1901(5).

The effects of this "massive removal" on Indian children's individual welfare were acute, with many children encountering "serious adjustment problems . . . during adolescence," documented by psychiatric professionals. *Holyfield*, 490 U.S. at 33-34. Also of concern was "the impact on the tribes themselves," whose continued existence as discrete political bodies depends on the continued participation of younger generations in tribal life. *Id.*; *see also* 25 U.S.C. § 1901(3). As one tribal chief explained to Congress: "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people." *Holyfield*, 490 U.S. at 34.

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

C. ICWA

In response to the crisis, Congress enacted ICWA. ICWA declares a two-pronged federal policy "to protect the best interests of Indian children" and "to promote the stability and security of Indian tribes and families" by enacting into federal law certain protections for tribes and their children. 25 U.S.C. § 1902.

To meet those goals, ICWA enacts "minimum Federal standards" that act as an overlay on otherwise applicable state law in certain child-welfare proceedings. *Id.* §§ 1902, 1903(1), 1903(4). ICWA's standards explicitly preempt conflicting state law, except where state law provides a "higher standard of protection." *Id.* § 1921. ICWA's standards apply only in child-custody proceedings — defined to include foster-care placements, terminations of parental rights, and preadoptive and adoptive placements — involving an "Indian child." *Id.* §§ 1902, 1903(1), 1903(4). The term "Indian child" refers, in turn, to "any unmarried person who is under age eighteen" and who has one of two present-day relationships to a federally recognized Indian tribe: the child must be either (a) "a member of an Indian tribe"; or

(b) "eligible for membership in an Indian tribe *and* . . . the biological child of a member." *Id.* § 1903(4) (emphasis added).

ICWA imposes minimum requirements that apply in such proceedings. Procedurally, ICWA prescribes when proceedings involving an Indian child must be heard in tribal rather than state courts. 25 U.S.C. § 1911(a)-(b). For proceedings involving an Indian child that remain in state court, the statute imposes certain timing and notice requirements in order to protect tribes and their members — as well as the parents or custodian of the child at issue, Indian or not — from being excluded from meaningful participation. *Id.* § 1912(a). ICWA also imposes two federal information-sharing requirements: that state courts provide the Secretary of the Interior with copies of any final decree for the adoptive placement of an Indian child, *id.* § 1951(a); and that States maintain a record of Indian-child placements, which "shall be made available at any time" to Interior or to the child's tribe, *id.* § 1915(e).

Substantively, Section 1912 establishes standards that a state court must find satisfied before ordering the removal of an Indian child from his or her parents or before terminating parental rights. 25 U.S.C. § 1912(d), (e), (f). More relevant to this appeal, however, are Section 1915's placement preferences, which set non-dispositive "preferences" for adoptive and foster placement of Indian children. *Id.* § 1915(a)-(b). Section 1915(a) gives preference to *adoptive* placements with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe;

or (3) other Indian families" — meaning families containing a person who is "a member" of a federally recognized tribe, *id.* § 1903(3). Section 1915(b) gives preference to *foster* placements with (1) "a member of the Indian child's extended family"; (2) "a foster home licensed, approved, or specified by the Indian child's tribe"; (3) "an Indian foster home licensed or approved by an authorized non-Indian licensing authority"; or (4) "an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." With regard to both adoptive and foster preferences, the statute specifies "good cause" as a basis for state courts to deviate from the enumerated preferences. *Id.* § 1915(a); *id.* § 1915(b).

Three related provisions of ICWA are also at issue in this appeal. Section 1913(d) provides that, for two years after an adoption decree is entered, the parent of an Indian child may withdraw consent to the adoption upon a showing that "consent was obtained through fraud or duress." Section 1914 permits an Indian child, the child's parent or Indian custodian, or the child's tribe to petition any court to invalidate a child's removal from his or her family or the termination of a parent's rights upon a showing that certain protections for tribes, families, and Indian custodians were violated. Finally, ICWA contains an express severability clause: "If any provision of" the statute "or the applicability thereof is held invalid, the remaining provisions . . . shall not be affected thereby." 25 U.S.C. § 1963.

In the 40 years since ICWA's passage, ICWA has been recognized by child-welfare organizations as the "gold standard for child welfare policies and practices that should be afforded to all children." Brief of Casey Family Programs, et al. as Amici Curiae in Support of Respondent Birth Father, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1279468, at *2 (Mar. 28, 2013). States — including Plaintiffs Indiana, Louisiana, and Texas here — have applied its protections for decades. *See, e.g., In re D.S.*, 577 N.E.2d 572 (Ind. 1991); *Owens v. Willock*, 690 So. 2d 948 (La. Ct. App. 1997); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152 (Tex. App.—Houston [14th Dist.] 1995). Moreover, state courts — the bodies that actually apply ICWA's standards in individual cases — have routinely sustained ICWA against constitutional attack throughout its 40-year history.[1]

D. Interior's 2016 Rule

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

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

"not necessary" to promulgate "regulations with legislative effect," on the premise that "[s]tate and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department." 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979). Instead, Interior chose to promulgate non-binding guidelines for implementing most provisions of the statute.

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

E. The present action

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

Rather than challenging ICWA in the course of state proceedings to which they are or were parties, Plaintiffs jointly mounted a facial challenge to ICWA's constitutionality in federal court. In their operative second amended complaint, all Plaintiffs claimed that Section 1915 of ICWA violates the Fifth Amendment's guarantee of equal protection; that the chapters containing ICWA's substantive and procedural standards violate the Tenth Amendment; that ICWA exceeds Congress's authority under Article I; and that the 2016 Rule violates the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. ROA.635-54. In addition to those joint claims, State Plaintiffs separately claimed that one statutory provision contains an impermissible delegation of legislative authority to tribes. ROA.660-61. Individual Plaintiffs separately claimed that Section 1915 and the 2016 Rule violate their Fifth Amendment due process rights. ROA.654-60.

Plaintiffs named as defendants the United States, the Secretary of the Interior, and various other federal officers and agencies (collectively, the United States or the federal defendants). ROA.588. Intervening as defendants were the Cherokee Nation, Oneida Nation, Quinault Indian Nation, and Morongo Band of Mission Indians (collectively, the Intervenor Tribes). ROA.761.

The United States moved to dismiss the entire case on jurisdictional grounds, including that no Plaintiff had demonstrated standing to raise an equal-protection challenge. ROA.365-80. Before the motion to dismiss was fully briefed, however, State Plaintiffs and individual Plaintiffs filed separate motions for summary judgment. ROA.998, 2534. Over the objection of the United States, the district court ordered briefing on the motion to dismiss and motions for summary judgment to proceed simultaneously. ROA.2736. As part of that briefing, the United States filed a cross-motion for partial summary judgment. ROA.3614.

