IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CHAD EVERET BRACKEEN, et al. Plaintiffs, v. RYAN ZINKE, in his official capacity as Secretary of the United States Department of the Interior, et al., Defendants, and CHEROKEE NATION, et al., Defendant-Intervenors.	Civil Action No: 4:17-cv-868-O

MEMORANDUM IN SUPPORT OF
FEDERAL DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Federal Defendants—the Department of the Interior, Secretary of the Interior Ryan Zinke, the Bureau of Indian Affairs, and John Tahsuda III, Acting Assistant Secretary–Indian Affairs (collectively, Interior), the Department of Health and Human Services, Secretary of Health and Human Services Alex Azar, and the United States—move for Summary Judgment against the States of Texas, Indiana, and Louisiana (State Plaintiffs), seeking judgment on Counts One through Four, and Seven of the Second Amended Complaint, if the Court denies Defendants' pending Motion to Dismiss. Federal Defendants have opposed a motion for summary judgment brought by the Individual Plaintiffs on the grounds that further factual discovery is required before the Court can determine whether the Individual Plaintiffs have standing to bring their claims. Federal Defendants are thus not moving for summary judgment against the Individual Plaintiffs at this time.[1]

I. INTRODUCTION

As the three State Plaintiffs have recognized, they have "a duty of the highest order to protect the interests of minor children" under their jurisdiction. *Palmore v. Sidoti*, 466 U.S. 429 (1984), ECF No. 142 at 7. But the United States has its own authorities and responsibilities: based on constitutional authorities and practices dating to the founding of this Nation, the United States has obligations to members of Indian tribes, including tribal children, and to the tribes themselves. In particular, the federal government has an "undisputed … general trust relationship" with the Indian people, pursuant to which the federal government "has charged itself with moral obligations of the highest responsibility and trust, … obligations to the fulfillment of which the national honor has been committed." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011) (internal quotations and citations omitted). This general trust duty extends to the protection of Indian children and their parents.

[1] By filing this Motion, Federal Defendant do not concede that State Plaintiffs have standing to bring their claims, as all Plaintiffs fail to satisfy Article III's standing requirements for the reasons set forth in Federal Defendants' briefing on the Motion to Dismiss. ECF Nos. 57, 115, 116.

In furtherance of this responsibility and authority, Congress conducted an investigation into allegations of the "wholesale removal of Indian children from their homes," concluding that the states and private adoption agencies were not protecting the best interests of Indian children, families, and tribes. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Congress determined "that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901(4); *see also Holyfield*, 490 U.S. at 32 (noting "that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions."). And, Congress determined that Indian children—unlike most children in the foster-care system—tended to be placed without consideration of whether a placement was available with relatives or within the tribal community, often contrary to the best interests of those children. *See* 25 U.S.C. § 1901(5); *see also Holyfield*, 490 U.S. at 33 ("Approximately 90% of the Indian placements were in non-Indian homes" with "serious adjustment problems encountered by such children during adolescence"). The testimony before Congress demonstrated both a betrayal of the best interests of Indian children, as well as "the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34.

To address this crisis, Congress—using its sweeping Indian affairs authority—enacted the Indian Child Welfare Act (ICWA), declaring that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). It further declared that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." *Id.* § 1902. ICWA confirmed the rights of tribes to adjudicate child-custody matters on-reservation and provided minimum federal standards to protect the best interests of Indian children, including their interests in remaining with their family and their communities, in child-custody matters in state court. Rather than creating a separate system to protect Indian children, Congress carefully balanced the interests of

federal, state, and tribal governments, adopting a statute that does not "oust the States of their traditional jurisdiction over Indian children falling within their geographical limits," H.R. REP. NO. 95-1386, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7541, but rather provides standards for state courts to apply in child-custody proceedings involving an Indian child.

Thus, ICWA is no different from other federal laws that apply in state courts pursuant to the Supremacy Clause. As evidenced by the amicus brief filed by seven states (Alaska, California, Montana, New Mexico, Oregon, Utah, and Washington), ICWA does not unconstitutionally infringe on the powers reserved to the states; to the contrary, it balances the federal interests in protecting Indian children, their parents, and tribes with the states' traditional role in domestic relations. ECF No. 137 at 12. Indeed, many states, including plaintiff Louisiana, have chosen to enact state law to serve many of the same goals as ICWA. *E.g.*, ECF No. 138 at 18 -20. As *amici* States expressed, Plaintiffs' challenge to ICWA "poses a threat both to the state laws that similarly prioritize an Indian child's continued tribal connection and to the nationally uniform handling of child welfare cases involving Indian children." ECF No. 137 at 10. Moreover, if the State Plaintiffs' argument regarding their "exclusive" authority over domestic relations were followed to its logical conclusion, states would have complete authority over all child-custody matters, including those on Indian reservations and in other areas of undisputed federal authority. That argument would reverse 200 years of federal law and Supreme Court precedent and go against the very foundation of federal Indian law.

Plaintiffs' facial attack on ICWA fails as a matter of law, because settled law establishes that Congress has "plenary and exclusive" authority to legislate in the field of Indian affairs, including to prevent states from interference in tribal affairs. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). ICWA falls squarely within this plenary Indian affairs authority. Centuries of case law and statutory precedent also establish that classifications tied to tribal membership, such as those found in ICWA, are political, not racial, classifications and do not offend the Fifth Amendment. Plaintiffs—who are neither Indian children nor their lawful representatives—challenge ICWA's definition of "Indian

child" and in doing so, argue against Supreme Court precedent holding that classifications in federal law based on Indian tribal status constitute political, not racial, categories. *See United States v. Antelope*, 430 U.S. 641 (1977); *Morton v. Mancari*, 417 U.S. 535 (1974); *Worcester*, 31 U.S. 515. In fact, Plaintiffs fail to identify a single case in which the federal courts have held that a federal statute involving federally recognized Indian tribes or their members violates equal protection, or that such a federal statute exceeds Congress's Indian affairs powers or violates the Tenth Amendment.

State Plaintiffs' challenge to the Department of the Interior's Final Rule fails for similar reasons, and because it does not violate the Administrative Procedure Act (APA). Federal Defendants' motion for partial summary judgment should be granted.

II. BACKGROUND

A. Indian Child Welfare Act and the Final Rule[2]

ICWA applies solely to "child custody proceedings" (defined as foster-care placements, terminations of parental rights, and preadoptive and adoptive placements) involving an "Indian child."[3] 25 U.S.C. § 1903(1), (4). For Indian children domiciled within the reservation, Congress confirmed that Indian tribes have exclusive jurisdiction over child-custody proceedings. *Id.* § 1911(a). Tribes have concurrent jurisdiction (with states) over other cases involving Indian children. *Id.* § 1911(c); *Holyfield*, 490 U.S. at 42; *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382 (1976). The statute also provides tribes with intervention and other rights in state court proceedings. *E.g.*, 25 U.S.C. § 1911, 1912, 1914.

The "most important substantive requirement" of ICWA is the placement preferences. *Holyfield*, 490 U.S. at 36-37; *see* 25 U.S.C. § 1915(a)-(b). "In any adoptive placement of an

[2] Federal Defendants provided a more thorough recitation of ICWA and the Final Rule in its brief opposing Plaintiffs' summary judgment motions. To avoid repetition, Federal Defendants adopt by reference, as if fully set forth herein, those portions of its prior briefing. ECF No. 121 at 10-13 (Sections A.1 and A.2).

[3] The term "Indian child" is defined as "an unmarried person who is under age 18 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).

Indian child under State law," ICWA requires that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *Id.* § 1915(a) (adoptive preferences). These preferences reflect "Federal policy that, where possible, an Indian child should remain in the Indian community." H.R. REP. NO. 95-1386, at 23. Importantly, ICWA specifies that courts may deviate from these preferences for good cause. 25 U.S.C. § 1915(a)-(b). ICWA also allows an Indian child's parent or tribe to seek to invalidate a foster-care placement or termination-of-parental-rights determination upon a showing that certain provisions of ICWA, §§ 1911-1913, have been violated. *Id.* § 1914. ICWA also requires notice of state child-welfare proceedings be provided to an Indian child's parents and tribe. *Id.* § 1912(a). ICWA also establishes standards that must be met before an Indian child can be removed from his parent and placed in foster care, or before parental rights are terminated. *Id.* § 1912.

On June 6, 2016, after notice and comment, Interior issued a Final Rule to "promote[] the uniform application of Federal law designed to protect Indian children, their parents, and Indian Tribes," based on its conclusion that "implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State." *Indian Child Welfare Act Proceedings*, Final Rule, 81 Fed. Reg. 38,778-01 (June 14, 2016).[4]

B. Procedural Background

Plaintiffs filed their complaint on October 25, 2017. ECF No. 1. They amended their complaint on December 15, 2017. ECF No. 22. The Federal Defendants moved to dismiss for lack of subject matter jurisdiction on February 13, 2018. ECF No. 27. After moving for and receiving an extended time to respond, ECF Nos. 29-30, and then moving a second time for even

[4] Interior had previously issued regulations addressing tribal reassumption of jurisdiction, notice procedures, and federal grants for child and family programs, 44 Fed. Reg. 45,096-01 (July 31, 1979), which were revised in 1994, 59 Fed. Reg. 2,248-01 (Jan. 13, 1994), as well as guidelines for Indian child-custody proceedings in state courts, 44 Fed. Reg. 67,584 (Nov. 26, 1979), which were revised, 80 Fed. Reg. 10,146-02 (Feb. 25, 2015).

more time (and receiving that as well), ECF Nos. 31-32, Plaintiffs decided instead to amend their complaint a second time, seeking to cure jurisdictional defects by adding the United States and other new federal defendants. ECF No. 35. On April 5, 2018, the United States renewed its motion to dismiss the second amended complaint ("SAC" or "Complaint"). Plaintiffs elected to file two opposition briefs to the United States' motion, one on behalf of State Plaintiffs and one on behalf of Individual Plaintiffs and further sought to combine their opposition briefs with briefs in support of their motions for summary judgment. ECF No. 64. The Court granted permission for Plaintiffs to file two combined briefs. ECF No. 65. The United States moved to stay summary judgment briefing until the jurisdictional issues raised in the motion to dismiss were resolved, ECF No. 68, which motion the Court denied. ECF No. 86. In the same Order, the Court granted in part and denied in part Plaintiffs' motion to set a briefing schedule. *Id.*

Plaintiffs moved for summary judgment on April 26, 2018. ECF Nos. 72, 79. The United States moved for permission to file a combined brief replying in support of the motion to dismiss, opposing Plaintiffs' motions for summary judgment, and supporting a cross-motion for summary judgment. ECF No. 95. The Court denied permission to file a combined brief on May 24, 2018. ECF No. 105. In that order, the Court stated: "If Defendants wish to file a motion for summary judgment, they may do so separately, according to the local rules." *Id.* On May 25, 2018, the United States filed replies in support of the motion to dismiss and oppositions to Plaintiffs' motions for summary judgment. ECF Nos. 115, 116, 120, 122. In its opposition, the United States renewed its jurisdictional arguments, and specifically with regard to Individual Plaintiffs, sought discovery on standing in accord with Federal Rule of Civil Procedure 56(d). ECF No. 123-1. The United States now moves for partial summary judgment on all claims brought by State Plaintiffs.

III. ARGUMENT

State Plaintiffs have moved for summary judgment and the Federal Defendants now cross-move. "On cross-motions for summary judgment, the court reviews each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving

party." *Baylor Cty. Hosp. Dist. v. Burwell*, 163 F. Supp. 3d 372, 377 (N.D. Tex. 2016) (internal quotation marks omitted). Summary judgment is appropriate where "there is no genuine issue as to any material fact and [a] moving party is entitled to judgment as a matter of law." *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001) (citing FED. R. CIV. P. 56(c)).

