No. 18-11479

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants-Appellants.

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

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

CHEROKEE NATION; ONEIDA NATION; QUINAULT INDIAN NATION; MORONGO BAND OF MISSION INDIANS,

Intervenor Defendants-Appellants.

Pursuant to Local Rule 28.2.1, the undersigned counsel of record certifies that the following list of persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate potential disqualification or recusal.

1. Cherokee Nation (Intervenor-Defendant)

2. Oneida Nation (Intervenor-Defendant)

3. Quinault Indian Nation (Intervenor-Defendant)

4. Morongo Band of Mission Indians (Intervenor-Defendant)

5. Navajo Nation (Intervenor)

6. Chad Everet and Jennifer Kay Brackeen (Plaintiffs)

7. Frank Nicholas and Heather Lynn Libretti (Plaintiffs)

8. Altagracia Socorro Hernandez (Plaintiff)

9. Jason and Danielle Clifford (Plaintiffs)

10. State of Texas (Plaintiff)

11. State of Louisiana (Plaintiff)

12. State of Indiana (Plaintiff)

13. United States of America (Defendant)

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

15. John Tahsuda III, Bureau of Indian Affairs Principal (Defendant)

16. Tara Sweeney, Acting Assistant Secretary for Indian Affairs (Defendant)

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

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

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STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled Oral Argument for Wednesday, March 13, 2019.

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INTRODUCTION

There are two child welfare systems in Texas: one for "Indian children," and one for everyone else.

The latter, generally applicable system is governed by state law and geared toward protecting the best interests of each child. The other system, applicable only to "Indian children," arises from the Indian Child Welfare Act ("ICWA") and its implementing regulations. Congress declared in ICWA that "the best interests of Indian children" categorically would be "protect[ed]" by placement in homes that "reflect the unique values of Indian culture." 25 U.S.C. § 1902. ICWA thus replaces individualized consideration of an Indian child's best interests under state law with a dizzying array of federal mandates that state agencies and courts must apply to effectuate a transparently race-based federal policy of keeping "Indian children" within the "Indian community." At the core of those mandates are ICWA's placement preferences, which compel state courts to prefer any "Indian family"—which is to say, *any* family in *any* one of 573 federally-recognized Indian tribes—over *all* non-Indian families, such as the Individual Plaintiffs here.

If Congress had adopted similar mandates for African-American children—preferring African-American families over non-African-American families in all adoption proceedings—the law immediately would be condemned as a violation of equal protection. *See Palmore v. Sidoti*, 466 U.S. 429 (1984). ICWA may have been well-intentioned; some even weirdly tout its system of placement preferences as "the gold standard of child welfare"; but it is *de jure* racial segregation just the same.

That ICWA's definitions of "Indian" and "Indian child" are tethered to membership (or potential membership) in a federally-recognized Indian tribe does not suffice to make ICWA's classifications "political." Almost two decades ago, the Supreme Court rejected the same argument that Defendants make here—that all classifications based on tribal membership are political and none are racial. *See Rice v. Cayetano*, 528 U.S. 495 (2000). The Supreme Court instead recognized that tribal classifications depend on ancestry and that "[a]ncestry can be a proxy for race." *Id*. at 514.

Here, ICWA's "Indian child" classification is not even limited to tribal members; it sweeps in non-member children who have no political,

geographical, or cultural connection to a tribe. That demonstrates beyond doubt that ICWA's classification is based on ancestry. And ICWA's racial purpose and effect show that ICWA's ancestral classification, like the classification in *Rice*, is a proxy for race.

But ICWA's constitutional flaws run still deeper. Though Congress invoked its enumerated power "[t]o regulate Commerce … with Indian tribes," 25 U.S.C. § 1901(1), ICWA does not regulate commerce—it regulates children and the families that seek to adopt them. Moreover, Congress is not regulating private individuals' interactions with "Indian tribes." It is dictating, in minute detail, the operation of state agencies and state courts in the field of child custody and placement—powers at the core of the States' reserved sovereignty. ICWA thus presents a double-barreled violation of federalism principles. In enacting ICWA, Congress exceeded its enumerated powers and then compounded its transgression by impermissibly regulating the States in the exercise of *their* regulatory authority.

Even setting aside ICWA's constitutional defects, the Department of Interior's regulations still are unlawful. The agency's sudden discov-

ery—37 years after ICWA's enactment—of statutory authority to promulgate regulations that bind state courts and agencies signals those regulations' dubious legality. And the substance of those regulations—including the imposition of a heightened standard of proof on non-Indian families attempting to overcome ICWA's race-based preferences—is contrary to the plain meaning of the statute.

Desperate to evade a ruling on the merits, Defendants attack Individual Plaintiffs' Article III standing, but their arguments have no merit. Individual Plaintiffs have been and continue to be concretely injured by ICWA and the Final Rule, and a judgment declaring them unconstitutional would reduce or eliminate the burdens they impose. Individual Plaintiffs thus have Article III standing for each of their claims.

The judgment of the district court should be affirmed.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Individual Plaintiffs are being injured by ICWA and the 2016 Rule—through their application in ongoing state court proceedings and

their imposition of an extended period for collateral attack on their adoptions of Indian children. Does ICWA's requirement that state courts administer federal mandates mean that Plaintiffs' challenges to federal law cannot be heard in federal court?

2. ICWA segregates "Indian children" into a separate legal regime that is designed to route Indian children to Indian families. A classification of tribal Indians is racial rather than political when it affects an "affair of the State" rather than the tribes' self-government. *Rice*, 528 U.S. at 520-22. Does ICWA's imposition of placement preferences in state-court proceedings involving Indian children impermissibly discriminate on the basis of race?

3. In enacting ICWA, Congress cited its power to "regulate Commerce … with the Indian tribes." 25 U.S.C. § 1901. Congress then dictated how state agencies and courts must regulate the placement of Indian children. Does Congress's power to regulate commerce with Indian tribes include the power to regulate the States' regulation of foster care and adoption of children?

4. For 37 years after ICWA's enactment, Interior maintained that it lacked statutory authority to issue regulations that are binding on

state agencies and state courts. In 2016, Interior announced it "no longer agrees" with its prior interpretation and issued regulations that impose a heightened burden of proof that appears nowhere in the statute. Does Interior's 2016 rule exceed its statutory authority?

STATEMENT OF THE CASE

I. Statutory And Regulatory Framework

A. State Law and the Indian Child Welfare Act

The "statutory regulation of domestic relations," including adoption, is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Under the laws of the several States, the "primary consideration" in state-court adoption proceedings has been the "best interest of the child." *E.g.*, Tex. Fam. Code § 153.002. This standard requires state welfare agencies and courts to find a permanent, loving, and stable family for the adoptive child. *See, e.g.*, *In re Adoption of L.M.R.*, 884 N.E.2d 931, 938 (Ind. Ct. App. 2008). Families that have developed close connections with a child as a result of foster care are often chosen as adoptive parents due to those connections. *See, e.g.*, La. Stat. Ann. § 46:286.13. Once an adoption de-

cree is entered, state law allows a limited window during which the adoption can be challenged collaterally, typically for six months. *See, e.g.*, Tex. Fam. Code Ann. § 162.012.

In the mid-1970s, Congress became concerned that "abusive child welfare practices" in certain states were "result[ing] in the separation of large numbers of Indian children from their families and tribes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Congress enacted ICWA to end those practices and "preserve the cultural identity and heritage of Indian tribes." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 655 (2013). Accordingly, ICWA "establish[ed] a Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37.

To effectuate this federal policy, ICWA imposes an array of federal mandates that state courts and agencies must follow in any child-welfare or placement proceeding involving an "Indian child," defined by ICWA as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Thus, in any state adoption proceeding involving an "Indian

child," a state court must, "in the absence of good cause to the contrary," place the child with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *Id.* § 1915(a). A similar set of preferences applies to the foster care or pre-adoptive placement of an Indian child. *Id.* § 1915(b).[1]

ICWA does not define the term "good cause" or otherwise specify the circumstances sufficient to warrant departure from Section 1915's placement preferences. The committee report explained that "good cause" was "designed to provide State courts with a degree of flexibility in determining the disposition of a placement proceeding involving an Indian child." S. Rep. No. 95-597, at 17 (1977).

When a family does adopt an Indian child, ICWA further compels states to let either of the child's biological parents collaterally attack the adoption for at least *two years* after the final adoption order. 25 U.S.C. § 1913(d). And ICWA authorizes an Indian child's tribe to attack an underlying termination of parental rights indefinitely. *Id*. § 1914.

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[1] ICWA does not apply to proceedings in tribal courts. 25 C.F.R. § 23.103.

