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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Defendants—the Department of the Interior, Secretary of the Interior Ryan Zinke, the Bureau of Indian Affairs, and Tara Sweeney, Assistant Secretary–Indian Affairs (collectively, Interior),[1] the Department of Health and Human Services, Secretary of Health and Human Services Alex Azar, and the United States—submit this Reply Brief in Support of 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 (SAC).

INTRODUCTION

In hundreds of pages of briefing and complaints, Plaintiffs have failed to identify a single case in which a court has held that federal legislation addressing federally recognized tribes and their members exceeds Congress's Indian affairs authority, or violates the Equal Protection Clause or the Tenth Amendment. State Plaintiffs also fail to explain how federal legislation directed toward Indian tribes and their members could violate the Constitution or the Fourteenth Amendment, when the Constitution itself and the Fourteenth Amendment both expressly single out Indian tribes or Indians, demonstrating that such classifications are permissible. Plaintiffs, therefore, fall far short of the high standard required to succeed in a facial challenge to the constitutionality of an act of Congress, *United States v. Salerno*, 481 U.S. 739, 745 (1987); indeed, their briefs only rarely mention the specific provisions of the Act they challenge. As a matter of law and logic Plaintiffs' claims fail.

Plaintiffs in effect ask this Court to second guess the manner in which Congress responded to what it termed an "Indian child welfare crisis [ ] of massive proportions," H.R. Rep. No. 95-1386, at 9 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7532. Congress arrived at a statutory solution to this crisis that protects, first and foremost, the best interests of Indian children, but also the rights of their parents and families and the interests of states and tribes. *See* 25 U.S.C. § 1902. ICWA confirmed exclusive tribal court jurisdiction for Indian children domiciled on a reservation, and concurrent jurisdiction over Indian children domiciled off

[1] Assistant Secretary–Indian Affairs Tara Sweeney is substituted for Acting Assistant Secretary John Tahsuda III pursuant to Fed. R. Civ. P. 25(d).

reservation. 25 U.S.C. § 1911; *see Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 38-39 (1989). For those Indian child custody proceedings that remain in state courts, Congress opted not to "oust the States of their traditional jurisdiction," H.R. Rep. No. 95-1386, at 19, but chose a less intrusive approach—"minimal safeguards" to protect the interests of Indian children, their parents, families, and tribes where state law was not equally or more protective, *id*. at 17. Forty years later, Plaintiffs ask this Court to rewrite the balance Congress struck in ICWA, concerning activity that lies at the heart of its Indian affairs authority—the protection of Indian children and their families, and the continued existence of federally recognized tribes.[2]

State Plaintiffs, unable to find support for constitutional arguments, are reduced to arguing for the first time in their Response Brief that "the Court cannot grant judgment to Defendants on Plaintiffs' Administrative Procedure Act (APA) claim . . . until it is able to review 'the whole record.'" ECF No. 153 at 2. Once again, this argument lacks legal support: this Court is free to grant either the Federal Defendants' Motion to Dismiss or Motion for Summary Judgment without the administrative record. That said, the Federal Defendants will file the administrative record by August 16, 2018.

ARGUMENT

I. THE ADMINISTRATIVE RECORD IS NOT NECESSARY TO RESOLVE PLAINTIFFS' APA CLAIMS AS DEMONSTRATED BY PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

The Final Rule's lengthy preamble thoroughly addresses the question of the Department of Interior's (Department) authority as well as all the other claims raised by Plaintiffs. Plaintiffs

[2] Plaintiffs do not argue that ICWA's protections are no longer necessary. Even if they had, states, child welfare organizations, and the federal courts have provided substantial evidence that ICWA continues to provide important protections for tribes and their citizens. *See Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015) (appeal pending) (finding state judges failed to protect Indian parents' fundamental rights at hundreds of removal proceedings); ECF No. 137 at 23 (Amicus Brief of Seven States noting ICWA has improved outcomes for Indian children but that disparities continue to exist); Amicus Brief of Casey Family Programs, et al., *Adoptive Couple v. Baby Girl*, 2013 WL 1279468, at 2 (U.S. 2013) (ICWA is "the gold standard for child welfare policies and practices").

relied upon what that preamble says—and allegedly does not say—in moving for summary judgment on claims challenging the Final Rule. State Plaintiffs now contend that the absence of an administrative record for the Final Rule somehow precludes this Court from granting *Defendants* summary judgment.

