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' REPLY BRIEF

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
WILLIAM B. LAZARUS
RACHEL HERON
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-0943
eric.grant@usdoj.gov

Counsel for Federal Appellants

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INTRODUCTION

The district court's decision declaring unconstitutional the Indian Child Welfare Act of 1978 (ICWA) is contrary to binding Supreme Court precedent. In their answering briefs, Plaintiffs recast those precedents in ways that would upend centuries of settled law and threaten "an entire Title of the United States Code (25 U.S.C.)." *Morton v. Mancari*, 417 U.S. 535, 552 (1972). This Court should reverse.

ARGUMENT

I. ICWA is constitutional.

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

1. Plaintiffs lack standing to challenge ICWA on equal-protection grounds.

Plaintiffs lack standing to challenge ICWA on equal-protection grounds, because relief in this case would not redress any injuries that they may have suffered. *See* Federal Appellants' Opening Brief (U.S. Opening Brief) 18-19. Plaintiffs do not dispute that the decision below is not binding on the respective state courts that are actually adjudicating the ICWA proceedings to which Plaintiffs are parties. *See* Brief of Individual Plaintiffs-Appellees (Individual Brief) 28-30. Accordingly, they cannot show that the decision is "likely" to redress any injury, as required to satisfy Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Plaintiffs' arguments to the contrary are unavailing. First, it is immaterial that some or all of the *parties* to the state-court proceedings would be bound by that decision, *see* Individual Brief 29, given that the state courts themselves remain free to apply ICWA without regard to the decisions of the district court or of this Court. Second, it is also immaterial that the Supreme Court could grant review and issue a decision that would bind the state courts, for the reasons already stated in the Opening Brief of Intervenor Navajo Nation (at 27). Third and finally, it is likewise immaterial that the state courts could voluntarily choose to adopt the district court's analysis. If Article III were satisfied by the mere possibility that an unbound third party might find an advisory opinion persuasive, standing would *always* exist — even where redress "depends on the unfettered choices made by independent actors not before the courts." *Defenders of Wildlife*, 504 U.S. at 562.

Separate from the redressability problem, Plaintiffs have failed to establish an "actual or imminent" injury stemming from all but one of the provisions that they challenge on equal-protection grounds. *Id.* at 560. As for State Plaintiffs, States have no Fifth Amendment rights and may not assert injury to their citizens' rights here, because it "cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923); *see generally* U.S. Opening Brief 20. It is of no moment that the Supreme Court's long-standing

rule "makes no sense" to State Plaintiffs, State Appellees' Brief (State Brief) 20; neither Plaintiffs nor this Court are free to second-guess it.

State Plaintiffs' alternative argument that it may sue to vindicate its "quasi-sovereign interest" in its citizens' welfare, *id.*, simply repackages its impermissible parens patriae claim. Although the Supreme Court has permitted a State or territory to sue a *private party* based on a general interest in its citizens' wellbeing, *e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601-09 (1982), that derivative interest is far afield from the direct harms to the State's own property or sovereign powers that have been demonstrated in cases where a State has been permitted to sue the *federal government*. *See Massachusetts v. EPA*, 549 U.S. 497, 519 (2007) (recognizing State's interest in protecting its "sovereign territory"); *Texas v. United States*, 809 F.3d 134, 151-52 (5th Cir. 2015) (recognizing State's interest in protecting public fisc and avoiding pressure to alter state law).

As for individual Plaintiffs, they have simply failed to demonstrate that they actually are (or imminently will be) subject to the vast majority of statutory provisions they challenge. U.S. Opening Brief 19-24. Rather than attempting to cure that failing, they argue that the United States "badly misapprehends" standing law. Individual Brief 27. As explained below, however, it is Plaintiffs' position that is irreconcilable with Article III.

Plaintiffs argue that the injury giving rise to an equal-protection claim is the fact of unequal treatment under the law, rather than any particular adverse outcome stemming from such treatment. Individual Brief 25. That principle, however, has never excused a plaintiff from demonstrating that he or she actually is subject to — and hence, injured by — the particular statutory provision at issue. *See, e.g.*, *Northeast Florida Chapter of Associated General Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1983) (explaining that "the 'injury in fact' in an equal protection case . . . is the denial of equal treatment resulting from *the imposition of* the barrier" against the plaintiff (emphasis added)). Individual Plaintiffs have not done so here.

