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

STATE APPELLEES' EN BANC BRIEF

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General
Kyle.Hawkins@oag.texas.gov

BETH KLUSMANN
Assistant Solicitor General

DAVID J. HACKER
Special Counsel to the
First Assistant Attorney General

(Additional counsel on inside cover)

JEFF LANDRY
Attorney General of Louisiana

Louisiana Department of Justice
1885 North Third Street
Baton Rouge, Louisiana 70802
(225) 326-6766

CURTIS HILL
Attorney General of Indiana

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, Indiana 76204
(317) 232-6255

Counsel for State Appellees

Certificate of Interested Persons

No. 18-11479

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.

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.

Individual Plaintiffs-Appellees:
Chad Everet Brackeen
Jennifer Kay Brackeen
Altagracia Socorro Hernandez
Jason Clifford
Danielle Clifford
Frank Nicholas Libretti
Heather Lynn Libretti

Counsel for Individual Plaintiffs-Appellees:
Matthew D. McGill
Lochlan F. Shelfer
Robert E. Dunn
Elliot T. Gaiser
Gibson, Dunn & Crutcher LLP

Mark Fiddler
Fiddler Osband, LLC

State Plaintiffs-Appellees:
Texas
Indiana
Louisiana

Counsel for State Plaintiffs-Appellees:
Ken Paxton
Jeffrey C. Mateer
Kyle D. Hawkins (lead counsel)
Beth Klusmann
John C. Sullivan
David J. Hacker
Office of the Attorney General

Curtis Hill, Attorney General of Indiana
Jeff Landry, Attorney General of Louisiana

Intervenor Defendants-Appellants:
Cherokee Nation
Oneida Nation
Quinault Indian Nation
Morongo Band of Mission Indians

Counsel for Intervenor Defendants-Appellants:
Adam H. Charnes
Christin J. Jones
Thurston H. Webb
Keith M. Harper
Venus McGhee Prince
Kilpatrick Townsend & Stockton LLP

Kathryn E. Fort
Michigan State Univ. College of Law, Indian Law Clinic

Federal Defendants-Appellants:
United States of America
Bureau of Indian Affairs
Bryan Rice, Director of Bureau of Indian Affairs
John Tahsuda III, Bureau of Indian Affairs Principal Assistant Secretary for Indian Affairs
Tara Sweeney, Acting Assistant Secretary for Indian Affairs
United States Department of the Interior
David Bernhardt, Acting Secretary of the Department of the Interior
United States Department of Health and Human Services
Alex Azar, Secretary of the Department of Health and Human Services

Counsel for Federal Defendants-Appellants:
Steven Miskinis
Christine Ennis
Ragu-Jara "Juge" Gregg
Amber Blaha
John Turner
Jeffrey H. Wood
Samuel C. Alexander
Sam Ennis
JoAnn Kintz
Rachel Heron
U.S. Department of Justice

Intervenor
Navajo Nation

Counsel for Intervenor
Colleen E. Roh Sinzdak
Thomas P. Schmidt
Maria Wyckoff Boyce
Catherine E. Bratic
Hogan Lovells US, LLP
Paul Spruhan
Kandis Martine
Navajo Nation Department of Justice

/s/ Kyle D. Hawkins
KYLE D. HAWKINS
Counsel of Record for State Appellees

Statement Regarding Oral Argument

The Clerk has calendared this case for oral argument on January 22, 2020.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Constitutional Provisions, Statutes, and Rules:

Other Authorities:

Introduction

Under the State Plaintiffs' laws, A.L.M., Child P., and Baby O. would be treated as individual children with unique circumstances and needs who should be placed in accordance with their best interests—even if that happens to be with non-Indian families. Under the Indian Child Welfare Act, however, they are tribal "resources" to be placed in accordance with the tribes' interests and demands. However one views the policy goals underlying ICWA, the means Congress chose to employ in it are not constitutionally permissible. Congress has conscripted state officials, agencies, and courts to carry out this federally mandated program and given Indian tribes the ability to trump state law regarding where a child should be placed. And Congress has purported to do all of this through its "plenary power" over Indian affairs, which Defendants claim gives Congress the power to enact essentially *any* law regarding Indians.

