

No. 18-11479

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Chad Evert Brackeen; Jennifer Kay Brackeen; State of Texas; Altagracia Socorro Hernandez; State of Indiana; Jason Clifford; Frank Nicholas Libretti; State of Louisiana; Heather Lynn Libretti; Danielle Clifford, *Plaintiffs-Appellees*,

v.

Ryan Zinke, in his official capacity as Secretary of the United States Department of the Interior; Tara Sweeney, in her official capacity as Acting Assistant Secretary for Indian Affairs; Bureau of Indian Affairs; United States Department of Interior; United States of America; Alex Azar, In his official capacity as Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services, *Defendants-Appellants*.

Cherokee Nation; Oneida Nation; Quinault Indian Nation; Morongo Band of Mission Indians, *Intervenor Defendants-Appellants*.

On Appeal from the United States District Court
for the Northern District of Texas

**BRIEF OF ADMINISTRATIVE LAW AND CONSTITUTIONAL LAW
SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF
DEFENDANTS-APPELLANTS**

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and law firm have an interest in this amicus brief. Amici are all professors of administrative law, constitutional law, and related public law subjects. Amici's titles and institutional affiliations are provided solely for identification purposes.

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TABLE OF CONTENTS

SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES ii

TABLE OF AUTHORITIES vi

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 7

I. The Anticommandeering Doctrine Does Not Prohibit Congress From Regulating State Activities And Imposing Binding Federal Law On State Courts..... 7

 A. The Anticommandeering Doctrine Does Not Prohibit Congress From Enacting Preemptive Federal Law That State Courts Are Obligated To Apply 8

 B. The Anticommandeering Doctrine Does Not Prohibit Congress From Regulating State Activities 14

II. The Nondelegation Doctrine Does Not Prohibit Congress From Incorporating Another Sovereign’s Policy Judgments Into A Federal Regulatory Scheme..... 16

 A. Congress’s Incorporation of Another Sovereign’s Law Into Federal Law Is Not An Unconstitutional Delegation Of Congress’s Legislative Authority 18

 B. Congress May Enact Cooperative Regulatory Schemes That Include States And Indian Tribes 21

 1. Congress Does Not Violate The Nondelegation Doctrine Simply By Permitting States And Indian Tribes To Play A Role in The Implementation of Federal Law..... 21

 2. Section 1915(c) Of ICWA Contains An Intelligible Principle 25

CONCLUSION..... 26

CERTIFICATE OF COMPLIANCE..... 27
CERTIFICATE OF FILING AND SERVICE 28

TABLE OF AUTHORITIES

Cases

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).....20

Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000).....27

Butte City Water Co. v. Baker, 196 U.S. 119 (1905).....26

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).....6

Carter v. Carter Coal Co., 298 U.S. 238 (1936)26

City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996).....27

Clafin v. Houseman, 93 U.S. 130 (1876).....15

Dolgencorp. v. Mississippi Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014).....24