B. The 1979 Guidelines

The year after ICWA was enacted, the Bureau of Indian Affairs ("BIA"), a federal agency within the Department of the Interior, promulgated *Guidelines for State Courts; Indian Child Custody Proceedings* ("1979 Guidelines"), 44 Fed. Reg. 67,584 (Nov. 26, 1979). These Guidelines were "not intended to have binding legislative effect." *Id.* at 67,584-85. BIA recognized Congress's "inten[t]" that the "Department [not] exercise supervisory control over state … courts," and that the "[p]rimary responsibility" for interpreting and implementing ICWA instead "rests with the courts that decide Indian child custody cases." *Id.*

In the years that followed, state courts applying ICWA often held that the "good cause" exception to ICWA's placement preferences required consideration of the child's best interests, including bonds or attachments formed with the child's current caregivers. *See*, *e.g.*, *In re Adoption of Baby Girl B.*, 67 P.3d 359, 370-75 (Okla. Civ. App. 2003). Other state courts, applying the "Existing Indian Family doctrine," limited ICWA to circumstances where the child has some significant political or cultural connection to the tribe to avoid equal protection problems that

would arise from applying ICWA to children based solely on their ancestry. *See, e.g.*, *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715-23 (Cal. Ct. App. 2001); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527-29 (Cal. Ct. App. 1996).

C. The 2016 Final Rule

In 2016, BIA asserted that it "no longer agree[d] with statements it made in 1979 suggesting that it lacks the authority to issue binding regulations," and promulgated rules that govern every aspect of state child-welfare and placement proceedings involving Indian children to "promote[] nationwide uniformity" and "the maintenance of Indian families." *Indian Child Welfare Act Proceedings* ("Final Rule"), 81 Fed. Reg. 38,778, 38,786 (June 14, 2016) (codified at 25 C.F.R. pt. 23). The Final Rule "set[s] binding standards for Indian child-custody proceedings in State courts" that claim "force of law." *Id.* at 38,785.

Of particular significance to non-Indian families seeking to adopt Indian children, the Final Rule sharply limits what may constitute "good cause" to depart from the placement preferences. Explaining that the "good cause" inquiry should not be a "'best interests' determination," 81 Fed. Reg. at 38,847, BIA's regulations dictate that a finding of "good cause" be based on one or more of five specified factors. 25 C.F.R.

§ 23.132(c). The Final Rule also expressly forbids applying the Existing Indian Family doctrine, 81 Fed. Reg. at 38,802, and prohibits any consideration of whether the child has any cultural, social, religious, or political connection to a tribe in determining whether ICWA's placement preferences apply. 25 C.F.R. § 23.103(c). Furthermore, the Final Rule decrees that "[t]he party seeking departure from the placement preferences should bear the burden of proving *by clear and convincing evidence* that there is 'good cause' to depart from the placement preferences." *Id*. § 23.132(b) (emphasis added). BIA acknowledged, however, that this heightened standard of proof "is not articulated in section 1915." 81 Fed. Reg. at 38,843.

II. Factual Background

A. The Brackeens, A.L.M., and Y.R.J.

A.L.M. was born in Arizona in August 2015. ROA.2683. His biological mother is a member of the Navajo Nation and his biological father is a member of the Cherokee Nation. ROA.2683. When A.L.M. was ten months old, Texas officials removed him from his parents and placed him in the Brackeens' foster care. ROA.2684. A.L.M.'s biological parents voluntarily terminated their rights, and the Brackeens petitioned to adopt

A.L.M., with the support of both biological parents and the child's guardian ad litem. ROA.2684-85. At A.L.M.'s adoption hearing, the Cherokee and Navajo Nations "reached an agreement" among themselves in the hallway prior to the hearing, pursuant to which the Navajo Nation was designated A.L.M.'s tribe. ROA.2685. The Navajo Nation then identified a potential alternative placement for A.L.M. with non-family members in New Mexico. *Id*. Despite testimony from both of A.L.M.'s biological parents that they preferred adoption by the Brackeens, and expert testimony concluding that A.L.M. and the Brackeens had a strong emotional bond, the state court denied the Brackeens' petition, concluding that the Brackeens had failed to demonstrate by clear and convincing evidence that "good cause" existed to depart from ICWA's placement preferences. ROA.2707.

Days later, a Texas official notified the Brackeens that A.L.M. imminently would be removed from their care and transferred to the Navajo family. The Brackeens obtained an emergency stay of A.L.M.'s removal and filed this action. The Navajo Nation's proposed placement then withdrew and the Texas court finally granted the Brackeens' adoption peti-

tion in January 2018. ROA.615. Although the adoption is now final under state law, ICWA still exposes A.L.M.'s adoption to prolonged collateral attack. ROA.615.

The Brackeens now also are engaged in Texas state court proceedings to obtain placement of A.L.M.'s half-sister, Y.R.J., who was born in June 2018 and is in foster care in Texas. ROA.4102-09; *In re: Y.R.J.*, No. 323-107644-18 (Tarrant County Dist. Ct.). Although state law prefers placement with siblings, 40 Tex. Admin. Code § 700.1309(3), Texas officials informed the Brackeens that any placement of Y.R.J. is "subject to any requirements of [ICWA]." ROA.4105. The Navajo Nation is opposing placement of Y.R.J. with the Brackeens on the basis of ICWA's placement preferences.

B. The Cliffords and Child P.

Child P. was born in July 2011 in Minnesota. ROA.441. In 2014, she was placed in foster care when her biological parents were arrested for drug-related offenses. ROA.480. After years of moving from one placement to another, Child P. was placed with Jason and Danielle Clifford in July 2016. *Id*. Child P. flourished in their care, and the

Cliffords began the process of adoption, which was supported by Minnesota state officials and Child P.'s guardian ad litem. *Id.*

In January 2017, the White Earth Band of Ojibwe, to which Child P.'s maternal grandmother, R.B., belongs, reversed its prior position and announced that Child P. was now an enrolled member of the Band. ROA.481, 485, 488, 2659. Minnesota officials immediately flipped positions and supported placing Child P. with R.B., ROA.2627, despite the facts that R.B.'s foster license had been revoked due to her criminal history, *id.*, and that Child P.'s guardian ad litem supported maintaining Child P.'s placement with the Cliffords, ROA.4022.

Although it acknowledged that the Cliffords "arguably alleged facts that suggest there may be good cause to deviate from" ICWA's preferences, the state court concluded that the Cliffords did not "establish[] good cause" by "clear and convincing evidence." ROA.2668-69. The Minnesota Court of Appeals denied the Cliffords' emergency appeal, holding that "a child's best interests" "are an inadequate basis to deviate from ICWA's preferences." ROA.2676.

Under court order, the Cliffords brought Child P. to a government facility, where they were given less than twenty minutes to say goodbye.

ROA.2628. Child P. cried uncontrollably the entire time. ROA.2629. On January 17, 2019, the state court denied the Cliffords' renewed motion for adoptive placement because it had to provide "placement within the ICWA placement preference." Order, *In re Welfare of the Child in the Custody of: Comm'r of Human Servs.*, No. 27-JV-15-483 (4th Dist. Minn. Jan. 17, 2019). The Cliffords intend to appeal this ruling.

C. The Librettis and Baby O.

Baby O. was born in Nevada in March 2016 to Plaintiff Altagracia Hernandez and E.R.G. ROA.2695. Ms. Hernandez decided to have Nick and Heather Libretti adopt Baby O., a decision that E.R.G. supported. ROA.2695-96. Baby O. went home with the Librettis three days after her birth. ROA.2689.

Although not a tribal member, E.R.G. is descended from members of the Ysleta del sur Pueblo Tribe, which intervened in Baby O.'s custody proceedings. ROA.478, 2692, 2696. The Tribe then identified dozens of potential Indian-family placements, and the Librettis' adoption of Baby O. was delayed as Nevada—because of the Final Rule's requirement that state agencies "diligent[ly] search" for ICWA-preferred placements, 25 C.F.R. § 23.132(c)(5)—methodically studied each placement. ROA.2692.

After the Librettis joined this lawsuit, the Tribe relented and the Librettis finalized their adoption of Baby O. on December 19, 2018. Because of ICWA, the adoption remains subject to collateral attack by the Tribe until at least the end of 2020.

III. Procedural Background

The Brackeens, Cliffords, Librettis, Ms. Hernandez, and the States of Texas, Indiana, and Louisiana brought this action raising claims under the Constitution and the Administrative Procedure Act ("APA"). ROA.579. Defendants sought dismissal on various non-merits grounds, which the district court denied. ROA.3721-61. The parties then cross-moved for summary judgment; the district court granted in part and denied in part Plaintiffs' motion. ROA.4008-55.

The district court held that ICWA classifies children according to their race, rather than according to political status, and violates equal protection because the government failed to show ICWA's mandates are narrowly tailored to serve a compelling government interest. ROA.4017, 4028-36.

The district court also held that ICWA violated Article I by impermissibly delegating congressional lawmaking power to Indian tribes and

impermissibly commandeering the States' regulatory authority within the field of child custody and placement. ROA.4021, 4036-40, 4040-45, 4053-54.

The district court held that the Final Rule violated the APA because it implements an unconstitutional statute and exceeds BIA's statutory authority. ROA.4045-53.

The district court also granted Individual Plaintiffs' motion to supplement the record with information about the Brackeens' ongoing effort to adopt Y.R.J. ROA.4314 n.3.