The district court properly held that ICWA is unconstitutional and the Final Rule is arbitrary and capricious. The divided panel's now-vacated decision ignored binding Supreme Court precedent and placed virtually no limits on Congress's authority. The en banc court should affirm the judgment of the district court, holding that ICWA violates multiple provisions of the Constitution and that the Final Rule is arbitrary and capricious.

Statement of Jurisdiction

There is subject-matter jurisdiction under 28 U.S.C. § 1331 because this case raises federal questions. ROA.579-664. The Court has appellate jurisdiction because

the Federal Defendants and Tribes timely filed notices of appeal following the district court's final judgment. ROA.4458-61, 4762-64.

Issues Presented

The State Plaintiffs' panel-stage brief laid out the issues on appeal. *See* States Panel Br. 2. While all of those issues remain in the case, the State Plaintiffs will focus their en banc brief on the following three questions:

1. Do ICWA and the Final Rule unconstitutionally commandeer the States in violation of the Tenth Amendment?
2. Do ICWA and the Final Rule unconstitutionally delegate law-making authority to Indian tribes?
3. Did Congress have the constitutional authority to enact ICWA?

Statement of the Case

I. The Indian Child Welfare Act and Related Laws

A. In ICWA, Congress rewrote the child custody laws of all 50 States whenever the child at issue is a member or potential member of any one of the 573 federally recognized Indian tribes in America. It did so by purporting to invoke its "plenary power over Indian affairs," which it found in the Commerce Clause and "other constitutional authority." 25 U.S.C. § 1901(1).

Congress took such a drastic step because it determined that (1) Indian children are an essential resource to the continued existence of Indian tribes, and (2) public and private agencies were wrongly breaking up Indian families and placing their children with non-Indians. *Id.* § 1901(3), (4). Congress singled out the States for failing

to recognize "the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families" when conducting child custody proceedings in judicial and administrative settings. *Id.* § 1901(5).

Consequently, Congress enacted ICWA to govern the removal of Indian children from their homes and their placement in foster and adoptive homes. ICWA applies to any "child custody proceeding" involving an "Indian child." An "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *Id.* § 1903(4). "Child custody proceedings" include terminations of parental rights, foster care placements, and adoptive placements. *Id.* § 1903(1). In short, state officials, agencies, and courts must comply with federal law, not state law, when handling child custody proceedings involving an Indian child.

B. Shortly after ICWA was enacted, the Department of the Interior promulgated "Guidelines for State Courts; Indian Child Custody Proceedings." 44 Fed. Reg. 67,584 (Nov. 26, 1979). The Guidelines did not have "binding legislative effect," but left "primary responsibility" of interpreting and implementing ICWA "with the courts that decide Indian child custody cases," *i.e.*, state courts. *Id.*

In 2016, however, the Department became dissatisfied with how some state courts were interpreting and implementing ICWA, so it promulgated the Final Rule at issue here. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,782 (June 14, 2016). The Final Rule is intended to be binding on the States and, as discussed below, places additional obligations on the States when implementing ICWA.

C. In 1994, Congress amended the Social Security Act to make certain child-welfare payments to the States dependent on those States having a plan for compliance with ICWA. 42 U.S.C. § 622(a), (b)(9). Prior to that point, there was no link between those federal payments and ICWA. 139 Cong. Rec. 15940 (Nov. 17, 1993). Should a State fail to comply with ICWA, some of its funding may be withheld. 45 C.F.R. §§ 1355.34(a), (b)(2)(ii)(E), 1355.36. For the State Plaintiffs, that could total over $660 million each year. ROA.4014-15.

II. State Implementation of ICWA

There can be no question that ICWA must be implemented by state officials, agencies, and courts. *See, e.g.*, 81 Fed. Reg. at 38,839 ("This language creates an obligation on State agencies and courts to implement the policy outlined in the statute."). And its impact is extensive. In the words of the Texas Department of Family and Protective Services, when a child is an Indian child, "almost every aspect of the social work and legal case is affected." ROA.1017. The parties' briefs at the panel stage include a detailed description of ICWA and the Final Rule. The State Plaintiffs will highlight here some of the key sections of ICWA.