Fisher v. District Court, 424 U.S. 382 (1976).....29

Gibbons v. Ogden, 9 U.S. (Wheat.) 1 (1824)..... 5, 22

Hancock v. Train, 426 U.S. 167 (1976).....25

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).....10

McCarty v. McCarty, 453 U.S. 210 (1981)10

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)29

Mississippi Band of Choctaw Indians v. Holyfield, 480 U.S. 30 (1989)..... 2, 24

Mondou v. New York, New Haven & Hartford Railroad, 223 U.S. 1 (1912).....4

Murphy v. NCAA, 138 S. Ct. 1470 (2018) passim

Nevada v. Hicks, 533 U.S. 353 (2001).....24

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)3

New York v. United States, 505 U.S. 144 (1992)..... 4, 9, 12

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).....20

Parker v. Richard, 250 U.S. 235 (1919).....7

PLIVA, Inc. v. Mensing, 564 U.S. 604 (2011)10

Printz v. United States, 521 U.S. 898 (1997)..... 9, 12, 14

Reno v. Condon, 528 U.S. 141 (2000) 10, 17

Rice v. Rehner, 463 U.S. 713 (1983)28

South Carolina v. Baker, 485 U.S. 505 (1988).....18

Testa v. Katt, 330 U.S. 386 (1947) 4, 14

Union Elec. Co. v. EPA, 427 U.S. 246 (1976).....27

United States v. Kebodeaux, 570 U.S. 387 (2013)6

United States v. Knight, 26 F. Cases 793 (No. 15,539 (D. Me. 1838)22

United States v. Lara, 541 U.S. 193 (2004)..... 3, 25

United States v. Mazurie, 419 U.S. 544 (1975) 7, 21, 28, 29

United States v. Sharpnack, 355 U.S. 286 (1958) 6, 23

Whitman v. Am. Trucking Ass’ns, 531 U.S. 457 (2001) 6, 20, 21, 31

Williams v. Lee, 358 U.S. 217 (1959).....23

Statutes

Fed. R. App. P. 29(a)1

Fed. R. App. P. 29(a)(4)(E).....1

Other Authorities

18 U.S.C. § 1161 28, 29

25 C.F.R. §§ 23.140-4111

25 U.S.C. § 190111

25 U.S.C. § 1901(1)	2
25 U.S.C. § 1902	2, 11
25 U.S.C. § 1903	11
25 U.S.C. § 1908	11
25 U.S.C. § 1911	2, 13
25 U.S.C. § 1912(a)	18
25 U.S.C. § 1912(d)	18
25 U.S.C. § 1913	13
25 U.S.C. § 1915	13
25 U.S.C. § 1915(a)	19, 30
25 U.S.C. § 1915(b)	19, 30
25 U.S.C. § 1915(c)	passim
25 U.S.C. § 1915(e)	11, 16
25 U.S.C. § 1917	11, 16
25 U.S.C. § 1918	11
25 U.S.C. § 1921	13
25 U.S.C. § 1922	13
25 U.S.C. § 1951(b)	11
25 U.S.C. § 1952	11
28 U.S.C. § 3702(1)	15
Andrew S. Oldham, <i>Sherman’s March (In)to the Sea</i> , 74 Tenn. L. Rev. 319, 370 (2007)	20
Ann Laquer Estin, <i>Federalism and Child Support</i> , 5 Va. J. Soc. Pol’y & L. 541 (1998)	10

Assimilative Crimes Act (ACA), 355 U.S. 286 (1958).....23

H.R. Rep. No. 95-1386, at 10-122

ICWA Section 1915(a)-(b)5

ICWA Section 1915(c).....5

ICWA Sections 1901-0311

ICWA Sections 191113

ICWA Sections 191213

ICWA Sections 191313

ICWA Sections 191511

ICWA Sections 191613

ICWA Sections 1917 11, 13

Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 Vand. L. Rev. 1347 (1996).....23

Regulations

25 C.F.R. § 23.10111

INTEREST OF AMICI CURIAE

Amici are professors of administrative law, constitutional law, and related public law subjects at institutions across the United States. They have extensive experience studying and teaching about the legal doctrines implicated by this case and share an interest in the proper application of constitutional limits on Congress's authority to enact supreme federal law and state courts' obligations to decide properly presented federal questions. With this brief, they seek to bring to the Court's attention fundamental principles of administrative and constitutional law that are central to the resolution of this appeal.

Amici join this brief solely on their own behalf and not as representatives of their universities. A full list of *amici* appears in the Certificate above.¹

SUMMARY OF ARGUMENT

This case presents settled questions of administrative and constitutional law concerning the authority of Congress to enact supreme federal law that is binding on state court judges. The Indian Child Welfare Act (ICWA) provides minimum federal standards to protect the best interests of Indian children in child custody proceedings in state court. *See* 25 U.S.C. § 1902. Congress enacted these federal

¹ The brief is submitted pursuant to Fed. R. App. P. 29(a), and Fifth Circuit Local Rule 29. All parties have consented to the submission of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel for a party authored this brief in whole or in part, and no person other than the *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

standards in response to evidence of widespread bias in state and private child welfare agencies and violations of due process in state courts, which together had led to the “wholesale removal of Indian children from their homes.” *Mississippi Band of Choctaw Indians v. Holyfield*, 480 U.S. 30, 32-33 (1989); see H.R. Rep. No. 95-1386, at 10-12 (explaining that Indian child welfare decisions “in most cases, [were] carried out without due process of law”). ICWA protects the rights of Indian children and families by allocating jurisdiction over child custody proceedings among Indian tribes and the states, providing procedures for custody proceedings in state courts, and identifying preferences for the placement of Indian children. See, e.g., 25 U.S.C. § 1911, 1912, 1915.

Congress enacted ICWA pursuant to its constitutional authority over Indian affairs. See 25 U.S.C. § 1901(1). “The Constitution grants Congress broad general powers to legislate in respect to Indian tribes,” powers that include the authority to recognize “tribal sovereign authority” over a tribe’s members and tribal territory. *United States v. Lara*, 541 U.S. 193, 200, 204 (2004). States are largely excluded from the regulation of Indian affairs. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). Moreover, Congress’s constitutional authority over Indian affairs authorizes it to enact federal law that preempts state laws regulating the same. *Id.* at 333-34. The District Court did not hold that Congress lacked constitutional authority under the Indian Commerce Clause to legislate with respect

to the custody of Indian children. *See* D. Ct. Op. 45-46. It is a simple application of the Supremacy Clause to conclude that state courts have an obligation to apply ICWA's protections for Indian children and families where they apply.

The District Court's decision striking down key provisions of ICWA on their face threatens not only federal statutory protections for Indian children, but also well-settled principles of our federal system. The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the plain text of the Supremacy Clause, not to mention U.S. Supreme Court precedent, it is beyond dispute that Congress may enact federal laws that state courts are obligated to apply. Yet the District Court incorrectly concluded that Congress's decision to do so through ICWA violates the anticommandeering and nondelegation doctrines. D. Ct. Op. 29-38. Its conclusion is contrary to foundational principles of administrative and constitutional law.