Plaintiffs bring facial constitutional challenges to ICWA, and thus bear the burden of "establish[ing] that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

A. Congress has Constitutional Authority to Enact ICWA

Count Two of Plaintiffs' Complaint asserts that ICWA Sections 1901-1923 and 1951-52 (all provisions except those addressing Indian Child and Family grant programs) exceed Congress's constitutional authority (SAC ¶ 274), and seeks declaratory and injunctive relief. SAC ¶ 281. This claim is directly contradicted by uniform Supreme Court precedent and Congress's legislative enactments since the Nation's founding. It should be rejected.

1. Congress has Plenary and Exclusive Authority to Regulate Regarding Indian Affairs

It is well settled that Congress has "plenary and exclusive" authority to regulate in the field of Indian affairs. *See, e.g.*, *Lara*, 541 U.S. at 200; *Board of Com'rs of Creek County v. Seber*, 318 U.S. 705, 716 (1943) (The "plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." (citing cases)). The Supreme Court has recognized this broad authority of Congress since the early 19th century, when then Chief Justice Marshall held that the constitutional powers granted to Congress "comprehend all that is required for the regulation of our intercourse with the Indians" and "are not limited by any restrictions on their free actions." *Worcester*, 31 U.S. at 559; *see also Cherokee Nation v. Georgia*, 30 U.S. at 14; *Oneida County, N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law.").

The "plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Mancari,* 417 U.S. at 551-52. In particular, the Constitution states that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST., art. I, § 8, cl. 3. The "central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs." *Lara,* 541 U.S. at 200 (citing cases). Congress's authority in the Indian affairs arena, however, is not drawn solely from the Indian Commerce Clause. The plenary authority also derives from the President's treaty power, U.S. CONST. art. II, § 2, cl. 2, which "has often been the source of the Government's power to deal with the Indian tribes." *Mancari*, 417 U.S. at 552. In 1871, Congress ended the practice of entering into treaties with Indian tribes, 25 U.S.C. § 71, but this "in no way affected Congress's plenary powers to legislate on problems of Indians." *Lara*, 541 U.S. at 201 (citing *Antoine v. Washington*, 420 U.S. 194, 203 (1975)). The Supreme Court has also recognized that Congress's power in this area stems from "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as 'necessary concomitants of nationality," *Lara,* 541 U.S. at 201 (citations omitted), as well as the federal government's assumption of a trust obligation toward Indian tribes. *Mancari*, 417 U.S. at 552. Congress expressly relied on the Indian Commerce Clause, "other constitutional authority," and its "plenary power over Indian affairs" to support the enactment of ICWA. 25 U.S.C. § 1901(1). *See also* H.R. REP. NO. 95-1386, at 13-14. (The "Supreme Court has, time and again, upheld the sweeping power of Congress over Indian matters.").

2. Congress's Indian Affairs Authority is Not Limited to Economic Activities

Despite longstanding and well-settled precedent, Plaintiffs' attempt to confine the scope of congressional plenary authority under the Indian Commerce Clause to "trade" and other economic activity, to the exclusion of ICWA. But this cramped reading is directly contradicted by both Supreme Court precedent and longstanding practice. From the founding of this Nation,

Congress has exercised its Indian affairs authority to reach far beyond commerce to include such topics as criminal jurisdiction involving crimes between Indians and non-Indians. *See* Act of March 3, 1817, 3 Stat. 383 (1817) (amendment to the Indian Trade and Intercourse Act).[5] The Supreme Court has repeatedly ruled that Congress has authority to legislate regarding many Indian affairs matters that are not economic activities, including matters concerning the attributes of tribal sovereignty and self-government, *Lara*, 541 U.S. at 202; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978); the power to remove Indians from their lands, *Fellows v. Blacksmith*, 60 U.S. 366 (1856); the imposition of federal criminal laws on Indians, *United States v. Kagama*, 118 U.S. 375 (1886);[6] and the abrogation of treaty terms, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Plaintiffs' only support for this argument is a concurring opinion authored by Justice Thomas, and not joined by any other Justices. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas, J., concurring). That is not the law, and it cannot be squared with precedent or two hundred years of congressional action.[7]

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[5] In the early 1800s, Congress left the prosecution of crimes between Indians to tribal forums. *See* 3 Stat. 383, § 2; codified as amended 18 U.S.C. § 1152. In 1885, Congress ended that by enacting the Major Crimes Act (MCA), criminalizing a set of "major" crimes committed by Indians, regardless of whether the victim of that action was an Indian or a non-Indian. Act of March 3, 1885, 23 Stat. 385, § 9, codified as amended 18 U.S.C. § 1153.

[6] State Plaintiffs claim that the Supreme Court's decision in *Kagama*, 18 U.S. at 378, supports their argument that child-custody matters fall outside "commerce." ECF No. 142 at 15. In *Kagama*, the Court considered a challenge by a tribal member convicted pursuant to the MCA, 23 Stat. 385, of murdering another tribal member. Plaintiffs seize upon language in *Kagama*, 118 U.S. at 378, questioning whether the Indian Commerce Clause provided Congress with the authority to enact the MCA, which concerns criminal jurisdiction, not commerce. Plaintiffs neglect to mention that the Court upheld the MCA, finding an extra-constitutional authority for Congress's Indian affairs powers: Based on what the Court described as the wardship of Indian tribes, "largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, *there arises the duty of protection, and with it the power*. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen." *Id.* at 384 (emphasis added). The Supreme Court, therefore, found Congress had broad Indian affairs authority, including the power to enact the MCA.

[7] Justice Thomas first criticized the Court's Indian Commerce Clause jurisprudence in *Lara* in 2004, but no other Justice in the last fourteen years has joined in this position. Justice Thomas relies heavily on the law review articles cited in Plaintiffs' Briefs (ECF No. 74 at 66). But his conclusions, and those of these authors, have also been critiqued as misstating and misunderstanding the original understanding of the Indian Commerce Clause and the

In their Memorandum in support of Summary Judgment, the States seek to import the case law and legal standards related to the Interstate Commerce Clause to the Indian Commerce Clause, but the three grants of authority in Article I, Section 8, Clause 3 of the Constitution have long been treated distinctly. *See Cherokee Nation*, 30 U.S. at 13 ("The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct" and the same is true for the constitutional provision). And the Supreme Court has expressly rejected analogizing the two clauses. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Cherokee Nation*, 30 U.S. at 18. In *Cotton Petroleum*, the Court observed that it is "well established that the Interstate Commerce and Indian Commerce Clauses have very different applications." 490 U.S. at 192. Whereas the Interstate Commerce Clause "is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, [] the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* (citations omitted).

Thus, case law interpreting the Interstate Commerce Clause is not applicable to Indian affairs, as it "is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Id*. As a result, court-imposed limitations on Congress's authority to legislate through powers derived from the Interstate Commerce Clause do not transfer to the Indian Commerce Clause, under which Congress's authority is "plenary."

Constitution more broadly. *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L. J. 1012 (2015); Law Professors' Brief, ECF No. 108 at 19 n.2. For example, the State's Brief quotes Justice Thomas' concurrence as asserting that regulation of Indian commerce historically referred to "legal structures governing the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters." But legal historians have pointed out that the Founders viewed trade with the Indians with a diplomatic and political lens, not commercial. Ablavsky, 124 Yale L. J. at 1030.

Faced with this overwhelming precedent, the States suggest, without authority, that Congress must have relied on its Interstate Commerce Clause authority because ICWA "regulates States." ECF No. 142 at 15, 20. But, as discussed below, ICWA does not "regulate States."[8] It establishes federal law to protect Indian children, parents, and tribes, which will be applied in state-court proceedings (preempting state law where it is less protective), but this is not the same as imposing direct regulation on a state. *See New York v. United States*, 505 U.S. 144, 178 (1992) ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."). Moreover, in enacting ICWA, Congress expressly relied on its Indian affairs power, not its authority over interstate commerce, *see* 25 U.S.C. § 1901(1), and the States have presented no valid reason why Congress's clear statement should be ignored. And, ICWA is in line with many other Indian affairs statutes enacted since the founding of the Nation that impact states, preempt state law, and affect state interests. For example, the United States can create Indian reservations or recognize tribal rights within a state without its consent, *United States v. John*, 437 U.S. 634 (1978); preempt state criminal jurisdiction, *see* 18 U.S.C. § 1153, *Rice v. Olson*, 324 U.S. 786, 789 (1945); preempt state property taxes, *Seber*, 318 U.S. 705; and override state fishing laws, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

Plaintiffs restate their "economic activity" argument by asserting that "children are not 'commerce.'" SAC ¶ 272; ECF No. 74 at 66. But as discussed above, Congress's Indian affairs authority has been interpreted to extend far beyond the regulation of articles of commerce, to include, of particular relevance here, the authority to protect, modify, or reduce tribal sovereignty and self-government, and to address matters involving individual Indians. *E.g.*, *Lara*, 541 U.S. at 202; *Santa Clara Pueblo*, 436 U.S. at 56-57; *Kagama* 118 U.S. at 384. Several ICWA

[8] The States' only support for this point is a document promulgated by the Texas Department of Family and Protective Services, not the Federal Government. ECF No. 73 at 14-16 (States MSJ App.0014-16). A state agency may establish policies to promote compliance with federal law, but this does not convert the underlying law into one that regulates states.

provisions challenged by Plaintiffs ***directly*** address tribal authority to adjudicate or participate in child welfare proceedings involving tribal children, and fall squarely within this precedent. *See, e.g.*, 25 U.S.C. §§ 1911; 1912(a); 1914, 1915(c), 1919. And the entirety of ICWA is designed to protect the "continued existence and integrity of Indian tribes" by protecting tribal children and their connection to the tribe in response to evidence of wide-spread abuse by state and private child welfare agencies.[9] *Id.* § 1901(3); *see also* 25 U.S.C. §§ 1915 (preference for tribal placements); 1917 (requiring courts to inform adopted individuals of their parents' tribal affiliations); 1951 (regarding disclosure of information to the Secretary of the Interior and for purposes of enrollment). As the Supreme Court recounted, there was "considerable emphasis" in the congressional hearings leading to ICWA "on the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34.

Plaintiffs also assert that Congress can only "regulate Indian tribes," and lacks authority to legislate regarding individual Indians, including children, although they fail to explain how that might work. ECF No. 74 at 66-68. The Supreme Court has held to the contrary, however, finding that "commerce with Indian tribes means commerce with the individuals composing those tribes." *United States v. Holliday*, 70 U.S. 407, 417 (1865); *Dick v. United States*, 208 U.S. 340, 357 (1908); *see also Maryland Cas. Co. v. Citizens Nat. Bank of W. Hollywood*, 361 F.2d 517, 520 (5th Cir. 1966) (The "paramount authority of the federal government over Indian tribes *and Indians* is derived from the Constitution, and Congress has the power and the duty to enact legislation for their protection." (emphasis added)). Congress has routinely passed laws under its Indian affairs power that address individual Indians, such as by dictating which individuals are recognized as part of a tribe, are eligible for a distribution of funds, are subject to

[9] That Congress sought to protect tribal children from unwarranted removal by state authority only highlights the difference between enactments pursuant to the Indian affairs authority and enactments pursuant to the Interstate Commerce Clause. With the latter, the Court is careful to ensure Congress does not overstep its bounds by legislating matters properly left to the States. But the sovereign rights and interests of Indians do not typically align with those of the States; instead, they rely upon federal legislation to protect and advance their interests. *See Cotton Petroleum*, 490 U.S. at 192-93.

tribal, state, or federal criminal jurisdiction, may receive federal benefits, and a variety of other subjects. *See, e.g.*, 25 U.S.C. § 5108 (Interior may take land in trust for an "Indian tribe or individual Indian"); *Id.* § 1621b (authorizing health care services "to Indians"); 18 U.S.C. § 1153 (criminal jurisdiction over "any Indian" who commits certain offenses).