The district court resolved all pending motions in two written orders. ROA.3721-60, 4008-54. The court first ruled that Plaintiffs had standing. ROA.3743-53. It then granted judgment to Plaintiffs on all counts except the Fifth Amendment due process claim. ROA.4008-54. In so doing, it declared a 40-year-old Act of Congress unconstitutional on three distinct grounds, striking down all but seven sections. *Id.*; ROA.4055.

First, the district court determined that ICWA violates Fifth Amendment equal-protection principles. ROA.4028-36. In this regard, the court declined to follow the unbroken line of precedent that federal statutes governing the relationship between the United States and federally recognized Indian tribes and their members draw *political*, rather than *racial*, distinctions and thus are subject only to rational basis review. ROA.4029-33. Instead, the court concluded that the statute draws racial classifications and thus is subject to strict scrutiny. ROA.4023-33. The United States had asked that, if the court determined that strict scrutiny applied, the United States be permitted to develop a factual record and to provide briefing on the novel question of how that standard applies to a statute aimed at promoting tribal autonomy. ROA.3086, 4033-34. The court denied that request and determined, without the benefit of full briefing or record evidence, that ICWA did not satisfy strict scrutiny. ROA.4033-36.

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

certain administrative tasks, including making a record of an Indian child's placement available to the Secretary of the Interior. ROA.4043-44. The court did not consider whether any such requirements were severable from the statute's other provisions. *See id.*

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

In addition to declaring ICWA unconstitutional, the district court set aside the 2016 Rule for "purport[ing] to implement an unconstitutional statute." ROA.4036-40. The court additionally held that the Department of the Interior lacked statutory authority to issue regulations with the force of law, ROA.4046-49; and that the 2016 Rule erred in recommending that "good cause" for deviating from ICWA's adoptive-placement and foster-placement preferences be established by clear and convincing evidence, ROA.4050-53.[2]

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[2] Plaintiffs had also requested that two statutes administered by the Department of Health and Human Services be declared unconstitutional, ROA.662, but the district court did not do so, ROA.4055. Contrary to Plaintiffs' claims, those statutes do not make federal funding contingent on States' compliance with ICWA. One statute requires state applicants for certain funds to document "specific measures taken by the State to comply with" ICWA, but does not require that a State be in compliance to receive the funds. 42 U.S.C. § 622(b)(9). The other statute does not mention ICWA at all. *Id.* § 677(b)(3)(G).

After the United States and the Intervenor Tribes each filed notices of appeal, this Court stayed the district court's decision. Order, ECF No. 00514745522 (Dec. 3, 2018).

SUMMARY OF ARGUMENT

"Striking down an Act of Congress 'is the gravest and most delicate duty that [a court] is called on to perform.'" *Shelby County v. Holder*, 570 U.S. 529, 556 (2013). Yet the district court here declared a 40-year-old Act of Congress unconstitutional on its face. That decision is both unprecedented and erroneous, and a panel of this Court has already stayed it. The Court should now reverse.

1. a. This Court should reverse the district court's conclusion that ICWA violates the Fifth Amendment. As a threshold matter, the court lacked jurisdiction to consider Plaintiffs' equal-protection claim. Even assuming the district court had jurisdiction, however, its conclusion on the merits was erroneous. The challenged provisions are subject to rational basis review — not strict scrutiny. Neither those provisions nor the "Indian child" definition on which the court focused draw distinctions based on race, but only on present-day affiliation with a federally recognized Indian tribe. The Supreme Court and this Court have long recognized that such distinctions drawn or authorized by Congress are political, rather than racial, and do not offend equal protection so long as they are rationally related to the government's interest in fulfilling its unique obligation toward tribes and their

members. The challenged provisions satisfy that standard. In any event, even if strict scrutiny were to apply, ICWA would still be constitutional on its face, and to the extent any one of Section 1915's preferences did violate equal-protection principles, such preference would be severable, particularly given ICWA's express severability clause.

b. The district court's conclusion that ICWA violates the Tenth Amendment should also be reversed. The court held that ICWA improperly commandeers state courts by requiring those courts to apply federal standards in state child-custody proceedings. But the Supreme Court's anti-commandeering decisions recognize that state courts' obligation to faithfully apply federal law is a function of the Supremacy Clause and does not offend the Tenth Amendment. The district court's attempt to distinguish rules that would otherwise apply in a *state-law* cause of action versus a *federal* cause of action has no basis in the Supremacy Clause.

The district court likewise erred in concluding that ICWA commandeers state agencies. Information-sharing requirements like those at issue here do not offend the Tenth Amendment, and they are severable from the remainder of the statute in any event.

c. The district court further erred in holding that Section 1915(c) of ICWA works an impermissible delegation of Congress's authority. That provision does not delegate authority at all. It merely recognizes tribes' authority to enact their

own preferred order of adoptive placements and foster placements for their members' children. Moreover, even if ICWA could be seen as a delegation, it would be lawful (and severable).

2. Because each of the district court's rationales as to why ICWA itself violates the Constitution is erroneous, its decision to set aside the 2016 Rule for "purport[ing] to implement an unconstitutional statute" should also be reversed. The court identified two other grounds for invalidating that rule, but both rationales are erroneous and provide no basis for invalidation.

The judgment of the district court should be reversed.

STANDARD OF REVIEW

A district court's conclusions regarding standing, the constitutionality of a federal statute, and an agency's compliance with the APA are all reviewed de novo. *NAACP v. City of Kyle*, 626 F.3d 233, 236 (5th Cir. 2010); *Richard v. Hinson*, 70 F.3d 415, 416 (5th Cir. 1995); *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 219 (5th Cir. 2016).

ARGUMENT

ICWA is consistent with the Constitution, and the 2016 Rule is consistent with the Constitution and the APA. In declaring otherwise, the district court erred as a matter of law.

I. ICWA is constitutional.

The district court declared ICWA unconstitutional on multiple grounds. As explained below, the court was wrong as to each ground.

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

The district court erred in holding that ICWA violates Fifth Amendment equal-protection principles. At the threshold, the court should never have reached the bulk of the claim, because Plaintiffs lack standing. On the merits, the court erred in subjecting the challenged provisions to strict scrutiny. In any event, the court's analysis is flawed even under strict scrutiny.

1. Plaintiffs lack Article III standing.

To assert a claim in federal court, the "irreducible constitutional minimum of standing" requires a plaintiff to demonstrate that he or she suffered an "injury in fact" that is "fairly . . . trace[able]" to the challenged conduct and that is "likely" to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). No Plaintiff here has met this burden with regard to the Fifth Amendment claim.

