No. 18-11479

In the United States Court of Appeals for the Fifth Circuit

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants,

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

Intervenor Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division

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Plaintiffs-Appellees,

v.

David Bernhardt, Acting Secretary, U.S. Department of the Interior; Tara Sweeney, in her official capacity as Acting Assistant Secretary for Indian Affairs; Bureau of Indian Affairs; United States Department of Interior; United States of America; Alex Azar, In his official capacity as Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services,

Defendants-Appellants,

Cherokee Nation; Oneida Nation; Quinault Indian Nation; Morongo Band of Mission Indians,

Intervenor Defendants-Appellants.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The Court has set this case for oral argument on March 13, 2019.

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INTRODUCTION

Because of the Indian Child Welfare Act, a Texas state court was forced to deny the Brackeens' petition to adopt A.L.M., whom they had raised for over half his life, because a Navajo couple in another state with no connection to A.L.M. expressed interest in adopting him. A Minnesota state court was forced to order that Child P. be taken from the only stable home she had known and given to a grandmother, previously deemed unfit to provide foster care, because the White Earth Band of Ojibwe Indians decided Child P. was a member of the tribe. And a Nevada state court was forced to delay the adoption of Baby O. by a family who had raised her since birth and cared for her severe medical needs, after the Ysleta del sur Pueblo Tribe registered her as a member without her biological mother's consent and opposed the adoption. All of this happened because Congress imposed a federal regulatory system on the States that requires them to place Indian children in accordance with statutory requirements based on race, rather than the children's best interests.

The district court correctly found that Congress had no authority to demand this of the States and that ICWA and the Final Rule violate numerous provisions of the Constitution. ICWA and the Final Rule commandeer state agencies and courts, discriminate on the basis of race, improperly delegate authority to Indian tribes, and violate the Administrative Procedure Act. The Commerce Clause, the purported source of Congress's authority to enact ICWA, does not authorize Congress to commandeer the States to carry out a racially discriminatory federal regulatory system. The State Plaintiffs have demonstrated real and existing harm, both to themselves

and to the resident Indian children in their care. The district court's judgment should be affirmed.

Statement of Jurisdiction

The State Plaintiffs agree with the jurisdictional statements of the Appellants except for the statement by the Federal Defendants that Plaintiffs lack standing to bring a Fifth Amendment claim. Fed. Br. 1; Navajo Br. 4; Tribes Br. 2; *see infra* pp.19-20.

Issues Presented

The State Plaintiffs and their residents are directly harmed by ICWA and the Final Rule, as the laws mandate that the States change nearly every aspect of child custody proceedings when an Indian child is involved.

1. Do the State Plaintiffs have standing to sue?
2. Do ICWA and the Final Rule unconstitutionally commandeer the States, and are the laws otherwise permitted under the Commerce Clause or Spending Clause?
3. Do ICWA and the Final Rule violate the equal-protection component of the Due Process Clause of the Fifth Amendment?
4. Does ICWA unconstitutionally delegate legislative authority to Indian tribes?
5. Does the Final Rule violate the Administrative Procedure Act?

STATEMENT OF THE CASE

I. Factual and Legal Background

The States of Texas, Indiana, and Louisiana have entire legal codes designed to ensure the safety and welfare of children within their borders, as well as state agencies and employees dedicated to carrying out that mission. *See, e.g.*, Ind. Code tit. 31; La. Child. Code; Tex. Fam. Code tit. 5. In Texas, "the Family Code's entire statutory scheme for protecting children's welfare focuses on the child's best interest." *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003); *see also* Tex. Fam. Code §§ 161.001(b)(2), 162.016(a)-(b). The same holds true for Indiana and Louisiana. Ind. Code §§ 31-19-11-1(a), 31-35-2-4(b)(2); La. Child. Code arts. 1001, 1037(B) & (D), 1217(B), 1255(B)-(C).

But the best-interest standard does not apply when the child is an Indian child, as defined by ICWA. Instead, it is replaced by a federal scheme that requires, among other things, placement in accordance with rigid preferences based on the race of the child and his prospective parents. 25 U.S.C. § 1915(a), (b). As recognized by the Texas Department of Family and Protective Services, "[i]f a Native American child . . . is taken into DFPS custody, almost every aspect of the social work and legal case is affected . . . ." ROA.1017. This includes the legal burdens of proof, notice requirements, the need to make "active efforts" at reconciliation, and the placement of the child—not according to the child's best interest—but according to ICWA's statutory preferences, in which the race of the child and prospective parents is generally dispositive. ROA.1017.

A. Indian Child Welfare Act

ICWA was enacted in 1978 following concerns that public and private agencies were wrongly breaking up Indian families and placing Indian children in non-Indian homes and institutions. 25 U.S.C. § 1901(4); *see also Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Congress, purporting to act under the Commerce Clause and "other constitutional authority," established "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. §§ 1901(1), 1902.

ICWA applies to any "child custody proceeding" involving an "Indian child." An "Indian child" is "any unmarried person who is under age eighteen" who 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." *Id.* § 1903(4). An "Indian tribe" is "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of the Interior] because of their status as Indians." *Id.* § 1903(8).[1] An "Indian" is "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." *Id.* § 1903(3). And "child custody proceeding[s]" include foster care placements, termination of parental rights, preadoptive placements, and adoptive placements. *Id.* § 1903(1).

[1] There are approximately 570 federally recognized Indian tribes. 83 Fed. Reg. 4235 (Jan. 30, 2018).

When a child custody proceeding involves an Indian child, ICWA sets the substantive decisional law, imposes numerous rules and standards on state courts, and compels state employees to undertake additional work. *See* ROA.1013 (Texas DFPS policies concerning ICWA note that "[i]f a DFPS lawsuit involves a Native American child, [ICWA] applies and the legal requirements change dramatically.").

1. Impact on state courts and judicial officers

ICWA creates a set of placement preferences that state courts must follow "in the absence of good cause to the contrary" in any adoptive, preadoptive, or foster care placement of an Indian child. 25 U.S.C. § 1915(a), (b). In an adoptive placement of an Indian child, the state court "shall" give a preference to "(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).

Foster care or preadoptive placements must be "in the least restrictive setting which most approximates a family and in which [the child's] special needs, if any, may be met" and "within reasonable proximity to his or her home." *Id.* § 1915(b). Absent good cause to the contrary, preferences must be given to

> (i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) 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.

Id. An Indian tribe may alter the order of any of these preferences and the state court "shall follow such order" as long as it is the least restrictive setting appropriate to the needs of the child. *Id.* § 1915(c). Although Congress declared a policy of protecting the "best interests of Indian children," *id.* § 1902, the preferred placements in ICWA do not include individualized consideration of a child's best interest, but rather impose race-based presumptions on all Indian children, *id.* § 1915(a), (b).

ICWA also sets the substantive decisional law for any foster care placement or termination of parental rights. For foster care placement, a court must find "by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(e). Termination of parental rights requires the same findings and expert testimony, except the burden of proof is raised to "evidence beyond a reasonable doubt." *Id.* § 1912(f).

Under ICWA, a state court handling a child custody proceeding of an Indian child must:

- Transfer foster care and termination of parental rights proceedings involving an Indian child to tribal courts in certain circumstances, even if the child is not living on a reservation, *id.* § 1911(b);
- Grant mandatory intervention to an Indian custodian and the child's tribe at any point in a child custody proceeding, *id.* § 1911(c);
- Delay any foster care placements or termination proceedings until ten days after the parents, Indian custodian, tribe, or Secretary of the Interior (the

Secretary) receive notice, and grant up to a twenty-day extension upon request, *id.* § 1912(a);

- Allow a parent or Indian custodian to withdraw consent to foster care placement at any time, *id.* § 1913(b);
- Allow a parent or Indian custodian to withdraw consent to voluntary termination of parental rights "for any reason at any time prior to entry of a final decree of termination or adoption," and return the child to the parent, *id.* § 1913(c);
- Permit a parent of an Indian child to withdraw consent to a final adoption decree for up to two years after the final judgment, if they claim consent was obtained through fraud or duress, *id.* § 1913(d); and
- Allow an Indian child, parent, Indian custodian, or Indian child's tribe to petition for invalidation of a foster care placement or termination of parental rights if the process did not comply with ICWA, *id.* § 1914.