SUMMARY OF ARGUMENT

I. Individual Plaintiffs' claims are justiciable. A claim is justiciable under Article III if one party has standing to raise it. Thus if State Plaintiffs have standing to raise a claim—and the States, as the objects of the federal regulation, clearly have standing to bring the Article I and APA claims advanced here—that is sufficient to establish subject matter jurisdiction as to those claims.

But, as the district court correctly concluded, Individual Plaintiffs independently have Article III standing to bring each of their claims for relief. Individual Plaintiffs suffer an injury-in-fact from ICWA's and the

Final Rule's relegation of them to fourth-class status—behind *any* Indian family—in their ongoing adoption cases. And ICWA also exposes their otherwise finalized adoptions to an extended period of collateral attack. These injuries are traceable to the United States, which is a defendant here. And they are likely to be redressed by a favorable judgment because such a judgment: (1) immediately will bind Texas and the Navajo Nation in the Brackeens' ongoing efforts to adopt Y.R.J.; (2) automatically will end any application of the Final Rule in the Brackeens' and Cliffords' ongoing cases; (3) inexorably will lead to a decision of the Supreme Court that will be binding on all state courts; and (4) is at least likely to be respected and followed by Texas and Minnesota state courts even if the Supreme Court does not review this Court's decision. Defendants' argument that Individual Plaintiffs' injuries can be redressed by judgments of state courts is meritless.

II. ICWA discriminates on the basis of race in violation of equal protection. ICWA creates a parallel regime for adoption proceedings involving "Indian children" and replaces the traditional best-interests-of-the-child analysis with a racial hierarchy designed to ensure "Indian child[ren] … remain in the Indian community." *Holyfield*, 490 U.S. at

37. ICWA's definitions of "Indian children" and "Indian families" are racial classifications, as membership in an Indian tribe depends on lineal descent from historical tribal rolls and often also a minimum blood quantum. "Ancestry can be a proxy for race," *Rice*, 528 U.S. at 514, and discrimination "solely because of … ancestry" "is racial discrimination," *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

Morton v. Mancari, 417 U.S. 535 (1974), does not control this case. When Congress is regulating tribal land or self-governance, a classification of tribal Indians might be said to identify a "political" group. But ICWA does not regulate tribal self-government. Instead, ICWA directs *States* in the operation of their own agencies and courts. Moreover, ICWA regulates not just tribal members but also children who are merely *eligible* for membership. Because ICWA's classifications have nothing to do with tribal self-government or land, but instead apply to every child with the requisite quantum of "Indian blood," the classifications are not "political." They are racial.

Indeed, the racial nature of ICWA's classifications is made plain by ICWA's placement preferences, which relegate non-Indian families to

fourth-tier status beneath not just members of the child's family or Indian tribe, but also *any other Indian family*. ICWA's preference for *any* Indian family over *all* non-Indian families demonstrates beyond doubt that ICWA is suffused with a racial purpose.

ICWA's racial classifications cannot survive strict scrutiny. ICWA is not narrowly tailored to advance any compelling interest the government may have in protecting tribal sovereignty or preventing tribal children from being separated from their parents.

III. ICWA also exceeds Congress's Article I authority to regulate commerce with the Indian tribes. Defendants' repeated claim that Congress wields "plenary" power under the Indian Commerce Clause is unavailing because children are not chattels in commerce and ICWA regulates not interactions with Indian tribes but state child-custody proceedings. ICWA also exceeds Congress's power by commandeering state courts and executive agencies to implement the federal policy of keeping Indian children with Indian families.

IV. Even apart from ICWA's many constitutional flaws, the Final Rule violates the APA and was properly vacated. The agency's unexplained change in its interpretation of ICWA is paradigmatic arbitrary

and capricious agency action, and the Final Rule exceeds the agency's authority under ICWA and contradicts the understood meaning of the statutory text it purports to clarify.

STANDARD OF REVIEW

"[T]he constitutionality of a federal statute" is reviewed "de novo." *United States v. Rasco*, 123 F.3d 222, 226 (5th Cir. 1997). Standing is also reviewed de novo, but "[f]acts expressly or impliedly found by the district court in the course of determining jurisdiction are reviewed for clear error." *Cole v. Gen. Motors Corp.,* 484 F.3d 717, 721 (5th Cir. 2007).

ARGUMENT

I. All Of Plaintiffs' Claims Are Justiciable.

Seeking to avoid a disposition on the merits, Defendants throw up a varied menu of challenges to Plaintiffs' Article III standing. While the Navajo Nation counter-intuitively asserts that *no plaintiff* has standing to challenge ICWA or the Final Rule in federal court, Navajo Br. 18, the United States argues only that Plaintiffs lack standing to bring "the bulk

of" their equal protection claim, U.S. Br. 18. Defendants' jurisdictional challenges lack merit.

To establish standing, a plaintiff must demonstrate "injury in fact" that is "fairly traceable to the challenged action of the defendant" and "likely" to "be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," and once Article III standing is established to bring a claim for relief, any plaintiff may advance any argument in support of that claim. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). These principles establish this Court's subject matter jurisdiction over each of Individual Plaintiffs' claims.

Article I Claims—Commerce Clause and Anti-Commandeering

State Plaintiffs indisputably have Article III standing to challenge ICWA's manifold commands as to how state courts and agencies conduct state child welfare and custody proceedings as exceeding Congress's powers under Article I and violating the anti-commandeering principle. Texas Br. 17-21. This suffices to establish an Article III case or controversy as to Individual Plaintiffs' claims under the Indian Commerce

Clause and the anti-commandeering doctrine. In any event, Individual Plaintiffs independently have standing to raise Article I claims. *See Bond v. United States*, 564 U.S. 211, 222 (2011).

Administrative Procedure Act

Defendants do not dispute that the State Plaintiffs have Article III standing to bring their claim under the APA against the Final Rule. Nor could they, because the States undisputedly are the "objects" of the Final Rule's many requirements. *Contender Farms, LLP v. USDA*, 779 F.3d 258, 266 (5th Cir. 2015). With subject matter jurisdiction over the APA claim established, Individual Plaintiffs can advance any argument as to why the Final Rule violates the APA, including that it implements an unconstitutional statute. The Final Rule thus could not be sustained without this Court addressing *each* of Plaintiffs' four separate constitutional challenges to ICWA.[2]

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[2] The Brackeens and the Cliffords also independently have standing to challenge the Final Rule because it is now being applied to them in ongoing state proceedings, and a ruling vacating the regulation necessarily would end its application as to them. *United States v. Munsingwear, Inc*. 340 U.S. 36, 41 (1950) (that which is vacated loses the ability to "spawn[] any legal consequences"); *see also Nat'l Mining*

Equal Protection

Wholly apart from their standing to raise constitutional arguments in connection with their APA claims, the Brackeens, Librettis, and Cliffords each independently have Article III standing to challenge ICWA's classifications as impermissibly race-based.

The Brackeens

ICWA currently is injuring the Brackeens in two distinct ways. First, Sections 1913 and 1914 of ICWA place their adoption of A.L.M., which is final under Texas law, in a disadvantaged legal category that is exposed to an extended period of collateral attack. Second, the Brackeens' ongoing efforts to adopt A.L.M.'s half-sister, Y.R.J., are being frustrated by Section 1915's placement preferences. Each of these injuries satisfies Article III's constitutional minimum requirements.

1. The Intervenor-Defendants contend that the Brackeens' allegation of harm from Sections 1913 and 1914 is speculative because no party has yet mounted a collateral attack on A.L.M.'s adoption. Tribes Br. 18.

Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

But the Brackeens' injury arises from the fact that Sections 1913 and 1914 place their adoption of A.L.M. on a different and disadvantaged footing as compared to non-ICWA adoptions. When government action "positions similar parties unequally before the law," "no further showing of suffering based on that unequal positioning is required for purposes of standing." *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012); *see also Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017). The "[un]equal treatment" itself constitutes the injury. *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Because Sections 1913 and 1914 require unequal treatment of state-law adoptions of Indian children, the Brackeens suffer an injury-in-fact "irrespective of whether [they] will sustain an actual or more palpable injury as a result of the unequal treatment." *Time Warner*, 667 F.3d at 636.[3]

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[3] The Tribes suggest Section 1913(d) "applies only to a biological parent's challenge to her voluntary consent to adoption," and therefore cannot injure the Brackeens. Tribes Br. 17. Courts disagree. *See Morrow v. Winslow*, 94 F.3d 1386, 1395 n.6 (10th Cir. 1996) ("withdrawal of consent to termination of parental rights" may be made under "§ 1913(d)"); *In re Adoption of Erin G.*, 140 P.3d 886, 889 n.12

2. The Brackeens also are being injured by ICWA's application to their ongoing effort to obtain placement of A.L.M.'s sister, Y.R.J., and those injuries independently support Article III standing to raise their equal protection challenge to ICWA's placement preferences.