Sections 1913(d) and 1914 authorize certain persons to challenge certain child-custody decisions in limited circumstances. But individual Plaintiffs do not allege that a petition under those provisions has been (or is likely to be) filed either against the Librettis (who disclosed in their answering brief that they successfully adopted Baby O. during the pendency of this appeal) or against the Brackeens. *See* Individual Brief 24-25, 30 n.5.

Section 1915 imposes seven adoptive- and foster-placement preferences, and individual Plaintiffs do not dispute that those preferences apply only where a preferred person or entity takes formal steps to foster or adopt an Indian child. *See Adoptive Couple v. Baby Girl*, 570 U.S. 637, 654 (2013); Individual Brief 24-31. Yet, except with regard to Child P.'s biological grandmother in the Cliffords'

proceeding (who may claim Section 1915's preference for extended family members), Plaintiffs make no effort to show that a preferred person or entity has actually come forward in any ongoing custody proceedings. *Id.* at 30-31.[1] In short, Plaintiffs fail to show that they have actually been subjected to *any* of Section 1915's remaining preferences, including the adoptive preference for placement with members of a tribe other than the child's own, which plays an outsize role in their equal-protection argument. *See id.* at 32-58; State Brief 34-44.

Individual Plaintiffs mischaracterize the United States' argument as an attack on whether Plaintiffs' injury is "traceable" to defendants' conduct. Individual Brief 27-28. But for the reasons already stated, whether Plaintiffs are actually subject to those provisions determines whether there is an injury to be traced in the first place. Plaintiffs' invitation to instead dispense standing in gross must be rejected.

Individual Plaintiffs similarly miss the mark in suggesting that standing to challenge Interior's 2016 Rule interpreting ICWA confers standing to challenge the constitutionality of ICWA itself. *See id.* at 23. Even in challenging a rule under the

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[1] Indeed, of the three children referenced in the operative complaint, only Child P. is even still the subject of ongoing proceedings. *See* Individual Brief 24-31. The Brackeens now claim an injury based on ongoing proceedings involving another Indian child, Y.R.J. But standing is assessed at the time the complaint is filed, *e.g.*, *Defenders of Wildlife*, 504 U.S. at 569 n.4, and the Brackeens' attempt to adopt Y.R.J. postdates their operative complaint, ROA.4102-09. Moreover, the Brackeens have not demonstrated that any preferred person or entity has actually come forward in Y.R.J.'s proceedings. *See* Individual Brief 26-27.

Administrative Procedure Act (APA), as in directly challenging a statute, plaintiffs must show an injury from each provision that they seek to invalidate. *See Defenders of Wildlife*, 504 U.S. at 557 (applying Article III standing requirements to an APA-based "challenge to a rule promulgated by the Secretary of the Interior").

2. The challenged provisions should be upheld under *Morton v. Mancari*.

Should this Court reach the merits of Plaintiffs' equal-protection challenge, it should uphold the challenged provisions of ICWA under *Mancari*'s rational relationship test. *See* U.S. Opening Brief 25-37. Plaintiffs do not dispute that these provisions meet this test, arguing instead that *Mancari* does not control. *See* Individual Brief 32-58; State Brief 34-44. Plaintiffs' arguments are unpersuasive.

a. *Mancari* controls.

The driving force behind Plaintiffs' equal-protection argument is their view that federally recognized Indian tribes are primarily *racial* groups, such that statutory classifications based on tribal affiliation are presumptively race-based, unless some exception applies. *See, e.g.*, Individual Brief 34-36. The well-established law is exactly opposite. Federally recognized tribes are "distinct, independent political communities," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978), and expressly recognized as such in the United States Constitution, *e.g.*, art. I, § 8, cl. 3. The federal government's relationship with each of the recognized tribes is thus a formal political one. *See Mancari*, 417 U.S. at 551-52; 83 Fed. Reg. 4235 (Jan. 30,

2018).[2] In light of that relationship, the Supreme Court held in *Mancari* that federal statutory classifications based on tribal membership are not racial at all, but *political*. 417 U.S. at 553 & n.24; *accord Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1213-16 (5th Cir. 1991).

Plaintiffs attempt to limit *Mancari* in various ways. They first argue that it was "effectively overruled" by *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995), at least insofar as the federal preference that *Mancari* deemed political drew distinctions based on *both* tribal membership *and* an individual's quantum of Indian blood — the latter of which Plaintiffs argue is inherently racial. Individual Brief 41. But ICWA contains no blood-quantum requirement. And the opinion for the Court in *Adarand* does not even cite *Mancari*, much less overrule it. *See* 515 U.S. at 204-39. Moreover, the Court has cited *Mancari* approvingly since deciding *Adarand*, including in *Rice v. Cayetano*, 528 U.S. 495, 520 (2000), on which Plaintiffs rely.