2. Impact on state agencies

With respect to state agencies involved in child custody proceedings, ICWA requires them to use "active efforts" to prevent the breakup of the Indian family, *id.* § 1912(d); find qualified expert witnesses for any foster care placement or termination of parental rights, *id.* § 1912(e), (f); and maintain records demonstrating ICWA compliance and make those records available for inspection at any time by the Secretary or the child's Indian tribe, *id.* § 1915(e). ICWA also includes several notification requirements. State agencies or courts must:

- Notify the Indian child's parents or Indian custodian and Indian tribe by registered mail of child custody proceedings involving an Indian child, and if the parent or Indian custodian cannot be found, notify the Secretary, *id.* § 1912(a); and
- Provide the Secretary with a copy of final adoption decrees, including the name and tribal affiliation of the child, the names of the biological parents, the names of the adoptive parents, and the identity of any agency having files or information relating to the adoption, *id.* § 1951(a).

B. Final Rule

In 1979, the Department of the Interior promulgated "Guidelines for State Courts; Indian Child Custody Proceedings." 44 Fed. Reg. 67,584 (Nov. 26, 1979). The Guidelines were "not intended to have binding legislative effect," but only to assist in the implementation of ICWA. *Id.* They left "primary responsibility" of implementing and interpreting ICWA "with the courts that decide Indian child custody cases." *Id.*

Most relevant here, the 1979 Guidelines addressed the "good cause" standard for deviating from ICWA's placement preferences. The Guidelines stated that "the legislative history of [ICWA] states explicitly that the use of the term 'good cause' was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." *Id.* Some state courts concluded that the "good cause" exception to the placement preferences required considering the child's best interests, including any bond or attachment the child had formed with a non-preferred placement. *See, e.g.*, *In re Adoption of T.R.M.*, 525 N.E.2d 298,

312-13 (Ind. 1988); *In re Appeal in Maricopa Cty. Juv. Act. No. A-25525*, 667 P.2d 228, 234 (Ariz. Ct. App. 1983); *see also In re Adoption of M.*, 832 P.2d 518, 522 (Wash. Ct. App. 1992).

In 2016, the Department reversed course and promulgated the Final Rule at issue here with the intent that it bind state courts and agencies. 81 Fed. Reg. 38,778, 38,782 (June 14, 2016). Significantly, the Final Rule restricts the ability of state courts to find "good cause" to deviate from the placement preferences, requiring proof by clear and convincing evidence and limiting a court's determination of good cause to five enumerated factors. 25 C.F.R. § 23.132(b), (c). The Final Rule explicitly prohibits finding good cause "based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." *Id.* § 23.132(e).

The Final Rule rejects the "existing Indian family doctrine," which had been used by some state courts to limit ICWA's application to circumstances in which the child had a significant political or cultural connection to an Indian tribe, rather than a mere genetic link. *See, e.g.*, *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715-16 (Cal. Ct. App. 2001) (recognizing that use of the existing Indian family doctrine may avoid ICWA's constitutional problems); *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990); *In re Interest of S.A.M.*, 703 S.W.2d 603, 608-09 (Mo. Ct. App. 1986). Instead, the Final Rule states that, when determining whether ICWA applies, courts may not "consider factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the

Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum." 25 C.F.R. § 23.103(c).

The Final Rule repeats many of the requirements in ICWA and expands on some. For example, with respect to determinations about whether a child is an Indian child and to what tribe he belongs, courts must:

- Ask each participant, on the court record, whether the child at issue is an Indian child, and instruct parties to inform the court if they receive new information, *id.* § 23.107(a);
- Apply ICWA if there is "reason to know" that the child may be an Indian child, until it is demonstrated on the record that the child is not Indian, *id.* § 23.107(b)(2).
- Request "a report, declaration, or testimony included in the record," that the state agency or other party used due diligence to identify and work with all of the tribes of which there is reason to know the child may be a member (or eligible for membership), *id.* § 23.107(b)(1);
- Require participants in voluntary child custody proceedings to state on the record whether the child is an Indian child, or whether they have reason to believe the child is an Indian child, *id.* § 23.124(a);
- Defer to the judgment of the Indian tribe of which it is believed the child is a member (or eligible for membership) to determine if he is eligible for membership, *id.* § 23.108(a); and
- Defer to the tribes' agreement on which tribe the child belongs to when he or she is a member of more than one tribe, *id.* § 23.109(b)-(c).

The Final Rule also defines the "active efforts" necessary to prevent the breakup of the Indian family. *Id.* §§ 23.2 (listing eleven examples of what may be required), 23.120. The Final Rule contains detailed requirements for the emergency removal of an Indian child. *Id.* § 23.113. And the Final Rule requires state courts to notify the child's biological parent or prior Indian custodian and the child's tribe if the adoption decree is vacated or the adoptive parent consents to termination of parental rights. *Id.* § 23.139(a).

C. Impact on State Plaintiffs

All State Plaintiffs have federally recognized Indian tribes in their borders, ROA.4023 n.4, and all must comply with ICWA. Because ICWA contains provisions for collaterally attacking any removal, termination, or adoption that is not made in compliance with ICWA, 25 U.S.C. §§ 1913(d), 1914, the States have no choice but to comply. If they do not, any placement made in violation of ICWA could be undone through a collateral attack, depriving the children of permanency. The State Plaintiffs cannot subject Indian children to the risk of being uprooted from a non-preferred placement and must, therefore, comply with ICWA to avoid any collateral attack.

The States also receive millions of dollars in federal funding as a result of complying with ICWA. States that receive child welfare funding through Title IV-B, Part 1 of the Social Security Act must have a plan for child welfare services. 42 U.S.C. § 622(a). That plan must include, among other items, "a description, developed after consultation with tribal organizations . . . in the State, of the specific measures taken by the State to comply with [ICWA]." *Id.* § 622(b)(9). The Depart-

ment of Health and Human Services determines whether a state agency is in "substantial conformity" with the Title IV-B plan requirements, including whether it is meeting ICWA's requirements. 45 C.F.R. § 1355.34(a), (b)(2)(ii)(E). States that are not in substantial compliance may have their funds withheld. *Id.* § 1355.36.

In fiscal year 2018, Texas was appropriated approximately $410 million in federal funding for Title IV-B and Title IV-E programs, Louisiana was appropriated approximately $64 million, and Indiana was appropriated approximately $189 million. ROA.4014-15.

D. Impact on Individual Plaintiffs

ICWA can have significant consequences for Indian children and non-Indian families that wish to adopt them. As in the cases of the Individual Plaintiffs, the hands of the state agencies and courts were tied by ICWA, which prioritized the child's race over his or her best interests.

The Brackeens, for example, raised A.L.M., an Indian child, for over a year, and their request to adopt A.L.M. was supported by A.L.M.'s biological parents. ROA.2684. Yet, the Navajo Nation wrote to the family court and requested, pursuant to ICWA, that A.L.M. be removed from the home in which he had spent most of his life and given to an unrelated Navajo couple—simply because he was an Indian child and the Brackeens were not Indians. ROA.2684-85. The Brackeens were unable to meet the "good cause" standard in ICWA for deviating from the placement preferences, and their petition to adopt A.L.M. was denied. ROA.2685-86. They obtained emergency appellate relief, ROA.2686, and when the placement with the Navajo couple was no longer available, the Brackeens' adoption was approved.

ROA.2686-87. The Brackeens are now seeking to adopt A.L.M.'s half-sister, Y.R.J., but it is unclear whether that adoption will be permitted under ICWA. ROA.4102-09; *In re Y.R.J.*, No. 323-107644-18 (Tarrant County Dist. Ct.).

The Cliffords took Child P. into their home after she spent two years being shuttled between various foster parents. ROA.2625-26. The instability in her young life lead to extensive psychological harm, which the Cliffords have worked to overcome. ROA.2626-27. In 2015, the White Earth Band of Ojibwe Indians informed the state court that Child P. was not eligible for membership. ROA.2627. But in 2017, the Band changed its mind, decided Child P. was a member, intervened in the custody proceedings, and demanded that, pursuant to ICWA, Child P. be removed from the Cliffords and given to a grandmother (whose foster care license had previously been suspended). ROA.2627. The state court agreed and removed Child P. from her home with little notice. ROA.2628-29. Child P. has experienced serious emotional harm as a result, and the grandmother with whom she lives has not filed a petition to adopt her. ROA.2629.