At the outset, Plaintiffs' unusual choice to bring a facial challenge to ICWA in a federal court, rather than in the particular state-court proceedings to which they are parties, means that even a favorable judgment will not redress their alleged injuries — for the simple reason that a decision from the district court or even this

Court will not bind state judges. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997). In other words, a state court may still hold Plaintiffs to ICWA's standards regardless of the outcome of this case. To have a justiciable claim, Plaintiffs must present their concerns about ICWA to the courts that actually adjudicate the proceedings in which those concerns arise.

Aside from the redressability problem, Plaintiffs have failed to assert a cognizable injury with regard to the bulk of the provisions that they have challenged. Plaintiffs requested in their complaint a declaration that Section 1915's adoptive-placement and foster-placement preferences violate the Fifth Amendment. ROA.654. In their motion for summary judgment, Plaintiffs additionally requested that Sections 1913(d) and 1914 be invalidated on equal-protection grounds. ROA.2593-2601. Plaintiffs accordingly had a burden to demonstrate an injury stemming from *each* of those provisions — including each of Section 1915's three adoptive-placement and four foster-placement preferences. *See, e.g.*, *Legacy Community Health Services, Inc. v. Smith*, 881 F.3d 358, 366 (5th Cir. 2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357-58 & n.6 (1996)); *K.P. v. LeBlanc*, 729 F.3d 427, 436 (5th Cir. 2013). To demonstrate such an injury, Plaintiffs needed to show (at a minimum) that those provisions have been or will imminently be applied in ongoing proceedings to which they are parties, not merely that they might be subject to those provisions in the future. *See, e.g., Clapper v. Amnesty International*

USA, 568 U.S. 398, 409 (2013) (requiring that plaintiffs show a "certainly impending" injury). With the sole exception of the foster preference for extended family members, no Plaintiff has met that burden.

As an initial matter, State Plaintiffs as a matter of law lack standing to raise an equal-protection claim against the United States. A State itself has no rights under the Fifth Amendment. *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). A State's citizens do have Fifth Amendment rights, of course, and a State may sue certain defendants as *parens patriae* to vindicate the rights of those citizens. *See generally Georgia v. McCollum*, 505 U.S. 42, 55 (1992). But it is blackletter law that a State may not sue the United States "to protect her citizens from the operation of federal statutes." *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *accord, e.g., Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007). Thus, to the extent that any Plaintiff has standing to raise that claim, it cannot be the States — as the district court itself apparently recognized. *See* ROA.3753.

The critical question, then, is whether *individual* Plaintiffs have met their burden. To answer that question, the seven individual Plaintiffs can be classified into three groups. The first group is the Brackeens, a Texas couple that successfully adopted an Indian child called A.L.M. in January 2018, while the present case was pending. ROA.2683, 2687. The Brackeens allege that their adoption could be subject to a petition for reopening under Sections 1913(d) and 1914, but they do not

assert that a petition to reopen under either provision has been filed or even threatened. *See* ROA.2683-87. With regard to Section 1915, because A.L.M.'s adoption is complete, there is no circumstance in which Section 1915's preferences would apply.[3]

The second group of individual Plaintiffs includes Ms. Hernandez, the biological mother of Baby O.; and the Librettis, a Nevada couple fostering and seeking to adopt Baby O. ROA.2688-93, 2695. Ms. Hernandez avers that she surrendered Baby O. (whose father is a member of the Ysleta del Sur Pueblo Tribe) to the State of Nevada at birth, and that she supports the Librettis' attempts to adopt Baby O. ROA.2692, 2695-97. The Librettis aver that the Ysleta del Sur Pueblo Tribe has searched for alternative placements for the baby among tribal members, but the Librettis maintain that none of the potential placements identified by the tribe "sought to adopt Baby O. and none seeks foster custody over Baby O." ROA.2692. Rather, the Librettis "are the only people seeking to adopt Baby O." *Id.*

The third and final group of individual Plaintiffs are the Cliffords, a Minnesota couple that wishes to adopt Child P., who is either a member of or eligible for

[3] In a post-judgment motion to supplement the record, the Brackeens indicated their interest in adopting another Indian child. ROA.4102-09. But injury in fact must be "certainly impending" when the complaint is filed, *see, e.g., Defenders of Wildlife*, 504 U.S. at 564 n.2, and the Brackeens' belated assertion does not cure their standing problem, as it does not indicate whether they have formally petitioned to adopt that child or disclose whether any competing placements have come forward.

membership in the White Earth Nation. ROA.2625, 2627, 2672. According to their declaration, the Cliffords previously fostered Child P., but they no longer have physical custody of the child. ROA.2625-29. Citing ICWA's preference for foster placement with extended biological family, a Minnesota court upheld the State's decision to move Child P. to live with the child's biological grandmother, a White Earth Nation member. ROA.2662-69. State-court filings suggest that as of January 2018, the State wished to place Child P. with the child's grandmother for adoption, but the Cliffords aver that the grandmother has filed no petition to adopt Child P. ROA.2629, 2666.

On this record, Plaintiffs failed to demonstrate that the bulk of the statutory provisions that they challenge are being or will imminently be applied to them. Beginning with Section 1913(d), only the Brackeens have even alleged a finalized adoption — a precondition of that section's application. 25 U.S.C. § 1913(d); ROA.2687. But the Brackeens have fallen far short of showing that a petition challenging termination of the biological parents' rights under Section 1913(d) is "certainly impending," as required to satisfy Article III. *Clapper*, 568 U.S. at 409. If and when a petition under Section 1913(d) is filed, the Brackeens will be free to challenge Section 1913(d) on any grounds that are available. Until that time, however, any injury from that section's operation is too speculative to confer standing. *See Clapper*, 568 U.S. at 409.

The same is true regarding Section 1914, which permits certain persons to challenge an Indian child's removal from his or her Indian parent or custodian where certain protections were not afforded. No Plaintiff has demonstrated that a Section 1914 petition regarding the children at issue has been filed or is forthcoming. Any potential injury from that section is accordingly too speculative to satisfy Article III.