Plaintiffs' argument lacks support. They make no claims that turn on factual issues that require review of a record. Plaintiffs failed, in their own motion or briefs, to identify any disputed material facts related to the record. They do not invoke Rule 56(d), the procedural mechanism for showing that additional time is needed to present evidence on contested facts during summary judgment briefing. Nor do Plaintiffs assert, much less demonstrate, that Defendants' motion raises material issues of fact dependent on record review. Because Plaintiffs' claims are purely legal, and present facial challenges, the issues are "presumptively reviewable," *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005), and courts grant summary judgment to federal agencies when examination of an administrative record would be "pointless." *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1221 n.9, 1224 n.13 (11th Cir. 2015). *See also Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 440 n.37 (5th Cir. 2001) (in resolving a facial challenge to agency's regulation, "[a]lthough the administrative record for the regulation is not before this Court, that is of no moment. Our review is limited to interpreting the extent to which the regulation is consistent with the statute—a task which we are competent to perform without the administrative record.") (citation omitted); *Am. Banker's Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 266 (D.C. Cir. 2001) (record unnecessary when challenge to rule could be "resolved with nothing more than the statute and its legislative history").

II. ICWA IS A LEGAL APPLICATION OF CONGRESS'S INDIAN AFFAIRS POWER

The Supreme Court has long characterized Congress's Indian affairs authority as "plenary and exclusive," *United States v. Lara*, 541 U.S. 193, 200 (2004), "drawn both explicitly and implicitly from the Constitution itself," *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

ICWA, which serves to protect both tribes and their members and the offspring of those members who are either members or eligible for membership, lies at the heart of Congress's Indian affairs authority. Notwithstanding the overwhelming precedent on this point, State Plaintiffs claim that ICWA exceeds the scope of the Indian affairs power.[3] To do so, they must rewrite the law as understood by Supreme Court and Congress since the founding of our Nation. Plaintiffs' arguments in this regard are based on two fundamental misconceptions of the Supreme Court's jurisprudence regarding the Indian affairs power.

First, contrary to the States' arguments, the Supreme Court has held that Congress's "broad general powers to legislate in respect to Indian tribes" are not based on a single constitutional provision, but rather have multiple sources and supports. *Lara,* 541 U.S. at 200-01. The Constitution expressly vests Congress with authority over "Indian Tribes" in the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, which provides Congress with the power to "regulate Commerce with . . . the Indian Tribes." *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. . . ."). But support for federal authority is also found in the Treaty Clause, U.S. Const. art. II, § 2, cl. 2, and is implicit in the structure of the Constitution and the duty of protection that arose from the United States' past relationship with Indian tribes. *Lara*, 541 U.S. at 201 (citing "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government" in light of the fact that historically, "Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law"); *Bd. of Cty. Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). State

[3] As with many of their other arguments, State Plaintiffs provide scant discussion of any specific provision of ICWA that they assert exceeds Congress's authority. For example, they fail to provide any explanation for how provisions addressing tribal jurisdiction (*e.g.,* 25 U.S.C. § 1911(a) (addressing tribal court jurisdiction), 25 U.S.C. § 1918 (regarding tribal reassumption of jurisdiction over child custody proceedings)), "regulate states" or exceed Congress's Indian affairs authority. They have thus failed to meet the standard to succeed in a facial challenge to the entire statute. *E.g., Salerno,* 481 U.S. at 745.