The Librettis took Baby O., an Indian child, home from the hospital after her birth and raised her for 23 months, caring for her severe medical conditions that have required multiple surgeries. ROA.2690. Their attempt to adopt her, which was supported by her biological mother (who is also a plaintiff in this case), was opposed by the Ysleta del sur Pueblo Indian Tribe, who had registered Baby O. as a member without the consent of her biological mother. ROA.2691-92. The Tribe sought to take Baby O. from her home in Nevada and place her with a member in Texas.

ROA.2692. As a result of this suit, the Librettis have been able to adopt Baby O, ROA.2692-93, but still face the possibility of a collateral attack on the adoption.

II. Procedural History

Plaintiffs' operative complaint asserts multiple constitutional challenges to ICWA, as well as a challenge to the Final Rule under the Administrative Procedure Act. ROA.579-664. The State Plaintiffs alleged that ICWA violates the Fifth Amendment's requirement of equal protection, the anti-commandeering doctrine from the Tenth Amendment, the non-delegation doctrine of Article I, and the Indian Commerce Clause in Article I. ROA.635-54, 660-61. The State Plaintiffs also asserted that the Final Rule violates the APA because it is unconstitutional, arbitrary, and capricious. ROA.635-41.

Plaintiffs sought declaratory and injunctive relief against the United States, several federal agencies, and several federal officers (Federal Defendants). ROA.588, 661-62. Four Indian tribes (the Tribes) intervened to defend ICWA from the constitutional challenges. ROA.761. The Federal Defendants and Tribes filed motions to dismiss, primarily on the basis of standing, but also included arguments on ripeness, abstention, and waiver of the APA claim. ROA.824-42, 844-46. The district court denied the motions to dismiss in their entirety. ROA.3721-60.

All parties filed motions for summary judgment. ROA.2391-2467, 2539-2623, 3547-3613, 3620-3677. Following a hearing at which all parties presented argument, ROA.4462-4582, the district court granted in part and denied in part the motions, ROA.4008. With respect to the States' claims, the district court first ruled that ICWA violated the Fifth Amendment's guarantee of equal protection because it is a

race-based statute that cannot be justified under strict scrutiny. ROA.4028-36. Second, the court held that ICWA's grant of authority to Indian tribes to reorder adoption placement preferences violated the non-delegation doctrine found in Article I. ROA.4036-40. Third, the court concluded that requiring state courts to apply federal standards to state-created causes of action violated the anti-commandeering doctrine. ROA.4040-45. Fourth, the court ruled that the Final Rule violated the APA because it was unconstitutional for the reasons just described, because it exceeded the Department's statutory authority, and because the "good cause" standard was unambiguous. ROA.4045-53. Finally, the court held that the Indian Commerce Clause did not give Congress the authority to enact ICWA. ROA.4053-54. The district court, therefore, declared portions of ICWA (25 U.S.C. §§ 1901-23, 1951-52) and the Final Rule (25 C.F.R. §§ 23.106-22, 23.124-32, 23.140-41) unconstitutional. ROA.4055.

The Tribes and Federal Defendants appealed. ROA.4458-61, 4762-64. This Court stayed the judgment below but accelerated the appeal. The Court has also permitted the Navajo Nation to intervene as an Appellant.

Summary of the Argument

I. ICWA and the Final Rule impose an unconstitutional federal regulatory scheme on the States that requires them to treat Indian children differently because of their race. The State Plaintiffs will continue to suffer a direct injury to their sovereign and quasi-sovereign interests unless and until ICWA and the Final Rule are enjoined. And the Indian children within their care will continue to be placed, not according to their best interests, but according to ICWA's rigid racial preferences.

II. ICWA violates the anti-commandeering doctrine because it imposes obligations on state agencies, employees, and courts. State agencies and employees must treat Indian children differently, send multiple notices, find certain expert witnesses, and meet federal standards for removals and placements. ICWA also sets the substantive decisional law for terminations, foster care placements, and adoptions—none of which is permitted by the Commerce Clause or Spending Clause.

III. ICWA also violates the equal-protection component of the Fifth Amendment. Appellants' argument that ICWA merely makes political distinctions based on tribal membership fails to fully address the relevant case law. Classifications of Indians, even if based on tribal membership, are still race-based classifications and are subject to strict scrutiny unless the classification is either (1) a promotion of Indian self-governance, or (2) a direct federal regulation of Indians and their lands. Because ICWA is neither, it is subject to—and fails—the strict scrutiny test.

IV. ICWA's delegation to Indian tribes of the ability to reorder the placement preferences is also unconstitutional. The delegation was not to a sovereign entity to control its own affairs, but rather to Indian tribes to control state courts and agencies and, in some cases, individuals with no connection to an Indian tribe. There is no constitutional foundation for permitting Indian tribes to do so.

V. Finally, the Final Rule is unconstitutional for the same reasons ICWA is unconstitutional. Further, the Department's decision to make the Final Rule binding is not due any *Chevron* deference, as the change is not necessary to carry out ICWA. For all of the foregoing reasons, the district court's judgment was correct and should be affirmed.

ARGUMENT

I. The State Plaintiffs Have Standing.

All three groups of Appellants raise arguments challenging the State Plaintiffs' standing to bring certain claims. But the State Plaintiffs have standing, as they have demonstrated (1) an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the Federal Defendants; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

A. The State Plaintiffs' claims are traceable and redressable.

The Navajo raise several standing arguments on behalf of the Federal Defendants regarding traceability and redressability. Navajo Br. 21-30; *see also* Fed. Br. 18-19. The Navajo contend that the State Plaintiffs' harms are not traceable to the Federal Defendants or redressable because ICWA and the Final Rule apply only in state-court proceedings, and the Federal Defendants do not control state-court decisions. Navajo Br. 22. The Navajo overlook the burdens and restrictions that ICWA and the Final Rule create by commandeering state agencies and employees, all of which would be alleviated by a declaration of unconstitutionality.[2] *See infra* pp.23-29.

ICWA and the Final Rule require state agencies to treat Indian children differently than non-Indian children, to provide various notices to Indian tribes and the

[2] If declaring ICWA unconstitutional in a federal district court has no practical effect, as the Navajo appear to argue, then the Tribes would not have needed a stay of the district court's injunction pending appeal.

federal government, to hire expert witnesses, and to use "active efforts" to prevent the breakup of the Indian family, among other things. *See supra* pp.4-11. Under ICWA and the Final Rule, state employees must also attempt to place children based on racial preferences, not according to the child's best interest. *See supra* pp.5-6. While state courts remain free to decide whether to follow ICWA (unless and until the United States Supreme Court weighs in), enjoining ICWA and the Final Rule will relieve the State Plaintiffs from the burden of having to comply with the numerous requirements placed on their agencies and judicial officers. *See Texas v. United States*, 497 F.3d 491, 497-98 (5th Cir. 2007) (finding Texas had standing to challenge federal regulations that imposed an administrative process on Texas). The State Plaintiffs have alleged a redressable injury.

The Navajo also challenge the State Plaintiffs' monetary injury, arguing that the Federal Defendants might not withhold federal funding if the States fail to comply with ICWA. Navajo Br. 28-29. But the statutes and regulations are clear—the States must show substantial compliance with their child-welfare plan, including compliance with ICWA, in order to receive funding. 42 U.S.C. § 622(a); 45 C.F.R. § 1355.34(a), (b)(2)(ii)(E); *see, e.g.*, *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 733 (D.C. Cir. 2003) (holding that possibility of reduced revenues sufficed to establish standing). The Navajo raise the possibility of administrative review before any decision to withhold funds is made, Navajo Br. 29, but do not explain how that process would result in continued funding for a State that explicitly refuses to comply with ICWA as part of the required child-welfare plan. The State Plaintiffs have alleged an injury and have standing to sue the Federal Defendants.

B. The State Plaintiffs have standing to bring an equal-protection claim.

All three sets of Appellants assert that the State Plaintiffs lack standing to bring an equal-protection claim and suggest that the district court ruled that the State Plaintiffs lacked standing. Fed. Br. 20; Navajo Br. 30; Tribes Br. 24-25. But the district court *denied* the motions to dismiss for lack of standing in their entirety, ROA.3760, and then referenced and ruled on the State Plaintiffs' summary-judgment motion regarding the equal-protection claim, ROA.4028-29, 4036. At most, the district court neglected to list equal protection as one of the claims brought by the State Plaintiffs. ROA.3753.