Congress has the authority, pursuant to its constitutional plenary authority over Indian affairs, to enact ICWA. *See* 25 U.S.C. § 1901. Defendants are entitled to summary judgment on Count Two.

B. Plaintiffs' Tenth Amendment Challenge Fails as a Matter of Law

In Count Three, Plaintiffs assert that ICWA (in its entirety) violates the Tenth Amendment, that domestic relations are the "virtually exclusive province of the States," and that it impermissibly commandeers state governments. SAC ⁋⁋ 284-293. For the reasons below, these arguments fail, and Federal Defendants are entitled to summary judgment.

1. When the Constitution Confers Authority on Congress, the Tenth Amendment Does Not Reserve Such Authority to the States

Plaintiffs assert that ICWA impermissibly intrudes on states' authority over domestic relations. SAC ¶ 283-292. But, state authority over domestic relations is not expressly conferred in the Constitution, but rather is a residual authority defined by what remains *after* constitutional grants of authority to the federal government, *Printz v. United States*, 521 U.S. 898, 919 (1997), which include the Indian affairs power. Thus, if a state's exercise of authority over areas such as domestic relations overlaps or conflicts with an area of primary or exclusive constitutionally-vested federal power, it is the state's authority, not the federal authority, that must give way. *E.g., Arizona v. United States*, 567 U.S. 387, 398-99 (2012). Here, Congress's plenary power over Indian affairs, including the protection of Indian children, parents, and tribes, is such an area.

a. The Tenth Amendment Does Not Restrict Congress's Authority over Indian Affairs

"If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. at 156. Here, the Constitution explicitly and implicitly grants Congress plenary and exclusive authority over Indian affairs. Because Congress passed ICWA pursuant to this enumerated power, the Tenth Amendment is not implicated. *Id.*; *Deer Park Ind. School Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1099 (5th Cir. 1998); *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1153-54 (9th Cir. 2013); *Raich v. Gonzales*, 500 F.3d 850, 867 (9th Cir. 2007); *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000) ("We have held that if Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment."). So, while it is true that the Supreme Court has recognized that domestic relations are generally the province of the states, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), the Supreme Court has also long recognized that states "have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996); *Rice v. Olson*, 324 U.S. at 789 ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." (citing *Worcester*, 31 U.S. at 560-61)). Congressional authority includes, if Congress so chooses, divesting the state of authority over domestic relations matters involving Indian parents and children and concomitantly enhancing tribal or federal authority over Indian children. *Cf. United States v. Windsor*, 570 U.S. 744, 764–65 (2013) (Congress may enact statutes that address marital rights and privileges, including by preempting state laws). On this basis, ICWA is fully within Congress's Indian affairs authority, and does not violate the Tenth Amendment. *See Matter of Guardianship of D.L.L.*, 291 N. W. 2d 278 (S.D. 1980) (finding ICWA does not violate the Tenth Amendment).

b. State Authority over Domestic Relations is Not Exclusive and Must Give Way to Federal Laws Addressing Domestic Relations of Indians

Plaintiffs cast ICWA as an unprecedented intrusion on states' "exclusive" authority over domestic relations. But this is not accurate. State authority over domestic relations is not

exercised to the exclusion of federal law, and Congress regularly legislates in the field of domestic relations.

Congress has legislated on numerous occasions to address child-welfare issues related to other federal powers, such as interstate disputes, immigration, and foreign relations.[10] State authority over domestic relations in these areas has been correspondingly diminished. *See New York*, 505 U.S. at 159. For example, in 1980, Congress established uniform national standards for the assertion of child-custody jurisdiction in the Parental Kidnapping Prevention Act (PKPA), to address the nationwide problem caused by parents who lost custody in one state illegally removing the child to a different state where the non-custodial parent might receive more favorable treatment. 28 U.S.C. § 1738A; *see Thompson v. Thompson*, 484 U.S. 174, 180 (1988).[11] Like ICWA, the PKPA "is addressed entirely to States and state courts." *Id*. at 183. Congress has also legislated with regard to child welfare in the areas of immigration and foreign affairs. *See, e.g.*, 8 U.S.C. § 1101(a)(27)(J) (requiring consent of the Secretary of Health and Human Services to juvenile court jurisdiction over an alien in the Secretary's custody); 22 U.S.C. § 9003(a) (granting federal courts jurisdiction concurrent with state courts over Hague

[10] *See, e.g.*, Child Abuse Prevention and Treatment Act, Victims of Child Abuse Act of 1990, 34 U.S.C. § 20301 *et seq.*; Family Violence Prevention and Services Act, 42 U.S.C. § 10401 *et seq.*; Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A; Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–628, 670–679a; Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, 42 U.S.C. §§ 5111–5115; Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 *et seq*.

[11] State law is also subject to natural limits imposed by the exercise of jurisdiction by other states and tribes. *See, e.g.*, *Wicks v. Cox*, 208 S.W.2d 876, 878 (Tex. 1948) (noting duty to pay "due heed to existing relationships on the part of the child or other persons concerned with other states, whether within or without the scope of the full faith and credit clause of the federal constitution"). States in the modern era have recognized the need for "national uniformity in child custody disputes" and nearly all states (including State Plaintiffs) have passed the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *See In re Dean*, 393 S.W.3d 741, 743 (Tex. 2012). The UCCJEA requires courts to consider whether other "states" have jurisdiction before making an initial custody determination themselves. *See* Tex. Fam. Code Ann. § 152.201. The UCCJEA does not apply to ICWA proceedings, but states have nonetheless committed therein to treat a tribe "as if it were a state of the United States," and have extended the same treatment to foreign countries. *Id*. §§ 152.104, 152.105; La. Rev. Stat. §§ 1804, 1805; Ind. Code Ann. §§ 13-21(2), 13-21(3).

convention actions). The situation today, therefore, is considerably more complex than it was in 1890, when the Supreme Court declared "the whole subject" of domestic relations as belonging to the laws of the states.[12] *See In re Burrus*, 136 U.S. 586, 593-94 (1890).

ICWA is fully in line with this statutory precedent. It is undisputed that Congress may legislate regarding the protection and definition of tribal sovereignty and self-government (*see Lara*, 541 U.S. at 202 and *supra* at Section III.A.2), which ICWA directly and indirectly addresses. *E.g.*, 25 U.S.C. § 1911 (tribal jurisdiction over Indian child custody proceedings). As much as states may have authority over the domestic relations of their citizens, tribes also have sovereign authority over the domestic relations of tribal citizens, including the welfare of tribal children. *Montana v. United States*, 450 U.S. 544, 564 (1981); *United States v. Wheeler*, 435 U.S. 313, 322 (1978); *Holyfield*, 490 U.S. at 42; *Fisher*, 424 U.S. at 389; *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 561-62 (9th Cir. 1991) (inherent sovereignty over adoption). This sovereign interest exists even outside of tribal lands. *See e.g., John v. Baker*, 982 P.2d 738, 754-55, 759-60 (Alaska 1999) (Tribes' authority over child custody matters derives "from a source of sovereignty independent of the land they occupy."). Through ICWA, Congress has confirmed and protected these sovereign authorities. *See, e.g.*, 25 U.S.C. § 1911 (confirming tribal court jurisdiction and providing for full faith and credit to acts of Indian tribe).

c. In Enacting ICWA, Congress Balanced the Interests of Indian Tribes, States, and the Federal Government

ICWA does not oust states of their authority over domestic relations in the manner Plaintiffs suggest. Rather, ICWA is the culmination of Congress's efforts to balance states' interests in child-welfare proceedings occurring in their states with the federal government's interests in ensuring Indian families' and tribes' interests are adequately accounted for within those proceedings.

[12] In 1890, tribal Indians had not yet been granted U.S. citizenship, and would not have been understood be encompassed in this recognition of state authority. 43 Stat. Ch. 233, p. 253.

Congress's Indian affairs authority extends not only to matters relating to the domestic relations and sovereignty of tribes, but also to these subjects as they pertain to state-tribal relations. From the earliest days of our Nation, Congress has exercised its Indian affairs power to protect Indian tribes from the actions of non-Indians, including states.[13] Early treaties between the United States and tribes concerned all aspects of tribal intercourse with non-Indians (including states), as did the series of Non-Intercourse Acts that Congress regularly passed through 1802. *See* Act of 1790 (July 22, 1790); Act of 1793; Act of 1796; Act of 1799; Act of 1802; Act of 1817, Act of 1834, codified in part at 25 U.S.C. § 177. The aim of these measures was to build peaceful relations and "prevent unfair, improvident, or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress," *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996), and to maintain a system of federal and tribal criminal jurisdiction over Indians. Congress has continued in its role of overseeing state and tribal relations to the present day, including in the area of child welfare. *See, e.g.*, 42 U.S.C § 655(f) (amending Title IV-D of the Social Security Act to authorize direct payments to tribes that demonstrate the "capacity to operate a child support enforcement program meeting [program] objectives"); 45 C.F.R. § 302.36(a)(2) (requiring State IV-D programs to "extend the full range of services available under its IV-D plan to . . . [a]ny Tribal IV-D program").

In ICWA, Congress expressly balanced the interests of federal, state, and tribal governments, noting that the statute does not "oust the States of their traditional jurisdiction over Indian children falling within their geographical limits," H.R. REP. NO. 95-1386, at 19, but rather only provides minimum standards for state courts to follow where state law is not equally or more protective. Congress concluded, however, that it could impose standards and procedures to be followed by state courts in order to protect the substantive rights of all Indian children, relying

[13] Nor does Congress lose this authority simply because a state also has jurisdiction over a group of Indians. *See, e.g.*, *John*, 437 U.S. at 653-54 (although Choctaw Indians who remained in Mississippi became state citizens, Congress retained power "to deal with them" including by the exercise of federal criminal jurisdiction).

in part on the Supreme Court's holdings that local forms of practice may not be applied to defeat a federal right. *Id.* at 18 (citing, *inter alia*, *Brown v. Western Ry. Co.*, 338 U.S. 294 (1949)); *see also Testa v. Katt*, 330 U.S. 386 (1947). Thus, ICWA balances the federal interest in protecting the integrity of Indian families and Indian tribes with the states' interest in child-welfare matters.

2. ICWA and the Final Rule Do Not Commandeer States.

Count Three also alleges that ICWA violates the Tenth Amendment because it commandeers states to enforce a federal regulatory program. The anti-commandeering doctrine, as the Court just recently re-emphasized, serves three important interests, all of which are exemplified by ICWA. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018). First, it is not designed to protect states but rather to establish a balance between states and the federal government that protects the people subject to the governance of both: "the Constitution divides authority between federal and state governments for the protection of individuals." *Id.* Here, ICWA "protect[s] the best interests of Indian children" and promotes the "stability and security of Indian tribes and families" by establishing "minimum Federal standards" that apply to proceedings involving "the removal of Indian children from their families" and their placement elsewhere. 25 U.S.C. § 1903. ICWA protects Indian children in the context of state proceedings that, Congress found, otherwise had operated in disregard of an Indian child's important connections to their parents, extended family, and tribe. *Id.* at § 1901(5). Second, "the anticommandeering rule promotes political accountability," *Murphy*, 138 S. Ct. at 1477, by ensuring that the benefits or burdens of law are traceable to either the federal or state government. ICWA establishes federal standards that apply in state court proceedings, rather than a requirement that states enact such standards, and in doing so, lets "[v]oters . . . know who to credit or blame" for those minimum federal standards. *Id.* Third, "the anticommandeering principle prevents Congress from shifting the costs of regulation to the States." *Id.* ICWA does not require states to enact a new regulatory program—as Plaintiffs assert, states already conduct

child-welfare proceedings. ICWA simply provides federal law to apply to the extent those proceedings implicate a federal interest—the welfare of Indian children and tribes.