Plaintiffs ignore this precedent, and instead argue that each source of authority must be considered separately. ECF No. 142 at 15-16. This is incorrect.

Second, State Plaintiffs argue that the Interstate Commerce Clause, rather than the Indian Commerce Clause, must be the source of Congress's authority to enact ICWA. This contradicts the statute itself, which cites the Indian Commerce Clause, and also has no basis in case law. States Plaintiffs' arguments that the Interstate Commerce Clause does not provide authority to enact ICWA are simply beside the point. These arguments are addressed in more detail below.

A. Congress's Indian Affairs Power Extends Beyond the Regulation of Tribes and Tribal Land

Plaintiffs claim that, under its Indian affairs power, Congress may regulate only "Indian tribes" or "tribal activity." ECF No. 74 at 68; ECF No. 142 at 16. But State Plaintiffs cite no authority on this point, and it is simply not the law. Pursuant to its Indian affairs power, Congress has enacted, and the Supreme Court has upheld, laws that affect non-Indians on numerous occasions. *E.g.*, *Perrin v. United States*, 232 U.S. 478 (1914) (finding Congress had authority to ban sale of alcohol on off-reservation lands ceded by Indians). And as discussed below, laws enacted under the Indian affairs power routinely impact states and third parties.

State Plaintiffs also assert that Congress's Indian affairs authority does not extend to legislation concerning individual Indians. ECF No. 74 at 66. Once again, the Supreme Court has repeatedly held to the contrary, finding that "commerce with Indian tribes means commerce with the individuals composing those tribes." *United States v. Holliday*, 70 U.S. 407, 417 (1865); *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."). And Congress has routinely passed laws under its Indian affairs power that address individual Indians. *E.g.*, 18 U.S.C. § 1153 (criminal jurisdiction over "any Indian" who commits certain offenses); *id*. § 1152 (extending general criminal laws of the United States to Indian country, except for "offenses committed by one Indian against the person or property of another Indian.").

B. ICWA Does Not Regulate States and Is Not Based on the Interstate Commerce Authority

State Plaintiffs assert that Congress cannot rely on its Indian affairs power because ICWA "regulates States." ECF No. 142 at 16. Thus, they assert without citation that "the only possible source of congressional power to enact ICWA's restrictions is the Interstate Commerce Clause." *Id.* This argument is flawed, for two reasons. First, ICWA does not "regulate states." Instead, it establishes standards that protect the rights of Indian children, families, and tribes, including in state court child welfare proceedings. This does not constitute regulation of states. *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."). Second, State Plaintiffs erroneously assume that Congress is precluded from impacting states through the exercise of its Indian affairs powers. This profoundly misconstrues the nature and history of the Indian affairs powers. Supreme Court precedent dating back to *Worcester v. Georgia*, 31 U.S. 515, 517 (1832), establishes that Congress's Indian affairs authority includes the power to remove, or restrict, state authority over Indian tribes and their members. *See also Antoine v. Washington*, 420 U.S. 194 (1975) (federal law precluded state from applying its game laws to Indians hunting on off-reservation lands). The fact that ICWA impacts states in their dealings with Indian children does not therefore mean states are directly regulated.[4]

C. Congress's Indian Affairs Power is Not Limited to Economic Regulation

Plaintiffs argue that the term "commerce" in the Indian Commerce Clause should be interpreted the same as in the Interstate Commerce Clause, and be limited to economic activities. ECF No. 142 at 18. This argument lacks support in precedent or historical practice. From the

[4]*See, e.g.*, *United States v. John*, 437 U.S. 634, 652–53 (1978) (rejecting Mississippi's argument that the state, rather that the federal government, has prosecutorial authority over the Choctaws on newly acquired trust lands); *New Mexico v. Mescalero Apache*, 462 U.S. 324, 341 (1983) (rejecting concurrent state jurisdiction by New Mexico over non-Indian hunters on the reservation); 25 U.S.C. § 71 (prohibiting state taxation on income derived from treaty fishing rights).