First, the anticommandeering doctrine does not prohibit Congress from enacting federal "laws enforceable in state courts." *New York v. United States*, 505 U.S. 144, 178 (1992). This principle's roots run deep. *See, e.g., Testa v. Katt*, 330 U.S. 386, 394 (1947) (holding that where state courts had "jurisdiction adequate and appropriate under established local law to adjudicate [an] action," they "are not free

to refuse enforcement” of a federal claim); *Mondou v. New York, New Haven & Hartford Railroad*, 223 U.S. 1, 57 (1912) (stating that federal statutory law “is as much the policy of [a state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state”). The District Court apparently concluded (at Op. 35-36) that the Supreme Court disturbed that settled principle in *Murphy v. NCAA*, 138 S. Ct. 1470 (2018). But *Murphy* reaffirmed that “federal law is supreme in case of a conflict with state law.” *See id.* at 1479. Where ICWA’s federal standards concerning the adoption of Indian children apply, they are binding on state courts in child custody proceedings and preempt conflicting state laws, which *Murphy* makes clear federal statutes may do.

Second, the Constitution does not prohibit Congress from incorporating another sovereign’s policy judgments into a federal regulatory scheme. *See, e.g., Gibbons v. Ogden*, 9 U.S. (Wheat.) 1, 207-08 (1824) (“Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject . . .”). The District Court held that ICWA Section 1915(c) of ICWA, which incorporates the order of placement preferences adopted by “the Indian child’s tribe” if that order differs from the baseline set in Section 1915(a)-(b), violates the nondelegation doctrine because it delegates federal legislative power to Indian Tribes. Section 1915(c) does not, however, delegate federal legislative power. To the contrary, it permits for local tailoring of the placement preferences for Indian

children by adopting the law of another sovereign as federal law. Such incorporation of another’s sovereign’s law does not violate the nondelegation doctrine. *See United States v. Sharpnack*, 355 U.S. 286, 293-94 (1958) (holding that Congress may incorporate state law as binding federal law for federal enclaves); *cf. United States v. Kebodeaux*, 570 U.S. 387, 393 (2013) (“[T]he fact that the federal law’s requirements in part involved compliance with state-law requirements made them no less requirements of federal law.”). Indeed, Section 1915(c) of ICWA involves a much more limited incorporation of another sovereign’s laws than other federal statutes that the Court has held constitutional.

In any event, the Constitution does not prohibit Congress from enacting a scheme that leaves some “degree of policy judgment . . . to those executing or applying the law,” so long as Congress supplies an “intelligible principle” to guide that judgment. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474-75 (2001). Congress may, for example, enact a federal regulatory scheme that depends upon a state government for its implementation, and indeed has done so with respect to Indian affairs. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (describing Public Law 280, which “expressly granted six States . . . jurisdiction over specified areas of Indian Country”); *Parker v. Richard*, 250 U.S. 235, 239 (1919) (holding that Congress could select a state court as “agency” to decide validity of conveyance of property rights in land to citizens of five Indian

Tribes). Congress no more violates the nondelegation doctrine by enacting a regulatory scheme providing for some policy judgment by Indian tribal governments than it does when it enacts a cooperative federalism scheme providing for some policy judgment by state governments. It is for this reason that the Supreme Court, in an opinion by then-Justice William Rehnquist, unanimously held that Congress may enact a statute delegating to Indian tribes federal regulatory authority over the distribution of alcohol in Indian Country. *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975). To hold that Congress may not incorporate any policy judgments by Indian Tribes into a federal regulatory scheme because Tribes are “not a coordinate branch of government” calls into question not only ICWA, D. Ct. Op. 32, but also a wide swath of federal regulatory programs that rely upon state governments for implementation.

Nothing in the anticommandeering or nondelegation doctrines supports the District Court’s holding that ICWA is unconstitutional on its face. This Court should reverse the District Court’s erroneous anticommandeering and nondelegation holdings and hold that ICWA, as the supreme law of the land, binds states pursuant to the Supremacy Clause.

ARGUMENT

I. The Anticommandeering Doctrine Does Not Prohibit Congress From Regulating State Activities And Imposing Binding Federal Law On State Courts

The District Court held that Congress unconstitutionally commandeered the state courts when it enacted preemptive federal law that applies in child placement proceedings. D. Ct. Op. 35. On the District Court’s view, Congress cannot enact any “federal standards” that apply in state courts where such standards “modify *state created* causes of action.” *See id.* But the anticommandeering doctrine, which prohibits congressional commands to state legislatures and state executives, does not preclude Congress from enacting federal “laws enforceable in state courts.” *New York*, 505 U.S. at 178. The Supremacy Clause imposed upon state courts an obligation “to enforce federal prescriptions,” one “understandable” in light of the Framers’ recognition that state courts “applied the law of other sovereigns all the time.” *Printz v. United States*, 521 U.S. 898, 907 (1997).