With regard to Section 1915, Plaintiffs have failed to show that all but one of that provision's seven distinct placement preferences are applicable to their ongoing cases. As the Supreme Court has explained, Section 1915's preferences are not relevant in every custody proceeding involving an Indian child; instead, they apply only where a preferred person "has formally sought to adopt" or foster the child at issue. *Adoptive Couple*, 570 U.S. at 655. Here, no Plaintiff has even hinted that an Indian family not affiliated with the child's own tribe has formally sought to adopt the children. Therefore, Plaintiffs have not demonstrated the applicability of, let alone injury from, the third adoptive placement for "other Indian families." 25 U.S.C. § 1915(a)(3). Likewise, no Plaintiff has suggested that any "Indian foster home licensed or approved by an authorized non-Indian licensing authority" or "institution for children approved by an Indian tribe or operated by an Indian organization" has formally sought to foster the children at issue. 25 U.S.C. § 1915(b)(iii)-(iv).

With regard to Section 1915's second adoptive preference (for members of the child's tribe) and second foster preference (for foster homes approved by that tribe), the Librettis aver that Baby O.'s tribe has searched for and suggested various potential competing placements. ROA.2692. But the Librettis maintain that no competing request to foster or adopt Baby O. has been made. *Id.* Therefore, Section 1915's preferences do not apply. *See Adoptive Couple*, 570 U.S. at 655.

Finally, with regard to Section 1915's primary adoptive and foster preferences (for placement with a member of the child's extended family), the Cliffords have adequately demonstrated that ICWA's *foster* preference for extended families was applied in transferring Child P. to the care of the child's biological grandmother. ROA.2662-69. With regard to the *adoptive* preference, however, the Cliffords' showing is equivocal. Although the State of Minnesota apparently wished to place Child P. for adoption with the child's grandmother, the Cliffords aver that the grandmother has not filed a competing petition to adopt the child. ROA.2629, 2666. Absent a showing that Child P.'s grandmother has "formally sought" to adopt the child, the adoptive preference's applicability is unclear. *See Adoptive Couple*, 570 U.S. at 655.

For these reasons, even setting aside the redressability problem that infects Plaintiffs' entire equal-protection claim, Plaintiffs have arguably demonstrated injury only regarding Section 1915(b)(1)'s first foster-placement preference.

2. To the extent that Plaintiffs have standing, *Mancari*'s rational relationship test applies, and the challenged provisions satisfy that test.

a. *Mancari* governs.

Since 1974, the Supreme Court has repeatedly held that federal statutes providing special treatment based on membership in a federally recognized Indian tribe do not impose suspect *racial* classifications. *Mancari*, 417 U.S. at 55; *see also, e.g.*, *United States v. Antelope*, 430 U.S. 641, 643-47 (1977); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-80 (1976); *Fisher v. District Court*, 424 U.S. 382, 390-91 (1976). This Court has followed suit. *See, e.g.*, *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214-16 (5th Cir. 1991). Such provisions instead draw *political* classifications, which are upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. That rational relationship standard applies here as well, and the district court erred in applying strict scrutiny.

Mancari involved a Bureau of Indian Affairs (BIA) hiring preference for members of federally recognized tribes with "one-fourth or more degree Indian blood." 417 U.S. at 551 n.24. Non-Indians contended that the preference constituted "invidious racial discrimination." *Id.* A unanimous Supreme Court disagreed. *Id.* at 551-55. The Court explained that the preference was enacted against the "unique legal status of Indian tribes under federal law and upon the plenary power of

Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Id.* at 551. Against that background, federal laws singling out tribes and members are not suspect: to the contrary, "[l]iterally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations." *Id.* at 552.[4] If all such laws "were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* Instead, "[a]s long as" a federal law's "special treatment can be *tied rationally* to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555 (emphasis added).

[4] The district court read this sentence to mean that the hiring preference "provided special treatment only to Indians living on or near reservations." ROA.4031. The preference eligibility criteria are reproduced in the *Mancari* opinion and contain no requirement that an applicant live on or near a reservation. 417 U.S. at 553 n.24. And while the Supreme Court apparently understood in 1974 that tribal members had historically tended to live on or near the tribe's reservation, the federal government's special relationship with Indian tribes is not limited to those members who currently reside on or near a reservation. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (describing the "overriding duty of our Federal Government to deal fairly with Indians *wherever located*" (emphasis added)); *see also Peyote Way*, 922 F.2d at 1213-16 (upholding peyote exemption for members of a religious group, "most" — but not all — of whom live on reservations).

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

Since *Mancari*, the Supreme Court has repeatedly rejected arguments that other federal laws singling out tribes and tribal members draw suspect racial classifications. *See, e.g., Antelope*, 430 U.S. at 643-47 (upholding statute subjecting Indians who commit crimes on Indian lands to federal jurisdiction); *Moe*, 425 U.S. at 479-80 (upholding exemption from state sales and personal property taxes for on-reservation Indians); *Fisher*, 424 U.S. at 390-91 (upholding law requiring individuals to bring adoption proceedings in tribal court). This Court has done the same, holding that a federal controlled-substances law exempting peyote use by members of the "Native American Church" — which was limited to "members of federally recognized tribes who have at least 25% Native American ancestry" — drew a permissible *political* classification. *Peyote Way*, 922 F.2d at 1216.

In light of the foregoing, none of the three challenged sections of ICWA draws suspect racial classifications. Section 1913(d), which authorizes an Indian child's biological parent to petition a state court to vacate a decree of adoption where that parent's consent was obtained through fraud or duress, applies regardless of whether the child is adopted by Indian or non-Indian parents. The same is true of Section 1914, which authorizes a tribe, biological parent, or Indian custodian to petition a state court to invalidate an Indian child's foster-care placement.[5]

Turning to Section 1915's adoptive-placement and foster-placement preferences, both the first adoptive placement and the first foster placement — the only placement that Plaintiffs have demonstrated applies to them, *see supra* pp. 20-24 — give special status to prospective placements based on an existing familial relationship with the child. 25 U.S.C. § 1915(a)(1), (b)(i). Distinctions based on a present-day familial relationship are typically not suspect racial classifications. To the contrary, they are a longstanding mainstay of child-custody, probate, and other law — including under the laws of the States that bring this challenge. *See, e.g.*, Tex. Family Code § 263.001 (declaring placement with "a suitable relative or other

[5] Both provisions do, of course, draw distinctions based on the identity of the *child* in question — specifically, whether that child meets ICWA's definition of "Indian child." 25 U.S.C. §§ 1903(4), 1913(d), 1914. But no Indian child is a party to this action, and Plaintiffs did not ask the court to declare the definition of Indian child unconstitutional. *See* ROA.654, 2458-64, 2593-2601. In any event, that definition is also political rather than racial, for reasons discussed below (pp. 30-34).

designated caregiver" to be the "least restrictive setting" for a child); La. Children's Code. Art. 702(C)(4) (declaring preference for placement "in the legal custody of a relative"); *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002) (recognizing state-law presumption that placing child with biological parents is in the child's best interest); Ind. Code §§ 29-1-2-4 to -15 (declaring intestate succession order favoring surviving spouse and other descendants); La. Civ. Code. Art. 880 (same); Tex. Estates Code § 201.001 (same).