first days of this Nation to the present, Congress has exercised its exclusive Indian affairs authority to reach far beyond traditional economic "commerce" to include such topics as:

- Federal criminal jurisdiction over crimes between Indians and non-Indians, 3 Stat. 383 (1817) (amendment to Indian Trade and Intercourse Act);
- Expanding the inherent criminal jurisdiction of tribes over members of other tribes, upheld in *Lara*, 541 U.S. at 202;
- Federal criminal jurisdiction over crimes between Indians, upheld in *United States v. Kagama*, 118 U.S. 375 (1886);
- Abrogation of treaty rights involving future land cessions, upheld in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903);
- Removal of Indians from their lands, upheld in *Fellows v. Blacksmith*, 60 U.S. 366 (1856);
- Acquisition of new lands within a state over which a tribe and federal government would have jurisdiction, upheld in *United States v. John*, 437 U.S. 634 (1978); *see also United States v. Sandoval*, 231 U.S. 28, 46-49 (1913);
- Termination of tribes, *see Menominee Tribe v. United States*, 391 U.S. 404, 407-08 (1968), and re-recognition of them, *see, e.g.*, Menominee Restoration Act, 25 U.S.C. § 903-903f; *see United States v. Long*, 324 F.3d 475, 482-83 (7th Cir. 2003); and
- Delegation of federal Indian country jurisdiction to states, upheld in *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 471-72, 477 n.22 (1979).

And the Supreme Court has expressly rejected analogizing the two clauses. *See Cotton Petroleum Corp.*, 490 U.S. at 192 (it is "well established that the Interstate Commerce and Indian Commerce Clauses have very different applications"); *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831). These purported limitations on Congress's Indian affairs authority simply do not exist, and judgment should be granted to Federal Defendants on Count Two.

III. ICWA DOES NOT VIOLATE THE TENTH AMENDMENT

Plaintiffs have failed to rebut the extensive Supreme Court authority holding that Congress has constitutional power over Indian affairs, or to show that ICWA falls outside this "plenary" authority. The Tenth Amendment reserves to the states those powers not conferred on the federal government, but this "in no way inhibits the activities of the federal government in situations in which a power has been so conferred." *Deer Park Ind. Sch. Dist. v. Harris Cty. Appraisal Dist.*, 132 F.3d 1095, 1099 (5th Cir. 1998). If Congress acts under one of its enumerated powers, a Tenth Amendment challenge must demonstrate that the Amendment limits

the power of Congress to regulate in the way it has chosen. *See New York*, 505 U.S. at 160. Plaintiffs have not met their burden here.

Plaintiffs argue that ICWA unconstitutionally commandeers states by requiring a state, "including its agencies responsible for child welfare," to "regulate the state-law child custody proceedings of Indian children in a certain way." ECF No. 142 at 10. But Plaintiffs fail to point to a single provision of ICWA that requires state legislatures to legislate, or state agencies to regulate.

Every single one of the cases relied on by Plaintiffs involved a law directed at state legislative or executive branches in a way that ICWA simply is not. For example, the statute at issue in *New York* was found invalid because it required states to either regulate low level radioactive waste pursuant to Congress's direction, or take title to such waste. But nothing in ICWA requires states to enact laws or regulations, nor does it impose any liabilities if the states do not. In fact, most states have not enacted substantive laws related to ICWA, including lead Plaintiff Texas, which has not pointed to a single Texas law related to ICWA. Texas cannot credibly argue that ICWA commands state legislatures to act or refrain from acting in a particular way when, forty years after the statute was enacted, its legislature has taken no action at all. And unlike in *Printz v. United States*, 521 U.S. 898, 929 (1997), ICWA does not direct state executive branch officers to take any particular actions on the federal government's behalf.[5]

Plaintiffs lean heavily on the Supreme Court's recent decision in *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), but the statute at issue in that case, the