Plaintiffs next argue that *Mancari* actually holds that classifications based on tribal membership are *racial*, unless the statute in question fits into one of two categories of Plaintiffs' own devising: (1) statutes that promote "tribal self-

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[2] The fact that members of recognized tribes typically descend from a particular historic group, *see* 25 C.F.R. § 83.11(e), does not negate the fact that the tribes themselves are political bodies. The same is true of the citizens of many foreign countries. Moreover, tribes have authority to set their own membership criteria. *Santa Clara Pueblo*, 436 U.S. at 72 n.32. How a given tribe chooses to exercise that authority does not alter the political nature of the federal government's relationship with that tribe and its members.

government"; and (2) statutes that relate to "tribal lands." Individual Brief 48.[3] That account mischaracterizes *Mancari*. At issue was a Bureau of Indian Affairs (BIA) hiring preference for members of federally recognized tribes. *Mancari* determined that the preference "is not . . . a 'racial' preference," because the "preference is not directed towards a 'racial' group consisting of 'Indians,'" but "instead . . . applies only to members of federally recognized tribes." 417 U.S. at 553 & n.24. *Mancari* went on to declare that the preference should be upheld as long as the singling out of individuals can be "tied rationally to the fulfillment of Congress' unique obligation toward Indians." *Id.* at 556. The BIA preference met that test because it "is reasonable and rationally designed to further Indian self-government." *Id.*

Plaintiffs would turn *Mancari*'s description of the BIA hiring preference as a measure designed to improve Indian self-government into a requirement that statutes drawing distinctions based on tribal affiliation must *only* (and in a narrow sense) further tribal self-government — or, alternatively, regulate on-reservation activities — to be deemed political rather than racial. But their argument misreads *Mancari* at two levels. One, as this Court has recognized, *Mancari* deemed the BIA hiring preference political rather than racial not because of its subject matter, but because of whom it targeted: not "individuals who are racially to be classified as 'Indians,'"

[3] The two answering briefs describe the second category somewhat differently, with individual Plaintiffs also including therein statutes that involve "treaty obligations, reservations, or tribal membership." Individual Brief 44; *see also* State Brief 36.

but rather "members of quasi-sovereign tribal entities." *Id.* at 553 n.24, 554; *accord Peyote Way*, 922 F.2d at 1215; *United States v. Antelope*, 430 U.S. 641, 646 (1977). That the preference promoted tribal self-government was relevant only to the subsequent inquiry whether that political classification was "tied rationally" to fulfilling Congress's responsibilities toward the tribes. *Mancari*, 417 U.S. at 555. Two, even at that second step of the inquiry, *Mancari* made clear that promoting Indian self-government was only *one* "legitimate, nonracially based goal" that would satisfy the test. *Id.* at 554-55.

Mancari's progeny do not support, let alone compel, Plaintiffs' cramped view of that decision. Plaintiffs cite not a single controlling decision articulating their proffered rule that classifications based on tribal affiliation are political only when they relate to tribal self-government (which Plaintiffs apparently would confine to wholly internal affairs) or to on-reservation activities. Contrary to Plaintiffs' contentions, *see* Individual Brief 44-45; State Brief 36-39, the various statutes that have been upheld by the Supreme Court and this Court do not all fit into those categories. These statutes include the exemption upheld by this Court for peyote use by members of the Native American Church — "most" *but not all* of whom lived on reservations. *Peyote Way*, 922 F.2d at 1212-16; *see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (upholding treaty authorizing tribal members to fish *off* reservation); *cf. Perrin v.*

United States, 232 U.S. 478, 482 (1914) (recognizing Congress's "power . . . to prohibit traffic in liquors with tribal Indians, whether upon or off a reservation").

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

Plaintiffs next argue that the Supreme Court adopted their limited reading of *Mancari* in *Rice v. Cayetano*. But *Rice* did not involve federal statutory distinctions based on tribal affiliation. 528 U.S. at 519. Instead, it involved a state statute that limited eligibility to vote in certain statewide elections to "Hawaiians," i.e., "those persons who are descendants of people inhabiting the Hawaiian Islands in 1778." *Id.* at 499. *Rice* cited *Mancari* with evident approval, but it recognized that the Hawaii statute was fundamentally different from the hiring preference at issue in *Mancari* in that it drew distinctions based on ancestry alone rather than on any present-day affiliation with a federally recognized tribe. *Id.* at 519-20. Assuming arguendo that the Hawaii statute was comparable to the federal preference, the Court nevertheless declined to extend the "limited exception of *Mancari*" to the "new and larger dimension" represented by the state law, reasoning: "It does not follow from *Mancari* . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians to the exclusion of all non-Indian citizens." *Id.* at 520.