Thus, the anticommandeering doctrine does not shield state courts from an obligation to apply any and all federal laws that somehow “modify” state causes of action. In the area of family law, for example, the Supreme Court has held that federal law may modify the relief available under state law causes of action.² *See*

² More generally, “federal statutes governing income tax, pensions, and bankruptcy significantly affect divorce practice. Supreme Court decisions have altered many of the ground rules for adoption and inheritance when non-marital children are involved. Many of the most

McCarty v. McCarty, 453 U.S. 210, 235-36 (1981) (holding that federal law preempted state courts from allocating military retirement pay pursuant to state community property laws upon divorce); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979) (holding that federal law preempted state law’s definition of community property subject to division with respect to federal pension benefits). In myriad areas of regulation, federal law may in one way or another “modify” the availability of relief under state law, including by preempting claims altogether. *See, e.g., PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011). The anticommandeering doctrine does not, moreover, prohibit Congress from regulating state activities. *See Reno v. Condon*, 528 U.S. 141, 150-51 (2000). With ICWA, Congress regulated state activities and enacted preemptive federal law that applies in state courts under the Supremacy Clause. That is not unconstitutional commandeering.

A. The Anticommandeering Doctrine Does Not Prohibit Congress From Enacting Preemptive Federal Law That State Courts Are Obligated To Apply

None of the sections of ICWA that the District Court held unconstitutional violate the anticommandeering doctrine.³ Nor do the Department of the Interior’s

complex problems addressed in family law courses concern the intersection of federal and state statutes governing such matters as child support and child custody jurisdiction.” Ann Laquer Estin, *Federalism and Child Support*, 5 Va. J. Soc. Pol’y & L. 541, 541 (1998).

³ As an initial matter, Sections 1901-03 of ICWA do not command the states to do anything. *See* 25 U.S.C. § 1901 (listing congressional findings that supported enactment of ICWA); *id.* § 1902 (declaring federal policy “to protect the best interests of Indian children”); *id.* § 1903 (defining ICWA’s key terms). Neither do Sections 1918 or 1919. *See id.* § 1918

ICWA regulations, which “clarify” but do not alter “the minimum Federal standards governing implementation of [ICWA].” *See* 25 C.F.R. § 23.101; *but cf.* D. Ct. Op. at 36 n.17 (citing 25 U.S.C. §§ 1915(e) & 1917 as well as 25 C.F.R. §§ 23.140-41, which clarify Sections 1915 and 1917 of ICWA). According to the Court’s anticommandeering jurisprudence, implicit in the Tenth Amendment and the federal structure of the Constitution is a prohibition on congressional commandeering of state legislatures and executive officials. In *New York v. United States*, 505 U.S. at 144, the Court held that Congress may not command state legislatures to enact specific legislation. 505 U.S. at 144. And in *Murphy*, the Court held that Congress may not command state legislatures to refrain from enacting legislation either. 138 S. Ct. at 1479. Finally, in *Printz v. United States*, 521 U.S. at 898, the Court shielded state executives from federal commands that they administer federal programs.

While Congress may not command state legislatures to legislate (or to refrain from legislating) or state executives to administer federal law, it may enact preemptive federal law that state courts are obligated to apply. *See Murphy*, 138 S. Ct. at 1481; *Printz*, 521 U.S. at 907; *New York*, 505 U.S. at 178. Thus, the

(providing a right for Indian tribes to reassume jurisdiction over child custody proceedings if certain criteria are met); *id.* § 1919 (“authoriz[ing]” states and Indian tribes to enter into agreements concerning child custody proceedings). Nor does Section 1951(b), which imposes obligations on the Secretary of the Interior to disclose information to Indian individuals, adoptive or foster parents of Indian children, and Indian tribes. *See id.* § 1951(b). Finally, Section 1952 is a garden-variety authorization for administrative rulemaking and imposes no obligation on states. *See id.* § 1952.

anticommandeering doctrine’s constraint on congressional compulsion of state legislatures and executives does not extend to state courts.

The District Court disregarded this crucial distinction when it held subchapter I of ICWA unconstitutional. Subchapter I contains preemptive federal law that state courts are obliged to apply in child custody proceedings under the Supremacy Clause. This preemptive federal law includes jurisdictional and procedural rules for adjudicating child custody proceedings,⁴ rights to petition state courts for various forms of relief,⁵ and substantive standards concerning the best interests of Indian children in placement proceedings.⁶ The anticommandeering doctrine does not

⁴ See 25 U.S.C. § 1911 (providing rules allocating jurisdiction over “Indian child custody proceedings” between tribal and state courts and requiring that full faith and credit be given to “public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings” on same terms as full faith and credit is given to public acts, records, and judicial proceedings of other governments); *id.* § 1912 (providing procedural rules to govern “pending court proceedings” concerning placement of Indian children); *id.* § 1920 (directing courts to “decline jurisdiction over [a] petition” for child custody where petitioner has “improperly removed the child from custody . . . or has improperly retained custody”); *id.* § 1923 (specifying effective date of various provisions of subchapter I).

⁵ See 25 U.S.C. § 1914 (providing right to “petition any court of competent jurisdiction to invalidate” an “action for foster care placement or termination of parental rights” based upon violation of Sections 1911, 1912, and 1913 of ICWA); *id.* § 1916 (providing right to petition court for return of custody to biological parent or prior Indian custodian under certain circumstances); *id.* § 1917 (providing right of Indian individual who was adopted to apply to “court which entered the final decree” for information about tribal affiliation of individual’s biological parents).