Substantively, Appellants simply state that a State may not sue the United States as *parens patriae* to vindicate the rights of its citizens.[3] Fed. Br. 20 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)); Tribes Br. 25 n.9 (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982)). In *Mellon*, the Supreme Court explained that, when an individual is a citizen of the United States and a State, it is the United States that may assert *parens patriae* claims. 262 U.S. at 485-86. But the Supreme Court declined to rule that State may never sue the United States to protect its residents, expressly acknowledging that a State might, in some instances, have standing "to protect its citizens against . . . enforcement of unconstitutional acts of Congress." *Id.* at 485.

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[3] Appellants do not separately address the State Plaintiffs' standing to bring an equal-protection challenge to the Final Rule under the APA. As an object of the Final Rule, the State Plaintiffs have standing to challenge its constitutionality. *See Contender Farms, LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015).

States are given "special solicitude" in the standing analysis when they sue for injuries sustained in their capacities as quasi-sovereigns. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Here, the State Plaintiffs asserted a quasi-sovereign interest: the protection and welfare of resident children. *See Alfred L. Snapp*, 458 U.S. at 607 ("[A] State has a quasi-sovereign interest in the health and well-being-both physical and economic-of its residents."). As the Supreme Court has held, "[t]he State, of course, has a duty of the highest order to protect the interests of minor children." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Further, ICWA commandeers state agencies and employees to violate the equal-protection rights of others, which is an injury to the State Plaintiffs. The State Plaintiffs also have statutory bases for their claims. 5.U.S.C. § 702; 28 U.S.C. § 2201.

It makes no sense to conclude that States must defer to the federal government to protect children's equal-protection rights in court when it is *Congress* that enacted the law that requires state agencies and courts to violate those equal-protection rights in the first place. The special solicitude shown to States, combined with the States' recognized interest in the protection of their resident children and a statutory right to bring suit, is sufficient to allow the State Plaintiffs to raise an equal-protection claim in this lawsuit. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 151-55 (5th Cir. 2016) (finding standing based on the APA and an injury to quasi-sovereign interests).

Regardless, the Individual Plaintiffs have standing to bring an equal-protection claim, and the presence of one plaintiff with standing is sufficient to satisfy the case-or-controversy requirement. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

C. The State Plaintiffs have standing to raise a non-delegation claim.

The Tribes also challenge the States' standing to bring a non-delegation claim, asserting that an injury-in-fact has not been established because any impact from an Indian tribe's change to the placement preferences is not "certainly impending." Tribes Br. 53 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)). That argument is defeated by both the general ability of Indian tribes to change the law at any time and the specific example provided to the district court of the Alabama-Coushatta Tribe of Texas. That tribe has "advised that their placement preferences differ[] from those in" ICWA and those placement preferences "are on file with DFPS." ROA.1919. The State does not have to wait for the other shoe to drop before challenging the impermissible delegation here (and indeed there likely would not be time for such a challenge given the need to quickly place children in foster or adoptive care).

II. ICWA Unconstitutionally Commandeers States.

At its core, "[t]his is a case about federalism," *Coleman v. Thompson*, 501 U.S. 722, 726 (1991), and respect for "the constitutional role of the States as sovereign entities," *Alden v. Maine*, 527 U.S. 706, 713 (1999). "It is incontestible that the Constitution established a system of dual sovereignty." *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (citations and quotation marks omitted). When the thirteen original States declared their independence, "they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority 'to do all . . . Acts and Things which Independent States may of right do.'" *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018) (quoting Declaration of Independence para. 32). While

the States surrendered some of their powers to the federal government when they ratified the Constitution, "they retained 'a residuary and inviolable sovereignty.'" *Printz*, 521 U.S. at 918-19 (quoting The Federalist No. 39, at 245 (J. Madison)).

One part of States' inviolable sovereignty is that the federal government may not commandeer them to carry out federal programs. "[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority." *Murphy*, 138 S. Ct. at 1476. The anti-commandeering doctrine, in its most basic form, holds that "Congress [has] the power to regulate individuals, not States." *Id.*

The Supreme Court has identified three reasons why the anti-commandeering doctrine is important. First, it "serves as 'one of the Constitution's structural protections of liberty.'" *Id.* at 1477 (quoting *Printz*, 521 U.S. at 921). The Constitution divides authority between the federal and state governments, and a healthy balance of power between these governments "reduces the risk of tyranny and abuse from either front." *Id.* (citation and quotation marks omitted). Second, it "promotes political accountability." *Id.* When Congress enacts laws governing the people, "[v]oters who like or dislike the effects of the regulation know who to credit or blame." *Id.* But if Congress compels a State to act, "responsibility is blurred." *Id.* Third, the anti-commandeering doctrine "prevents Congress from shifting the costs of regulation to the States." *Id.* When Congress forces States to carry out federal directives, Congress need not worry about costs to the federal government. *Id.*

The district court correctly held that ICWA and the Final Rule violate the anti-commandeering doctrine. ROA.4040-45. These laws unquestionably conscript state executive and judicial officers to execute a federal program, and they rewrite the substance of state family law by inserting federal standards of decision into state-created causes of action. Neither the Commerce Clause nor the Spending Clause authorize ICWA's intrusion into state sovereignty.

A. ICWA and the Final Rule commandeer state officials.

If the anti-commandeering doctrine stands for anything, it is that state officials may not be "'dragooned' . . . into administering federal law." *Printz*, 521 U.S. at 928. In *Printz*, the Supreme Court reviewed the Brady Handgun Violence Prevention Act, which required state chief law enforcement officers (CLEOs) to, among other things, conduct background checks on prospective handgun purchasers. *Id.* at 902. This required CLEOs to "participate[] . . . in the administration of a federally enacted regulatory scheme." *Id.* at 904.

The Court held that the background-check requirement—even though a discrete and ministerial task—violated the Constitution's anti-commandeering doctrine. *Id.* at 929-30. Such an arrangement allowed Congress to take credit for solving problems while passing the financial obligations of implementing the policy onto the States. *Id.* Moreover, by administering the federal program, the state officials were "put in the position of taking the blame for its burdensomeness and for its defects." *Id.* "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 935.

"[S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Id.*

The commands to state officials in ICWA and the Final Rule go even farther than those in *Printz*. When a child is under the care of a state child welfare agency, ICWA mandates that the state agency use "active efforts" to prevent the breakup of the Indian family. 25 U.S.C. § 1912(d). ICWA requires the state agency to "notify the parent or Indian custodian and the Indian child's tribe[] . . . of the pending proceedings and of their right of intervention." *Id.* § 1912(a). If the state officials cannot identify or locate the parent or Indian custodian, or if the tribe cannot be determined, then the state officials must notify the Secretary. *Id.*; *see also* 25 C.F.R. § 23.11. And no foster care placement or termination of parental rights proceeding may continue until ten days after receipt of these notices. 25 U.S.C. § 1912(a).

If a parent or Indian custodian is indigent, "the court *shall* promptly notify the Secretary upon appointment of counsel." *Id.* § 1912(b) (emphasis added). States must also maintain a record of every placement of an Indian child, "evidencing the efforts to comply with the order of preference," and the record "*shall* be made available at any time upon the request of the Secretary or the Indian child's tribe." *Id.* § 1915(e) (emphasis added); *see also* ROA.1026 (Texas DFPS handbook describing the record-keeping requirements). If ICWA required only the foregoing actions, it would violate the anti-commandeering doctrine just as the background checks did in *Printz*. But ICWA and the Final Rule require more.

When state courts enter a final adoption decree for an Indian child, they "*shall* provide the Secretary with a copy of such decree," including specified details. 25

U.S.C. § 1951(a) (emphasis added); *see also* 25 C.F.R. § 23.140. If a state court vacates an adoption decree or the adoptive parents consent to the termination of parental rights, then the court "must notify" the child's biological parent or prior Indian custodian and the child's tribe. 25 C.F.R. § 23.139.