Plaintiffs make much of the fact that *Rice* described *Mancari* as a "limited exception," but that phrase cannot bear the weight that Plaintiffs place upon it. They argue that ICWA falls within the limit actually announced in *Rice* because it "fences out" non-Indians from child-custody proceedings. Individual Brief 50. But ICWA does not bar any person from participating in the child-custody proceedings to which

it applies. To the contrary, the statute *expands* the class of persons able to participate in those proceedings. *E.g.*, 25 U.S.C. § 1912(a).

Plaintiffs finally seek support from *Adoptive Couple*'s suggestion that certain provisions of ICWA (not challenged by Plaintiffs on equal-protection grounds) "would raise equal protection concerns" to the extent that they were read to apply to a child whose only tribal-member parent had already legally severed his relationship with the child. 570 U.S. at 655-56. As the United States has explained, however, that language merely reflects that such a reading might fail *Mancari*'s rational relationship test. *See* U.S. Opening Brief 34-35. The language is not an indication that the classification is necessarily race-based.[4]

b. Under *Mancari*, the challenged provisions draw political classifications.

For the foregoing reasons, this Court should reject Plaintiffs' argument about when a classification based on tribal affiliation is political. Under *Mancari*, a federal statute that singles out individuals based on their affiliation with a recognized tribe draws a political classification — not a racial one — regardless of whether the statute relates to Plaintiffs' limited conception of tribal self-government or Indian lands.

[4] Plaintiffs similarly misread *Mancari*'s admission that a blanket, government-wide hiring preference for Indians would present an "obviously more difficult" equal-protection issue. 417 U.S. at 554. In that hypothetical, as in *Adoptive Couple*, the question is whether the special treatment for tribally affiliated persons is rationally related to Congress's unique obligation toward tribes, *not* whether it is racial.

The challenged provisions of ICWA are political under that rule. *See* U.S. Opening Brief 28-30. Plaintiffs' remaining arguments to the contrary are unavailing.[5]

First, like the district court, Plaintiffs rely on a statutory provision that is not actually at issue in this case: ICWA's second definition of "Indian child," which extends the statute's protections to children who, although not yet formally enrolled with a tribe, (1) have a biological parent who is a member and (2) are eligible for membership themselves. 25 U.S.C. § 1903(4); *see also* U.S. Opening Brief 28 n.5. Plaintiffs contend that this definition is racial, because it sweeps in children whose sole connection to a tribe is biological, not based on any voluntary decision by parent or child. *See* Individual Brief 52-53 (contrasting 8 U.S.C. § 1433, which extends U.S. citizenship to the children of citizens upon a parent's application). That is incorrect. Children do not meet the second definition merely because they descend from persons with Indian heritage: at least one of their parents must *choose* to enroll in a tribe — or, at least, choose to remain a member of a tribe in which he or she was

[5] Even under Plaintiffs' reading, moreover, the challenged provisions are political. ICWA furthers tribal self-government by ensuring a forum for tribes to exercise their sovereign interest in protecting their members' domestic arrangements, 25 U.S.C. § 1911; *see generally Santa Clara Pueblo*, 436 U.S. at 55-56; and by promoting, where possible, tribes' continued relationships with their members and their children, on whom tribes' continued political autonomy depends, 25 U.S.C. § 1901(3); *see generally Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33-34 (1989). Plaintiffs object, *see* Individual Brief 50-51, but ensuring the right of tribes to advocate for their members' domestic interests and protecting against death by attrition support tribal autonomy at least as directly as deciding who is employed at the BIA. *See Mancari*, 417 U.S. at 553.

enrolled — thereby entitling the parent and the child to the statute's protections (assuming the child is also eligible for enrollment). *See* 25 U.S.C. § 1903(4).[6]