[5] It is true that, in some instances, a state agency is a party to a child-custody proceeding in state court that seeks "the foster care placement of, or termination of parental rights to, an Indian child," and will thus be required to comply with certain federal standards. *E.g.*, 25 U.S.C. §1912(a). But these standards are directed at all parties to Indian child-custody proceedings, not just state executive branch officials. *See, e.g.*, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (discussing application of ICWA to private adoption); *Matter of Adoption of T.A.W.*, 383 P.3d 492 (Wash. 2016) (en banc) ("active efforts" requirement in 25 U.S.C. § 1912(d) applies in privately initiated adoption actions). "The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018).

Professional and Amateur Sports Protection Act (PASPA), is entirely different than ICWA. PASPA "prohibit[ed] state authorization of sports gambling" by "unequivocally dictat[ing] what a state legislature may and may not do." *Id.* at 1478. In contrast, ICWA does not require, prohibit, direct, or even seek to influence what state legislatures may do. *Murphy* is simply inapposite. And, in *Murphy*, the Court distinguished, and did not call into question, its precedent upholding federal laws that, like ICWA, do not "commandeer[] the state legislative process." *Id.* at 1478-79.

Unlike the statute in *Murphy*, ICWA falls squarely within the bounds of the Supremacy Clause of the U.S. Constitution, which provides that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, … shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. VI, cl. 2; *Testa v. Katt*, 330 U.S. 386, 391 (1947). As such, the Supreme Court has recognized "the well established power of Congress to pass laws enforceable in state courts." *New York*, 505 U.S. at 178 (citations omitted).

Plaintiffs argue that this precedent does not apply because ICWA "does not regulate private individuals." ECF No. 142 at 11. To the contrary, ICWA is entirely directed at the securing the rights of, and imposing obligations on, private actors.[6] The statute expressly furthers the national policy "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," and provides a myriad of rights and protections for Indian children, their parents, and tribes. *See, e.g.*, 25 U.S.C. §§ 1911, 1912(a), 1912(d), 1913, 1921. State courts apply these rights and standards as they adjudicate child

[6] *Murphy*, 138 S. Ct. at 1480, found that federal law validly preempts state law when "Congress enacts a law that imposes restrictions or confers rights on private actors." As *Murphy* recognized, a statute that appears to be directed at states may be a legitimate exercise of federal preemption authority where its effect is to confer federal rights on private entities. 138 S. Ct. at 1480.

welfare proceedings, much as they must apply other federal laws that protect individual rights and federal interests.[7]

ICWA does not violate the anticommandeering doctrine, and summary judgment should be granted to Defendants on Count Three.[8]

IV. ICWA DOES NOT VIOLATE EQUAL PROTECTION

The Supreme Court has repeatedly held that classifications in federal law that are tied to membership in a federally recognized tribe, such as the placement preferences and definition of "Indian child" in ICWA, are political, rather than racial classifications and do not implicate the Fifth or Fourteenth Amendment. *United States v. Antelope*, 430 U.S. 641 (1977); *Mancari*, 417 U.S. 535. Such political classifications are not subject to strict scrutiny and need only "be tied rationally to the fulfillment of Congress's unique obligation[s] to the Indians." *Mancari*, 417 at 555. ICWA's classifications easily meet this rational review standard.

Despite clear Supreme Court precedent, Plaintiffs challenge ICWA's placement preferences (25 U.S.C. §§ 1915(a) and (b)) as a violation of Equal Protection. SAC ¶ 338 (ECF No. 35). Plaintiffs have failed to rebut any of Federal Defendants' arguments regarding the validity of the first two adoption placement preferences, and fail to address the foster placement preferences at all. *See* ECF No. 143 at 16 (discussing only the third placement preference).