In their complaint, the Brackeens alleged that they would continue to provide foster care, and possibly adopt, other children in need and that ICWA and the Final Rule imposed a continuing barrier to those efforts. ROA.232-33. The Navajo Nation argues that "the fact that the Brackeens may wish to adopt another Indian child in the future is too speculative," Navajo Br. 14, but when the Navajo Nation filed its brief it *knew* that the Brackeens were attempting to obtain placement of Y.R.J., ROA.615, 4314 n.3, because *it* is opposing the Brackeens' efforts in state court in Texas,

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(Alaska 2006) (Section 1913(d) includes challenges to "the voluntary relinquishment of parental rights"). The Tribes also argue Section 1914 incorporates state-law limitations periods. Tribes Br. 18. BIA disagrees. 81 Fed. Reg. at 38,847-48 (ICWA "does not establish a statute of limitations" for "section 1914"); *see also Belinda K. v. Baldovinos*, 2012 WL 464003, at *12 (N.D. Cal. 2012) (Section 1914 does not contain any "statute of limitations at all").

arguing that ICWA and the Final Rule dictate placement of Y.R.J. in accordance with ICWA's placement preferences. *In re: Y.R.J.*, No. 323-107644-18 (Tarrant County Dist. Ct.). ICWA's placement preferences thus are imposing an "increased regulatory burden" on the Brackeens' effort to adopt Y.R.J., *Contender Farms*, 779 F.3d at 266, that "interferes with th[eir] lives in a concrete and personal way." *Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 518-19 (5th Cir. 2014). More than "certainly impending," U.S. Br. 21 n.3, and certainly not "speculative," Navajo Br. 14, the Brackeens' injury from the application of ICWA and the Final Rule in proceedings concerning Y.R.J. is *ongoing*.

The Federal Defendants nevertheless dispute the Brackeens' standing to challenge Section 1915's placement preferences, arguing that the Brackeens have not shown that their injuries are traceable to each of Section 1915's "seven distinct placement preferences." U.S. Br. 23. This badly misapprehends the traceability inquiry. The correct question is whether the Brackeens' injury—being held "unequally before the law," *Time Warner*, 667 F.3d at 636—is "traceable to the challenged action of the defendant," *Lujan*, 504 U.S. at 561. Here, the "defendant" is the

United States, and the "challenged action" is its enactment of an unconstitutional statute. Traceability is easily satisfied. *See* ROA.3747.[4]

3. The unequal treatment the Brackeens are suffering with respect to their adoption of A.L.M. and their attempts to adopt Y.R.J. are manifestly traceable to the United States' statutory provisions that command the unequal treatment, and it should be equally obvious that a judicial declaration that those provisions are unconstitutional would redress that injury. ROA.3748.

The Navajo Nation argues that the Brackeens' injuries arising from ICWA are not redressable here because ICWA, in its peculiar design, requires state courts to carry out its mandates and those state courts will not be bound by this Court's ruling. Navajo Br. 23 (citing *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) (en banc)). This argument—notably

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[4] The Federal Defendants' argument about "seven distinct placement preferences" is really an argument about the *scope of relief* necessary to redress Plaintiffs' injuries. But the argument fails even on those terms, because the Brackeens' injury arises not just from the application of any one placement preference, but the fact that ICWA subjects their effort to adopt Y.R.J. to different processes and standards than are generally applicable under state law because Y.R.J. is an Indian child. Complete relief of that injury requires that the entirety of ICWA's regime of placement preferences be set aside and that state courts be permitted to apply state law.

premised on the concession that ICWA issues commands to state courts—is an insupportable perversion of Article III's case-or-controversy requirement that this Court should reject for at least three reasons.

First, Plaintiffs have sought declaratory relief, and a declaration that the statute is unconstitutional will redress the Brackeens' injuries because it would bind Texas state officials and the Navajo Nation, both of whom are parties to this action. A favorable judgment would thus immediately relieve the Brackeens of the possibility that the Navajo Nation—A.L.M.'s and Y.R.J.'s tribe—could seek to invalidate A.L.M.'s adoption under Section 1914 or seek to enforce any of Section 1915's preferences in Y.R.J.'s placement.

Second, if this Court affirms the district court's ruling that ICWA is unconstitutional, its decision almost certainly will be reviewed by the Supreme Court, whose judgment *will* bind all state courts. The "practical consequence" of a ruling in the Brackeens' favor here thus would "amount to a significant increase in the likelihood that the[y] would obtain relief that directly redresses the injury suffered." *Utah v. Evans*, 536 U.S. 452, 464 (2002); *see also Duarte*, 759 F.3d at 521.

Third, even if Texas's state courts are not directly bound by this Court's ruling, "a judgment in [the Brackeens'] favor would at least make it easier" for them to obtain equal treatment under the law because state courts are likely to follow this Court's leadership. *Duarte*, 759 F.3d at 521; *see also Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 159 n.19 (5th Cir. 2007) (redressability satisfied "where actors who [a]re not parties to the lawsuit could be expected to amend their conduct in response to a court's declaration").

The Brackeens thus have Article III standing to challenge Sections 1913(d), 1914, and 1915 on equal protection grounds.[5]

The Cliffords

The Cliffords' standing to challenge ICWA's placement preferences is equally clear. "[T]he Cliffords saw Child P. removed from their home because of the ICWA placement preferences," ROA.3746, and they have remained separated for more than a year. As the district court rightly

[5] The Librettis, whose recent adoption also is subject to ICWA's extended periods of collateral attack, have Article III standing to raise their equal protection claim for substantially the same reasons as the Brackeens.

recognized, this tragedy "constitute[s] concrete and particularized injury." *Id.*

The Cliffords' injury unquestionably is traceable to ICWA. In rejecting their request for adoptive placement, the state court held that, "[a]lthough the Cliffords have arguably alleged facts that suggest there may be good cause to deviate from the §1915(a) preferences, they have not established good cause by clear and convincing evidence." ROA.2668 (same conclusion for "the §1915(b) placement preferences"). And on remand after appeal, the state court again applied ICWA's placement preferences and denied the Cliffords' motion for adoptive placement. *In re: Welfare of the Child in the Custody of: The Commissioner of Human Services*, No. 27-JV-15-483 (Minn. 4th Dist. Jan. 17, 2019).

This injury is redressable because the Cliffords' case is subject to appeal, and a ruling from this Court holding ICWA's placement preferences unconstitutional, as a practical matter, would "significant[ly] increase … the likelihood" that the Cliffords would obtain relief. *Evans*, 536 U.S. at 464. Article III does not require more.

II. ICWA And The Final Rule Discriminate On The Basis Of Race In Violation Of Equal Protection.

At the outset of any state child-welfare or placement proceeding, a State must categorize the child as an "Indian" or a non-Indian and use the child's category to determine the substantive legal standards that will guide her placement. If she is a non-Indian, state law applies and the state court will make a decision in accordance with an individualized consideration of her best interests. If, however, she is an "Indian child," the state-law best-interests determination is supplanted by ICWA's placement preferences that "push state courts to place Indian children with Indian families," *Doe v. Piper*, 165 F. Supp. 3d 789, 794 (D. Minn. 2016), in furtherance of Congress's explicitly racial vision that "Indian children" should be raised by the "Indian community," H.R. Rep. No. 95-1386, at 23.

Six years after ICWA's enactment, the Supreme Court made clear that state courts may not use racial considerations to make child-custody determinations. *See Palmore*, 466 U.S. at 433-34. ICWA's preference for placing Indian children with Indian families is no more constitutional than the *Palmore* state court's belief that Caucasian children should be placed with Caucasian (not mixed-race) parents.

ICWA's definitions of "Indian children" and "Indian families" are racial classifications. Membership in an Indian tribe depends on lineal descent from historical tribal rolls, and in many cases includes a blood quantum requirement. As the Supreme Court has recognized, "[a]ncestry can be a proxy for race," *Rice*, 528 U.S. at 514, and discrimination "solely because of ... ancestry" "is racial discrimination," *Saint Francis College*, 481 U.S. at 613.

Defendants' contention, based on *Morton v. Mancari*, 417 U.S. 535, 553-54 & n.24 (1974), that all classifications based on tribal membership are "political" in nature and subject only to rational basis review, cannot be sustained. The Supreme Court explicitly rejected that broad reading of *Mancari* in *Rice*, 528 U.S. at 519-20, and it implicitly rejected *Mancari*'s application to ICWA when it observed that ICWA raised "equal protection concerns." *Adoptive Couple*, 570 U.S. at 656.

Instead, *Rice* and *Mancari* together make clear that a classification based on tribal membership can be regarded as "political" only when it relates to the tribes' self-governance. One could argue that BIA's hiring preference at issue in *Mancari* related to tribal self-governance because BIA has a "sui generis" role in regulating Indian tribes as governmental

units, defining tribes' powers of self-government. But ICWA's directives concerning state courts' placement of children do not bear on Indian tribes' self-governance. ICWA regulates "Indian children" even if they are not members of an Indian tribe at all. ICWA's classifications of Indian children and Indian families are based on race, not politics.

Because ICWA's classifications are based on race, this Court must apply strict scrutiny, and there is no serious argument that they can survive that most exacting standard. Indeed, defendants did not even attempt to satisfy it below. Whatever governmental interest defendants might articulate, ICWA's blunt racial preferences cannot possibly be described as narrowly tailored.