Second, Plaintiffs argue that Section 1915's third adoptive preference for placement with members of tribes other than the child's own — which Plaintiffs lack standing to challenge, *see supra* pp. 3-6 — is racial because it shows that Congress's true goal was to keep Indians with Indians, not to further a child's relationship with his or her tribe. Not so. That preference, which like all of Section 1915's placement preferences may be set aside for "good cause" in a particular proceeding, is accorded to certain potential adopters not because they are genetically "Indian," but because they are *members of a federally recognized tribe*. 25 U.S.C. §§ 1903(3), 1903(8), 1915(a)(3). Membership in *any* federally recognized tribe is a political status, just as is membership in a *particular* recognized tribe, and statutes that treat all members of recognized tribes as a single class are permissible. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 197-98 (2004) (criminal prosecution). Moreover, the third adoptive preference is indeed related to the goal of furthering an Indian child's relationship with his or her own tribe, because it allows for placement with members of tribes

[6] Plaintiffs suggest that the Department of Justice argued otherwise while Congress was debating ICWA. *See* Individual Brief 53-54. The comment cited by Plaintiffs expressed concern that the second definition might require some persons to litigate child-custody proceedings in tribal court even where no tribal member was party to the proceeding; however, it agreed that "no constitutional problem arises" where "a parent who is a tribal member has legal custody of a child who is merely eligible for membership at the time of a proceeding." H.R. Rep. No. 95-1386, at 39 (1978).

that share historic and cultural connections with the child's own. *See* U.S. Opening Brief 29, 36-37.

Third and finally, Plaintiffs invoke 42 U.S.C. § 1996b, which provides that a ban on considering "race, color, or national origin" in adoption proceedings "*shall not be construed* to affect the application of" ICWA. *Id.* (emphasis added). That statute merely expresses Congress's view that the ban, properly construed, has no effect on ICWA. It thus confirms that ICWA does *not* draw racial distinctions.

For these reasons, ICWA's tribal-affiliation-based classifications are political, not racial, under *Mancari*. Accordingly, they are subject to the rational relationship test articulated in that decision (which no party disputes is satisfied).

3. The challenged provisions would survive strict scrutiny in a facial challenge.

Should this Court nevertheless apply strict scrutiny, it should still reverse, because the challenged provisions on their face serve compelling interests and are narrowly tailored. *See* U.S. Opening Brief 38-43.

At the outset, the United States did not waive its strict scrutiny argument. It requested additional time to fully brief the issue if the district court determined that strict scrutiny applied. *See* U.S. Opening Brief 38-39 & n.6 (discussing ROA.4034 n.12). The district court's denial of that request does not compel this Court to pass on the constitutionality of a 40-year-old Act of Congress without the benefit of full briefing, especially given that the government's strict scrutiny argument closely

mirrors its arguments under *Mancari* and that considering those arguments should not prejudice Plaintiffs. *See id.* at 34-37, 39-42.

On the merits, State Plaintiffs dispute that ICWA's twin purposes of promoting tribes' continued existence and protecting the best interests of Indian children are compelling. But the case cited by the States, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), does not control here: even assuming arguendo that ICWA's classifications are racial in part, they also serve race-neutral purposes, and those race-neutral purposes *are* compelling. *See* U.S. Opening Brief 38-40. Nor does the purported conflict between ICWA's standards and the States' preferred standards undercut the compelling nature of ICWA's interests: the federal government, the tribes, and the States *all* have valid roles in regulating the domestic arrangements of Indian children. *See infra* p. 18.

Regarding narrow tailoring, Plaintiffs largely repeat the district court's reasoning, which is rebutted in our opening brief. *See* U.S. Opening Brief 40-43. Plaintiffs advance no arguments specific to Sections 1913(d) and 1914, and they err in suggesting that Section 1915's seven preferences should be assessed in gross, rather than individually on their respective merits. *See* Individual Brief 56-58; State Brief 42-43. Moreover, Plaintiffs' generalized critique of Section 1915 erroneously assumes that its adoptive- and foster-placement preferences are absolute, when they expressly allow state-court judges to deviate based on "good cause" in an individual

child's case.[7] Regarding Plaintiffs' suggestion that Congress failed to consider race-neutral alternatives, Congress could not have effectively acted to stop the grave abuses that ICWA was designed to correct *without* drawing lines like those drawn in ICWA, which Congress tied not to "individuals who are racially to be classified as 'Indians,'" but instead to "members of quasi-sovereign tribal entities." *Mancari*, 517 U.S. at 553 n.24, 554.

For that reason and the others discussed above, the district court's equal-protection holding should be reversed.