A. State agencies and officials

Under ICWA, state child-welfare officials seeking to terminate parental rights or place a child in foster care must use "active efforts" "to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). The Final Rule defines "active efforts" as "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child

with his or her family." 25 C.F.R. § 23.2. The efforts must be "provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe." *Id.* The Rule goes on to list eleven examples of the necessary efforts. *Id.*

In those same situations (termination of parental rights and foster care placement), state officials must also find and hire qualified expert witnesses to testify. 25 U.S.C. § 1912(e), (f). According to the Final Rule, the expert must be able to testify regarding the "prevailing social and cultural standards of the Indian child's Tribe." 25 C.F.R. § 23.122(a). The Indian child's tribe may designate a witness as qualified. *Id.*

State officials seeking to involuntarily remove an Indian child from his or her home must notify the parent, Indian custodian, and Indian tribe of the proceeding, or the Secretary of the Interior if none of the above can be found. 25 U.S.C. § 1912(a). The Department estimates that state agencies and courts will spend a total of 81,900 hours per year sending 13,650 of these notices at a cost of over $260,000. 81 Fed. Reg. at 38,863-64. The child custody proceeding cannot move forward for ten to thirty days after receipt of the notice. 25 U.S.C. § 1912(a).

ICWA also requires state officials to alter their searches for foster and adoptive homes for Indian children. State officials seeking to place children in foster care and adoptive homes under the State Plaintiffs' laws look for placements that are in the children's best interests. *See, e.g.*, Ind. Code § 31-19-11-1(a); La. Child. Code arts. 1001, 1217(B), 1255(B)-(C); Tex. Fam. Code § 162.016(a)-(b). But ICWA mandates placement preferences for foster and adoptive homes for Indian children that differ

from state law. For adoption, preferences must be given first to family, second to members of the Indian child's tribe, and third to any other Indian family in America. 25 U.S.C. § 1915(a); *see also id.* § 1915(b) (foster care placement preferences). Thus, rather than look for homes that meet the child's best interests, state officials must change their search criteria to match ICWA's dictates.

B. State courts

In addition to altering the procedural rules and substantive law that state courts must apply, *see infra* pp.8-9, ICWA and the Final Rule place additional, non-judicial obligations on state courts. *See* 81 Fed. Reg. at 38,804 ("ICWA . . . imposes obligations on a court when it knows or has reason to know that a child is an Indian child."), 38,778 ("The final rule addresses requirements for State courts in ensuring implementation of ICWA in Indian child-welfare proceedings and requirements for States to maintain records under ICWA.").

Section 1917 requires state courts that enter final adoption decrees regarding Indian children to provide certain information to those children, upon request, once they reach the age of eighteen: "the 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." *See also* 25 C.F.R. § 23.138. The Department estimates that 1000 Indians will take advantage of this each year. 81 Fed. Reg. at 38,863. Courts must also notify the Secretary of the Interior of the appointment of counsel for indigent parents or Indian custodians. 25 U.S.C. § 1912(b).

Section 1951(a) requires any state court that enters any final order in an adoptive placement involving an Indian child to provide the Secretary of the Interior with the order, along with the name and tribal affiliation of the child, the names and addresses of the child's biological and adoptive parents, and the identity of any agency having information regarding the placement. The Final Rule expands the required information to include the child's birth name and adopted name, the child's birthdate, and "[a]ny information relating to Tribal membership or eligibility for Tribal membership of the adopted child." 25 C.F.R. § 23.140(a). The Department estimates that state courts will make a total of 2350 of these notifications each year. 81 Fed. Reg. at 38,863.

Although it does not specify whether the obligation is placed on state courts or state agencies, ICWA requires States to maintain indefinitely a record of each placement and to make that record available at any time upon request of the Secretary of the Interior or the Indian child's tribe. 25 U.S.C. § 1915(e). The Final Rule specifies that the records must include the petition or complaint, all substantive orders, court findings, statements by social workers, and "detailed documentation of the efforts to comply with the placement preferences." 25 C.F.R. § 23.141(b). Those records must be made available to the Secretary or tribe within 14 days of a request. *Id.* § 23.141(a). The preamble to the Final Rule confirms that this requirement was added so that the Secretary can ensure that the States are complying with ICWA. 81 Fed. Reg. at 38,785 ("Congress also tasked the Department with affirmatively monitoring State compliance with ICWA by accessing State records of placement of

Indian children, including documentation of State efforts to fulfill ICWA placement preferences.").