A. ICWA's Classifications of Indian Children and Indian Families Are Racial Classifications.

ICWA defines an "Indian" as "any person who is a member of an Indian tribe," and an "Indian child" as a minor that is "either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(3)-(4).

The Supreme Court has long understood an Indian "tribe" to be "a body of Indians of the same or a similar race." *Montoya v. United States*,

180 U.S. 261, 266 (1901). This is because membership in a tribe is based on lineal descent from historic tribal members. *See, e.g.*, Cherokee Nation Membership Act, § 11A. Indeed, federal law requires that, for a tribe to be federally-recognized, its membership must "consist[] of individuals who descend from a historical Indian tribe," shown by demonstrating either "that [its] members descend from a tribal roll … on a descendancy basis" or other proof of "descent from a historical Indian tribe." 25 C.F.R. § 83.11(e).

Many tribes also have explicit blood quantum requirements. *See* Pub. L. No. 112-157, 126 Stat. 1213 (2012) (membership in the Ysleta del sur Pueblo Tribe is based on "Indian blood"); Gila River Indian Comm. Const. art. III § 1(b); White Earth Band of Ojibwe Const. ch. 2, art. 1. Scholars thus have concluded that tribal membership criteria overwhelmingly are defined by "lineal descent" and "blood-quantum" rules. Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 Am. Indian L. Rev. 243, 247 (2009). "[T]he context of tribal rules that condition membership on the existence of tribal blood … shows

that biology, above all else, makes a person Indian under ICWA." Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 Colum. J. Gender & L. 1, 40 (2008).

ICWA's definition of "Indian child" is even more explicitly based on lineal descent. It sweeps in not only children who are enrolled members of an Indian tribe, but any "*biological* child of a member of an Indian tribe" who is eligible for tribal membership. 25 U.S.C. § 1903(4)(b) (emphasis added). Indeed, the Brackeens' adopted son, A.L.M., was subject to ICWA only because he was the biological child of a tribal member and had the requisite blood quantum. As the California Court of Appeals explained, because many tribes "recognize[] as members all persons who are biologically descended from historic tribal members," "children who are related by blood to such a tribe may be claimed by the tribe, and thus made subject to the provisions of ICWA, solely on the basis of their biological heritage." *Bridget R.*, 49 Cal. Rptr. 2d at 527.

Rice establishes that "[a]ncestry can be a proxy for race," 520 U.S. at 514, and ICWA's placement preferences demonstrate that ICWA's tribal membership classification "is that proxy here." *Id.* Section 1915's

placement preferences reflect an unmistakably racial goal unrelated to the ancestry of any particular Indian child or Indian family. Section 1915(a) grants an adoption preference over non-Indian families to *any* "other Indian famil[y]," 25 U.S.C. § 1915(a)(3), which is to say *any* family from *any* one of *573* federally-recognized tribes, 83 Fed. Reg. 34,863 (July 23, 2018), each of which has its own unique culture and traditions—including, in some cases, blood-quantum requirements that would *exclude* the child from membership in his adoptive family's tribe. ICWA similarly mandates preferences in foster and pre-adoptive placements for any "Indian foster home," and even any "institution for children approved by an Indian tribe." 25 U.S.C. § 1915(b)(iii)-(iv).[6] These "any Indian" placement preferences treat Indian tribes as fungible, "regardless of cultural, political, economic, or religious differences between" them. Maldonado, *supra*, 17 Colum. J. Gender & L. at 25. A policy that seeks to keep Indian

[6] That *amici* could tout ICWA's preference for placement in an "institution" over placement with a loving non-Indian foster family as reflecting "the gold standard of child welfare," Casey Family Programs Amicus Br. at 3, 5, well demonstrates that their conception of "child welfare" is utterly divorced from the best interests of children as individuals.

children "in the Indian community," H.R. Rep. 95-1386, at 23, regardless of tribe, can only be referring to the "Indian community" as a *race*.[7]

Indeed, Congress itself recognized the race-based nature of ICWA's classifications when it determined it was necessary to exempt ICWA from generally applicable prohibitions on racial discrimination. The Multi-Ethnic Placement Act of 1994 broadly prohibits "delay[ing] or deny[ing] the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved," 42 U.S.C. § 1996b(1)(B), but then provides that the provision does not "affect the application of [ICWA]." *Id*. § 1996b(3). Congress would not have exempted ICWA from a statute prohibiting racial discrimination if ICWA did not discriminate on the basis of race.

Defendants contend that ICWA's classifications cannot be characterized as racial because "many children who are racially Indian do not qualify as Indian children under ICWA." Tribes Br. 30. But the mere

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[7] The United States tries to justify these "any Indian" preferences on the basis that "many tribes have deep historic and cultural connections with other tribes." U.S. Br. 41-42. But neither ICWA's placement preferences nor the Final Rule suggest any limitation to a "connected tribe."

fact that a class "does not include all members of the race does not suffice to make the classification race neutral." *Rice*, 528 U.S. at 516-17. Nor does it matter that certain tribes might include a few descendants of freed African-American slaves or adopted whites among their members. Tribes Br. 29-30. ICWA's classification of "Indian children" overwhelmingly identifies children of a particular racial category—those with Indian blood. What is more, Congress did so expressly to preserve "Indian culture." 25 U.S.C. § 1902; *see Adoptive Couple*, 570 U.S. at 655 (ICWA "was enacted to help preserve the cultural identity and heritage of Indian tribes"). And the Supreme Court has recognized that when a state uses an ancestral qualification to identify a "common culture" and "preserve that commonality," it is "us[ing] ancestry as a racial definition and for a racial purpose." *Rice*, 528 U.S. at 514-15. "Ancestral tracing of this sort … employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name" and is every bit as "odious to a free

people whose institutions are founded upon the doctrine of equality." *Id.* at 517.[8]

B. *Mancari* Does Not Control This Case; Strict Scrutiny Applies.

Defendants contend that the Supreme Court's decision in *Mancari* "governs" this case and dictates a conclusion that ICWA's classifications are political rather than racial. U.S. Br. 25; Tribes Br. 25. It does not.

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[8] The Tribes also suggest that ICWA's preferences are underinclusive because "tribal membership is a voluntary status" that "can be renounced." Tribes Br. 31. In fact, many tribes *automatically* enroll children as members. *See*, *e.g.*, Navajo Nation Code § 701 ("automatically" enrolling any child of an enrolled member provided the child is "at least one-fourth degree Navajo blood"); *see* Navajo Nation Amicus Br. 10, *Adoptive Couple v. Baby Girl*, 2013 WL 1399374 ("The Navajo Nation's laws provide automatic membership to individuals—including children—who are at least one-quarter Navajo."); Constitution of the Oglala Sioux Tribe, art. II, § 1 ("automatic[ally]" enrolling any child "born to any member of the Oglala Sioux Tribe"); Cherokee Nation Membership Act, § 11A (automatically enrolling any child that is a "direct descendant" of an "original enrollee" in the Cherokee Nation regardless of whether either of the child's parents were members). Once enrolled, a child cannot renounce tribal membership on her own, and some tribes prohibit parents from relinquishing a minor's membership without simultaneously enrolling the minor in a different tribe. *See, e.g.*, Hopi Enrollment Ordinance No. 33 § 11.1(B)(III). Yet even if a child could relinquish her membership in a Tribe, if her biological parent is an enrolled member, she still would be subject to ICWA's regime because she cannot relinquish her *eligibility* for membership.

At the threshold, *Mancari* has been effectively overruled by *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200 (1995). *Mancari* involved "a preference in appointment, promotion, and training" at BIA for persons that had "one-fourth or more degree Indian blood" and were "a member of a Federally recognized tribe." 417 U.S. at 553 n.24. However one characterizes a classification based on tribal membership, the blood-quantum requirement is, by definition, racial. *Rice*, 528 U.S. at 519 (*Mancari*'s "classification had a racial component"); *see also Loving v. Virginia*, 388 U.S. 1, 5 n.4 (1967) (quoting statutes defining races by blood quantum). Under *Adarand*, "*all racial classifications*, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." 515 U.S. at 227. Whatever exception from equal protection principles *Mancari* might have carved out for laws respecting Indian blood quantum, *Adarand* ended it, as Justice Stevens' dissent in *Adarand* recognized. *See id*. at 244-45 (Stevens, J., dissenting) (arguing that the majority's reasoning undermined the "special preferences that the National Government has provided to Native Americans"); *see also Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997) ("If

Justice Stevens is right about the logical implications of *Adarand*, *Mancari*'s days are numbered.").