B. The challenged provisions comport with the Tenth Amendment.

1. The challenged provisions do not commandeer state courts.

ICWA operates by crafting "minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes," which standards preempt less protective state laws. 25 U.S.C. §§ 1902, 1921. The preemption of state law does not unlawfully commandeer state

[7] At various points, Plaintiffs argue that Interior's 2016 Rule narrowed the grounds on which a judge may depart from the preferences. *See, e.g.*, Individual Brief 10-11. Although that rule does state that good cause for departing "should" fit into one of five categories and "should" be proven by clear and convincing evidence, it does not mandate those suggestions. 25 C.F.R. § 23.132(b), (c). Additionally, Plaintiffs err in suggesting that the rule bars consideration of a child's cultural and social ties to a tribe as part of the good-cause analysis. Individual Brief 11. To the contrary, the rule simply confirms that such ties are irrelevant to whether a child "meets the statutory definition of 'Indian child.'" 25 C.F.R. § 23.103(c).

courts under the Tenth Amendment, as the twenty-one States that filed an amicus brief in favor of reversal agree. *New York v. United States*, 505 U.S. 144, 178-79 (1992); *see generally* Brief of Amicus States California, et al. 9-14.

The argument of the three State Plaintiffs to the contrary proceeds from the erroneous assumption that, outside reservations, only States have a legitimate interest in the custody law applied to individuals affiliated with Indian tribes. *See* State Brief 28; *see also* Individual Brief 6. But while States undoubtedly play a critical role in regulating their citizens' domestic relations, Indian tribes likewise have a sovereign interest in the domestic relations of their own members and their members' children, whether located on or off reservation. *See Santa Clara Pueblo*, 436 U.S. at 55-56. Accordingly, there is nothing inherently suspect in Congress's crafting federal rules governing the treatment of Indian children to further its obligations to those tribes. *See* H.R. Rep. No. 95-1386, at 14-15. Plaintiffs nevertheless offer three reasons that Congress's decision to preempt conflicting state child-custody laws constitutes unlawful commandeering; none is availing.

First, Plaintiffs argue that preempting the law applied in state causes of action is tantamount to forcing states to alter their own state law. State Brief 26 (citing *Koog v. United States*, 79 F.3d 452, 458 (5th Cir. 1996), which did not speak to Congress's authority to promulgate substantive federal law that preempts conflicting state law). But the Supreme Court has adopted the opposite rule. *See New York*,

505 U.S. at 178 ("Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly."). Moreover, the Supreme Court has repeatedly recognized Congress's authority to preempt state law that would otherwise apply in state causes of action. *See* U.S. Opening Brief 45.

Second, Plaintiffs argue that only federal laws exclusively regulating private activity may preempt state law. But Congress's authority to enact statutes that grant certain rights or protections to individuals — and that, in practice, directly constrain States — is settled. *E.g.*, *Fishing Vessel*, 443 U.S. at 684-85 (recognizing that congressionally ratified treaty securing tribal right to fish off-reservation preempted certain state regulations); *Antoine v. Washington*, 420 U.S. 194, 204 (1975) (same regarding off-reservation hunting rights); *Deer Park Independent School District v. Harris County*, 132 F.3d 1095, 1099 (5th Cir. 1998) (upholding federal statute granting businesses exemption from local tax). This Court expressly recognized in *Deer Park* — which Plaintiffs fail even to cite — that such laws do not violate the Tenth Amendment. *Id.* Nor is *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), to the contrary: the federal statute invalidated in that case was a direct command to state legislatures regarding what types of laws they could enact — *not*, as here, a federal statute simply preventing state courts from *applying* conflicting state laws to certain persons protected by the federal statute. *Id.* at 1478-79.

Third, and most sweepingly, Plaintiffs argue that ICWA may not validly preempt state law because Congress lacked authority to promulgate ICWA in the first place. Like Plaintiffs' attempt to recast *Mancari*, this third theory would radically undermine Supreme Court precedent and cast into doubt myriad laws stretching back to this Nation's earliest days. The Supreme Court has stated consistently and unequivocally that Congress's authority to legislate "Indian affairs" is plenary. *E.g.*, *Lara*, 541 U.S. at 200 ("The Constitution grants Congress broad general powers to legislate in respect to Indian tribes . . . that we have consistently described as 'plenary and exclusive.'"); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979) (referring to Congress's "plenary and exclusive power over Indian affairs"); *Mancari*, 417 U.S. at 551 (recognizing Congress's "plenary power . . . to deal with the special problems of Indians"). That authority stems in part from the Indian Commerce Clause, art. I, § 8, cl. 3, but also from other sources, including the Treaty Clause, art. II, § 2, cl. 2, and "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government," *Lara*, 541 at 200; *see also United States v. Kagama*, 118 U.S. 375, 384-85 (1886).