Under the anti-commandeering doctrine, the federal government may not "command[] state legislatures to enact or refrain from enacting state law." *Id.* at 1478; *see also New York,* 505 U.S. at 161 ("Congress may not simply commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." (internal quotation marks omitted)). Nor may it "circumvent that prohibition by conscripting the State's officers directly." *Printz*, 521 U.S. at 935. But, where a federal law "applie[s] equally to state and private actors," there is no anti-commandeering problem. *Murphy,* 138 S.Ct. at 1479. For example, a federal law regulating how state motor vehicle departments may disclose personal information in their databases was not direct regulation of state agencies because it also applied to "private resellers or redisclosers of that information in commerce." *Reno v. Condon*, 528 U.S. 141, 151 (2000). And where a federal law entails state agencies' time and effort to ensure compliance, that in itself does not raise an anti-commandeering problem: "That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect." *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988).

In *Murphy,* the Court took pains to distinguish when federal legislation unconstitutionally commandeers state legislatures by prohibiting the enactment of certain kinds of laws, and when federal legislation permissibly preempts state law that conflicts with federal law. Indicia of the latter permissible kind are statutes that "confer . . . federal rights on private actors" or that provide a right of action, private or otherwise, against a party violating the federal law. *Id.* at 1481. ICWA falls squarely in this latter category because it protects Indian children, families, and tribes, and provides all three with federal rights. *See, e.g.,* § 1911(c) ("Indian custodian of the child and the Indian child's tribe shall have a right to intervene"); § 1912(a) ("party seeking foster care placement of, or termination of parental rights" obliged to notify parent or Indian custodian and tribe of proceedings); § 1912(c) ("Each party to a foster care placement or

termination of parental rights proceeding . . . shall have the right" to examine documents filed with the court); § 1912(d) ("Any party seeking" foster care placement or termination of parental rights obliged to demonstrate "active efforts have been made to . . . prevent the breakup of the Indian family"); § 1913 (parental rights in cases of voluntary consent to termination of parental rights or foster care placement); § 1914 (right of action for "Indian child . . . any parent or Indian custodian . . . and the Indian child's tribe" to petition court for redress of violations of ICWA).

Other provisions establish legal standards to be followed where courts are making decisions affecting the rights of the Indian children, their parents, and tribes.[14] But this is no anomaly: the Supreme Court has repeatedly reaffirmed the "power of Congress to pass laws enforceable in state courts." *New York*, 505 U.S. at 178; *Testa*, 330 U.S. at 394; *F.E.R.C. v. Mississippi*, 456 U.S. 742, 760-61 (1982). As the Supreme Court recognized, statutes enacted by the very first Congress established "that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907. As *Murphy* explains, even where the "language" of a federal statute "might appear to operate directly on States," the real question is whether the law at issue "confers on private entities . . . a federal right." *Murphy*, 138 S. Ct. at 1480. ICWA meets this standard.

Like every federal law weighed in state courts, the availability of different causes of action, rights, and legal arguments may alter specific proceedings before the court, but this does not constitute impermissible commandeering. ICWA does not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."

[14] In this regard, ICWA follows a long line of statutes in which the federal government establishes rights that states must respect. *See, e.g.*, Fair Housing Act, P.L. 90-284, 82 Stat. 73 (prohibiting discrimination in the sale or rental of most housing); Voting Rights Act of 1965, P.L. 89-110, 79 Stat. 437 (temporarily suspending literacy tests and voter disqualification devices); Civil Rights Act of 1960, P.L. 86-449, 74 Stat. 86 (requiring, *inter alia*, that voting and registration records for federal elections be preserved); Civil Rights Act of 1875, 43 Cong. Ch. 114, March 1, 1875, 18 Stat. 335 (barring discrimination in public accommodations; prohibiting exclusion of African Americans from jury duty).

Printz, 521 U.S. at 935. ICWA neither creates the underlying child-custody proceedings nor compels an outcome. It merely provides standards that may apply in those cases, and the State, when it is a party to a proceeding, must comply with those standards, just as any party must adhere to the governing legal standards in a court proceeding. Thus, this case is unlike the statute at issue in *Printz*, since it does not command the state executive to take action but rather imposes "an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." 521 U.S. at 907. That state agencies and courts may need to devote some effort to comply with ICWA's standards is "an inevitable consequence of regulating a state activity" but does not violate the Tenth Amendment. *South Carolina*, 485 U.S. at 514-15.[15]

Plaintiffs' suggestion that Sections 1915(c), 1917, and 1951, which preserve records related to child-custody proceedings, are "ministerial" and therefore commandeer state courts is also unavailing. *See* ECF No. 74 at 45. Child-custody proceedings are a "quintessentially adjudicative task" such that, as the Supreme Court has observed, "it is unreasonable to maintain that the ancillary functions of recording, registering, and certifying the [associated] applications [are] unalterably executive rather than judicial in nature." *See Printz*, 521 U.S. at 908 n.2.[16]

Finally, Count Three alleges a number of provisions of the Final Rule offend the Tenth Amendment. The Final Rule does not violate the anti-commandeering doctrine for the same reason that ICWA does not. Indeed, some of the challenged provisions merely reiterate ICWA's own requirements. SAC ¶¶ 302, 304, 306. As for other provisions which do more than reiterate

[15] Plaintiffs' Guarantee Clause Claim (SAC ¶¶ 315-16) fails similarly because it too requires a holding that federal rights may not be enforced in state courts, contrary to the authorities cited in this discussion.

[16] Plaintiffs' third count also alleges Equal Footing and Full Faith and Credit claims (SAC ¶¶ 310-313). Plaintiffs allege Congress may not require states to substitute tribal law for state law. ICWA does not substitute anything for state law. ICWA preempts state law to the extent it conflicts with the federal law provisions of the statute but does not replace state law with either federal or tribal law provisions. *See Murphy*, 138 S. Ct. at 1479-81 (distinguishing the preemption of state law by federal law regulating or conferring rights on private actors from federal laws directing state legislatures to enact or not enact laws).

ICWA's requirements, they are in the nature of "clarifications," elaborating how ICWA should be implemented based on agency expertise and authority. 81 Fed. Reg. at 38,789; *see EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603 (2014) ("We routinely accord dispositive effect to an agency's reasonable interpretation of ambiguous statutory language."). The Final Rule does not order state judges to follow agency commands; instead it reasonably interprets ambiguities and silences in ICWA and is entitled to deference by the Courts.[17]

C. Section 1915(c) Does Not Offend the Non-Delegation Doctrine

Count Seven alleges that that Section 1915(c) of ICWA is an unconstitutional delegation of Congress's legislative power to tribes. SAC ¶ 372.[18] The non-delegation doctrine bars Congress from delegation of legislative authority. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Nonetheless, the Court's "jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Accordingly, Congress can delegate decision-making authority to federal agencies without offending the doctrine, *Whitman*, 531 U.S. at 463-64 (unanimously reversing D.C. Circuit finding that Clean Air Act violated the non-delegation doctrine), and delegations to private entities have also been upheld. *See A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (delegating authority to miners regarding regulation of mining claims). This includes the authority to delegate to other sovereigns, such as states and tribes. As the Supreme Court noted in a challenge involving a delegation to state legislatures: "if Congress has power to delegate to a

[17] Plaintiffs allege that provisions of the Social Security Act, 42 U.S.C. §§ 622(b)(9) and 677(b)(3)(G), commandeer states by requiring them to comply with ICWA in order to receive funding. SAC ¶ 309. But these provisions were passed pursuant to the Spending Clause, U.S. Const., art. 1, § 8, cl. 1, and "Congress may offer funds to the States, and may condition those offers on compliance with specified conditions." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 537 (2012). States are free to decline to accept these funds if they do not wish to abide by the associated requirements.

[18] Count Seven also alleges the Final Rule's Section 23.130(b) is an unconstitutional delegation of regulatory power. That provision, however, just reiterates ICWA's Section 1915(c).

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." *Butte City Water Co. v. Baker*, 196 U.S. 119, 127 (1905). Only twice in its history, and not since 1935, has the Supreme Court invalidated a statute on the ground of excessive delegation of legislative authority. Since then, the Court has narrowly construed the non-delegation doctrine and has consistently upheld congressional enactments containing broad conferrals of decision-making authority. *Whitman*, 531 U.S. at 475-76; *Mistretta*, 488 U.S. at 379; *Yakus v. United States*, 321 U.S. 414, 427 (1944).

Section 1915 establishes ICWA's preferences for adoptive, preadoptive, and foster care placements, absent good cause to the contrary. The baseline preferences are established in Sections 1915(a) and (b), while Section 1915(c) allows refinement of the baseline preferences by individual tribes with respect to their Indian children, as well as consideration of the preference of the Indian child and her parents:

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

25 U.S.C. § 1915(c). This provision is a means by which Congress's standards, established in Sections 1915(a) and (b) can be modified to account for "local customs or rules," *Schecter*, 295 U.S. at 537; in this case, those of the child's tribe, parents, or the child. This is a common sense way of ensuring that ICWA's preferences can be modified to suit the customs, culture, and needs of those most intimately involved in child-welfare proceeding, rather than authority to depart wholesale from ICWA's preferences.[19] The Supreme Court has recognized, in the context of

[19] As discussed above, in enacting ICWA, Congress balanced the interests of federal, state, and tribal governments. H.R. REP. NO. 95-1386, at 19. Congress opted to retain state-court jurisdiction over cases involving Indian children by providing minimum federal standards, rather

non-delegation challenges, Congress cannot be expected "to appraise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

Moreover, Section 1915(c) does not give the tribe the last word on a child's placement—that remains in the hands of the state court. As this Court has noted, legislative authority is not delegated to a private party where the "ultimate authority to reject that [private party] advice" is retained elsewhere. *Texas v. United States*, Civil Action No. 7:15-cv-00151-O, 2018 WL 1478250, at *23 (N.D. Tex. Mar. 5, 2018). *See also Cospito v. Heckler*, 742 F.2d 72, 88 (3d Cir. 1984) (rejecting non-delegation claim where agency, in deciding to decertify a hospital under Medicare following hospital's loss of accreditation by private accreditation commission, nonetheless retained "ultimate authority over decertification decisions"); *Riverbend Farms Inc. v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) (no unconstitutional delegation where Secretary of Agriculture "retains the authority to depart from or ignore [recommendations] altogether").

With regard to foster care placements, a state court defers to the tribe's choice only if the proposed placement is "the least restrictive setting appropriate to the particular needs of the child." 25 U.S.C. § 1915(c). And in the case of adoptive or foster care placements, "the court would still have the power to determine whether 'good cause' exists to disregard the tribe's order of preference." *Adoptive Couple*, 570 U.S. at 655 n. 11. Moreover, Section 1915(c) requires consideration of the preferences of the parents and, where appropriate, the Indian child as well, leaving the tribe's expressed order of preference one among many factors the court considers in placing a child. Accordingly, at the end of the day, a tribe cannot dictate the placement of its children—that ultimate authority remains in the hands of the state courts.

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than broadening existing tribal court jurisdiction, federalizing the process, or otherwise limiting the role of states. That choice, however, necessitated a mechanism that allowed tribes to modify the preferences to accommodate differing notions of kinship. *See Windsor*, 570 U.S. at 764–65 (recognizing the "general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt.")