ICWA also requires state courts to maintain *indefinitely* records of every Indian child adoptive placement, and when asked by an Indian individual who is at least eighteen years old, they "*shall* inform such individual of [his or her] tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect *any rights* flowing from the individual's tribal relationship." 25 U.S.C. § 1917 (emphases added); *see also id.* § 1951; 25 C.F.R. § 23.138. This requires state-court officials to stay abreast of all rights an individual may have due to his or her "tribal relationship," which could include any provisions within Title 25 of the United States Code and any rights that individual may have in one (or more) of the over 570 federally recognized tribes.

When an Indian child is removed from a home on an emergency basis, "[t]he State authority, official, or agency involved *shall* insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject" to ICWA. 25 U.S.C. § 1922 (emphasis added); *see also* ROA.1023 (Texas DFPS handbook describing emergency removal requirements).

These requirements, which Appellants ignore, impermissibly commandeer state executive branch and judicial branch officials. They blur responsibility by giving the

impression that state courts or legislatures are responsible for ICWA's standards. *Murphy*, 138 S. Ct. at 1477. They also impose affirmative duties and obligations on state officials for which the States will bear the costs. *Id.* In the words of Texas DFPS, when an Indian child subject to ICWA "almost every aspect of the social work and legal case is affected." ROA.1017. "'The Federal Government' may not 'command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.'" *Murphy*, 138 S. Ct. at 1477 (quoting *Printz*, 521 U.S. at 935). This rule applies not only to state policymakers, but also "to those assigned more mundane tasks." *Id.* (citation omitted). The requirements imposed by ICWA and the Final Rule on state officials exceed those that the Supreme Court found unconstitutional in *Printz*. But ICWA and the Final Rule commandeer state courts in an additional way—by mandating the incorporation of federal standards into state-created causes of action.

B. ICWA and the Final Rule commandeer state courts.

Congress may not compel state courts to implement federal standards within state-created causes of action. Of course, state courts must hear federal claims when they would ordinarily hear similar state-law claims. *Testa v. Katt*, 330 U.S. 386, 394 (1947). But the federal government may not, pursuant to the Commerce Clause, change the rules of decision in state-law claims. Such action is "tantamount to forced state legislation." *Koog v. United States*, 79 F.3d 452, 458 (5th Cir. 1996).

Before the Supreme Court held the Brady Act unconstitutional in *Printz*, this Court examined the same law and highlighted why certain portions of the Act commandeered state law. The Act "substantively change[d] the enacted policies of state

governments" and imposed duties on CLEOs that "bypass[ed] the state legislative process . . . ." *Id.* The law also required CLEOs to use "federally-specified law enforcement methods" to execute the federal program. *Id.* at 458-59. Of course, as in *Printz*, the Act also impermissibly regulated States, *id.* at 459, "undermine[d] state sovereignty," *id.* at 460, and blurred accountability, *id.* Because the Act "attempt[ed] substantively to amend the States' criminal codes," *id.* at 461, this Court held that it unconstitutionally commandeered States, *id.* at 462.

ICWA commandeers state courts in a similarly impermissible way. In addition to the ministerial duties placed on state agency employees and state judges, *see supra* pp.4-11, ICWA "substantively change[s]" state family codes, *Koog*, 79 F.3d at 458. The examples are numerous. ICWA supplants the best-interest-of-the-child standard with racial placement preferences. *Compare* 25 U.S.C. § 1915(a) ("a preference *shall* be given") (emphasis added), 1915(b) ("[A]ny child . . . *shall* be placed") (emphasis added), *with* Tex. Fam. Code § 162.016 (requiring findings that termination of parental rights and adoption are "in the best interest of the child"). Tribal social and cultural standards "shall" apply to a placement. 25 U.S.C. § 1915(d). State courts "shall transfer" proceedings to tribal court if requested, *id.* § 1911(b), and a tribe "shall" have a right to intervene in "any State court proceeding" for foster care placement or termination of parental rights, *id.* § 1911(c). State courts must apply different evidentiary standards under ICWA. *See, e.g.*, *id.* § 1912(e) (requiring "clear and convincing evidence" by expert witnesses before ordering foster care placement). And ICWA specifies the standard for voluntarily consenting to foster

care placement or termination of parental rights, *id.* § 1913(a), and when consent may be withdrawn, *id.* § 1913(b)-(d).

ICWA and the Final Rule change the burden of proof for terminating parental rights from clear and convincing evidence in Texas, Indiana, and Louisiana (Tex. Fam. Code §§ 161.001(b), .206; Ind. Code § 31-37-14-2; La. Child. Code art. 1035(A)) to proof beyond a reasonable doubt, 25 U.S.C. § 1912(f); 25 C.F.R. § 23.121. ICWA and the Final Rule also change when a parent may voluntarily relinquish parental rights. *Compare* Ind. Code § 31-35-1-6 (anytime after birth); La. Child. Code art. 1130 (prior to or after birth); Tex. Fam. Code § 161.103(a)(1) (48 hours after birth), *with* 25 U.S.C. § 1913(a) (10 days after birth); 25 C.F.R. § 23.125(e) (same). ICWA grants the Indian child's custodian or tribe mandatory intervention in state court proceedings, 25 U.S.C. § 1911(c), when state laws provide other standards, Ind. R. Tr. P. 24; La. Code Civ. P. art. 1091; Tex. R. Civ. P. 60. Finally, ICWA and the Final Rule permit the parent of an Indian child to collaterally attack any final adoption decree for up to two years, 25 U.S.C. § 1913(d); 25 C.F.R. § 23.136, when the State Plaintiffs allow only six months to one year, Ind. Code § 31-19-14-2; La. Child. Code art. 1263; Tex. Fam. Code § 162.012(a).

ICWA does not create federal causes of action applicable in state courts or federal jurisdiction of the child custody matters it regulates, as there is no federal jurisdiction over domestic-relations cases.[4] *Sosna v. Iowa*, 419 U.S. 393, 408-09 (1975).

[4] The one exception is that ICWA allows an Indian child, his parents, custodian, or tribe to "petition any court of competent jurisdiction" to invalidate a foster care placement or termination of parental rights order. 25 U.S.C. § 1914.

ICWA relies on state family-law causes of action, and then changes the rules of decision in those claims to conform with federally desired policy outcomes. As the district court correctly held, these aspects of ICWA offend the "Constitution's structural protections of liberty." *Murphy*, 138 S. Ct. at 1477. Under the anti-commandeering doctrine, the federal government may not do that.

C. ICWA does not preempt state family law.

Appellants argue that ICWA merely preempts state child custody law with respect to Indian children. Fed. Br. 43, 46; Tribes Br. 41. But Congress may preempt state laws only by "regulating private activity affecting interstate commerce." *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981). Under the Supremacy Clause, a "federal law that regulates the conduct of private actors," *Murphy*, 138 S. Ct. at 1481, and that "represent[s] the exercise of a power conferred on Congress by the Constitution" will preempt a state law, *id.* at 1479. The district court correctly determined that ICWA fails both requirements, as it directly regulates States and exceeds federal power.

1. ICWA regulates States, not individuals.

As explained above, ICWA regulates state agencies and courts, not individuals.[5] In *New York v. United States*, the Supreme Court noted an important difference between the type of legislation in *Testa* (which the Court found to be a constitutional

[5] It makes no difference that ICWA also regulates private agencies. Am. Br. of States of Cal., et al. 12-14. The States are the primary protectors of child welfare and have devoted agencies, employees, and laws to fulfilling that duty. That a private

application of the Supremacy Clause) and the legislation in *New York* (which the Court found to violate the anti-commandeering doctrine). 505 U.S. 144, 178-79 (1992). In *Testa*, the law at issue was a direct regulation of individuals, with a grant of jurisdiction for state courts to enforce the statutorily created rights. In *New York*, by contrast, the law was a congressional requirement that States regulate radioactive waste in certain way, which Congress could not do. *See id.* at 178-79. The federal government may regulate individuals. But Congress cannot regulate States by demanding that state officials perform certain functions or by changing the rules of decision in state-law causes of action. ICWA runs afoul of both principles, and for this reason alone is not a valid preemption of state law.

2. ICWA is not authorized by the Commerce Clause.

ICWA also exceeds Congress's lawful authority under the Commerce Clause.[6] The Commerce Clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Children are not objects of commerce. *See United States v. Lopez*, 514 U.S. 549, 585 (1995) ("At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these

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agency may also attempt to make adoptive placements for Indian children does not change that most of ICWA's commands are directed at the States.