Section 1915's second adoptive preference — for "other members of the Indian child's tribe," 25 U.S.C. § 1915(a)(2) — accords special treatment based on a prospective adopter's membership in a federally recognized Indian tribe. In that respect, the preference is indistinguishable from the preference upheld by the Supreme Court in *Mancari*, 417 U.S. at 551-55, and by this Court in *Peyote Way*, 922 F.2d at 1214-16.

The same is true of Section 1915's third adoptive preference, for "other Indian families." 25 U.S.C. § 1915(a)(3). ICWA's definitions make clear that "Indian" as used in the statute refers not to a person who is of Indian *race or ancestry* but rather exclusively to a "person who is a member of an Indian tribe" recognized by the United States. *Id.* § 1903(3), (8). Thus, the preference accords special status to some families based not on Indian race or ancestry but rather on membership in a political body with which the United States has a government-to-government relationship.

Section 1915's remaining foster preferences — for foster homes "licensed, approved, or specified by the Indian child's tribe"; "Indian foster home[s] licensed or approved" by a non-Indian authority; and other institutions "approved by an Indian tribe or operated by an Indian organization," *id.* § 1915(b)(ii)-(iv) — likewise draw political distinctions. Each accords special status based on a placement's affiliation with a federally recognized tribe or tribal organization — either because that political entity has approved the placement, *id.* § 1915(b)(ii), (iv); or because a foster parent is a member of that entity, *id.* § 1915(b)(iii); 25 C.F.R. § 23.2.

The district court nevertheless concluded that strict scrutiny was the "appropriate level of review." ROA.4029-33. In so concluding, however, the court identified no decision subjecting federal distinctions based on affiliation with a federally recognized tribe to strict scrutiny, and its unprecedented decision was error.

In the first place, the district court did not address the classifications in the provisions challenged by Plaintiffs. Instead, the court applied strict scrutiny across the board based on its conclusion that one prong of ICWA's Indian-child definition, 25 U.S.C. § 1903(4)(b) — which no party had asked to be declared unconstitutional on equal-protection grounds — drew a race-based classification. ROA.4029-33; *see also* ROA.654, 2458-64, 2593-2601. That conclusion was erroneous. ICWA's definition of "Indian child" extends the statute's protections to unmarried minors with one of two close, present-day connections to a federally recognized tribe: the

child himself or herself must be a member of the tribe, or the child must be both eligible for membership *and* the biological child of a member. 25 U.S.C. § 1903(4). The first definition is plainly based on a child's own status as a member of an Indian tribe, just like the provisions at issue in *Mancari* and its progeny. *See, e.g.*, *Mancari*, 417 U.S. at 551-55; *Peyote Way*, 922 F.2d at 1214-16.

The second definition is also based on a child's affiliation with a tribe — and thus political in nature — even though it is not strictly based the child's current enrollment status. By way of background, membership in an Indian tribe is generally not conferred automatically upon birth. *See* H.R. Rep. No. 95-1386, at 17. Instead, an eligible child (or, under many tribes' rules, the child's parents) must take affirmative steps to enroll the child. *See id.*; 81 Fed. Reg. at 38,783. For this reason, most infants and young children born to tribal members are not immediately enrolled as tribal members, although they may be eligible for membership. *See* H.R. Rep. No. 95-1386, at 17. Given this reality, Congress recognized that covering only children that are already enrolled members would make ICWA's protections largely illusory, because they would provide little protection against improper removal of children from their tribal communities during the earliest years of life, before enrollment occurs.

In this context, the second definition's requirements — eligibility for membership plus a member parent, 25 U.S.C. § 1903(4) — are proxies for the child's

not-yet-formalized *tribal affiliation*, rather than proxies for *race*. Indeed, imputing a biological parent's political affiliation to a child is familiar from federal statutes that extend United States citizenship to children who are born abroad to United States citizens. *See, e.g.*, 8 U.S.C. § 1433. The definition also ensures that *parents* of such children — who are already enrolled members — benefit from statutory provisions protecting parents' rights. *See, e.g.*, 25 U.S.C. §§ 1911-1913.

The district court reached a contrary conclusion relying primarily on *Rice v. Cayetano*, 528 U.S. 495, 499 (2000), which struck down under the Fifteenth Amendment a Hawaii law restricting the franchise for certain statewide elections to "persons who are descendants of people inhabiting the Hawaiian Islands in 1778." *See* ROA.4029-43. But in declaring the Hawaii statute unconstitutional, the Supreme Court did not call *Mancari* into question; to the contrary, it confirmed that *Mancari* remained the rule for federal laws enacted in furtherance of the United States' unique relationship with Indian tribes. *See id.* at 518-20. Indeed, *Rice* reiterated (with evident approval) *Mancari*'s observation that "every piece of legislation dealing with Indian tribes and reservations . . . singles out for special treatment a constituency of tribal Indians." *Id.* at 519 (quoting 417 U.S. at 552).

The Hawaii voting statute at issue, however, was fundamentally different. It was not enacted by Congress, and it was not enacted to aid any Indian tribe or other political entity with which the United States maintains a government-to-government

relationship. *Id.* 518-19. And the statute did not depend on membership or eligibility for membership in any federally recognized political unit to qualify for the statute's special treatment. Instead, it granted special treatment based on ancestry alone. *See id.* at 499. ICWA's definition of Indian child shares none of those distinguishing characteristics. As explained above, the statute was enacted by Congress, to aid Indian tribes and their members and members' families, and applies only to proceedings involving persons who are enrolled members of recognized tribes or whose parents are members and who are themselves eligible to enroll.

The district court nevertheless equated the second definition with the *Rice* statute's generic ancestry requirement on the ground that the second definition turns in part on a child's eligibility for tribal membership, and some (though not all) tribes determine eligibility based in part on ancestry. *See* ROA.4032-33. But that approach proves too much. If membership eligibility criteria were an impermissible proxy for racial ancestry, then membership itself — which is, by definition, based on those same criteria — would *also* be an impermissible proxy for ancestry. Yet the Supreme Court and this Court have conclusively held that tribal membership classifications are political, regardless of whether membership itself is based in part on ancestry. Indeed, in both *Mancari* and *Peyote Way*, the courts upheld preferences that were expressly contingent on both membership in a tribe *and* a specific ancestry

requirement, defined as a necessary quantum of "Indian blood." *Mancari*, 417 U.S. at 551; *Peyote Way*, 922 F.2d at 1214-16.