C. State legislative process

By altering the duties and obligations of state officials, agencies, and courts, as described above, ICWA intrudes on the state legislative process itself. And as described in prior briefing, ICWA alters the substantive law that applies to child custody proceedings that involve Indian children. States Panel Br. 5-8. As the preamble to the Final Rule states, "Congress's clear intent in ICWA is to displace State laws and procedures that are less protective." 81 Fed. Reg. at 38,851.

Among other things, ICWA (1) requires courts to permit the child's Indian tribe to intervene in any child custody proceeding, 25 U.S.C. § 1911(b); (2) sets the evidentiary standards and burdens of proof for foster care placement and termination of parental rights, *id.* § 1912(e), (f); (3) sets the placement preferences that courts must follow when placing an Indian child in foster care or an adoptive home, *id.* § 1915(a), (b); (4) requires state courts to use the "prevailing social and cultural standards of the Indian community in which the parent or extended family [of the Indian child] resides . . . or maintain[s] social and cultural ties," *id.* § 1915(d); and (5) enlarges the time for collaterally attacking terminations of parental rights, foster care placements, and adoption decrees, *id.* §§ 1913(d), 1914.[1] ICWA also permits Indian tribes to alter the placement preferences and requires state courts to follow

[1] As described in the State Plaintiffs' panel briefing, ICWA and the Final Rule also govern emergency removal proceedings, voluntary terminations, and transfers to tribal courts. States Panel Br. 5-10.

those alterations. *Id.* § 1915(c). But at no point does ICWA permit a court to consider an Indian child's "best interests," which is the primary consideration under state law.

III. Procedural History

The State Plaintiffs (Texas, Indiana, and Louisiana) joined with several individuals (the Individual Plaintiffs) to bring suit to have ICWA declared unconstitutional and the Final Rule arbitrary and capricious. ROA.579-664 (live complaint). Defendants are several federal agencies, officials, and the United States (the Federal Defendants), as well as four Indian tribes (the Tribes) that intervened to defend ICWA.

After determining that all Plaintiffs had standing, ROA.3749-53, the district court ruled on motions for summary judgment, concluding that ICWA violated (1) the equal-protection guarantee of the Fifth Amendment, ROA.4028-36; (2) the anti-commandeering doctrine, ROA.4040-45; (3) the non-delegation doctrine, ROA.4036-40; and (4) the Administrative Procedure Act. ROA.4045-53. The district court also rejected Defendants' argument that the Commerce Clause permitted Congress to enact ICWA. ROA.4053-54. The district court, therefore, declared the challenged portions of ICWA (25 U.S.C. §§ 1901-23, 1951-52) and the Final Rule (25 C.F.R. §§ 23.106-22, .124-32, .140-41) unconstitutional. All Defendants appealed, and this Court issued a stay pending appeal. The Court also permitted the Navajo Nation to intervene as an appellant.

After expedited briefing and argument, a divided panel reversed the judgment of the district court. Although the panel concluded that Plaintiffs had standing, Panel Op. 11-19, it held that ICWA was constitutional and the Final Rule did not violate

the APA. Panel Op. 19-46. Judge Owen dissented in part and would have held that portions of ICWA commandeered the States. Panel Op. 47-55 (Owen, J., dissenting in part). The Court granted en banc review.

SUMMARY OF THE ARGUMENT

ICWA is a federal regulatory scheme that must be implemented by the States. Congress has conscripted state officials, agencies, courts, and the legislative process itself to carry out Congress's preferred child-placement policies with respect to Indian children. Through ICWA, Congress inserts itself into state-court child custody proceedings and sets evidentiary standards, permits tribal intervention, delays proceedings, controls burdens of proof, requires multiple notices, mandates record-keeping and access, extends statutes of limitations, and decrees the very decision of where to place a child in need of a home. States have no choice but to comply.