Because Section 1915(c) is not a delegation of legislative authority to tribes but rather a mechanism by which tribal preferences for their own children can be placed before a court for consideration, the United States should be granted summary judgment on Count Seven.[20]

D. Plaintiffs' Equal Protection Challenge Fails as a Matter of Law

Count Four of the Complaint alleges that Section 1915(a) and (b) of ICWA (foster-care and adoptive placement preferences) and that the regulations implementing those provisions violate the Equal Protection Guarantee of the Fifth Amendment.[21] Plaintiffs seek a declaration that Section 1915(a) and (b) are unconstitutional and unenforceable, and an "injunction barring Defendants from implementing or administering that provision by regulation, guideline, or otherwise." SAC ¶ 338. As with all their constitutional claims, this is a facial challenge to these provisions, and Plaintiffs cannot satisfy their heavy burden.

Their argument is based on the bare assertion that "ICWA's classification of Indians . . . is based on race and ancestry" and thus violates the "constitutional guarantee of equal protection." SAC ¶ 331. This is incorrect as a matter of law. Federal laws addressing "Indians" have existed since the founding of this Nation, and have been repeatedly upheld by the Supreme Court and the lower courts. This is because, as the Supreme Court has articulated in several cases, such classifications refer to a political—not a racial—group. *Mancari*, 417 U.S. at 535. This reasoning holds true for ICWA's placement preferences, which are predicated on non-race-based factors such as a familial relationship with the child, a political affiliation with the child's

[20] Plaintiffs also allege the Final Rule violates the non-delegation doctrine insofar as it states that a "State court may not substitute its own determination" for that of a tribe's on the question of who is a member of the tribe. 25 C.F.R. § 109(b); SAC ¶ 373. Recognizing a tribe's authority to determine its own membership is not an unconstitutional delegation of legislative power but an established principle of federal Indian law. *Santa Clara Pueblo*, 436 U.S. at 72 n.32 ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.").

[21] The relief requested in Count Four is a declaration that Sections 1915(a) and (b) violate equal protection principles. SAC ¶ 338. The Count also includes allegations by individual plaintiffs related to the collateral attack provisions, 25 U.S.C. 1913(d) and 1914, but the States do not allege any impacts from these provisions or bring any challenge to them. *See* SAC ¶ 336. They are thus not addressed in this motion.

tribe or another Indian tribe, or holding a license from a tribal government. Thus, the placement preferences must only "be tied rationally to the fulfillment of Congress's unique obligation[s] to the Indians." *Id.* at 555. The preferences, which were designed to promote the retention of children within their tribe and have been characterized by the Supreme Court as "the most important substantive requirement imposed on state courts," *Holyfield*, 490 U.S. at 36-37, by ICWA, easily meet this standard. Summary judgment should be granted to Defendants on Count Four.

1. Classifications of Tribal Indians are Political, Not Racial in Nature

The States challenge ICWA's placement preferences, Section 1915(a) and (b), on the basis that they are a "discriminatory framework against potential foster and adoptive parents who wish to care for Indian children." SAC ¶ 336. This claim turns on their assertion that ICWA's classifications, which are based on membership in a federally-recognized Indian tribe, are racial. The Supreme Court has consistently rejected this argument, and it is flatly inconsistent with the Constitution and 230 years of federal law (now comprising the entire Title 25 of the U.S. Code).

It is well-established that federally recognized Indian tribes are "'separate sovereigns pre-existing the Constitution'" that exercise "'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty*, 134 S. Ct. 2024, 2030 (2014) (citing *Santa Clara Pueblo*, 436 U.S. at 56 and *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Tribes are expressly referenced as sovereigns in the Constitution. *See* U.S. CONST. art. I, § 8 (granting Congress the authority to regulate commerce "with the Indian tribes"); art. I, § 2 (excluding "Indians not taxed"); Amend. XIV, § 2 ("excluding Indians not taxed"). Since "the settlement of our country," Indian tribes "have been uniformly treated as a state," albeit different from U.S. states or foreign nations. *Cherokee Nation*, 30 U.S. at 12. Tribes are political entities—not racial groups.

The Supreme Court has flatly rejected Plaintiffs' argument that federal laws providing for "special treatment" of Indians, enacted in furtherance of "Congress' unique obligation toward the

Indians," are based on a racial classification. In *Mancari*, 417 U.S. 535, a unanimous Supreme Court rejected a constitutional challenge to an Indian government-employment preference because it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id*. at 554; *id.* at 553 n.24 ("The preference is political rather than racial in nature."). The Court based its holding on tribes' unique legal status under federal law as domestic, dependent nations, and upon Congress's plenary power to "single[] Indians out as a proper subject for separate legislation." *Id*. at 551-52; *see also Worcester*, 31 U.S. at 519 (Indian nations are "distinct, independent political communities, retaining their original natural rights," and the United States may regulate relations with the tribes). Thus, as "long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed." *Mancari*, 417 U.S. at 555.

The Supreme Court elaborated on these principles in *United States v. Antelope*, 430 U.S. 641, 646 (1977), confirming that they apply even when Indians assert that they are burdened, not benefitted by, the federal law in question. In *Antelope*, the Court rejected an equal protection challenge by two tribal members to the application of federal criminal law, rather than the more lenient state law, to crimes committed by Indians in Indian country. The Court explained:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as the subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal government's relations with Indians.

Id. at 645. Moreover, *Antelope* establishes that *Mancari* is not a narrow holding that is limited to the *sui generis* context of the Bureau of Indian Affairs; rather, it stands more broadly for "the conclusion that federal regulation of Indian affairs is not based upon impermissible racial classifications" but rather "is rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Id.* at 646.

The Supreme Court's opinions in *Mancari* and *Antelope* speak in broad terms, and are not limited to the particular law under review. The foundation of the *Mancari* Court's analysis is

the recognition of the "unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." 417 U.S. at 551. This applies to a range of federal laws, including ICWA, not just the preference at issue in *Mancari.*[22] Indeed, the Court recognized that the principle that Congress may "single[] out Indians for particular and special treatment" in order to fulfill the United States' unique obligation toward the Indians underlies much of federal Indian law and policy. *Id.* at 554-55; *see also id.* at 552 (noting that, if laws targeting tribal Indians "were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized"). The Court also relied on the fact that it had "on numerous occasions . . . upheld legislation that singles out Indians for particular and special treatment." *Id.* at 554-55. The Court cited four cases addressing subjects ranging from federally granted tax immunity to management of trust estates, to tribal court jurisdiction. *Id.* at 555 (citing *Seber*, 318 U.S. 705; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Simmons v. Eagle Seelatsee*, 384 U.S. 209 (1966); *Williams v. Lee*, 358 U.S. 217 (1959)). The Court therefore understood its holding to be part of a line of precedent upholding federal Indian laws with diverse subjects.

[22] Individual Plaintiffs' argue that *Rice v. Cayetano*, 528 U.S. 495 (2000), indicates that *Mancari* has been narrowed or overruled. ECF No. 80 at 57. This is incorrect. *Rice* is distinguishable, as it did not concern a classification related to federally recognized Indian tribes, nor was it decided on equal protection grounds. In fact, *Rice* confirmed the continued vitality of the *Mancari* analysis by acknowledging "[o]f course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs," and reiterating its observation from *Mancari* that "every piece of legislation dealing with Indian tribes and reservations … single[s] out for special treatment a constituency of tribal Indians." *Id.* at 519 (citing *Mancari*, at 552). And the Court repeated *Mancari*'s holding, that although the employment preference required both one-fourth or more Indian blood and affiliation with a federally recognized tribe, the preference was not directed toward Indians as a racial group but was rather "political . . . in nature." *Id.* at 520 (quoting *Mancari*, 417 U.S. at 553 n.24). Justice Breyer's concurrence similarly "reject[ed] Hawaii's effort to justify its rules through analogy to a trust for an Indian tribe," distinguishing the situation from one involving Congress's powers relating to Indian tribes. *Id. at* 525.

Both the Supreme Court and the courts of appeals have consistently rejected challenges to the different treatment of Indians. *See, e.g., Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 673 n.20 (Supreme Court has "repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians'"); *Fisher*, 424 U.S. at 390-91 (exclusive tribal court jurisdiction over adoption proceedings involving Indians is not racial discrimination); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-80 (1976) (tax immunity for reservation Indians is not racial discrimination); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210. 1216 (5th Cir. 1991) (church that limited membership to "Native American members of federally recognized tribes who have at least 25% Native American ancestry" was a political classification).[23]

The Complaint notes the language in *dicta* in the final paragraph of *Adoptive Couple*, 570 U.S. 637, which noted that certain interpretations of the parental termination provisions (25 U.S.C. 1912(d) and (f)), which are not at issue here, "would raise equal protection concerns." 570 U.S. at 656. But that case does not assist Plaintiffs, as it was decided on statutory interpretation grounds, not equal protection, and specifically focused on the father's lack of custodial rights in that case. 570 U.S. at 647-54. Nor do Plaintiffs explain how a statement made in *dicta* could apply to statutory provisions not before that Court, and in so doing undermine hundreds of years of Supreme Court precedent and congressional enactments. At

[23] *See also United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (*Mancari* applies even if statute involves "disproportionate burdens imposed on Indians"); *Means v. Navajo Nation*, 432 F.3d 924, 931 (9th Cir. 2005) (rejecting equal protection challenge to statute providing tribal criminal jurisdiction over nonmember Indians); *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1340 (D.C. Cir. 1998) (rejecting Tribe's equal protection claim, finding "ordinary rational basis scrutiny applies to Indian classifications"). Individual Plaintiffs also seek to limit Congress's Indian affairs powers to tribal lands, ignoring case law to the contrary. *See, e.g., United States v. Ramsey*, 271 U.S. 467, 471 (1926) ("Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States.").

most, the *Adoptive Couple* decision illustrates the inappropriateness of Plaintiffs' facial challenge to Sections 1915(a) and (b), given that state courts (and the Supreme Court) may consider equal protection arguments in the context of the specific facts before them, and determine whether particular circumstances or statutory interpretations raise unique concerns.[24]

2. ICWA is Based on Political, Not Racial Classifications

The Complaint references Indian "ancestry" or "heritage," *e.g.*, SAC ¶ 84, 212, and State Plaintiffs argue that "ICWA and the Final Rule's focus on ancestry creates race-based classifications." ECF No. 74 at 70. This argument is legally and factually incorrect.

First, the application of ICWA and the placement preference turns solely on a political connection with a federally recognized tribe.[25] ICWA applies to child-custody proceedings involving an "Indian child," which is defined as a child who is enrolled in a federally recognized Indian tribe, or who is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.[26] 25 U.S.C. § 1903(4). The determination of whether a child meets

[24] Numerous state courts have concluded that ICWA does not violate the equal protection guarantee of the U.S. Constitution. *See, e.g.*, *In re K.M.O.*, 280 P.3d 1203, 1215 (Wyo. 2012) (ICWA's standard of proof in case involving off-reservation Indian children did not violate equal protection); *In re Beach*, 246 P.3d 845, 849 (Wash. Ct. App. 2011) (ICWA does not deny off-reservation Indian child equal protection or substantive due process); *In re N.B.*, 199 P.3d 16, 23 (Colo. Ct. App. 2007) (ICWA is constitutional); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003) (transfer provision did not violate equal protection).

[25] Plaintiffs lack standing to assert the claims of either children or parents not before the court, and State Plaintiffs are barred from bringing *parens patriae* suits against the federal government in the manner they purport to do here. *Massachusetts v. E.P.A.*, 549 U.S. 497, 520 n.17 (2007). Moreover, the States' interests are not necessarily aligned with those of Indian children, as demonstrated by the briefs of amici. *See* ECF No. 138 (Amicus brief of 123 Federally Recognized Tribes and Indian Organizations), ECF No. 137 (Amicus brief of Seven States).