[6] The district court ruled that Congress lacked authority under the Commerce Clause to enact ICWA. ROA.4053-54. Appellants barely address this ruling. Fed. Br. 48; Tribes Br. 40 n.14.

purposes."); *see also* U.S. Const. amend. XIII. In fact, the Supreme Court has rejected a broad reading of the Commerce Clause power that includes domestic relations and child custody. *See Lopez*, 514 U.S. at 564 (noting that Congress could not use Commerce Clause power to regulate "family law (including marriage, divorce, and child custody)").

Appellants assert that Congress has "plenary authority" to regulate Indian affairs. Fed. Br. 44. But this power "is not absolute." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (internal quotation marks and citation omitted). When the Court uses the term "plenary," it does so in reference to Congress's power "to legislate in respect to Indian *tribes*." *United States v. Lara*, 541 U.S. 193, 200 (2004) (emphasis added). Moreover, even when the Court acknowledges Congress's "plenary" power over a certain domain, that power is still restrained by the Constitution's structural limitations and grant of affirmative rights. *See, e.g., Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012) (discussing limits on federal power found in the federal government's enumerated powers and "affirmative prohibitions," such as the Bill of Rights).

For example, in *Buckley v. Valeo*, the Supreme Court acknowledged that "Congress has plenary authority" to regulate federal elections, but held that it is still subject to the Appointments Clause. 424 U.S. 1, 132 (1976) (per curiam). In *United States v. Creek Nation*, the Court examined the United States' power over the Creek Nation's land, which the Nation held in fee-simple title, and concluded the federal government's power was "not absolute" because it was restrained by the Fifth Amendment's Takings Clause. 295 U.S. 103, 109-10 (1935). And in *Weeks*, the Court

examined congressional power over the distribution of money awarded to Delaware Indians. 430 U.S. at 84. Although the Court upheld the federal government's actions, it tested those actions under the due process and equal protection clauses of the Fifth Amendment. *Id.* Thus, other provisions of the Constitution, including both the structure of the Constitution and its amendments, restrain Congress's power over Indian tribes.

ICWA, though, is doubly unconstitutional. Not only does it dictate the States' regulation of Indians living outside of reservations under state jurisdiction, it also regulates non-tribal members. The Commerce Clause does not give Congress plenary authority to regulate Indians off-reservation. Nor does Congress's commerce power allow it to regulate children who are only fractionally Indian by descent, may not be tribal members, do not live on a reservation, and may have never been in the custody of a tribal member.

Under Appellants' theory, Congress could require the States to apply different rules of evidence to Indian defendants in criminal cases or regulate landlord-tenant relationships involving Indians. But whatever the limits of Congress's authority to regulate "Indian affairs," neither the Commerce Clause nor any federal treaty gives Congress authority to regulate state-court adoptions of children not living on tribal land.[7] *See Adoptive Couple v. Baby Girl*, 570 U.S. 637, 658-66 (2013) (Thomas, J., concurring) (describing how ICWA exceeds the Commerce Clause power). ICWA does

[7] None of the treaties referenced by the parties authorizes congressional control over state child-welfare proceedings, Fed. Br. 39; Navajo Br. 32, nor do Appellants

not preempt state law; it commandeers state agencies and courts to carry out a federal program. Thus, the district court correctly held ICWA and the Final Rule violate the anti-commandeering doctrine.

D. The Spending Clause does not authorize ICWA.

The Tribes attempt to argue that the Spending Clause authorizes ICWA. Tribes Br. 49-51. While the Tribes mentioned the Spending Clause during oral argument in the district court, they forfeited that argument by never raising it in their briefs below. *See F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) ("[I]f a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court."). They should not be able to raise that argument on appeal.

Regardless, their argument is meritless. Congress expressly enacted ICWA pursuant to the Commerce Clause. 25 U.S.C. § 1901(1). In a completely different title of the United States Code, States that receive funding for child welfare services under Titles IV-B and IV-E of the Social Security Act, must certify compliance with ICWA as a condition of receiving federal funds. 42 U.S.C. § 622. The Spending Clause authorizes this federal funding, but it does not authorize ICWA, which stands alone as a federal mandate to States.[8]

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explain how a treaty can override constitutional limitations on Congress's authority to control State activities.

[8] For this reason, the Tribes' citation of other child-welfare laws applicable to the States do not help their argument. Tribes Br. 46-47. Those laws were specifically tied to spending, whereas ICWA applies regardless of State acceptance of federal funds.

To be sure, in *New York*, the Supreme Court upheld the *incentives* offering States the choice of either regulating the disposal of radioactive waste according to federal standards or having state law preempted by federal regulation. 505 U.S. at 173-74. ICWA, however, offers no incentives. While States must certify compliance with ICWA to receive certain federal child welfare funds, they must comply with ICWA regardless of that funding. Thus, even though the Tribes waived their Spending Clause argument in the district court, it is meritless.

III. ICWA Denies Equal Protection to Indian Children and Their Prospective Parents.

The district court correctly held that ICWA's placement preferences, 25 U.S.C. § 1915(a)-(b), and collateral-attack provisions, *id.* §§ 1913(d), 1914, as well as the related portions of the Final Rule, 25 C.F.R. §§ 23.129-132, violate the equal-protection component of the Due Process Clause of the Fifth Amendment. This is unsurprising, as the Supreme Court has already recognized that ICWA presents equal-protection concerns. *Adoptive Couple*, 570 U.S. at 656.

Appellants claim the equal-protection analysis is simple: ICWA defines "Indian child" by tribal membership, creating a political, not racial, classification that survives rational-basis review. Fed. Br. 25-37; Navajo Br. 30-46; Tribes Br. 25-28. But ICWA's classification based on tribal membership or eligibility is not dispositive. Rather, the Court must apply strict-scrutiny review unless ICWA is either (1) a promotion of Indian self-governance, or (2) a direct federal regulation of Indians and their land. ROA.4031 n.8. Because it is neither, ICWA's Indian classification is race-

based, deprives Indian children of the best-interest standard, and fails the strict-scrutiny test. The district court's equal-protection ruling should be affirmed.

A. Whether a classification of Indians is racial or political depends on the purpose of the statute.

1. The first question the Court must answer is whether ICWA's classification of "Indian" draws a political line, warranting only rational-basis review, or a racial line, requiring strict scrutiny. The source of the political/racial dichotomy is the Supreme Court's decision in *Morton v. Mancari*, where the Court considered an equal-protection challenge to a statutory preference for hiring Indians at the Bureau of Indian Affairs. 417 U.S. 535, 537-38 (1974). The preference applied only to members of federally recognized Indian tribes with one-fourth or more Indian blood, *id.* at 553 n.24, and its purpose was "to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." *Id.* at 541-42.

Concluding that the preference was intended as a political distinction, as opposed to a racial one, the Court reasoned that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. The Court then articulated what has become the test: "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555.

The Court was careful to limit its ruling, however, clarifying that the hiring preference "does not cover any other Government agency or activity," and that the Court "need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations." *Id.* at 554. In short, then, classifying Indians is race-based unless there is a permissible purpose. The Ninth Circuit has recognized this rule, stating that *Mancari* "simply held that the employment preference at issue, *though based on a racial classification*, did not violate the Due Process clause because there was a legitimate non-racial purpose underlying the preference: the unique interest the Bureau of Indian Affairs had in employing Native Americans, or more generally, Native Americans' interests in self-governance-interests . . . ." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.,* 154 F.3d 1117, 1120 (9th Cir. 1998) (emphasis added).

Supreme Court precedent treating Indian classifications as political rather than racial fall into one of two categories: laws furthering tribal self-governance, and laws based on Congress's authority to directly regulate Indians and their lands. ICWA does not fall into either category and is, therefore, a race-based law.

2. Turning first to Indian self-government, the Supreme Court has explained that "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *Rice v. Cayetano*, 528 U.S. 495, 518 (2000) (noting "[t]he retained tribal authority relates to self-governance"); *see also Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425 (1989) (plurality

opinion) (stating that "an Indian tribe generally retains sovereignty by way of tribal self-government and control over other aspects of its internal affairs").