The operative test, therefore, is not whether a federal statutory classification has any relationship to Indian ancestry, as the district court assumed, but rather whether the classification is based on ancestry alone or instead based on affiliation with an entity that, as a matter of its own prerogatives, has chosen to base its membership criteria in part on ancestry (e.g., the tribal membership of the person's ancestors). *See Santa Clara Pueblo*, 436 U.S. at 72 n.32; *cf. Rice*, 528 U.S. at 519-20 (recognizing that the *Mancari* preference "had a racial component" but was not "directed towards a 'racial' group"). For the reasons set forth above, ICWA's definition of Indian child, like the classifications at issue in *Mancari* and *Peyote Way*, falls into the latter category. Accordingly, that definition — like the provisions of ICWA actually challenged by Plaintiffs — must be reviewed under *Mancari*'s rational relationship test, not under strict scrutiny.

b. The challenged provisions satisfy *Mancari*.

Mancari's test gives appropriate deference to Congress regarding what means will best achieve the goal of fulfilling the United States' self-imposed obligations to tribes. But it does not mean that an arbitrary preference could be accorded based on a nexus to a federally recognized tribe. *See Mancari*, 417 U.S. at 554 (recognizing that "a blanket e[x]emption for Indians from all civil service examinations" would

present a "more difficult question" than the BIA-specific preference); *Adoptive Couple*, 570 U.S. at 655-56 (noting a possible interpretation of sections of ICWA not challenged here "would raise equal protection concerns" to the extent those sections applied to a child "solely because an ancestor — even a remote one — was an Indian"). Each of the provisions challenged here plainly survives the test, because each directly furthers one or both of ICWA's twin goals of protecting Indian children and promoting the "continued existence and integrity of Indian tribes" — goals that directly implicate Congress's "unique obligation toward the Indians." 25 U.S.C. § 1901(3); *Mancari*, 417 U.S. at 555.

Turning to those challenged provisions, Section 1913(d)'s limited reopening procedure for parents who were victims of fraud or duress responds directly to Congress's finding that Indian children were being removed from their homes through less-than-scrupulous practices by state agencies. *See* 25 U.S.C. § 1901(4)-(5). Similarly, Section 1914 provides a recourse for individuals not accorded the protections intended to end the exclusion or marginalization of tribal voices in state child-custody proceedings. *See also* 25 U.S.C. §§ 1911-1913.

With regard to Section 1915's adoptive-placement and foster-placement preferences, the primary preferences are for members of a child's extended family. *See id.* § 1901(a)(1), (b)(i). In light of the copious literature showing that extended-family placements are frequently in children's best interests, those preferences

rationally further ICWA's stated goal of protecting the best interests of Indian children. *E.g.*, HHS, Placement of Children with Relatives (2018), *available at* https://www.childwelfare.gov/pubPDFs/placement.pdf. Indeed, many States prefer extended-family placements for all children, for the same reason. *E.g.*, Tex. Family Code § 263.001. And if on the particular facts of any given case, placement with extended family is *not* in a child's best interest, Section 1915 provides state-court judges sufficient flexibility to deviate. 25 U.S.C. § 1915(a).

Although Plaintiffs have not demonstrated that the remaining preferences are actually at issue in their pending cases, *see supra* Section I.A.1 (pp. 18-24), those preferences also satisfy *Mancari*. Section 1915's second adoptive preference — for other members of the child's tribe, *id.* § 1915(a)(2) — rationally furthers both of the twin goals stated above, given Congress' finding that (other factors being equal) safeguarding children's affiliation with the their tribes is in the best interest of both the children and the tribes. *See id.* §§ 1901(3), 1902. Again, to the extent that the facts support a different outcome in individual cases, the statute builds in flexibility. *Id.* § 1915(a). The same analysis supports Section 1915's second foster-care preference, i.e., for placements approved by the child's tribe. *See id.* § 1915(b)(ii).

Section 1915's third adoptive preference — for placement with members of *other* Indian tribes, *id.* § 1915(a)(3) — also furthers ICWA's twin goals. Although individual tribes are distinct political units, "Indian tribes" collectively are a distinct

type of political unit, like "the several States" or "foreign Nations." U.S. Const. art. I, § 8, cl. 3. Membership in that class is itself a political classification, and there is nothing inherently suspect about legislation that treats members of different tribes alike. *See, e.g.*, *Lara*, 541 U.S. at 209. Moreover, many tribes have close historical relationships and share linguistic, cultural, and religious traditions; indeed, many tribes that the United States recognizes as distinct political units are descended from the same larger historical bands. *See* 83 Fed. Reg. at 4235-41. Also, many Indian children may be eligible for membership in more than one tribe, including the Brackeens' child (A.L.M.), whose biological parents are enrolled members of two different tribes. ROA.2683. Section 1915's third adoptive preference allows children to be placed with members of other tribes with whom the child may have such a connection, while preserving flexibility to discard the preference where good cause exists. *See* 25 U.S.C. § 1915(a). Those same considerations also support Section 1915's remaining foster-care preferences, i.e., for other Indian foster homes and children's institutions approved by an Indian tribe or operated by an Indian organization. *See id.* § 1915(b)(iii)-(iv).

In sum, the provisions of ICWA challenged by Plaintiffs on equal-protection grounds are "tied rationally" to Congress's "unique obligation toward the Indians," and so they are constitutional under *Mancari*.

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

Even assuming that strict scrutiny were appropriate, the district court erred in applying that standard.

To justify a classification under the two-pronged "strict scrutiny" standard applied by the district court, the government must first "demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial" (i.e., that the classification serves a "compelling" interest) and, second, that its use of the classification is "necessary . . . to the accomplishment of its purpose" (i.e., that its methods are "narrowly tailored"). *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2208 (2016). Moreover, application of any heightened standard to this case would need to take into account that, even assuming arguendo that the challenged provisions of ICWA are not purely political, they nevertheless are directly related to tribal affiliation of the child or parent and thus are not purely ancestry-based either. And the relationship between parent and child has never been regarded as a suspect classification based on ancestry.

The United States requested below that, should the district court take the unprecedented step of subjecting the challenged provisions to strict scrutiny, it first allow opportunity to develop any necessary factual record and for full briefing on the application of the standard. ROA.4034 n.12. The court declined, but it then

proceeded to apply strict scrutiny. ROA.4033-36.[6] It assumed that the statute served compelling interests, but it ruled that various provisions were not narrowly tailored. *Id.* If this Court concludes that some form of heightened scrutiny should be applied, it would be appropriate to remand to the district court for a full opportunity for parties to address the issue, given that the validity of an Act of Congress is at issue.