⁶ See 25 U.S.C. § 1913 (specifying certain “[p]arental rights” and rules concerning termination of those rights); *id.* § 1915 (providing preferences governing adoptive placements and foster care placements for Indian children); *id.* § 1921 (directing courts to apply “higher standard of protection to the rights of the parent or Indian custodian” when there is conflict between state and federal standard); *id.* § 1922 (clarifying that subchapter I of ICWA does not “prevent the emergency removal of an Indian child . . . in order to prevent imminent physical damage or harm to the child”).

shield state courts from their obligation to apply these federal rules in cases where they apply.

And for good reason. Writing for the Court in *Printz*, Justice Scalia explained that “the Constitution was originally understood to permit the imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.” *Printz*, 521 U.S. at 907 (emphasis in original). This distinctive obligation of state judges to apply federal law is explicit in the Supremacy Clause, and was implicit in the Madisonian Compromise, which “made the creation of lower federal courts optional with Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States.” *Id.* As the *Printz* Court explained, *Testa v. Katt* made the implications of this Compromise explicit: “state courts cannot refuse to apply federal law.” *Id.* (citing *Testa v. Katt*, 330 U.S. 386 (1947)). This scheme, which preserves federal supremacy while permitting Congress to defer matters of federal law to state courts of competent jurisdiction, has been a crucial feature of judicial federalism since the Founding.

The District Court’s holding that subchapter I of ICWA unconstitutionally commandeers state courts cannot be reconciled with this fundamental feature of our federal system. State courts must apply the jurisdictional, procedural, and substantive rules that Congress designed to protect Indian children and families

because those rules are “just as much binding on the citizens and courts thereof as the State laws are.” *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876).

The District Court apparently concluded that the Supreme Court’s recent decision in *Murphy v. NCAA* released state courts from their obligation to apply federal law in cases where jurisdiction arises under state law. *See* D. Ct. Op. 38. But *Murphy* was concerned about the federal government compelling state governments to maintain existing laws on the books, not with prohibiting state governments from enforcing state policies that conflict with (and thus are preempted by) federal law. In *Murphy*, the Court held that the Professional and Amateur Sports Protection Act (“PASPA”) unconstitutionally commandeered the states by making it unlawful for a state to “authorize” sports gambling. *See* 138 S. Ct. at 1468 (quoting PASPA, 28 U.S.C. § 3702(1)); *id.* at 1478 (holding that PASPA’s prohibition violated the anticommandeering rule). Prohibiting a state from enacting new legislation authorizing sports gambling, the Court reasoned, is indistinguishable from requiring a state to enact legislation. *See id.* at 1478. PASPA did not purport to regulate private actors and thus to preempt conflicting state law doing the same, which the Court made clear would have been constitutionally permissible. *See id.* at 1476, 1481.

Unlike PASPA, ICWA is not a bare command to a state legislature to refrain from legislating or to maintain existing laws. To the contrary, ICWA regulates the

adoptions of Indian children directly and confers rights on private parties. *See Murphy*, 138 S. Ct. at 1481 (explaining that PASPA did not regulate private actors or confer private rights). ICWA, moreover, provides preemptive federal law regulating jurisdiction, choice of law, and procedure for child custody proceedings in state courts. *Murphy* nowhere questioned the longstanding principle that the anticommandeering ban does not shield state courts from their obligation to apply supreme federal law.

The District Court nevertheless reasoned that state courts should be free to ignore any and all “federally-mandated standards” in order to preserve political accountability and state judicial resources.⁷ D. Ct. Op. 35-36. As the District Court would have it, a state court may adjudicate causes of action arising under state law

⁷ ICWA contains recordkeeping and reporting requirements that the District Court (Op. 36 n.17) highlighted as examples of unconstitutional commandeering of state resources. *See* 25 U.S.C. § 1915(e) (requiring “[a] record of each such placement . . . of an Indian child [to] be maintained by the State” and “made available . . . upon the request of the Secretary or the Indian child’s tribe”); *id.* § 1917 (affording Indian individual who was adopted a right to apply to the “court which entered the final decree” to obtain information about the individual’s biological parents); *see also id.* § 1951 (requiring “[a]ny State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, [to] provide the Secretary with a copy of such decree or order”).

While some information-reporting requirements may pose the same constitutional concerns about burdening state resources as congressional commands to legislate or to implement federal law, the requirements imposed on state courts in ICWA do not. *See* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. Pa. L. Rev. 103, 164, 172 (2012) (arguing that “federal demands for state information [from state agencies are] prohibited commandeering” but distinguishing a requirement that state judges keep and disclose records of court judgments). The Plaintiff States’ complaint of diverted resources rings hollow; they already require their courts to disclose records of their adoption decrees to state agencies, whether an Indian child is involved or not, as part of the judicial function in child placement proceedings. *See* Ind. Code Ann. § 31-19-12-3; La. Rev. Stat. Ann. § 40:79(A)(1); Tex. Fam. Code Ann. § 108.003.

in a manner that would conflict with applicable federal law. *See id.* at 35 (holding that Congress may not enact “federal standards that modify *state created* causes of action”). That is not the system the Framers designed.⁸ Its adoption not only would undermine the rights of Indian and non-Indians alike, but also would stand the Supremacy Clause on its head.