Many of the cases cited by Appellants rely, like *Mancari*, on Indian classifications made to further tribal self-government. For example, *Fisher v. District Court of the Sixteenth Judicial District of Montana*, 424 U.S. 382 (1976) (per curiam), preserved exclusive tribal jurisdiction over an adoption proceeding in which all parties were members of the Northern Cheyenne Tribe and residents of the Northern Cheyenne Indian Reservation. Rejecting a race-discrimination claim based on the exclusion of Indians from state courts in this context, the Court observed that "[t]he exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law." *Id.* at 390. The Court concluded that precluding access to state courts in that case "further[ed] the congressional policy of Indian self-government." *Id.* at 391.

Other examples include *Lara*, 541 U.S. at 210, which concluded that Congress could recognize Indian tribes' inherent authority to criminally prosecute other Indians, and *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 502 (1979), which rejected an equal-protection challenge when the goal of the law was to permit a measure of tribal self-government.

ICWA's placement preferences and collateral-attack provisions do not further Indian self-government, as they do not preserve the right of Indian tribes to govern themselves or their people. Rather, they give Indians and Indian tribes a right to make demands on state agencies and state courts. *Cf. Lara*, 541 U.S. at 205 ("In particular, this case involves no interference with the power or authority of any State."). No

Appellant has explained how these provisions promote self-government, when the entire process of removing an Indian child from his home and placing him in foster or adoptive care does not require the involvement of the Indian tribe at all. ICWA cannot be justified as a political classification aimed at preserving Indian self-governance.

3. Other permissible Indian-specific laws have stemmed from Congress's authority to directly control Indians and Indian land. "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo*, 436 U.S. at 56; *see also Mancari*, 417 U.S. at 552 (stating every piece of Indian-specific legislation singles out "tribal Indians living on or near reservations").

For example, Congress enacted the Major Crimes Act of 1885, extending federal jurisdiction to certain criminal offenses committed by Indians on Indian land. *Keeble v. United States*, 412 U.S. 205, 209-10 (1973). The Supreme Court in *United States v. Antelope* upheld this classification because it dealt with "federal regulation of criminal conduct within Indian country implicating Indian interests." 430 U.S. 641, 646 (1977). The Court has also upheld federal authority to control the sale of liquor in Indian reservations, *Perrin v. United States*, 232 U.S. 478, 482 (1914); congressional authority to determine which Indians and tribes would receive federal funds, *Weeks*, 430 U.S. at 84-85; and congressional authority to exempt Indian reservations and activities on reservations from state taxation, *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 479-81 (1976). And this Court upheld a law allowing members of the Native American Church, most of

whom lived on Indian reservations, to use peyote for religious purposes. *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1212, 1216 (5th Cir. 1991).

ICWA is not a direct federal regulation of Indians and their lands. Instead, ICWA imposes a federal regulatory scheme on public and private agencies and state courts that are involved in child custody proceedings. It is a regulation, not of Indians, but of states.

B. ICWA creates a race-based classification.

Because ICWA does not fall within the permissible purposes of Indian-specific laws, it operates as a race-based classification. This is confirmed by the text of ICWA itself, the Final Rule, and other laws regarding Indian children.

1. As an initial matter, Appellants and their amici place great emphasis on the fact that ICWA's definition of "Indian child" depends on tribal membership.[9] 25 U.S.C. § 1903(4); Fed. Br. 30-31; Navajo Br. 37; Tribes Br. 29-31. Appellants then reason that not all individuals who are racially Indian are members of federally recognized tribes, and not all members of federally recognized tribes are racially Indian; therefore, ICWA does not draw a race-based line. Navajo Br. 34-36; Tribes Br. 29-31. But the Supreme Court rejected that type of argument in *Rice*.

In *Rice*, Hawaii limited the right to vote for certain state positions to Hawaiians and Native Hawaiians, each defined as having certain Hawaiian ancestors (generally

[9] The Federal Defendants note several times that Plaintiffs have not challenged the definition of "Indian child." Fed. Br. 28 n.5, 30. But the *definition* is not unconstitutional. It is the demands ICWA imposes as a result of that definition that are unconstitutional.

Polynesians). 528 U.S. at 509-10, 514. Hawaii argued that those definitions were not limited by race, as the classifications included individuals who were not Polynesian and excluded some who were Polynesian. *Id.* at 514. Despite the over-inclusive and under-inclusive nature of the definitions, the Supreme Court concluded that Hawaii was using ancestry as a proxy for race: "Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Id.* at 516-17; *see also Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (stating that discrimination based on "ancestry or ethnic characteristics" is race discrimination).

An "Indian child" must have Indian ancestry, either as a member of a tribe or as the son or daughter of a member.[10] 25 U.S.C. § 1903(4); *see Adoptive Couple*, 570 U.S. at 641 (child was an Indian because she was 1.2% (3/256) Cherokee); *Rice*, 528 U.S. at 519-20 (recognizing that *Mancari*'s classification "had a racial component"). Indeed, to become a federally recognized tribe today, a tribe must demonstrate that its members descend from a historical Indian tribe. 25 C.F.R. § 83.11(e). But the fact that tribal membership may not strictly align with the entire Indian race is not a reason to conclude that the classification is race-neutral. *See Rice*, 528 U.S. at 516-17. To hold otherwise would insulate any race-based law as long as the classification was less than exact.

[10] The examples given by Appellants and their amici of tribal membership requirements include an ancestral tie or blood quantum. Navajo Br. 7-8; Tribes Br. 33; *see also* Am. Br. of States of Cal., et al. 23 n.35; Am. Br. of Indian Law Scholars 27-28; Am. Br. of Members of Cong. 6.

2. Considered in context, Congress intended ICWA's classifications to draw race-based lines. For example, under ICWA's third adoption preference, a state court must prefer *any* Indian family (regardless of tribe) over a non-Indian family. 25 U.S.C. § 1915(a). Similarly, the foster care preferences include "Indian foster home[s]" and institutions approved by any Indian tribe or operated by any Indian organization. *Id.* § 1915(b). There is no requirement that any of the preferences provide the child with a meaningful connection to his or her Indian tribe, suggesting that the goal is simply to limit Indian placements to Indian families or Indian-approved foster homes on the basis of a child's race.

The Final Rule also confirms ICWA's race-based nature. *See* 25 C.F.R. § 23.103(c). As explained above, several state courts followed the "existing Indian family doctrine," which limited application of ICWA to instances in which the child was being removed from an existing Indian family—one which had significant cultural or political ties to an Indian tribe. *See, e.g.*, *In re Santos Y.*, 112 Cal. Rptr. 2d at 715-16; *S.A.*, 571 So. 2d at 1189-90. But the Final Rule explicitly rejects the existing Indian family doctrine by prohibiting state courts from considering factors such as "participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities" when deciding whether ICWA applies. 25 C.F.R. § 23.103(c). The Final Rule, thus, confirms that ICWA is not focused on maintaining Indian culture or tribal populations. It is preoccupied only with the race of the child and his or her prospective parents.

Finally, other federal law implicitly recognizes the race-based discrimination inherent in ICWA. Congress has decreed that adoption and foster care placements may

not be delayed or denied "on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved." 42 U.S.C. § 1996b(1).[11] Congress then stated that the statute should not be construed to affect the application of ICWA. *Id.* § 1996b(3). This statutory exemption belies any claim that ICWA is not an unconstitutional classification that discriminates based on race. After all, such an exemption from discrimination on the basis of race, color, or national origin would be unnecessary if ICWA was merely a political classification.

C. ICWA fails the strict-scrutiny test.

Because the placement preferences and collateral-attack provisions in ICWA are based on a racial classification, the Court must apply strict scrutiny. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *see also Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 & n.4 (1976) (per curiam) (applying strict scrutiny to classifications based on ancestry).[12] To survive strict scrutiny, a classification must be a "narrowly tailored measure[] that further[s] compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

Appellants urge that ICWA furthers a compelling governmental interest in preventing the unwarranted breakup of Indian families and preserving Indian tribes. Fed. Br. 39-40; Navajo Br. 42; Tribes Br. 37-38. But Appellants fail to grapple with

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[11] Texas law contains a similar provision. Tex. Fam. Code § 162.015.