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[7] *E.g.*, *Jinks v. Richland Cty.*, 538 U.S. 456, 464-65 (2003) (federal law did not violate principles of state sovereignty even though it tolled state statutes of limitation); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952) (state courts must provide federal right to trial by jury for claims under Federal Employers' Liability Act); *Cent. Vt. R.R. Co. v. White*, 238 U.S. 507, 511-12 (1915) (state court must enforce federal law placing burden of proof on defendant for proving contributory negligence under Federal Employers' Liability Act).

[8] That *Murphy* does not support Plaintiffs' cause is shown by the fact that they concoct a totally different statutory scheme that *could* have been at issue in *Murphy* (but was not), and speculate that such a scheme would have similarly been held unconstitutional. ECF No. 142 at 12. Plaintiffs' speculative unconstitutional statute is completely unlike ICWA, as they posit a scheme that would require state courts to "enjoin the state laws that legalized sports gambling." *Id.* ICWA does not require state courts to enjoin or invalidate any state law; in fact, it expressly provides that any state law that "provides a higher standard of protection to the rights of the parent or Indian custodian" than the rights provided by ICWA shall apply. 25 U.S.C. § 1921.

They instead appear to focus their arguments on the definition of "Indian child" (25 U.S.C. § 1903(4)), a provision that is not challenged in Count Four, and therefore is beyond the scope of this case. Moreover, Plaintiffs, who are neither Indian children nor their lawful representatives, lack standing to challenge this provision. Plaintiffs fail to explain how a classification expressly included in the Constitution, including in the Fourteenth Amendment itself, could violate Equal Protection.[9] Nor have Plaintiffs been able to identify a single case holding that a federal statute involving federally recognized tribes violated Equal Protection.

Instead, Plaintiffs claim that the Supreme Court has narrowed or overturned the *Mancari* line of cases. ECF No. 143 at 10-12; ECF No. 80 at 57. Plaintiffs cobble together this argument based on *Rice v. Cayetano*, 528 U.S. 495 (2000)—a case dealing with Native Hawaiians and a state voting scheme—and *dicta* in the final paragraph of *Adoptive Couple*, 570 U.S. 637. *See* ECF No. 80 at 59-60. Neither case supports Plaintiffs' claims.

***Rice v. Cayetano* Confirmed the Vitality of *Mancari*.** *Rice* addressed neither a classification in federal law directed at federally recognized tribes nor the Fourteenth Amendment, nor the authority of Congress. As a result, contrary to Plaintiffs' claim, *Rice* is distinguishable from *Mancari*. Moreover, *Rice* expressly affirmed the ongoing vitality of *Mancari*'s application to statutes like ICWA involving federally recognized tribes.

In *Rice*, the State of Hawaii sought to defend voting restrictions based on *Mancari*, but the situation in *Rice* differed significantly from *Mancari* because it involved Native Hawaiians rather than a federally recognized tribe;[10] state rather than federal law; and state-wide voting rights that implicated the Fifteenth Amendment as well. 528 U.S. at 520-22. The Court rejected the State's *Mancari* defense, finding that "[e]ven were we to take the substantial step of finding

[9] The Constitution expressly mentions and recognizes the unique role of tribes and their members. *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").

[10] *See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 81 Fed. Reg. 5,019-02 (Jan. 29, 2016) (List of federally recognized tribes published by Interior pursuant to 25 U.S.C. § 5131).

authority in Congress, delegated to the State, to treat . . . native Hawaiians as tribes, *Congress may not authorize a State to create a voting scheme of this sort*." *Id*. at 519 (emphasis added).

In rejecting Hawaii's defense, the Court reaffirmed *Mancari*'s holding that a federal employment preference that required both one-fourth or more Indian blood and affiliation with a federally recognized tribe 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). *Rice* went on to state that "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 reiterated 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." *Rice,* 528 U.S. at 519 (citing *Mancari,* 417 U.S. at 552). Contrary to Plaintiffs' claim, therefore, *Rice* reaffirmed, rather than limited, the holding of the *Mancari* line of cases.