In any event, the district court erred in its strict-scrutiny analysis. In considering what compelling interests are served by ICWA, the court overlooked the two purposes expressly stated in ICWA's "declaration of policy": "to protect the best interests of Indian children" while simultaneously "promot[ing] the stability and security of Indian tribes." 25 U.S.C. § 1902; *see also* ROA.3629. Those congressionally declared interests are indeed compelling. The first interest promotes the welfare of vulnerable Indian children, which is a core area of tribal and federal concern, *see Santa Clara Pueblo*, 436 U.S. at 55-56, and a frequent subject of federal treaties and legislation, *see, e.g.*, Treaty with the Chippewa, art. 6, 7 Stat. 290, 291 (Aug. 5, 1826); 25 U.S.C. § 184. And the second goes directly to tribes' continued ability to act as autonomous political units. Children are the lifeblood of a tribe, and Congress specifically found that "there is no resource that is more vital to the

[6] The court stated that the United States had failed to meet its burden under strict scrutiny "as a matter of law" because it did not articulate a strict scrutiny defense in its summary judgment brief. ROA.4034. But as stated in the text, the United States requested an opportunity to brief the question after developing a record.

continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3).

Each of the challenged provisions of ICWA directly furthers one or both of the statute's twin compelling interests for all the reasons discussed above (pp. 34-37), and each does so based not on race or ancestry but rather on a direct tribal or family nexus. The district court concluded, however, that in three respects ICWA "burden[s] more children than necessary" to achieve ICWA's goals. ROA.4035-36. Each of those aspects is justified.

First, the district court stated that the second provision of the ICWA's definition of "Indian child" is over-inclusive because it applies to what that court called "*potential* Indian children," who may "never be members of their ancestral tribe." *Id.* But no party asked the court to invalidate that definition or purported to represent such children in this proceeding. ROA.654, 2458-64, 2593-2601. In any event, Congress's judgment was that safeguarding only children who are already enrolled members would be insufficient to meet the statute's goals. ICWA protects tribal members and their families, and it therefore protects children whose parents are enrolled members even though the children are not yet themselves enrolled. Moreover, Congress determined that children who are "eligible for membership" are "vital" to tribes' continued existence. 25 U.S.C. § 1901(3). Given that infants and young children are generally dependent on the action of a parent or guardian to

formally enroll them in the tribe, *see* H.R. Rep. No. 95-1386, at 17; 81 Fed. Red. at 38,783, extending protection to children who are not yet enrolled members is not over-inclusive but rather specifically targeted to ICWA's goals.

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

Third and finally, the district court concluded that Section 1915's third adoptive preference, for placement with other Indian families, is not narrowly tailored. ROA.4035-36. As explained above, the third adoptive preference was not properly before the court. *See supra* pp. 20-24. But in any event, the preference is not merely a preference for "generic 'Indianness,'" as the district court suggested. ROA.4036. To the contrary, the preference reflects the reality that many tribes have deep historic and cultural connections with other tribes, and that many Indian

children may be eligible for membership in more than one tribe. *See supra* pp. 36-37. Placing a child with members of a connected tribe would foster a child's relationship with his or her own tribe, and therefore promote both of ICWA's goals.

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

For all these reasons, the district court's equal-protection ruling should be reversed. Moreover, if this Court were to find some constitutional infirmity in some aspect of the three provisions of the statute at issue, the Court should confine its holding to those individual provisions, consistent with ICWA's severability clause. *See* 25 U.S.C. § 1963; *see generally Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685-86 (1987).

B. The challenged provisions comport with the Tenth Amendment.

This Court should also reverse the district court's conclusion that ICWA violates the Tenth Amendment's prohibition against "commandeering" state legislatures and executive officers. The district court concluded that ICWA impermissibly commandeers state actors in two ways: by requiring state courts to apply federal standards in child-custody proceedings, and by enacting certain procedural requirements that state courts and agencies must follow in those proceedings. *See* ROA.4041-45. Both conclusions are incorrect.

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

ICWA does not impermissibly commandeer state courts simply by preempting state child-custody law. The Supreme Court's anti-commandeering decisions hold that Congress may not "'commandeer' the *legislative* processes of the States by directly compelling" or forbidding them to enact certain legislation.

New York v. United States, 505 U.S. 144, 161, 175-76 (1992) (emphasis added); *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018). Nor may Congress enlist state *executive* officers into carrying out federal regulatory schemes. *Printz v. United States*, 521 U.S. 898, 925-33 (1997). Those decisions are uniformly careful to note, however, that the doctrine does not disturb "the well established power of Congress to pass laws enforceable in state courts," which those courts must then apply. *New York*, 505 U.S. at 178. As the Court explained: "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause" and does not violate the Tenth Amendment. *Id.* at 178-79; *accord Printz*, 521 U.S. at 928-29; *Murphy*, 138 S. Ct. at 1479.

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

But preemption does not offend the Tenth Amendment. *New York*, 505 U.S. at 178; *Printz*, 521 U.S. at 928-29; *Murphy*; 138 S. Ct. at 1479. A contrary conclusion would convert countless unexceptional exercises of the Supremacy Clause into impermissible commandeering.

To be sure, the district court did attempt to cabin its holding, reasoning that ICWA's commands are different because they preempt the law that would otherwise apply in *state-law* causes of actions. *See* ROA.4041-42, 4044-45. But under the Supremacy Clause, that distinction is immaterial because "the Judges in every State shall be bound" by any "Laws of the United States" made in pursuance of the U.S. Constitution, notwithstanding "anything in the Constitution or Laws of any State to the Contrary." U.S. Const. art. VI, cl. 2. And the Supreme Court has repeatedly recognized that federal law may permissibly preempt the state law that applies in state-law causes of action, *e.g.*, *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190, 1196-99 (2017) (state subrogation law), including in areas of domestic concern like probate and marital property law, *see, e.g.*, *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 143 (2001) (state probate law); *Boggs v. Boggs*, 520 U.S. 833, 835-36 (1997) (state community property law).

The district court additionally reasoned that ICWA commandeers rather than preempts because certain provisions — specifically, Section 1915's placement preferences — constrain not only *private* actors but also *state* actors (i.e., by telling

state courts where they may place Indian children). ROA.4044-45. This distinction is also unavailing: Congress is permitted to place limits on what state officials may and may not do, provided that Article I provides Congress with authority to legislate in that area — as it undoubtedly does in the area of Indian affairs. *See New York*, 505 U.S. at 160. The anti-commandeering doctrine is not to the contrary, as illustrated by this Court's decision in *Deer Park Independent School District v. Harris County*, 132 F.3d 1095 (5th Cir. 1998). There, the Court declined to apply the anti-commandeering doctrine to invalidate a federal law that prohibited the State of Texas from collecting taxes from foreign businesses, explaining that the doctrine is not relevant to every federal constraint on state action, but only where a federal statute "hijack[s] the administrative apparatus of state and local government to help achieve Congress' ends." *Id.* at 1099.