In any event, *Mancari* never has stood for the proposition that all classifications based on tribal membership are political and none are "suspect racial classifications." U.S. Br. 27. The Supreme Court expressly disapproved that broad reading of *Mancari* in *Rice*. *See* 528 U.S. at 519-520; *see Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004) ("We reject the notion that distinctions based on Indian or tribal status can never be racial classifications subject to strict scrutiny."). Instead, *Rice* confirms that *Mancari* established, at most, a "limited exception" that is "confined to the authority of the BIA," 528 U.S. at 520, and that, according to *Mancari* itself, is applicable only when the classification is limited to tribal members and "further[s] Indian self-government," 417 U.S. at 555. That "limited exception," "confined" to the workings of a "*sui generis*" agency, *Rice*, 528 U.S. at 520, cannot be stretched to encompass ICWA's classifications of Indian children and families. As the Supreme Court's recent identification of ICWA's "equal protection concerns" strongly suggests, *Adoptive Couple*, 570 U.S. at 655-56, ICWA's

classifications are not subject to mere rational basis review. Strict scrutiny applies.

1. In *Mancari*, the Court upheld BIA's hiring preference for enrolled tribal members as "political rather than racial" based on BIA's authority to regulate the "lives and activities" of Indian tribes "in a unique fashion." 417 U.S. at 553-54 & n.24. The Court reasoned that BIA was "an entirely different service from anything else in the United States," and that in this "very specific situation," giving preference to registered members of an Indian tribe "further[ed] Indian self-government" by allowing Indians to participate more broadly in BIA's regulation of tribal life. *Id*. at 550, 554 & n.25.

Far from holding that *any* preference for tribal Indians in *any* context would be "political rather than racial," the Court noted that the "preference does not cover any other Government agency or activity." *Id.* at 554. And the Court further emphasized that it would be an "obviously more difficult question" if Congress were to establish "a blanket exemption for Indians from all civil service examinations." *Id.* *Mancari* thus

provides no support for Defendants' contention that all classifications involving tribal Indians are somehow "political" and thus immunized from strict scrutiny.

Consistent with *Mancari*, the Supreme Court has upheld various statutes giving special authority to Indian tribes where the subject of the legislation was closely tied to treaty obligations, reservations, or tribal membership. For example, the Court has held that the federal government may grant preferential fishing rights to "Indian tribes" by treaty. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979). Congress may also authorize tribal courts to exercise jurisdiction "over adoptions involving tribal members residing on the reservation," *Fisher v. District Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382, 385, 390-91 (1976) (per curiam), and to exercise jurisdiction over crimes committed by "enrolled members," "within the confines of Indian country," *United States v. Antelope*, 430 U.S. 641, 645-47 & n.7 (1977). Likewise, Congress may authorize tribes to tax tribal members for property "located within the reservation." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 480-81

(1976); *see* ROA.4031 n.8. None of these exercises of federal power regulate based on race; instead, they all regulate the powers, obligations, or operations of Indian tribes as quasi-sovereigns, and are tightly linked to tribal land, membership, and sovereignty.

This Court has applied *Mancari* in a similarly limited way in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991). There, this Court held that an exemption from peyote prohibition for the Native American Church was "a political classification" not only because Church "membership [was] limited to Native American members of federally recognized tribes who have at least 25% Native American ancestry," but also because "most" of the Church's members lived on a reservation, and each chapter was "incorporated by a different tribe." *Id.* at 1212, 1215-16 & n.4. The Church had a close connection both to tribal life and tribal land, and the exemption thus was in the species of legislation "singl[ing] out for special treatment a constituency of tribal Indians living on or near reservations." *Mancari*, 417 U.S. at 552.

2. *Rice* confirms that *Mancari* does *not* immunize all laws singling out tribal Indians from strict scrutiny but instead states a "limited exception" based on the "*sui generis*" factual scenario there. *Rice*, 528 U.S. at 520.

Rice involved a challenge to Hawaii's scheme for electing the trustees of its Office of Hawaiian Affairs, which administers programs for the benefit of "Hawaiians," defined as descendants of native persons inhabiting the Hawaiian Islands. 528 U.S. at 499. Hawaii's constitution limited the right to vote for the trustees to these native "Hawaiians." *Id*. In response to an equal protection challenge to this race-based voting scheme, the state invoked *Mancari*, arguing that "native Hawaiians have a status like that of Indians in organized tribes," and that the trustee positions afforded native Hawaiians "a measure of self-governance," in ways similar to the hiring preference in *Mancari*. *Id*. at 518-20. Hawaii thus argued that the classification was political, not racial.

The Supreme Court rejected Hawaii's argument, holding that it "does not follow from *Mancari*" that a state could have 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. The Court declined

to "extend the limited exception of *Mancari*" to this "new and larger dimension," because the trustee elections are "affairs of the State," not "the internal affair[s] of a quasi sovereign." *Id*. at 520-22. "To extend *Mancari*" in this way, the Court concluded, "would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs." *Id.* at 522.

Defendants contend that *Rice* is inapposite because Hawaii's statute did not involve federally-recognized tribes, Tribes' Br. 35, but the Court made clear that its holding would have been the same even if native Hawaiians were a federally-recognized tribe. In *Rice*, the United States—just as it does here—argued that *Mancari* "squarely held that distinctions based on the United States' unique trust relationship with indigenous people should not be equated with distinctions based on race that are prohibited by the Constitution." U.S. Br. 14, *Rice v. Cayetano*, No. 98-818, 1999 WL 569475 (U.S. July 23, 1999). In rejecting that argument, the Court assumed *arguendo* the proposition that Native Hawaiians were equivalent to a federally-recognized tribe, holding that "[e]ven" if it "were … to" consider "native Hawaiians as tribes," the classification was impermissible. 528 U.S. at 519; *see also id*. at 524 (Breyer,

J., concurring in result) (majority opinion "assumes without deciding that the State could 'treat Hawaiians or Native Hawaiians as tribes'").[9]

Rice thus confirms that *Mancari* establishes only a "limited exception" that is "confined to the authority of BIA." 528 U.S. at 520; *see also Williams*, 115 F.3d at 665 (*Mancari* applies only to "statutes that affect uniquely Indian interests," such as "preferences or disabilities directly promoting Indian interests in self-government").

3. For two reasons, *Mancari*'s "limited exception" cannot possibly encompass ICWA's classifications. First, ICWA's placement preferences lack any connection to tribal self-government or tribal lands, but rather apply to every state-court child custody proceeding involving an "Indian child," even if the child has never lived on tribal lands or even been in the custody of a tribal member. Second, ICWA's preferences are not limited

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[9] The government also advanced the same over-inclusive/under-inclusive argument as Defendants here, contending that Hawaii's classifications were not racial because some ethnic Polynesians were not included while some persons from "the Pacific Northwest" who were not ethnically Polynesian possibly could be. *Rice*, 528 U.S. at 514. The Court "reject[ed]" that "line of argument," concluding that Hawaii was seeking to preserve a "common culture" based on ancestry. *Id.*

to children who are tribal members, but apply even to children who are merely *eligible*—by virtue of their parentage—to become members. It thus applies to children whose only connection to a tribe is their ancestral heritage.

a. ICWA's placement preferences do not advance Indian self-government or regulate tribal land. While ICWA grants tribal courts "jurisdiction exclusive as to any State" whenever an Indian child "resides or is domiciled within the reservation," 25 U.S.C. § 1911(a), curiously, ICWA's preferences do not apply in tribal court proceedings. 25 C.F.R. § 23.103(b)(1). ICWA's placement preferences thus apply *only* in state court proceedings that (obviously) do not take place on Indian land and *only* when the subject Indian child does *not* live on Indian lands subject to exclusive tribal-court jurisdiction. And, as Individual Plaintiffs' cases vividly illustrate, the placement preferences often apply to Indian children who have *never* resided on Indian lands. Thus, unlike the statutes at issue in *Antelope*, *Confederated Salish*, *Fisher*, and *Peyote Way*, ICWA's placement preferences are not tethered to Indian self-government of tribal lands or their residents.

Instead, ICWA unabashedly imposes its placement preferences in the "critical state affair[]" (*Rice*, 528 U.S. at 522) of state-court proceedings concerning the welfare and placement of vulnerable children. These proceedings do not touch upon "the internal affair[s] of a quasi sovereign," *id.* at 520, but instead implicate and vindicate *state* interests "of the highest order." *Palmore*, 466 U.S. at 433. By imposing a parallel legal regime for Indian children that establishes a preference for "Indian families" over "non-Indian families," ICWA operates to "fence out" these disfavored families like Individual Plaintiffs from a quintessential "state affair[]." *Rice*, 528 U.S. at 522. *Rice* forbids that result.

Defendants nevertheless maintain that ICWA's placement preferences support tribal self-government by preventing loss of a tribe's children. Tribes Br. 36; U.S. Br. 35. This argument is rooted in Congress's declaration that each Indian child is a "resource" that belongs to its tribe. 25 U.S.C. § 1901(3). For multiple reasons, it should be rejected.

i) Most fundamentally, an Indian child does not belong to its tribe. Indeed, the Tribes' argument that each Indian child is a resource belonging to a tribe is at war with its argument elsewhere that "tribal membership is a voluntary status." Tribes Br. 31.

ii) There is no discernible relationship between placing a child with a tribal family (which may or may not live on tribal lands) and any governmental function of the tribe. Accrual of population is not enough; if it were Congress could enact a law requiring tribal members to live on reservations. *But see Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) ("[F]orcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful.").

iii) The argument is utterly irreconcilable with ICWA's placement preferences, which provide for placement not only with a member of the child's tribe, but with *any* Indian tribe. *See* 25 U.S.C. § 1915(a)(3), (b)(3). Placing a Cherokee child with a Navajo family does not rationally advance the "self-government" of either tribe.

iv) Finally, Defendants' argument assumes—quite wrongly—that any child placed with a non-Indian family somehow is lost to the tribe. Many Indian children adopted by non-Indian families remain members of their tribe, including A.L.M. and Baby O. here.