The Dicta in *Adoptive Couple* Does Not Assist Plaintiffs. Plaintiffs also assert that *Adoptive Couple* signals a rejection of *Mancari*. Plaintiffs' argument, however, relies solely on *dicta* in *Adoptive Couple.* In the final paragraph of that case, the Court noted that a broad interpretation of ICWA's parental termination provisions "would raise equal protection concerns" before noting that such an interpretation was not before the Court given that ICWA did not apply at all in that case. *Adoptive Couple,* 570 U.S. at 656. At most, this *dicta* illustrates that in unique situations, such as abandonment, where the connection between a child and a biological parent has been legally severed, ICWA may cease to apply. A state court, when faced with similar unique facts, may find this *dicta* instructive, but it provides no assistance to Plaintiffs in a facial challenge to ICWA and the Final Rule.

The Third Adoption Placement Preference Does Not Violate Equal Protection. The only provision of Sections 1915(a) or (b) that Plaintiffs address at all is the third adoption placement preference, which is to "other Indian families." But this preference easily meets the *Mancari* standard, as it is limited to members of federally recognized Indian tribes, which is a political classification. There is no limitation in *Mancari* that federal laws directed to Indians

must be constrained on a tribe-by-tribe basis. To the contrary, *Mancari* itself involved an employment preference that would apply to any tribal member who met the criteria, even though that employee might be (indeed, would likely be) hired by BIA to handle matters involving tribes other than his or her own. Congress has the authority to address "Indians" as a group, even though there are 573 separate federally recognized tribes, and may also give tribes the authority to prosecute criminal misdemeanors committed by members of other tribes. *See* 25 U.S.C. § 1301; *Lara*, 541 U.S. at 209; *Means v. Navajo Nation*, 432 F.3d 924, 934 (9th Cir. 2005).

Plaintiffs have failed to 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 Count Four should be granted to Defendants.[11]

V. INTERIOR HAD AUTHORITY TO ISSUE THE FINAL RULE AND INTERPRET AMBIGUITIES WITHIN ICWA, AND THAT INTERPRETATION IS REASONABLE AND ENTITLED TO DEFERENCE

Section 1952 provides a broad, general grant of rulemaking authority to the Department. *See* 25 U.S.C. § 1952 ("the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter"). Comparable language has been repeatedly interpreted as "mean[ing] what it says: The [agency] has rulemaking authority to carry out the 'provisions of this Act.'" *AT & T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 378 (1999) (citing 52 Stat. 588, codified as 47 U.S.C. § 201(b)). The Court explained with regard to this kind of rulemaking grant:

[11] With regard to Plaintiffs' non-delegation claim, State Plaintiffs concede that Congress can delegate legislative power to tribes and that such delegations are less strictly construed where the entity has authority over the subject matter (here tribal authority over their members and their children). ECF No. 142 at 13. The sticking point for the State Plaintiffs is that the alleged delegation of Section 1915(c) allows "tribes the ability to alter *state* law." *Id.* (emphasis in original). This misconstrues Section 1915(c) and the rest of ICWA as well, neither of which alter *state* law—both this provision and ICWA generally *preempt* state law to the extent it is less protective than ICWA. *See* 25 U.S.C. § 1921. To the extent Section 1915(c) constitutes a delegation, it is one that permits a tribe to alter federal—not state—law and only to the extent that such law is being applied to a tribe's children. The non-delegation claim should be denied.

> 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 thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'

Mourning v. Family Publ'ns. Serv., Inc., 411 U.S. 356, 369 (1973) (quoting *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 280-81 (1969)). *See also Florida v. Matthews*, 526 F.2d 319, 323 (5th Cir. 1976) (where statute "contains language similar to the statute discussed in *Mourning* . . . . appellants shoulder a difficult burden to prove that the regulation is inconsistent with the purpose of the enabling legislation."). Moreover, the Court has made clear that where an agency promulgates a rule pursuant to a general grant of authority, that rule is entitled to *Chevron* deference. *City of Arlington v. F.C.C.*, 569 U.S. 290, 306 (2013).