[26] Most, if not all, tribes do not confer membership at birth, but require that an individual or their parent submit a formal enrollment application, which must be reviewed and adjudicated by the tribe. Since children do "not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in [a] tribe," H.R. REP. NO. 95-1386 at 17, Congress provided that "Indian child" would encompass children who were not yet members but had two specific political ties to the tribe—a parent's membership, and their own eligibility for membership. Congress found that "the constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical

this definition does not turn on his or her race; rather, the statute only applies to a proceeding if the child has the requisite political connection to a federally recognized tribe. Similarly, "Indian" is defined as "any person who is a member of an Indian tribe or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43." 25 U.S.C. § 1903(3).

Plaintiffs suggest that the fact that many tribes include ancestry among their membership requirements makes the classification a racial one. ECF No. 74 at 71. But the *Mancari* Court recognized that the political relationship of the United States with Indian tribes is inextricably bound up in the status of those tribes as sovereigns predating the formation of the United States, and tribal members are therefore typically descendants of the indigenous peoples of this country.[27] 417 U.S. at 552-53; *see also* 25 C.F.R. § 83.11 (federal acknowledgment as an Indian tribe requires "membership consist[ing] of individuals who descend from a historical Indian tribe"). Per *Mancari*, this does not transform the portions of the Constitution or statutes that single out Indians for special treatment into racial or ethnic discrimination.

Although specific requirements vary by tribe, *see Santa Clara Pueblo*, 436 U.S. at 55-56, tribal membership is often based on demonstrating a connection, through factors that may include descendancy, with the political entity recognized by the federal government, such as by demonstrating a connection with an individual on a roll or list that was recognized by the federal government as representing the members of the tribal sovereign. *See, e.g., Stephens v. Cherokee Nation*, 174 U.S. 445, 455, 462 (1899) (discussing statute establishing commission to compile "a complete roll of citizenship of each of said nations [in the Indian territory]"). The Ysleta Del Sur Pueblo enrollment requirements are a clear example of this, as Congress by statute in 1987

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process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity." *Id.*

[27] Indeed, the Supreme Court has suggested that Congress could not "bring a community or body of people within the range of [its Indian affairs] power by arbitrarily calling them an Indian tribe"; rather, there must be some connection with "distinctly Indian communities." *United States v. Sandoval*, 231 U.S. at 46-47.

restored recognition of the Tribe, but also required that the membership of the tribe consist of individuals on an approved tribal roll, and their descendants. Pub. L. No. 100-89, § 108(a) (Aug. 18, 1987). For the Cherokee Nation, citizenship is limited to "original enrollees or descendants of original enrollees listed on the Dawes Commission Roll."[28] *See* Cherokee Nation Constitution, Art. IV, Section 1. And the White Earth Nation is similar, requiring a connection through descendancy to "the annuity roll of April 14, 1941, prepared pursuant to the Treaty with said Indians as enacted by Congress in the Act of January 14, 1889 (25 Stat. 642)." Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Minnesota, Art. II, Section 1.

Jus sanguinis—determining eligibility for citizenship based on having an ancestor, such as a parent or grandparent, who was a citizen of a nation—is hardly unusual or suspect. The United States does it: a child born outside the United States is nonetheless eligible for citizenship if one or both parents are U.S. citizens (provided certain conditions are met). 8 U.S.C. §§ 1431, 1433. And many other countries also grant citizenship rights based on descent. *See, e.g.*, Nick Petree, *Born in the USA: An All-American View of Birthright Citizenship and International Human Rights*, 34 Hous. J. Int'l L. 147, 154, n.49 (2012) (listing countries that use citizenship by descent). This illustrates that while "ancestry *can be* a proxy for race," it is not so in every circumstance, and is not so here. *See Rice*, 528 U.S. at 514 (emphasis added). Indeed, Justice Breyer's concurrence in *Rice* specifically contrasted the classification at issue there ("anyone with one ancestor who lived in Hawaii prior to 1778") with tribal membership requirements, noting that they generally defined membership "in terms of having had an ancestor whose name appeared on a tribal roll—but in the far less distant past." 528 U.S. at 526. The status of an ancestor—a parent, grandparent, or beyond—can be relevant to citizenship and other inquiries, without raising equal protection concerns. That is the case with tribal membership.

[28] Individuals who are descendants of the Cherokee Nation's freed slaves, and who were listed on the Dawes Roll, are also entitled to tribal citizenship pursuant to an 1866 treaty between the United States and Cherokee Nation. *See Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 139-40 (D.D.C. 2017).

Indian status also differs from racial classifications in other ways. Tribal membership, unlike race, is obtained through the affirmative choice of the individual (or their parent), and can also be relinquished. *See, e.g.*, 1 Navajo Nation Code § 751 (requiring a verified application for enrollment); *id.* § 705 (providing that "any enrolled member of the Navajo Nation may renounce his membership by written petition to the President of the Navajo Nation"). Furthermore, many individuals who might have Native American heritage are not eligible to be citizens of a tribe. If an individual cannot meet the tribe's membership criteria, he cannot become a tribal member, whatever his "racial" makeup or self-identity. *See Santa Clara Pueblo*, 436 U.S. at 55-56 (tribes have "power to make their own substantive law in internal matters" including membership (citing *Roff v. Burney*, 168 U.S. 218 (1897)).

And, tribal control over membership criteria, and membership eligibility determinations, also demonstrates that even if those requirements are viewed as involving ancestry or "racial" elements, it is the tribes—not the federal government—that are establishing those standards.[29] Federal law defers to tribal citizenship determinations made by these sovereigns, and does not distinguish based on race, ethnicity, ancestry, or any other prohibited basis, much as the federal government would not second guess whether the citizenship criteria of other nations improperly relies on ancestry. Indian status, including the definitional terms in ICWA's placement preferences, is a political, not a racial classification.[30]

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[29] In contrast, Plaintiffs suggest that state courts should evaluate whether a child has sufficient cultural or other ties to a tribe, such as by residing on Indian lands. But this test, which would require state-court judges to engage in a free-form evaluation of the "Indian-ness" of a particular child, presents far greater equal-protection concerns than a straightforward determination of whether the child meets the definition of Indian child in the statute. In other contexts, the United States does not subject citizens of other Nations to the sort of ad hoc tests proposed by Plaintiffs. Under any circumstances, it is difficult to imagine a stronger connection to a tribe than to be one of its citizens.

[30] As plaintiffs recognized, federal law prohibits discrimination based on "race, color, or national origin, 42 U.S.C. § 1996b(1), but also provides that this prohibition "shall not be construed to affect the application of the [ICWA]." *Id.* § 1996b(3). That Congress phrased this qualification as a *rule of construction*, not an exception, reinforces the conclusion that it views ICWA as drawing political, not racial distinctions.

3. ICWA and the Placement Preferences are "Tied Rationally to the Fulfillment of Congress's Unique Obligation toward the Indians"

Mancari requires that legislation singling out Indians for "particular and special treatment" "be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." 417 U.S. at 554-55. If the legislation meets this standard, Congress's "legislative judgments will not be disturbed." *Id.* at 555. As the Supreme Court has repeatedly recognized, from treaties and the federal government's course of dealing with the tribes, "there arises the duty of protection, and with it the power." *Kagama*, 118 U.S. at 384; *see also Seber*, 318 U.S. at 715; 25 U.S.C. § 5302(b) (declaring commitment of Congress "to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole").

ICWA expressly relies on this Federal responsibility. It cites "the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people," and is based on Congress's finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3); *see also* H.R. REP. NO. 95-1386, at 13-15 (discussing Congress's plenary power over Indian affairs, finding that "a tribe's children are vital to its integrity and future"). Put simply, if the children of a tribe were removed from their parents and the children's ties to their tribe severed, the tribe would cease to exist.

Congress was concerned about "the wholesale separation of Indian children from their families"—what Congress termed a "crisis [] of massive proportions," and sought to address the problem by confirming tribal jurisdiction over child-welfare cases, and providing federal standards for those that remain in state court. H.R. REP. NO. 95-1386, at 9. Congress received substantial evidence and testimony that tribes were being decimated by the removal of their children by state and private agencies and the placement of those children in non-Indian homes. *See Holyfield*, 490 U.S. at 32-35; S. REP. NO. 95-597, at 11-13 (1977). Congress observed that

most of these removals were not based on physical abuse, but on, among other things, the discovery of "neglect or abandonment where none exists." H.R. REP. NO. 95-1386, at 9-10. Congress also concluded that Federal policies towards Indian tribes—in particular, the "Federal boarding school and dormitory programs"—"also contribute[d] to the destruction of Indian family and community life." *Id.* at 9; *see also id.* at 12.

Contrary to the States' assertions, the establishment of minimum federal standards to protect tribal authority and prevent the widespread and often unwarranted removal of Indian children from their homes and tribes falls squarely within Congress's authority with respect to tribes. The protection of a tribe's *children*—its current and future citizenry—is a core element of protecting the tribe itself.[31] ICWA, and the placement preferences more specifically, increase the likelihood that, if an Indian child's biological parents are unable to care for him or her, that the child be placed in foster or adoptive care with his or her extended family, or with another tribal member, thus allowing the child to be raised within the tribal community and culture. This meets the standard that the Fifth Circuit applied in *Peyote Way*, where it held that a federal exemption "allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture" which is "fundamental to the federal government's trust relationship with tribal Native Americans." *Peyote Way*, 922 F.2d at 1216. ICWA too is rationally related to preserving tribes and their cultures, by protecting the ability of tribal children to be raised, if possible, within their family or the tribe. ICWA meets the *Mancari* standard because it is expressly designed to support tribal status, self-government, and culture, and is directly tied to Congress's "unique obligation to the Indians."

[31] The welfare of tribal children has long been a subject of treaties, federal legislation, and federal action. *See, e.g.*, Treaty with the Chippewa, art. 6, 7 Stat. 290 (Aug. 5, 1826); Treaty with the Menominee, art. 5 7 Stat. 342 (Feb. 8, 1831); Civilization Fund Act, Pub. L. 15-85, 3 Stat. 516b (Mar. 3, 1819) (providing federal funds to schools designed to educate Native American children); 25 U.S.C. § 302 (1906 statute authorizing an "Indian reform school," and providing "that the consent of parents, guardians, or next of kin shall not be required to place Indian youth in said school").

4. Sections 1915(a) and (b) are Political Classifications Directly Tied to Congress's Unique Obligation toward the Indians

Against this framework, the specific challenged ICWA provisions are addressed in turn.

a. Section 1915(a)—Adoptive Placement Preferences

Section 1915(a) provides: In any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. These preferences do not raise equal protection concerns because they do not classify based on race, and are rationally tied to Congress's unique obligation toward the Indians.

First, these are preferences, not mandates. State courts retain discretion to find that there is "good cause" to place a child outside the preferences. 25 U.S.C. § 1915(a). And in many cases, no "preferred placement" has come forward, and thus the preferences do not apply. *See, e.g., Adoptive Couple*, 570 U.S. at 654 ("[T]here simply is no 'preference' to apply if no alternative party who is eligible to be preferred under § 1915(a) has come forward."); *see also* H.R. REP. NO. 95-1386, at 23 ("This subsection and subsection (b) establish a Federal policy that, where possible, an Indian child should remain in the Indian community, but is not to be read as precluding the placement of an Indian child with a non-Indian family.").

The first preference, for placement with members of the child's extended family has no racial or tribal element at all. Indeed, similar preferences for consanguinity are often applied by states independent of ICWA. *See* HHS, Placement of Children with Relatives, available at https://www.childwelfare.gov/pubPDFs/placement.pdf (last visited May 22, 2018). This preference applies to all extended family members who can meet state standards as a safe and appropriate placement. It would apply equally to a child's non-Indian grandmother as it would to relatives who are tribal members. Preferences for placements with a child's relative are not unique to ICWA, and are part of many states' laws. Relative placements are also encouraged by federal law. 42 U.S.C. § 671(a)(19) ("[T]he state shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child."). ICWA's

preferences for family placements are thus not based on race or tribal status, and federal and state efforts (including through ICWA) to encourage kinship placements for a child are certainly not "invidious discrimination."