For all these reasons, ICWA's classifications and placement preferences cannot be justified as a measure to advance tribal self-government.

b. The district court correctly held that ICWA's classifications are racial, not political, for the additional reason that ICWA applies not only to tribal members but also to "those children simply *eligible* for membership who have a biological Indian parent." ROA.4032; 25 U.S.C. § 1903(4). *Mancari*'s "limited exception" does not extend to persons who are *not* members of a federally-recognized tribe. In the absence of tribal membership, the child has no "political connection to a tribal sovereign" whatsoever. Tribes Br. 32. As the district court explained, what makes the child "Indian" in that circumstance is that she "is related to a tribal ancestor by blood." ROA.4032.

Defendants portray ICWA's capacious definition of "Indian child" as a ministerial stopgap to account for the time it takes parents to enroll their child in the Tribe. U.S. Br. 31-32; Tribes Br. 32-33. Defendants claim that applying ICWA based on a "not-yet-formalized tribal affiliation" is no different than "extend[ing] United States citizenship to children who are born abroad to United States citizens." U.S. Br. 32 (citing 8 U.S.C. § 1433). For two reasons, Defendants' analogy is inapt.

First, if tribal membership is analogized to national citizenship, then ICWA's classifications are based on "national origin" and are subject

to strict scrutiny. *Seoane v. Ortho Pharm., Inc.*, 660 F.2d 146, 149 (5th Cir. 1981). For a state court to apply a different legal regime based on a child's national origin would be an obvious violation of equal protection principles.

Second, federal law does not extend U.S. citizenship to a child born abroad whose parents do not want such citizenship for their child. An application for naturalization by a parent is required. *See* 8 U.S.C. § 1433(a). ICWA's placement preferences, on the other hand, apply even to children whose parents do not wish to enroll them. This allows Indian tribes to invoke ICWA's placement preferences to block biological parents' plans for adoption of the non-member child by a non-Indian family, even though the Supreme Court has held that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008). Indeed, that is precisely what happened to A.L.M. ICWA applied to him not because of any pending applications for enrollment in a tribe, but because he was the blood descendent of a tribal member. As the Department of Justice warned when ICWA was being debated in Congress, applying the statute to a child whose only tie to a tribe

was "the blood connection between the child and a biological but noncustodial" tribal member "may constitute racial discrimination." H.R. Rep. 95-1386, at 39 (1978). Indeed it does.

4. That ICWA's classifications are based on race is powerfully confirmed by the Supreme Court's recent decision in *Adoptive Couple*, which recognized that ICWA raises "equal protection concerns." 570 U.S. at 656. In that case, the Court observed that if a tribal member could "play [the] ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests," then "many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA." *Id*. This, the Court recognized, "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian." *Id*. at 655-56.[10]

[10] Defendants dismiss the Supreme Court's recognition of "equal protection concerns" as *dictum*, *see* U.S. Br. 35, but those concerns informed the Court's interpretation of the statute. *See Adoptive Couple*, 570 U.S. at 656 (explaining that the South Carolina Supreme Court's interpretation of Section 1915, which the Court rejected, "would raise" constitutional "concerns").

If Defendants were correct and ICWA's classifications were political in nature and subject only to rational basis review, the "great disadvantage" that ICWA imposes on Indian children would be unassailable—justified fully by the Tribes' desire to collect additional adherents. But the Supreme Court instead recognized that ICWA imposes these disadvantages "solely because an ancestor … was an Indian," and therefore "raises equal protection concerns." 570 U.S. at 656. That is because "discrimination … solely because of [] ancestry" "is racial discrimination." *Saint Francis College*, 481 U.S. at 613.

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ICWA's placement preferences do not regulate tribal land or property, are not limited to enrolled members of tribes, and do not otherwise touch on tribal self-government. Instead—like the race-based statute struck down in *Rice*—ICWA uses ancestry as a proxy for race and uses ICWA's placement preferences effectively to "fence out" non-Indians from the quintessential state affair of state-court adoption proceedings. ICWA's classifications are subject to strict scrutiny.

C. ICWA Does Not Survive Strict Scrutiny.

Defendants claim that ICWA's race-based classifications survive strict scrutiny. Because they did not make this argument below, it is waived. *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007); *see also* ROA.4034 (government did not "attempt to prove" a compelling interest).

It is also meritless. Even assuming that the government has a compelling interest in preventing Indian children from being removed from reservations, or preserving Indian culture, *see* U.S. Br. 38-39; Tribes Br. 37-38, ICWA is not remotely narrowly tailored to any such interest. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007). On the contrary, ICWA's placement preferences are a terrifyingly blunt instrument. At least where there exists a tribal court competent to exercise jurisdiction, the placement preferences have *no* application to children who reside on Indian land, yet they apply to any biological child of a tribal member outside of Indian land regardless of her cultural connection (or lack thereof) to an Indian tribe, and then accord a preference to placement with *any* "Indian family" and even any

"institution" any tribe might approve. 25 U.S.C. § 1915(a)(3), (b)(iv). Because, under ICWA's scheme, an Indian family "from anywhere in the country enjoys an absolute preference over other citizens based solely on their race," it is "obvious that such a program is not narrowly tailored." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989).

Moreover, a "race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives—particularly race-neutral ones—have been considered and tried." *Walker v. City of Mesquite*, 169 F.3d 973, 983 (5th Cir. 1999); *see also Parents Involved*, 551 U.S. at 735 (no narrow tailoring where defendant "failed to present any evidence that it considered [race-neutral] alternatives"). There is no evidence in the legislative record that Congress considered, but rejected, race-neutral alternatives to address the concerns that led to ICWA's enactment. But there are many such alternatives, including use of the Spending Power to assist tribal families and to attract them to tribal lands. Instead, Congress applied ICWA to nearly every child with Indian blood and codified

the belief that placement with an Indian family invariably is in the best interests of those children. ICWA cannot survive strict scrutiny.[11]

Because ICWA's racial classifications fail strict scrutiny, the district court correctly declared unconstitutional the statutory and regulatory provisions challenged by Individual Plaintiffs on equal protection grounds, 25 U.S.C. §§ 1913(d), 1914-1915; 25 C.F.R. §§ 23.129-132. The district court's judgment under the equal protection component of the Fifth Amendment should be affirmed.

III. ICWA Exceeds Congress's Article I Enumerated Powers.

ICWA also is unconstitutional because Congress lacks the power to regulate the adoption of "Indian children" under state jurisdiction or to

[11] Defendants invoke the distinction between facial and as-applied challenges, but such distinctions are immaterial. *Ramos v. Town of Vernon*, 353 F.3d 171, 174 n.1 (2d Cir. 2003). When a racial classification does not satisfy strict scrutiny, it is invalid on its face. *See Croson*, 488 U.S. at 509; *id.* at 526 (Scalia, J., concurring). "[T]he distinction between facial and as-applied challenges" goes only "to the breadth of the remedy employed by the Court." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010).

direct state executive agencies and courts in the exercise of their own regulatory power.

1. Neither the Indian Commerce Clause nor any other grant of authority gives Congress plenary power over individuals who happen to be eligible for membership in an Indian tribe. Congress may enact legislation pursuant to the powers enumerated in the Constitution. "[A]ll other legislative power is reserved for the States, as the Tenth Amendment confirms." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018). Although the Indian Commerce Clause gives Congress authority "[t]o regulate Commerce … with the Indian *tribes*," U.S. Const. art. I, § 8, cl. 3 (emphasis added), "[t]he Clause does not give Congress the power to regulate commerce with all Indian *persons* any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States," *Adoptive Couple*, 570 U.S. at 660 (Thomas, J., concurring). ICWA's substantive standards do not

apply on Indian lands; instead they apply only to children outside of reservations. ICWA therefore cannot possibly be justified as a regulation of commerce with "tribes."

ICWA also exceeds Congress's enumerated powers because it does not regulate "commerce" at all. "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring). Under the original meaning of the Indian Commerce Clause, Congress thus was limited to exercising authority over "channels," "instrumentalities," and activities with a "substantial relation" to trade with the Indians. *United States v. Bird*, 124 F.3d 667, 673 (5th Cir. 1997); *see* Robert Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201, 210, 215 (2007). But children are not chattels or objects of commerce under the Constitution. *Cf.* U.S. Const. amend. XIII. Because ICWA "involve[s] neither 'commerce' nor 'Indian tribes,'" "there is simply no constitutional basis for Congress's assertion of authority over such proceedings." *Adoptive Couple*, 570 U.S. at 666 (Thomas, J., concurring).