Here, neither Section 1915 nor any of ICWA's other standards "hijack" the States because they do not require the States to adopt or refrain from adopting any particular standards *as a matter of the States' own law*; they simply change the governing federal law, which States must respect, just as the State was required to respect the federal tax exemption in *Deer Park*. *See New York*, 505 U.S. at 175-76; *Murphy*, 138 S. Ct. at 1478. By enacting a federal statute directly imposing certain minimum federal standards, rather than demanding that state legislatures alter their own statutes to provide certain protections to Indian children, Congress

appropriately heeded the Supreme Court's admonition that "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly." *New York*, 505 U.S. at 178.

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

As an alternative basis for its Tenth Amendment holding, the district court concluded that State Plaintiffs had "indisputably demonstrated that" ICWA requires state "executive agencies to carry out its provisions." ROA.4043. That was error.

In their summary judgment brief, State Plaintiffs cited provisions of ICWA that govern transfer from state to tribal courts, 25 U.S.C. § 1911; set notice requirements for proceedings involving an Indian child, *id.* § 1912; and require States to maintain and make available records regarding the placement of Indian children to Interior, *id.* §§ 1915, 1951. *See* ROA.2448.[7] None of these provisions constitutes unlawful commandeering. The transfer and notice requirements set minimum procedural standards for child-custody proceedings involving Indian children as a matter of federal law. Thus, they do not offend the Tenth Amendment, for the same reason that the federal substantive standards for such proceedings do not. *Cf. FERC v. Mississippi*, 456 U.S. 742, 770-71 (1982) (upholding federal statute

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

requiring state utility agencies to follow certain procedural standards). Moreover, with regard to the requirement that the States provide certain information regarding Indian children's placement to Interior, the Supreme Court has declined to hold that mere information-sharing requirements offend the Tenth Amendment. *Printz*, 521 U.S. at 918. Finally, to the extent that any of the procedural provisions cited by Plaintiffs posed an anti-commandeering issue, the appropriate remedy would be to sever such provision, leaving the remainder of the statute intact. *See* 25 U.S.C. § 1963; *Alaska Airlines*, 480 U.S. at 685-86.

Accordingly, the district court's declaration that ICWA violates the Tenth Amendment should be reversed. The court's conclusion that Congress lacked Article I authority to enact ICWA — based entirely on the notion that the Tenth Amendment "does not permit Congress to directly command the States in this regard, even when it relies on Commerce Clause power," ROA.4054 — should similarly be reversed. In any event, the Supreme Court has repeatedly held that Article I's Indian Commerce Clause gives Congress "plenary power to legislate in the field of Indian affairs." *E.g.*, *Lara*, 541 U.S. at 200.

C. ICWA contains no improper delegation.

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

Section 1915(c) provides that, where a tribe has instituted adoptive-placement and foster-placement preferences via tribal resolution that differ from those in ICWA, the tribally established order shall apply in state-law proceedings involving a child of that tribe. The district court deemed that provision an impermissible delegation of Congress's authority to legislate regarding Indian children. ROA.4036-40. But tribes already have their *own* sovereign authority to legislate on matters related to members and their children. *Santa Clara Pueblo*, 436 U.S. at 55-56. Consequently, Congress had no need to "delegate" that authority to them, and Section 1915(c) does not so delegate. Rather, Section 1915(c) merely provides for recognition of resolutions passed under tribes' own independent legislative authority. Such recognition or incorporation of legal standards established by other sovereigns into federal law is commonplace. A familiar example is the Federal Tort Claims Act, which generally makes the United States liable in tort "in accordance with the [state] law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); *see also, e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983) (recognizing that the Lacey Act makes it a federal crime to import species taken in violation of tribal law). These incorporations do not offend the nondelegation doctrine. *See, e.g., United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) (upholding Lacey Act). The Supreme Court has applied the principle in the specific context of a law enacted by an Indian tribe. *See United States v. Mazurie*,

419 U.S. 544, 556-58 (1975) (upholding statute affording authority to an Indian tribal council to regulate on-reservation sale of alcoholic beverages).

Moreover, the Supreme Court has held that measures challenged on nondelegation grounds must be sustained so long as they "lay down by legislative act an intelligible principle" to which the delegatee must conform. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Any delegation here is constrained by an express "intelligible principle": ICWA's express statement of its twin policies to further the best interest of Indian children and to promote tribal autonomy adequately constrains the authority afforded to tribes. 25 U.S.C. § 1902. And the district court was simply mistaken in assuming, *see* ROA.4039-40, that Congress may not permit the exercise of authority outside the federal government, particularly where the entity is an Indian tribe that itself possesses sovereign authority. *See, e.g., Mazurie*, 419 U.S. at 556-58.

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

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

II. The 2016 Rule is valid.

The district court also erred in invalidating the 2016 Rule. The court offered three grounds for so doing, none of which passes muster. First, the court concluded that the rule is invalid because it "purports to implement an unconstitutional statute." ROA.4046. As demonstrated in Part I above, that conclusion is wrong. We address the other two grounds in the following two sections.

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

The district court concluded that when the Department of the Interior "promulgated regulations with *binding* rather than advisory effect, it exceeded the statutory authority Congress granted to it to enforce the ICWA." ROA.4049. But ICWA's plain text authorizes Interior to "promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." 25 U.S.C. § 1952. As Interior explained in the preamble to the 2016 Rule, Section 1952's statement is classic language empowering the issuance of binding regulations. *See* 81 Fed. Reg. at 38,785 (collecting cases); *cf. United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (recognizing "a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed").

The district court rejected this authority on the ground that Section 1952 authorizes only those regulations that are "necessary," but Interior had determined

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

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

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

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

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

The district court identified only one other asserted problem with the 2016 Rule: its recommendation that facts giving rise to "good cause" justifying deviation from ICWA's placement preferences "should" be established by clear and

convincing evidence. 25 C.F.R. § 23.132(b). The court believed that a clear-and-convincing evidence requirement is inconsistent with the statute, which it interpreted to allow good cause to be established by a less demanding standard. ROA.4050-52.

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

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

CONCLUSION

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

Dated: January 16, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on January 16, 2019.

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