The second adoptive preference is for placements with other members of the child's tribe. This, too, is entirely unrelated to the race of the placement; rather, it turns on their political affiliation with the child's tribe. Individuals of Native American heritage who lack membership in a federally recognized tribe do not qualify for the preference. It is thus, like the preference considered in *Mancari*, "not even a 'racial' preference." 417 U.S. at 553. Rather, the preference is rationally tied to fulfillment of Congress's "obligation toward the Indians," *id.* at 554-55, and helps ensure that Indian children are not unnecessarily removed from their extended families and tribal community and polity, and "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and the tribe in retaining its children in its society." H.R. REP. NO. 95-1386, at 23.

The third adoptive placement preference is for "other Indian families."[32] Again, this term describes a political, not a racial group. ICWA defines "Indian" as "any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43." 25 U.S.C. § 1903(3). Thus, an individual or family would not qualify as an "Indian family" and thus be eligible for the preference unless at least one adult in the household is a tribal member. The race of the potential placement is not relevant to the state court's inquiry, only their political status as a member of an Indian tribe. For the reasons discussed above, this is a political, not a racial, classification.

This preference also passes rational basis review. *Mancari*, 417 U.S. at 555. Congress reasonably concluded that placements in the homes of members of other tribes will, in most cases, better promote the ongoing political and cultural connection of Indian children with their

[32] ICWA's adoptive preferences are comparable to provisions the United States has enacted to ensure that a search is made for domestic placements prior to permitting foreign adoptions. *See* 42 U.S.C. § 14932(B) (agency must make reasonable efforts to actively recruit and make a diligent search for prospective adoptive parents to adopt the child in the United States).

tribes, as well as the ongoing viability of the tribes themselves. Many tribes have close historic political and cultural connections, and may only be considered separate federally recognized tribes through historic events or the decisions of the Federal government. For example, the White Earth Band of Ojibwe is one of six component bands of the Minnesota Chippewa Tribe; a placement of a White Earth child with a member of one of the other bands would facilitate the child's political and cultural connection with the White Earth Band as well.[33]

Moreover, Congress has the authority to enact legislation addressing "Indians" as a group, even though there are 573 separate federally recognized tribes. Indeed, most of Title 25 speaks in terms of "Indians" and "Indian tribes" broadly. For example, tribes have the authority to prosecute criminal misdemeanors committed by Indians, including members of other tribes, within Indian country under their jurisdiction. 25 U.S.C. § 1301; *Lara*, 541 U.S. at 209; *Means*, 432 F.3d at 934 (25 U.S.C. § 1301 does not violate equal protection principles, because it "subjects [plaintiff] to Navajo criminal jurisdiction not because of his race but because of his political status as an enrolled member of a different Indian tribe"). Since the adoptive placement preferences "can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians," Congress's "legislative judgment" should "not be disturbed." *See Mancari*, 417 U.S. at 555.

b. Section 1915(b)—Foster Care and Preadoptive Placement Preferences

Section 1915(b) first instructs that children should be placed in a foster care or preadoptive placement "which most approximates a family and in which his special needs, if any, may be met," as well as "within reasonable proximity to his or her home, taking into account any special needs of the child." Within these confines, Section 1915(b) provides a preference,

[33] In addition, Congress recognized that a child may be eligible for membership in more than one tribe. *See* 25 U.S.C. § 1903(5). The third preference would encourage placement in another tribe where the child is eligible for membership, even if that tribe was not determined by the court to be the "Indian child's tribe" under 25 U.S.C. § 1903(5).

> [I]n the absence of good cause to the contrary, to a placement with (1) a member of the Indian child's extended family; (2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

As discussed above, these preferences do not prevent placement of a child with a non-Indian family.

In addition, the first preference for placement with a child's own family is not based on race or tribal membership, and does not violate equal protection principles. The second preference, for a foster home licensed or approved by the child's tribe, does not classify on the basis of race or even, necessarily, on tribal affiliation. Tribes may license foster homes that do not include tribal members. *See, e.g.*, https://www.nvbarrow.com/doc/Foster_Care_Standards_-_Final_A.pdf (Native Village of Barrow foster care provider eligibility requirements, which do not include tribal membership). Thus, this preference is simply for placements identified and licensed by a specific government. Congress rationally determined that the child's tribe would be best-positioned to identify suitable foster-care placements.[34]

The third foster-care placement preference is for Indian foster homes licensed by a non-Indian foster care licensing authority (e.g., a state or local government). As noted, the term "Indian" is clearly defined in the statute as meaning members of a tribe, and is thus a political classification. Congress rationally determined that foster-care in the home of a tribal member would best effectuate its legitimate goal of retaining Indian children's connections to their tribes. The final preference is for institutions approved by an Indian tribe or run by an Indian organization. *See* 25 U.S.C. § 1903(7) (defining Indian organization). Again, this preference is based on the political status as tribal members of the owners of the organization, and Congress rationally concluded that a foster-care institution run by tribal members would, in many cases, better facilitate a child's connection with their tribe.

[34] Congress found that "discriminatory standards have made it virtually impossible for most Indian couples to qualify as foster or adoptive parents" but that there "are Indian families within the tribe who could provide excellent care." H.R. REP. NO. 95-1386, at 11.

Plaintiffs, therefore, cannot meet the high bar of demonstrating "that no set of circumstances exists under which" these preferences would be valid. *Salerno*, 481 U.S. at 745. The challenged provisions of ICWA do not violate equal protection principles, and summary judgment on Claim Four should be granted to Defendants.

E. Interior Possesses Authority to Issue Regulations Interpreting Ambiguities within ICWA, and Interior's Interpretation of ICWA in the Final Rule is Reasonable and Entitled to Deference

Count One of the Complaint alleges that the Final Rule violates the APA, wherein Plaintiffs allege that the Final Rule is arbitrary and capricious under several theories, and also allege that the Final Rule is contrary to law claiming certain provisions violate ICWA and certain other provisions of the Final Rule violate the Constitution. State Plaintiffs bring this host of challenges to the Final Rule, despite Texas' formal comment to the proposed Rule, through its Department of Family and Protective Services, that it was committed to both the "letter and spirit of ICWA," ECF No. 57-1 at 8, and despite none of the State Plaintiffs—neither Texas or Indiana or Louisiana—providing any comments raising the concerns with the Final Rule that they now raise in their Complaint. In fact, Indiana and Louisiana declined to comment during the rulemaking process.[35] State Plaintiffs also failed to independently advance any arguments addressing the Final Rule in the briefing on their summary judgment motion, instead relying on the arguments advanced by Individual Plaintiffs. *See* ECF No. 74 at 75, ECF No. 142 at 24.

But even so, Defendants prevail as a matter of law because the Final Rule is a well-reasoned, lawful regulation. After a notice and comment period, Interior promulgated the Final Rule to improve implementation of ICWA and promote a more uniform application of the law. 81 Fed. Reg. 38,778. The Federal Register publication, spanning 100 pages, included thorough responses to comments received by the agency, and provided an analysis of Interior's statutory authority to promulgate the rule and an explanation of why additional regulations were needed.

[35] As argued in Federal Defendants' Motion to Dismiss, ECF No. 57 at 47, State Plaintiffs have waived their ability to challenge the Final Rule by failing to present their objections during the notice and comment period.

In Count One, Plaintiffs assert that the Final Rule is arbitrary and capricious because Interior changed its policy as to the reach and effect of its ICWA regulations. SAC ¶ 256. This allegation ignores that federal agencies "are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Plaintiffs then take issue with Interior's interpretation of the ambiguities within ICWA's Section 1915(a) placement preferences, *see* 25 C.F.R § 23.132 (How is a determination of "good cause" to depart from the placement preferences made?). Particularly, Plaintiffs challenge 25 C.F.R § 23.132(b), which recommends (but does not require) that a state court utilize a clear and convincing evidence standard when applying the good cause exception, and 25 C.F.R § 23.132(c)-(e), which interpret the ambiguous term "good cause" in ICWA. These provisions, Plaintiffs claim, are arbitrary and capricious and contrary to ICWA. SAC ¶ 257. Finally, Plaintiffs incorporate their constitutional challenges to ICWA (Equal Protection, Tenth Amendment, Article I) into their APA challenge to the Final Rule. Plaintiffs' challenges are without merit. The Court should grant summary judgment to Federal Defendants on Count One.

1. Interior Provided a Well-Reasoned Explanation for Promulgation of the Final Rule, Including its Change in Position

Plaintiffs' claim that the Final Rule is arbitrary and capricious primarily rests on their dissatisfaction with Interior's decision to promulgate more thorough regulations in 2016, although the agency declined to do so in 1979. SAC ¶ 256. But Plaintiffs' dissatisfaction with Interior's decision to issue the Final Rule does not translate into an APA violation, and a review of the preamble and the regulation demonstrate Interior provided a well-reasoned explanation for its decision.

In *FCC v. Fox*, 556 U.S. 502 (2009), the Supreme Court made clear that the APA's narrow standard of review—whether an agency's action was arbitrary, capricious, or otherwise contrary to law—is the appropriate standard of review when an agency revises an earlier action or changes its position, just as it is when the agency acts in the first instance. *Id.* at 514–16. The

Supreme Court held that when an agency revises prior action or changes its position, the agency must recognize the change of position and explain it. *Id.* at 515. The agency "need not demonstrate to a court's satisfaction that the reasons for the new [position] are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *Id.*

Plaintiffs' concede that "DOI spelled out" why it thought issuing the Final Rule was "a good idea," ECF No. 143 at 25, and that Interior acknowledged a change in its position, *see id* at 26. This concession satisfies *Fox*'s requirements and should foreclose Plaintiffs' arguments altogether. Instead, Plaintiffs argue that Interior did not "explain why its 1979 construction of the statute was incorrect." *Id.* at 25. But in making such an argument, Plaintiffs confuse the standard. Interior's task was to determine whether the regulations were "permissible under the statute." *Fox*, 556 U.S. at 515.

But under any circumstances, a review of the Final Rule demonstrates that Interior provided a fulsome and reasoned explanation for why it no longer agrees with the agency's prior positions as to its authority to issue such regulations. *See* 81 Fed. Reg. 38,782-90. The Final Rule's Preamble expressly recognizes that in the 1979 Guidelines, the Department made statements "suggesting that it lacks authority to issue binding regulations," 81 Fed. Reg. 38,786, but then explains its decision to reassess the authority issue. First, Interior reviewed its statutory authority. ICWA expressly authorizes rulemaking, stating that, "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." 25 U.S.C. § 1952. Interior interpreted this "expansive language" to "evince[] clear congressional intent that the Secretary will issue rules to implement ICWA." 81 Fed. Reg. 38,785.

Interior also recognized that in 1979, the agency did issue regulations addressing some issues, including notice in involuntary child custody proceedings, payment for appointed counsel, grants to Indian tribes and Indian organizations, and record-keeping and information availability. *Id*. Interior then looked at applicable federal law in determining that Section 1952's general grant of authority authorized the agency to issue rules and regulations addressing other

provisions of ICWA. *Id*. (citing cases, including *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) ("Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated hereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'") and *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013) (finding not "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field")).

Plaintiffs offer no authority, beyond Interior's prior pronouncements that the agency now expressly disavows, to support its assertion that Congress's broad grant of authority to issue regulations is limited as they suggest. If Congress wanted to impose such a limitation, it would have expressly done so. Instead Congress gave Interior broad authority to promulgate rules to "carry out the provisions of this chapter." 25 U.S.C. § 1952. Further, Plaintiffs make no effort to argue that Interior's interpretation of its authority is impermissible under the plain language of Section 1952, only that Plaintiffs disagree with the interpretation.[36] In doing so, Plaintiffs ignore the reasons Interior offered for determining that regulations are both authorized under ICWA and are necessary.