Plaintiffs propose a different rule. They argue first, based on their reading of the Indian Commerce Clause, that the Constitution grants authority only to regulate "trade" with tribes themselves, not to legislate with respect to individual Indians.

No controlling opinion has so held, however. To the contrary, the Supreme Court has expressly warned against treating Congress's authority under the Indian Commerce Clause as subject to the same limits as its authority to regulate interstate commerce. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).[8]

Moreover, Congress has not understood its authority to be so limited. To the contrary, one of the earliest statutes enacted under the new Constitution rendered invalid the sale of land by tribes *or individual Indians* to any person or State. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138. Over the next twelve years, Congress enacted five more statutes likewise invalidating transactions between individual Indians and other persons or States. Act of Mar. 1, 1793, ch. 19, § 8, 1 Stat. 329, 330; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469, 472; Act of Mar. 3, 1799, ch. 46, § 12, 1 Stat. 743, 746; Act of Mar. 30, 1802, ch. 13, § 12, 2 Stat. 139, 143; *see also* Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730 (targeting only sales by tribes); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 418 (1865) (recognizing right to regulate commerce with "any Indian tribe, or any person who is a member of such tribe"). Since the nineteenth century, Congress has also provided for the exercise of

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[8] To the extent that analogies between the two clauses are appropriate, Congress's authority to "regulate Commerce with foreign Nations" has been construed to include authority to protect children in international custody disputes — notwithstanding that children are not "objects of commerce." *See* Individual Brief 60; *United States v. Cummings*, 281 F.3d 1046 (9th Cir.) (upholding federal statute criminalizing the removal of a child from the United States with the intent to obstruct the lawful exercise of parental rights), *cert denied*, 537 U.S. 895 (2002).

federal criminal jurisdiction in Indian country, though prosecuting *crimes* against *individual Indians* is far afield from regulating *trade* with *tribes*. 18 U.S.C. §§ 1152, 1153. More contemporary examples of legislation that frustrate Plaintiffs' imagined limits on Congress's authority are also plentiful. *See, e.g., supra* p. 10.

Plaintiffs next contend that each time the Supreme Court said "plenary" in describing Congress's powers, it actually meant plenary only with regard to what Plaintiffs call "tribal matters" — purely internal concerns like membership or on-reservation activities. Individual Brief 61; *see also* State Brief 31. As with their attempts to limit *Mancari*, however, Plaintiffs can identify no decision actually articulating their preferred limit. The closest that Plaintiffs come is a statement from *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977), calling Congress's power "plenary" but "not absolute." *See* State Brief 31. *Weeks* merely held, however, that laws passed by Congress to aid Indians are not immune from judicial review. 430 U.S. at 84. The standard of review specified by *Weeks* imposed no limits on the subject matter Congress may address; rather, it echoed *Mancari*'s broad rule that a federal statute must be "tied rationally to the fulfillment of Congress's unique obligation toward the Indians." *Id.* at 85.

The Supreme Court has routinely upheld Indian-related federal statutes that regulate activity other than trade with tribes or internal tribal affairs. More than a century ago, the Supreme Court upheld a conviction of a non-Indian under a federal

statute that prohibited sales of alcohol to individual Indians on or off reservations. *Perrin*, 232 U.S. at 480-81. Other examples abound. The Supreme Court has recognized that federal treaties and other agreements ratified by Congress may preclude States from applying fish and game laws to individual Indians' activities outside of reservations. *E.g., Fishing Vessel*, 443 U.S. at 684-85; *Antoine*, 420 U.S. at 204. The Supreme Court has also recognized Congress's power to authorize the acquisition of privately held land within a State's boundaries in trust "for Indians." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220-21 (2005); *see also Arenas v. United States*, 322 U.S. 419, 433-34 (1944) (enforcing statute authorizing allotments of land to individual Indians). Finally, Congress's own understanding of its authority undercuts Plaintiffs' view. *See supra* pp. 10, 21-22.

2. The challenged provisions do not commandeer state officers.

State Plaintiffs argue that certain provisions of ICWA commandeer state executive officers as well as judges. But the relevant laws do not force those officers to administer federal law. *See Printz v. United States*, 521 U.S. 898, 928 (1997).