State Plaintiffs, incorporating Individual Plaintiffs' briefing, argue that this general grant of rulemaking authority only applies to provisions "necessary to carry out" provisions of ICWA and ICWA is structured to give the Department limited implementation responsibilities. ECF No. 143 at 27. This argument is in tension with State Plaintiffs' earlier argument, in support of their standing, in which they claimed that the Department is ICWA's enforcement agency by virtue of the fact that the statute mandates notice to the Department of ICWA-related child custody matters.[12] ECF No. 74 at 37. It also misconceives the role given the Department by Congress in ICWA. In granting rulemaking authority, the statute tasks the Department with determining what rules are necessary to carry out the provisions of the statute, without any limitation.

Congress did not direct the Department to participate in state court proceedings involving ICWA, but it did charge the Department with overseeing ICWA's implementation on a national scale to ensure the statute's minimum federal standards are effectively applied. In particular,

[12] For standing, the inquiry is whether the Department is actually applying the statute to Plaintiffs such that they are injured. *See* ECF No. 57 at 28-30. That is not the same as monitoring ICWA's implementation on a national basis and ensuring its provisions are "carried out" such that minimum federal standards continue to govern child welfare proceedings involving Indian children.

Section 1915(e) requires states to keep records of the placements of Indian children "evidencing the efforts to comply with the order of preference specified [in Section 1915]," and to make them available to the Department. 25 U.S.C. § 1915(e). State courts are further required to provide the Department with any final decree or order for an adoptive placement of an Indian child along with specified information about the child, parents, and placement. *Id.* § 1951. Thus, ICWA positions the Department as a clearinghouse for information relating to the implementation of the statute nationally, allowing it to assess whether additional national guidance is required.[13]

The Department also has expertise in the application of ICWA on the ground. Congress designated the Department as one of the entities to be noticed before a foster care or termination proceeding occurs if the identity or the parent or tribe cannot be determined, *id.* § 1912(a), and the Department must be given notice by a court where an indigent Indian child or parent or Indian custodian are without counsel and state law does not provide for counsel of right, *id.* § 1912(b). Besides funding tribal child welfare programs, the Department directly provides, along with tribes, child welfare services in Indian country. *Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,778-01, 38,785 (June 14, 2016).

Thus, the Department's nationwide responsibility to monitor ICWA's implementation combined with its on-the-ground experience with the statute enable it to "understand[] the areas where ICWA is or is not working at the State level," *id.*, and to promulgate the regulations necessary to "support ICWA's underlying purpose and to address those areas where a lack of binding guidance has resulted in inconsistent implementation and noncompliance with the statute," *id.* at 38,783.

[13] Moreover, the Department also collects information from tribes concerning ICWA for the Indian Child Welfare Quarterly and Annual Report. *Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,778-01, 38,784 (June 14, 2016). The Department also "publishes a nationwide contact list of Tribally designated ICWA agents for service of notice, administers ICWA grants, and maintains a central file of adoption records under ICWA." *Id.*

Plaintiffs' final argument on this point is that not reading the general grant of authority in 25 U.S.C. § 1952 as one designed to sharply limit the Department's regulatory authority raises a non-delegation problem. ECF No. 143 at 27. Plaintiffs rely on *Mistretta v. United States*, 488 U.S. 361 (1989), but misrepresent the decision. *Mistretta* recognized the necessity of delegations of the kind here because "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." *Id.* at 372. Plaintiffs' assertion that the delegation in *Mistretta* was upheld only because the judges on the sentencing commission would also implement the sentencing guidelines, ECF No. 143 at 27-28, is baseless. *Mistretta* supports Interior's interpretation of Section 1952 as a commonsense way for the federal agency most involved with ICWA's implementation to promulgate the regulations necessary to ensure uniform and proper application of the statute, "precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate." 488 U.S. at 379.

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 13th day of July, 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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