B. The Anticommandeering Doctrine Does Not Prohibit Congress From Regulating State Activities

The anticommandeering doctrine does not, moreover, prohibit Congress from regulating state activities. The Constitution allows Congress to regulate the states through generally applicable regulations that impose obligations on states and private parties alike. In *Reno v. Condon*, 528 U.S. 141 (2000), the Court unanimously held that Congress had the constitutional authority to enact the Driver’s Privacy Protection Act (DPPA), which prohibited state departments of motor vehicles from releasing a driver’s personal information without the driver’s consent. While Congress may not command the state’s political branches to regulate private parties, it may regulate a state’s activities, particularly where the regulatory scheme applies not only to state agencies but also to private entities. *See id.* at 150-51

⁸ *See* Evan H. Caminker, *State Sovereignty and Subordinancy: May Congress Commander State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1023 (1995) (“a state court may not entertain and adjudicate causes of action arising under state law in a manner that would conflict with applicable federal law”).

(explaining that “DPPA is generally applicable” and citing *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988))).

Like the DPPA, Subchapter I of ICWA, which the District Court held was unconstitutional in its entirety, regulates both states and private entities. For example, Section 1912(a) requires “the party seeking the foster care placement of, or termination of parental rights to, an Indian child [to] notify the parent or Indian custodian and the Indian child’s tribe.” 25 U.S.C. § 1912(a). Section 1912(d) similarly regulates *any* party—whether a state agency or a private party—by requiring them “to satisfy the court that active efforts have been made . . . to prevent the breakup of the Indian family” before the court may order a foster care placement or terminate parental rights at that party’s request. *Id.* § 1912(d). Not only are these valid federal preconditions to a state court’s issuing an order concerning the placement of an Indian child, they are also valid regulations of state activities. Just as Congress could constitutionally regulate state departments of motor vehicles through the DPPA, so too may it regulate state child welfare agencies seeking the foster care placement of, or termination of parental rights to, Indian children. The District Court therefore erred in concluding (Op. at 36) that ICWA is unconstitutional in its entirety because some statutory provisions reach state child welfare agencies.

II. The Nondelegation Doctrine Does Not Prohibit Congress From Incorporating Another Sovereign’s Policy Judgments Into A Federal Regulatory Scheme

The District Court concluded that Section 1915(c) of ICWA unconstitutionally delegates to Indian Tribes the Congress’s authority to legislate in the field of Indian affairs. D. Ct. Op. 33. In an exercise of its constitutional authority over Indian affairs, Congress enacted Section 1915 to protect the best interests of Indian children in child custody proceedings. Section 1915(a) directs that “a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the [Indian] child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.” 25 U.S.C. § 1915(a). Section 1915(b) similarly specifies placement preferences for foster care or preadoptive placements. *See id.* § 1915(b). Section 1915(c) incorporates an Indian tribe’s own judgment about the placement of an Indian child:

In the case of a placement under subsection (a) or (b) of this section, if the Indian child’s tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) Where appropriate, the preference of the Indian child or parent shall be considered.

Id. § 1915(c). Congress did not violate the nondelegation doctrine by thus providing for local tailoring of ICWA’s regulatory scheme.

While the Supreme Court has repeatedly stated that Congress may not delegate its legislative powers, the Court has struck down a congressional enactment on nondelegation grounds only twice. In one case, Congress had “provided literally no guidance for the exercise of discretion,” while in the other it had “conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’” *Whitman*, 531 U.S. at 474 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). As Justice Scalia summarized it, the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” *Id.* at 474-75 (internal quotation marks omitted); *see also* Andrew S. Oldham, *Sherman’s March (In)to the Sea*, 74 *Tenn. L. Rev.* 319, 370 (2007) (“modern courts have all but abandoned the nondelegation doctrine”). Rather, the Court has found the constitutionally required “intelligible principle” in a variety of regulatory statutes, including those that simply direct an agency to regulate “in the public interest.” *Id.* at 474 (internal quotation marks).

Section 1915(c) does not delegate Congress’s legislative authority to Indian tribes. Instead, it incorporates Indian tribes’ exercise of their inherent sovereign authority over child custody matters into ICWA’s regulatory scheme, and does so subject to clearly articulated legislative standards that supply an “intelligible

principle” for such incorporation. Nothing in the nondelegation doctrine prohibits Congress from incorporating another sovereign’s policy judgments into a federal regulatory scheme in this way. And even if Section 1915(c) is understood to delegate federal authority, the Supreme Court has held that Congress may delegate such authority to tribes when, as here, it involves a tribe’s “internal and social relations.” *Mazurie*, 419 U.S. at 557. Section 1915(c) is not a standardless delegation of federal legislative authority, but rather a carefully-crafted scheme allowing for local tailoring of federal, preemptive placement preferences for Indian children.

A. Congress’s Incorporation of Another Sovereign’s Law Into Federal Law Is Not An Unconstitutional Delegation Of Congress’s Legislative Authority

Section 1915(c) does not delegate federal legislative authority to Indian tribes but instead incorporates their sovereign policy judgments in order to tailor ICWA to local conditions. The District Court therefore erred in concluding that Section 1915(c) granted tribes federal legislative authority “to change” ICWA’s regulatory scheme. D. Ct. Op. 31. To the contrary, Congress concluded that the *federal* placement preferences in ICWA would track those adopted by a tribe.