[12] Neither the Federal Defendants nor the Tribes briefed a strict-scrutiny argument in the district court, even though they were on notice that Plaintiffs sought relief on that basis. The Federal Defendants simply advised the district court that it "should not" consider strict scrutiny without discovery. ROA.3127 n.7. Their arguments have been waived, but are without merit, regardless.

a countervailing state interest: placing a child according to that child's best interests, without regard to race. "The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." *Palmore*, 466 U.S. at 433. There can be no compelling governmental interest in judging a child for purposes of foster or adoptive placement on the basis of the child's race. *See id.* at 432 (finding equal-protection violation in child-custody case when the lower court "made no effort to place its holding on any ground other than race"); *see also Loving v. Virginia*, 388 U.S. 1, 11 (1967) (stating that distinctions based on ancestry are "odious to a free people whose institutions are founded upon the doctrine of equality") (internal quotation marks and citation omitted).

Under ICWA, an Indian child's best interests are not considered when placing him for foster care or adoption or when allowing collateral attacks on those placements years after the fact. A child's best interest should not be limited by a tribe's desire to maintain or increase its membership. *See Adoptive Couple*, 570 U.S. at 655 (recognizing that prioritizing a child's Indian ancestry "would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian").[13]

[13] The Federal Defendants urge the Court to analyze each individual preference separately. Fed. Br. 28-32. The Court should not do so. The equal-protection violation results from applying the preferences, as a whole, to Indian children, rather than the best-interest standard that would otherwise govern.

Even if a compelling governmental interest exists in preserving Indian tribes, however, the solution provided by ICWA is not narrowly tailored. There is no requirement that any of the placement preferences will pass along tribal culture and traditions, much less tribal membership. And by rejecting the existing Indian family doctrine, the Final Rule makes clear that ICWA is not concerned with preserving existing tribal cultures, but only with placing Indian children with other Indians, regardless of any connection to tribal practices and culture. 25 C.F.R. § 23.103(c).

Moreover, banning unrelated non-Indians (such as the Individual Plaintiffs) from the list of placement preferences is an extraordinarily broad remedy. *See Williams v. Babbitt*, 115 F.3d 657, 665-66 (9th Cir. 1997) (considering an Indian-specific law and finding a "race-based ban" to be the "broadest possible remedy" and "almost by definition not narrowly tailored"). And, by including all children who are "eligible" for tribal membership, the law includes children who may never become members of an Indian tribe or whose only connection to a tribe is a genetic link. 25 U.S.C. § 1903(4). The placement preferences and collateral-attack provisions are not narrowly tailored to preserve tribal cultures, traditions, or populations.

ICWA classifies Indian children by their race and requires state agencies and courts to make decisions based on their race, rather than their best interests. Appellants have not justified this discrimination under the strict-scrutiny standard, and the district court's equal-protection ruling should be affirmed.

IV. ICWA Unconstitutionally Delegates Authority to Indian Tribes.

Even assuming that Congress had the authority to legislate what state courts and agencies must do, that authority still may not be delegated to the Indian tribes. This

case thus involves a violation of that "fundamental precept of the delegation doctrine . . . that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). The ability of Indian tribes to reorder the placement preferences under ICWA evidences a law-making power as it allows tribes to rewrite the law to their liking. 25 U.S.C. § 1915(c). The delegation also reveals the shortcoming of Appellants' entire merits argument. ICWA is more concerned with race than tribal sovereignty. This impermissible assignment of legislative power merely confirms Plaintiffs' larger argument.

Appellants make two arguments: (1) there is no delegation since Indian tribes have sovereign authority (especially over domestic relations); and (2) any delegation here was permissible (because it involves an area of Indian sovereignty or because it has an "intelligible principle" that constrains it). Fed. Br. 49-50; Tribes Br. 54-59. The first claim misapprehends both Indian sovereignty and what is taking place under ICWA. The second claim fails because the delegation here transfers authority from the federal government to a separate entity that does not have authority over the sovereign States.

First, Appellants depend on caselaw that emphasizes tribal sovereignty, but ignore the context in which those decisions were made. For instance, *Santa Clara Pueblo*, 436 U.S. at 51, involved whether a federal court could determine a question of tribal membership. Such questions are rationally related to tribal self-governance. Likewise, it is true that tribes exercise greater authority "over their members and territories." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Ok.*, 498

U.S. 505, 509 (1991); *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975) (addressing on-reservation sale of alcohol). The issue here, however, involves citizens of Texas, Louisiana, and Indiana who are not (and need not be under ICWA) members of the tribe that would seek to control their lives. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) ("[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, 'are presumptively invalid.'").

Second, there is no precedent for giving Indian tribes authority to legislate what state courts or agencies are forced to do. This is not an instance of Congress delegating authority to a tribe to regulate conduct on tribal lands, even conduct of non-Indians. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650-51 (2001). This is a delegation of authority to force state actors to comply with tribal wishes in state-court cases involving children who may not even be members of the tribe. Whatever residual sovereignty remains in the tribes does not extend to state actions, and the federal government may not transfer its Supremacy Clause power to an outside entity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). So while the federal government is free to incorporate Indian law in certain instances—*see, e.g.*, Lacey Act (cited at Fed. Br. 49)—there is no authority to allow Indian tribes to rewrite federal law that is then imposed on the States.

Critically, Appellants' arguments, including the claim of an "intelligible principle" that the law be interpreted to further the interests of Indian children, only underscore the argument that Plaintiffs have been making all along. ICWA promotes a federal policy of race-based preferences, not the sovereignty of individual tribes. The placement preferences that can be altered by an Indian tribe are for any "Indian

child," which includes any child who is merely "eligible for membership in an Indian tribe." 25 U.S.C. § 1903(4). This means that, under ICWA, a tribe could reorder the adoptive placement preferences to place a non-member child with a completely different Indian tribe over members of her extended family. Appeals to tribal sovereignty for the delegation of authority here, grounded in precedent that should apply (at most) only to tribal members or those on tribal lands, ring hollow against the reality of the impermissible delegation of authority that Congress provided. The district court's non-delegation ruling should be affirmed. ROA.4036-40.

V. The Final Rule Violates the Administrative Procedure Act.

Finally, the district court's decision holding that the Final Rule violates the Administrative Procedure Act should be affirmed. ROA.4045-53. If the Court affirms any of the constitutional arguments made above, then the portions of the Final Rule that give effect to those provisions of ICWA must be held unlawful and set aside. 5 U.S.C. § 706(2)(B).

The Final Rule is also arbitrary and capricious because it purports to be binding. ROA.4046-49. When issuing its original Guidelines in 1979, the Department concluded that "[p]romulgation of regulations with legislative effect with respect to most of the responsibilities of state or tribal courts under the Act, however, is not necessary to carry out the Act." 44 Fed. Reg. at 67,584. The Department realized that "[f]or Congress to assign an administrative agency such supervisory control over courts would be an extraordinary step . . . at odds with concepts of both federalism and separation of powers . . . ." *Id.*

Nevertheless, in 2016, the Department concluded that Congress did want it to take that "extraordinary step" and issue regulations that would bind state agencies and state courts. 81 Fed. Reg. at 38,786 (stating that the Department "no longer agrees with [the] statements it made in 1979"). The reasons given by the Department are that state courts are not uniform in their application of ICWA, and that the Department disagrees with how some are applying ICWA. *Id.*

This new position is not entitled to *Chevron* deference. When a new agency interpretation is "in conflict with its initial position," it "is entitled to considerably less deference" and is met with "a measure of skepticism." *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 381 (5th Cir. 2018) (internal quotation marks and citations omitted). ICWA's plain text permits the Department to make rules "as may be necessary to carry out" ICWA. 25 U.S.C. § 1952. But the Department has not shown why the Final Rule must necessarily be binding, when in 1979 the Department concluded the opposite and noted the lack of congressional directives authorizing such a rule. The Department's disagreement with the legal interpretations of some state courts is not grounds to impose regulations "at odds with concepts of both federalism and separation of powers." Therefore, issuing binding regulations exceeded the statutory authority granted by Congress in ICWA.[14]

[14] The State Plaintiffs agree with and adopt the arguments of the Individual Plaintiffs regarding the Final Rule's attempt to define the good cause standard.

Conclusion

The Court should affirm the judgment of the district court.

Respectfully submitted.

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This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,979 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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