Of the eight statutory requirements that assertedly commandeer state officers, *see* State Brief 24-26, one sets limits on when parental rights may be terminated or when an Indian child may be placed in foster care, 25 U.S.C. § 1912(d); and one sets limits on how long an emergency placement of an Indian child may last, *id.* § 1922. Those provisions are arguably phrased as directives to state agencies, but they are in

substance federal rules governing the rights of Indian children and their parents — rules that simply preempt conflicting state rules, and consequently pose no anti-commandeering problem, for the reasons explained above. *See supra* pp. 17-23.

Four other requirements set minimum procedural rules in judicial proceedings involving an Indian child; again, these rules simply preempt conflicting state rules. *See* 25 U.S.C. §§ 1912(a) (notice and timing requirements), 1912(b) (appointment of counsel), 1917 (release of case information to Indian child reaching adulthood); *cf.* 25 C.F.R. § 23.139 (setting notice requirements when the adoption of an Indian child is vacated, which also fits into this category). These provisions are also an appropriate use of Congress's authority under the Supremacy Clause. *See Jinks v. Richland County*, 538 U.S. 456, 461-65 (2003); *FERC v. Mississippi*, 456 U.S. 742, 770-71 (1982).

The remaining two requirements simply require States to provide minimal information regarding Indian-child proceedings to the federal government. *See* 25 U.S.C. §§ 1915(e), 1951(a). As we have explained, the Supreme Court has declined to hold that information-sharing requirements offend the Tenth Amendment. *See* U.S. Opening Brief 48 (citing *Printz*, 521 U.S. at 918). Plaintiffs have not disputed this point. Nor do Plaintiffs dispute that, even if any of these provisions violated anti-commandeering principles, the appropriate remedy would simply be to sever that particular provision. 25 U.S.C. § 1963.

C. ICWA contains no improper delegation.

Plaintiffs' final argument for declaring ICWA unconstitutional also fails. For the reasons in our opening brief, Section 1915(c) contains no impermissible delegation; instead, it merely adopts as a matter of federal law any tribal resolution reordering Section 1915's adoptive- and foster-placement preferences. *See* U.S. Opening Brief 48-50. State Plaintiffs' contention that a tribe acting on its own would lack authority to require a State to apply tribal law, *see* State Brief 46, is beside the point. *See also, e.g.*, *Wisconsin v. EPA*, 266 F.3d 741, 478 (7th Cir. 2001) (recognizing that under the Clean Water Act, EPA may authorize tribes to regulate off-reservation discharges); *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996) (same).[9]

In sum, ICWA comports with the Constitution.

II. The 2016 Rule is valid.

The district court's decision to set aside Interior's 2016 Rule should also be reversed. For the reasons just discussed, that rule does not apply an unconstitutional statute, and the district court's only independent criticisms of the rule were erroneous. *See* U.S. Opening Brief 51-54. Plaintiffs have not shown otherwise.

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[9] State Plaintiffs' suggestion that Section 1915(c) undermines the United States' equal-protection argument is incorrect. *See* State Brief 46-47. Regardless of order, each of those preferences is race-neutral and rational. *See* U.S. Opening Brief 28-30, 35-37.

First, Plaintiffs do not dispute that the Department of the Interior gave reasons for departing from its 1979 position that regulations with the force of law were not necessary. *See* Individual Brief 64-66; State Brief 47-48. Plaintiffs nevertheless argue that ICWA's goal of providing state-court judges with flexibility precludes Interior's finding that uniform nationwide definitions of some statutory terms are needed. The Supreme Court disagrees. *See Holyfield*, 490 U.S. at 47 (concluding that the term 'domicile' in ICWA must have a uniform meaning). In any event, even under Interior's regulations, state judges retain significant discretion. *See* 81 Fed. Reg. 38,778, 38,780, 38,824-25 (June 14, 2016).

Second, Plaintiffs' argument that good cause for deviating from the placement preferences established by Section 1915 need be proven only by the preponderance of the evidence is immaterial: the 2016 Rule merely recommends — but does not command — a higher evidentiary standard. 25 C.F.R. § 23.132(b). The rule similarly recommends but does not command that such good cause "should" fit into one of five enumerated categories. *Id.* § 23.132(c).

The 2016 Rule is valid.

CONCLUSION

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

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Respectfully submitted,

s/ Eric Grant

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
WILLIAM B. LAZARUS
RACHEL HERON
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

Counsel for Federal Appellants

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 February 19, 2019.

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s/ Eric Grant
ERIC GRANT

Counsel for Federal Appellants

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s/ Eric Grant
ERIC GRANT

Counsel for Federal Appellants