Interior made the decision to reconsider its authority to issue regulations based on thirty-seven years of experience, requests from the public, a notice and comment period that weighed in favor of a different result. 81 Fed. Reg. 38,785. Over that time, state courts have applied some ICWA provisions in an inconsistent and at times contradictory fashion, which Interior determined has impeded Congress's statutory intent. *Id*. at 38,786-87. Interior also found support for issuing regulations in the Supreme Court's decision in *Holyfield* which emphasizes the importance of ensuring ICWA and other federal laws have "uniform nationwide application"

[36] Plaintiffs fail to explain how Interior's promulgation of the Final Rule would violate separation of powers, ECF No. 143 at 26, and Plaintiffs' assertion that Interior does not grapple with principles of federalism are belied by the preamble. 81 Fed. Reg. 38,788-89 (federalism); 38,862 (federalism).

and are not be impaired by state law. *Id.* (quoting 490 U.S. at 43-44). Interior thus reasonably concluded that it should use its rulemaking authority to encourage greater nationwide uniformity, consistent with *Holyfield*.

2. Interior's Interpretation of Ambiguities in Section 1915(a) of ICWA Is Reasonable and Entitled to *Chevron* Deference

As demonstrated above, Interior provided a well-reasoned justification and analysis both as to its authority to promulgate regulations resolving ambiguities in ICWA and to the necessity of issuing regulations. *See* 25 U.S.C. § 1952. As such, the Final Rule is not "procedurally defective" as Plaintiffs contend and Interior is entitled to *Chevron* deference as to its interpretation of ambiguities in ICWA.[37] One such ambiguity, and in fact the only specific provision of the Final Rule that Plaintiffs challenge in their Complaint as contrary to ICWA, is Interior's interpretation of Section 1915(a). The provision provides a preference for adoptive placements, "in the absence of good cause to the contrary," with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. During the rulemaking process, Interior recognized that "the question of what constitutes good cause is a frequently litigated area of ICWA," and as a result, "determined it is important to provide some parameters on what may be considered 'good cause' in order to give effect to ICWA's placement preferences." 81 Fed. Reg. 38,839. Thus, 25 C.F.R. § 23.132 elaborates the factors that might constitute good cause.

Plaintiffs challenge three discrete provisions of Section 23.132. SAC ¶¶ 257-258. They take issue with the following: Section 23.132(b), which states that "the party seeking departure from the placement preferences *should* bear the burden of proving by clear and convincing evidence that there is 'good cause'" (emphasis added); Section 23.132(c), which states that the

[37] In their summary judgment briefing, Plaintiffs argue in a conclusory manner that *Chevron* deference should not apply because Interior lacks expertise in child welfare. To the contrary, Interior has expertise in Indian child and family services programs and child-welfare matters. 81 Fed. Reg. 38,784-85; *id.* 38,787-88 (describing BIA's experience in Indian child-welfare matters).

court's determination of good cause "*should*" be based one or more of five articulated considerations (emphasis added); and Section 23.132(e), which states that "[a] placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." First—and most important—Sections 23.132(b) and 23.132(c) are not articulated in mandatory terms but rather advise a court how they *should* apply "good cause," which on its own obviates Plaintiffs' concerns about those provisions. Moreover, Interior's interpretation of the good cause provision of Section 1915(a) in Sections 23.132(b), 23.132(c), 23.132(e) is reasonable and should be upheld by this Court.

ICWA does not provide any parameters on what constitutes "good cause" under Section 1915(a), and the legislative history only makes reference to "good cause" as being designed to provide state courts "a degree of flexibility" when making certain determinations. S. REP. NO. 95-597, at 17 (1977). Interior determined that its prior statements in the 1979 Guidelines gave "excessive weight" to this statement concerning flexibility, to the extent that the Department then believed that the statement foreclosed "*any* regulatory guidance" on the meaning of "good cause." 81 Fed. Reg. 38,788. After review, Interior concluded that while Congress recognized state courts should have flexibility in determining what constitutes good cause, "Congress intended good cause to be a limited exception, rather than a broad category that could swallow the rule," and that guidance was therefore appropriate. *Id.* at 38,839.

Having found ambiguity in the term "good cause" and sufficient authority to interpret it, Interior articulated five factors "upon which courts may base a determination of good cause to deviate from the placement preferences." *Id*. at 38,839. The five factors that Interior advises a state court to consider are: (1) the request of one or both of the Indian child's parents; (2) the request of the child; (3) the presence of sibling attachment; (4) extraordinary physical, mental or emotional needs of the Indian child; and (5) the unavailability of a suitable placement after the court is satisfied that a "diligent search" was made to find a preferred placement. 25 C.F.R. § 23.132(c)(1)-(5). The Final Rule does not mandate that good cause be based on one of these

factors. Indeed, Interior expressly recognized that its use of non-mandatory terms was intentional, to "leave[] open the possibility that a court may determine, given the facts of an individual case" that good cause may exist "for some other reason." 81 Fed. Reg. 38,839.

Plaintiffs do not challenge Interior's interpretation as unreasonable, but instead argue that "good cause" has an existing common law meaning that controls. ECF No. 80 at 74; ECF No. 143 at 29. Plaintiffs rely on *Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360, 369-70 (5th Cir. 2018), an ERISA case in which the court determined that when Congress used "fiduciary" without defining the term, it intended to "incorporate the well-settled [common law] meaning" of fiduciary. *Id*. at 371. But ERISA differs from ICWA in that the "starting point" for interpretation of ERISA is always the common law of trusts. *Harris Trust & Sav. Bank v. Salomon Smith Barney*, 530 U.S. 238, 250 (2000). The "Court look[s] to trust law in interpreting ERISA in large part because the terms used throughout ERISA . . . are the language and terminology of trust law." *Hunter v. Caliber Sys., Inc*., 220 F.3d 702, 711 (6th Cir. 2000) (quoting *Moench v. Robertson*, 62 F.3d 553, 565 (3d Cir. 1995)). Plaintiffs show no similar foundation in common law in ICWA: they simply assert that "good cause" has a well-known common law meaning, while also recognizing that the term "eludes a precise definition."[38] ECF No. 143 at 29; *see also* ECF No. 80 at 74. The folly in Plaintiffs argument is

[38] In fact, Interior made the determination to provide guidance on "good cause" because state courts differed in how they defined "good cause" to depart from the placement preferences. 81 Fed. Reg. 38,782. *See, e.g.*, *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1354 (2014) (determining that "a court may find good cause when a party shows by clear and convincing evidence that there is a significant risk that a child will suffer serious harm as a result of a change in placement"); *Native Vill. of Tununak v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 334 P.3d 165, 178 (Alaska 2014) (requiring a court to "searchingly inquire" as to the existence of a preferred placement and clear and convincing evidence that there is good cause to deviate from the adoptive placement preferences); *In re Adoption of Baby Girl B.*, 67 P.3d 359, 370, (Okla. Civ. App. Mar. 20, 2003) (determining "good cause" requires "multifaceted determinations concerning the best interests of the child or children involved *and* the Tribal interest, keeping in mind the fostering of the purposes and policies of the Indian Child Welfare Acts, the need for expert testimony, and [BIA] Guidelines.") (emphasis in original).

that a term that "eludes a precise definition," by definition, is an ambiguous term, and thus subject to reasonable interpretation by the agency.

Even if there were a clear common law definition, Plaintiffs ignore the fact that an agency generally has the inherent authority, when a term is not defined by Congress, to define it in derogation of the common law. *United States v. Chestman*, 947 F.2d 551, 558 (2d Cir. 1991) (common law did not preclude agency from defining a term inconsistent with the common law). The Supreme Court has made clear that "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). Plaintiffs provide no persuasive, let alone binding, precedent that unambiguously forecloses Interior's interpretation of good cause. Plaintiffs thus seek to substitute their judgment for that of the agency, and such efforts must be rejected. *Public Citizen, Inc. v. U.S. EPA*, 343 F.3d 449, 455 (5th Cir. 2003) (under APA review, "we cannot substitute our judgment for that of the agency").

Plaintiffs further challenge Section 23.132(e), which instructs that a "placement may not depart from the preferences based *solely* on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA," (emphasis added). This provision ensures parties are not rewarded for a violation of ICWA, which is consistent with Congress's intent that the good cause exception not be utilized as "a broad category that could swallow the rule." 81 Fed. Reg. at 38,846. Interior further clarified that the "determination of whether there was a violation of ICWA will be fact specific and tied to the requirements of the statute and this rule." *Id.*; *cf.* H.R. REP. NO. 95-1386, at 25 (persons who improperly secure or retain custody of Indian children should not be permitted to take advantage of their wrongful conduct). Based on these factors, Interior's interpretation of "good cause," through Section 23.132(e), is reasonable and comports with the statutory language and intent.

Plaintiffs also argue that Section 23.132(b) improperly "impos[es] a clear and convincing evidence 'requirement.'" SAC ¶ 257. That section advises state courts that the "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." As an initial matter, the "clear and convincing evidence standard," like the five factors Interior provides above for what can constitute "good cause," is not articulated as a mandate. The Rule merely states that a court "should" use that standard.[39]

Plaintiffs argue that Congress's silence as to an evidentiary standard for the "good cause" determinations reflects an intent to avoid a heightened evidentiary showing for good cause. ECF No. 80 at 76; ECF No. 143 at 30. While it is true that as a general matter, Congress's silence can evidence an intent to not require a "special, heightened standard of proof," *Grogan v. Garner* 498 U.S. 279, 286 (1991), that holding has been called into question by *Microsoft Corp. v. I4I Ltd. Partnership*, 564 U.S. 91, 100 (2011). In *Microsoft Corp.*, the Supreme Court upheld the Federal Circuit's reading of a provision of the Patent Act as requiring a showing of clear and convincing evidence, even though the statute contained "no express articulation of the standard of proof." *Id*. Thus, Plaintiffs rely too heavily on *Grogan*. Further, Plaintiffs' position is contrary to what many state courts have concluded in applying ICWA and "good cause." 81 Fed. Reg. 38,843 (citing cases). Relying on state court interpretations, Interior provided Section 23.132(b)'s evidentiary standard as guidance, but ultimately "decline[d] to establish a uniform standard of proof on this issue." *Id*. If Plaintiffs wish to advocate for a different evidentiary standard, those arguments should be made in the state courts that are applying the placement preferences, not here.

3. The Final Rule is Not Unconstitutional

Plaintiffs finally argue that the Final Rule violates the APA because both the rule and ICWA are unconstitutional. Plaintiffs' arguments boil down to the premise that because

[39] Plaintiffs baldly assert that "[nearly] every state court . . . would understand the regulations . . . only as a *requirement* to impose the clear-and-convincing evidence standard." ECF No. 143 at 30 (emphasis in original). But state court judges are capable of reading the plain language of the Final Rule and discerning Interior's intent. *See* 81 Fed. Reg. 38,843 (noting that the Rule does not mandate use of clear and convincing evidence standard).

Congress lacks the authority to enact ICWA, the Department therefore lacks the authority to promulgate the Final Rule pursuant to ICWA. This argument can only be successful if ICWA is in fact unconstitutional, and for the reasons stated herein, ICWA does not violate any aspect of the Constitution. For the same reasons, neither does the Final Rule. Plaintiffs have failed to show that the Final Rule is arbitrary, capricious, or contrary to law, and therefore, the Court should grant summary judgment in Defendants' favor as to Count One.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Federal Defendants' motion for partial summary judgment as to Counts One through Four, and Seven.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2018 a true and correct copy of the foregoing was submitted to the Clerk of the Court for the U.S. District Court, Northern District of Texas, along with Plaintiffs' and Defendant-Intervenors' counsel, using the ECF system of the court.

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