Under longstanding precedent, the nondelegation doctrine does not prohibit Congress from incorporating another sovereign’s policy judgments into federal law. Congress may, for example, incorporate state law into federal law. This principle’s roots run to Chief Justice John Marshall’s opinion in *Gibbons v. Ogden*, which noted,

“Congress may adopt the provisions of a State on any subject.” 9 U.S. (Wheat.) at 207-08. The precise scope of the principle was a matter of some debate in the nineteenth century. *United States v. Knight*, 26 F. Cases 793, 797 (No. 15,539 (D. Me. 1838) (questioning “whether [C]ongress does possess a constitutional authority to adopt prospectively state legislation on any given subject”); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 Vand. L. Rev. 1347, 1369 (1996). In *United States v. Sharpnack*, the Supreme Court laid any doubts to rest when it rejected a nondelegation challenge to the Assimilative Crimes Act (ACA). 355 U.S. 286 (1958). As amended in 1948, the ACA incorporated state criminal laws “in force at the time” of the alleged crime as the governing criminal law in federal enclaves within state boundaries. *See id.* at 292 (quoting ACA). Thus, the ACA prospectively incorporated state criminal laws enacted or amended after 1948. *See id.* The Supreme Court held that the ACA did not delegate “legislative authority to the States,” but instead was a “deliberate continuing adoption by Congress” of state law as binding federal law, with Congress retaining the authority “to exclude a particular state law from the assimilative effect of the Act.” *Id.* at 294. Prospective incorporation of a state’s laws thus did not violate the nondelegation doctrine.

Like a state, an Indian tribe is a sovereign government with authority to “make [its] own laws and be ruled by them.” *Williams v. Lee*, 358 U.S. 217, 220 (1959).

A tribe's inherent authority over matters involving family law and the welfare of Indian children does not stem from a delegation of federal authority. To the contrary, the Supreme Court has repeatedly affirmed that a tribe's inherent sovereignty extends to such matters. *See, e.g., Nevada v. Hicks*, 533 U.S. 353, 361 (2001); *cf. Dolgencorp. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 172 (5th Cir. 2014). Tribal authority "over Indian child custody proceedings is not a novelty of the ICWA." *Holyfield*, 490 U.S. at 42. Where ICWA requires it, the Supreme Court has "defer[red] to the experience, wisdom, and compassion" of tribal governments in matters involving the adoption of Indian children. *Id.* at 54 (internal quotation marks omitted).

Just as Congress may incorporate a state's law into federal law, so too may it incorporate a tribe's law. Section 1915(c) does not purport to delegate authority to Indian tribes. Instead, like the ACA, ICWA adopts the law of another sovereign as binding federal law. And like the ACA, ICWA does not preclude Congress from withdrawing its adoption of another sovereign's law if it decides to do so. Finally, like the ACA, which concerned federal enclaves over which Congress wields plenary authority, ICWA concerns Indian affairs over which Congress has plenary authority. *Compare Hancock v. Train*, 426 U.S. 167, 178 (1976) (plenary power over federal enclaves), *with United States v. Lara*, 541 U.S. 193, 200 (2004) (plenary power over Indian affairs). But unlike the ACA's prospective adoption of state

criminal law, Section 1915(c) of ICWA does not simply adopt prospectively any and all policy judgments and rules of conduct that an Indian tribe might prescribe. Instead, Section 1915(c) limits prospective incorporation to tribal placement preferences, which are limited policy judgments required for application of ICWA within the scope of the intelligible principles already established by Congress in ICWA. *See infra* pp. 24-25. The nondelegation doctrine is not a bar to Congress’s incorporation of another sovereign’s policy judgment through Section 1915(c) of ICWA.

B. Congress May Enact Cooperative Regulatory Schemes That Include States And Indian Tribes

1. Congress Does Not Violate The Nondelegation Doctrine Simply By Permitting States And Indian Tribes To Play A Role in The Implementation of Federal Law

Even assuming, however, that Section 1915(c) contains a delegation of federal authority, it does not violate the nondelegation doctrine. The District Court held Congress violated the Constitution because “Indian tribes are not a coordinate branch of government” and therefore cannot participate in the implementation of a federal regulatory scheme. D. Ct. Op. 32. As the District Court saw it, “an Indian tribe, like a private entity,” is constitutionally barred from playing such a role. *Id.* But this case does not present a reason to revive the private nondelegation doctrine, which limits the incorporation of private actors into public regulatory schemes. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (reasoning that delegation of

authority to adopt binding regulations for all market participants to a majority was “clearly arbitrary” and thus violated due process). Indian tribes are sovereign governments, not private entities, and Congress does not violate the nondelegation doctrine by permitting state or tribal governments to play a role in the implementation of federal law.