Defendants assert that the Indian Commerce Clause provides Congress with "plenary power to legislate in the field of Indian affairs." U.S. Br. 48 (quoting *United States v. Lara*, 541 U.S. 193, 200 (2004)). But "Indian affairs" must be understood as limited to *tribal matters*. *See Lara*, 541 U.S. at 218, 224 (Thomas, J., concurring). As with territories, Congress's "plenary" power to regulate tribes means that it may "exercise all the police and regulatory powers which a state legislature … would have in legislating for state or local purposes." *Palmore v. United States*, 411 U.S. 389, 397 (1973). Neither Congress' Indian Commerce power nor its textually broader Article IV power to "make all needful rules respecting the Territory … belonging to the United States" ever has been understood to allow Congress to legislate however it pleases as to Indian (or Puerto Rican or American Samoan) persons wherever they may be found.

Under Defendants' theory, Congress could directly regulate marriage or divorce of Indian persons domiciled under state jurisdiction or exempt Indian persons from *all* generally applicable state laws. That cannot be the law. The Indian Commerce Clause does not give Congress *carte blanche* authority to regulate state-court adoptions of children under state jurisdiction.

2. Even if Congress had authority to regulate state child-custody proceedings involving Indian children, ICWA would violate the Constitution for a separate reason: It unlawfully commandeers state courts and agencies in service of federal policy. The Constitution "confers upon Congress the power to regulate individuals, not States," and thus "withhold[s] from Congress the power to issue orders directly to the States." *Murphy*, 138 S. Ct. at 1475-76. This anti-commandeering principle "promotes political accountability" by ensuring that "the responsibility for the benefits and burdens of the regulation is apparent." *Id*. at 1477.

There is no federal official who administers ICWA or carries out its mandates; ICWA unabashedly requires state agencies and courts to carry out its federal policy of placing Indian children with Indian families. ICWA thus "shifts all responsibility to the States, yet 'unequivocally dictates' what they must do." ROA.4043 (quoting *Murphy*, 138 S. Ct. at 1477). Congress has no authority to micromanage the States' exercise of their own regulatory authority in this manner.

ICWA's mandates cannot be justified as a form of preemption. "[T]o preempt state law" a federal statute "must be best read as one that regulates private actors." *Murphy*, 138 S. Ct. at 1479. But ICWA regulates

state courts and agencies, not individuals. Indeed, ICWA repeatedly dictates what state agencies and courts "shall" do. *See, e.g.*, 25 U.S.C. § 1915 ("shall be given"; "shall be placed"; "shall follow"; "shall be maintained").

Defendants thus retreat to the argument that the Supremacy Clause permits "congressional commands to state courts." Tribes Br. 40. That would be a surprising loophole in the anti-commandeering principle, and a dangerous one. It would allow Congress, for example, to prescribe sentences for state-law drug offenses, or to require imposition of strict liability in auto-accident cases. While the Supremacy Clause requires state courts of general jurisdiction to entertain federal causes of action, *see Testa v. Katt*, 330 U.S. 386, 394 (1947), ICWA commands state courts to apply "federal standards that modify *state created causes* of action." ROA.4042. Indeed, ICWA effectively rewrites state law and then requires state judges and state child-welfare agencies to carry it out. Neither the Supreme Court nor this Court ever has suggested that Congress may manipulate the operation of state law in this way.

IV. The Final Rule Is Arbitrary and Capricious and Contrary to Law.

Because of ICWA's numerous constitutional defects, the district court correctly held that the Final Rule must be set aside as "arbitrary

and capricious" and "contrary to law." ROA.4046, 4052. The Final Rule also is invalid because of the "unexplained inconsistency in [BIA's] policy," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016), and because the Final Rule's new interpretation of the "good cause" requirement is contrary to the statute.

A. The Final Rule's unexplained reversal on the scope of its statutory authority was arbitrary and capricious.

BIA has the power to make only those rules that are "necessary to carry out" ICWA. 25 U.S.C. § 1952. The 1979 Guidelines properly interpreted that authority as limited to those "portions" of ICWA that "expressly delegate to the Secretary of the Interior responsibility for interpreting statutory language," and as not extending to the majority of ICWA's substantive provisions, including Section 1915. 44 Fed. Reg. at 67,584. BIA recognized that it "does not have" authority to issue binding regulations because Congress did not "intend[] th[e] Department to exercise supervisory control over state or tribal courts or to legislate for them with respect to Indian child custody matters." *Id*. "For Congress to assign to an administrative agency such supervisory control over courts would be an extraordinary step," fundamentally "at odds" with "federalism" and the "separation of powers." *Id.*

After 37 years, the Department announced that it "no longer agrees … that it lacks the authority to issue binding regulations." 81 Fed. Reg. at 38,786. It then severely constrained state courts' power to find "good cause" to depart from the placement preferences, specifying certain criteria for departure that must be proved by clear and convincing evidence. 81 Fed. Reg. at 38,839; 25 C.F.R. § 23.132(b), (c).

This Court has recognized that when an agency takes "forty years to 'discover'" regulatory authority under a statute, courts should not defer to the "novel interpretation." *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 380 (5th Cir. 2018). Interior's new view of its authority under Section 1952 thus is entitled to no deference. And because Interior has no role in "carry[ing] out" ICWA's child placement mandates—they are, by design, carried out only by States—Interior's supplementation of Congress's legislation cannot possibly be described as "necessary." The Final Rule nevertheless seeks to justify its regulations that state courts have reached divergent outcomes in ICWA cases, *see* 81 Fed. Reg. at 38,782, but flexibility and the ability of state courts to do justice in particular cases is integral to ICWA's design. The standardization of state-court outcomes that Interior's Final Rule attempts to impose thus is not

only "[un]necessary to carry out" ICWA's provisions; it defies those provisions.

B. The Final Rule's "good cause" regulations contradict ICWA.

Congress gave state courts the authority to deviate from ICWA's placement preferences for "good cause" to provide them with "flexibility." S. Rep. No. 95-597, at 17 (1977); 44 Fed. Reg. at 67,584 ("the term 'good cause' was designed to provide state courts with flexibility"); U.S. Br. 14 n.2, *Adoptive Couple v. Baby Girl*, No. 12-399, 2013 WL 1099169 (U.S. Mar. 15, 2013) ("good cause" standard is a "safety-valve"). Yet the Final Rule imposes a fixed definition of "good cause," limiting state courts to five enumerated factors, and then provides that "[t]he party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." 25 C.F.R. § 23.132(b)-(c).

These mandates are contrary to ICWA. Congress did not specify a standard for showing good cause to depart from the placement preferences. 25 U.S.C. § 1915(a)-(b). As the Department acknowledged, its new "burden of proof standard is not articulated in section 1915." 81 Fed. Reg.

at 38,843. Such "silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof." *Grogan v. Garner*, 498 U.S. 279, 286 (1991).

On the other hand, Congress did provide for heightened burdens of proof elsewhere in the statute. *See* 25 U.S.C. § 1912(e)-(f). Congress's decision to include heightened standards of proof in Section 1912 but not in Section 1915 "is presumed" to be "intentional[]." *Chamber of Commerce*, 885 F.3d at 373. In the absence of any evidence that Congress intended a heightened standard for "good cause," the default civil standard—preponderance of the evidence—must apply. *See Grogan*, 498 U.S. at 286.[12]

The United States observes that the Final Rule says that the clear-and-convincing standard "should" be applied and contends that the Rule thus does not "force[] Plaintiffs" to satisfy it. U.S. Br. 54. (So much for uniformity.) State courts, though, have not interpreted the Final Rule as

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[12] Defendants contend that the *expressio unius* canon "has been expressly rejected in the APA context," Tribes Br. 66, but "the Supreme Court and this court have relied on *expressio unius* in deciding issues of administrative law," *Texas v. United States*, 809 F.3d 134, 182 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).

merely suggestive. *See, e.g.*, ROA.2707 (finding that the Brackeens failed to show "good cause" because they "did not meet their burden under 25 C.F.R. § 23.132"); ROA.2668 ("Although the Cliffords have arguably alleged facts that suggest there may be good cause to deviate from the § 1915(a) preferences, they have not established good cause by clear and convincing evidence."). In any event, Interior has no statutory authority to suggest to state courts that they act in a manner contrary to the statute. If Interior's clear-and-convincing standard is contrary to Section 1915, so is Interior's directive that the heightened standard "should" be applied.

The Final Rule's limitations on what can constitute "good cause" also should be set aside. Congress chose that standard, which had a well understood meaning as allowing a court a wide berth to do justice, precisely to give state courts flexibility in administering ICWA's placement preferences. Interior's effort to straitjacket state courts contradicts the statutory text.

CONCLUSION

The judgment of the district court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this Brief contains 12,970 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

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

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CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2019, I filed the foregoing Brief using the Court's ECF system. Service on all counsel of record for all parties was accomplished electronically using the Court's CM/ECF system.

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