To hold, as the District Court did (Op. 32), that Section 1915(c) is unconstitutional because “Indian tribes are not a coordinate branch of government” and therefore cannot play a role in the implementation of federal law, would call a broad swath of settled federal regulatory law into question. States, like tribes, are not coordinate branches of the federal government. Congress may, and often has, delegated authority to states to play a role in implementing federal law. Such delegations have a long history. *See, e.g., Butte City Water Co. v. Baker*, 196 U.S. 119, 127 (1905) (“if Congress has power to delegate to a body of miners the making of additional regulations respecting location [of mining claims], it cannot be doubted that it has equal power to delegate similar authority to a state legislature”). They have become fundamental to the administrative state. Environmental regulation, such as the Clean Air Act (CAA), depends upon cooperative federalism schemes in which Congress has permitted state governments to play a vital role. Under the CAA, for example, states may design implementation plans for achieving the Environmental Protection Agency’s national standards for air pollutants. *See, e.g.,*

Union Elec. Co. v. EPA, 427 U.S. 246, 251 (1976). States may adopt plans that are “more stringent than federal law requires” and that have federal legal effect. *See id.* at 265-66. Such cooperative federalism schemes are a familiar feature of the federal regulatory landscape.

Like states, Indian tribes play a vital role in cooperative federalism schemes. Tribes also may exercise delegated regulatory authority under the CAA, for instance. *See Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1288 (D.C. Cir. 2000) (concluding that CAA expressly delegates federal authority over regulation of air quality to tribes); *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996) (holding that EPA had authority to require upstream dischargers to comply with Pueblo of Isleta’s effluent limitations where those limitations were more stringent than federal standards). Such delegations—which are more sweeping than any at issue in Section 1915(c)—are consistent with the Supreme Court’s precedent.

In *Mazurie*, the Court expressly rejected the argument that an Indian Tribe is indistinguishable from a private entity and therefore cannot exercise governmental power in implementing a federal regulatory scheme. Writing for the Court, Justice Rehnquist rejected a constitutional challenge to 18 U.S.C. § 1161, which authorized Indian tribes to regulate the introduction of liquor into Indian country. *Mazurie*, 419 U.S. at 547.⁹ The Court rejected the court of appeals’ conclusion that just as

⁹ In *Rice v. Rehner*, 463 U.S. 713, 728-29 (1983), the Court reaffirmed *Mazurie*’s holding.

Congress could not “delegate its authority [to regulate commerce with Indian tribes] to a private, voluntary organization,” so too Congress could not delegate that authority to a tribe. *Id.* at 556 (internal quotation marks omitted). As the Court reasoned, “it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory” and thus “possess[ed] independent authority over the subject matter.” *Id.* at 556-57; *id.* at 557 (“[W]hen Congress[] delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life”). The District Court’s conflation of an Indian tribe with a private entity for nondelegation purposes cannot be reconciled with *Mazurie*.

Like 18 U.S.C. § 1161, Section 1915(c) of ICWA is constitutional. ICWA concerns the “internal and social relations of tribal life.” *See Mazurie*, 419 U.S. at 557; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982) (explaining that an Indian tribe’s authority over “internal tribal affairs” includes its authority to “determine rights to custody of a child” (citing *Fisher v. District Court*, 424 U.S. 382, 388 (1976) (holding that “[s]tate-court jurisdiction over [a child custody dispute] plainly would interfere with [a Tribe’s] powers of self-government”))). Section 1915(c) permits an Indian tribe, in the exercise of its “independent authority over” child custody matters, to play a role in the implementation of federal law. *See*

Mazurie, 419 U.S. at 556-57. Indeed, Section 1915(c) contemplates a more limited role for Tribal governments than 18 U.S.C. § 1161. Thus, even if Section 1915(c) were understood as a delegation of federal authority to tribes, it would not violate the nondelegation doctrine.

2. Section 1915(c) Of ICWA Contains An Intelligible Principle

The District Court did not conclude that Section 1915 lacks an intelligible principle, nor could it reasonably have done so. The statute plainly specifies principles to govern the placement of an Indian child. Section 1915(c) refers to a baseline order of placement preferences in Sections 1915(a) & (b). If a tribe “establish[es] a different order” of placement preferences, then Section 1915(c) directs a court in a child custody proceeding to follow that reordered list, but only if the placement would be in “in the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section.” 25 U.S.C. § 1915(c). The statute further specifies that, “[w]here appropriate, the preference of the Indian child or parent shall be considered.” *Id.* In considering whether to establish a different order of preferences pursuant to Section 1915(c), tribes do not act without any congressional statement of policy, but instead have before them the baseline preferences Congress has identified in Sections 1915(a)-(b). And though Section 1915(c) provides that an Indian tribe’s decision may reorder the placement preferences, a state court must also consider the additional statutory factors bearing

upon the placement decision. The guidance to tribes and states in Section 1915 is more than enough to satisfy the nondelegation doctrine’s intelligible principle requirement. *See Whitman*, 531 U.S. at 474 (direction to regulate in the “public interest” suffices).

CONCLUSION

For the foregoing reasons, the District Court’s order granting Plaintiffs’ Motions for Summary Judgment in part should be reversed.

Date: January 14, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for *Amici* Law Professors certifies:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,248 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Time Roman 14-point for text; 12-point for footnotes.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on January 14, 2018, and by doing so served all counsel of record.

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