The anti-commandeering doctrine and the concept of dual sovereignty that underlies it do not permit the federal takeover of state child custody proceedings. This is not a simple issue of preemption as Defendants have urged (and *Murphy* rejected). ICWA issues direct commands to the States to regulate their citizens in accordance with Congress's instructions. It is impermissible under the Constitution and Supreme Court precedent. The district court correctly determined that ICWA is unconstitutional under the anti-commandeering doctrine.

In addition, section 1915(c) of ICWA violates the non-delegation doctrine found in Article I because it grants Indian tribes the authority to change the placement preferences enacted by Congress, binding the States and their courts. Indian tribes are not federal entities to whom legislative authority can be delegated, and they are

politically unaccountable to many of the people whose lives they may ultimately control. Contrary to Defendants' arguments, Indian tribal authority does not extend to state-court child custody proceedings. Section 1915(c) is unconstitutional.

Finally, ICWA does not fall within Congress's power under the Commerce Clause. It has nothing to do with "commerce," as originally or presently understood, and it exceeds Congress's "plenary power" over Indian affairs. Congress cannot intervene in any state-court child custody proceeding, carried out under state law, simply because an Indian or potential Indian child is involved. Congress's plenary power must have limits.

Defendants' interpretations of the constitutional provisions at issue place no limits on what Congress can do with respect to Indians. The Constitution is not so broad. ICWA is unconstitutional, and the Court should affirm the judgment of the district court.

STANDARD OF REVIEW

Summary-judgment rulings are reviewed de novo, applying the same standard the district court applied. *Smith v. Reg'l Transit Auth.*, 827 F.3d 412, 417 (5th Cir. 2016). The constitutionality of federal statutes is also reviewed de novo. *United States v. Willingham*, 310 F.3d 367, 370-71 (5th Cir. 2002).

ARGUMENT

I. ICWA and the Final Rule Commandeer the States.

Only two years ago, the Supreme Court reaffirmed the importance of the anti-commandeering doctrine as "one of the Constitution's structural protections of

liberty." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018) (quoting *Printz v. United States*, 521 U.S. 898, 921 (1997)). The division of federal and state power protects individuals from tyranny and abuse, holds Congress politically accountable for its actions, and forces Congress to pay for its own programs. *Id.* Stated simply, the doctrine provides that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992).

But that is what ICWA does. It compels state agencies, officials, and courts to administer a federal child-welfare program by issuing them direct commands and by altering the underlying state law that would otherwise govern their actions. As recognized by this Court in *Koog v. United States*, conscripting state officers to carry out a federal program alters state law itself and amounts to "forced state legislation." 79 F.3d 452, 458 (5th Cir. 1996). ICWA has been forced on the States. The district court correctly concluded that ICWA violates the anti-commandeering doctrine.

A. Congress may not conscript state officials to enforce federal regulatory programs.

The anti-commandeering doctrine has remained largely unchanged since *New York*: "[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz*, 521 U.S. at 925; *see also Murphy*, 138 S. Ct. at 1477 ("Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" (quoting *New York*, 505 U.S. at 161)).

The doctrine is a result of the Framers' decision to establish a "system of 'dual sovereignty'"—although the States surrendered some power to the federal government, they retained the remainder of their sovereignty. *Printz*, 521 U.S. at 918. An "essential attribute" of the States' retained sovereignty is that they "remain independent and autonomous within their proper sphere of authority." *Id.* at 928. In accordance with this "independence and autonomy," their officers may not be "dragooned . . . into administering federal law." *Id.*

The doctrine thus operates as a limit on the *means* that Congress may use to achieve its goals, rather than the *ends* it seeks to accomplish. The Framers chose to "withhold from Congress the power to issue orders directly to the States," *Murphy*, 138 S. Ct. at 1475, instead granting it only "the power to regulate individuals," *New York*, 505 U.S. at 166. As a result, "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Murphy*, 138 S. Ct. at 1477 (quoting *New York*, 505 U.S. at 178). In short, when Congress wants to solve a problem, it must do so by regulating individuals, not by telling the States how they must regulate individuals.

Commandeering can take the form of congressional orders either to state legislatures, as in *Murphy* and *New York*, or to state officials, as in *Printz* and *Koog*. Considering the Brady Act prior to the decision in *Printz*, this Court in *Koog* held that congressional orders issued directly to state officials commandeer the state legislative process by altering the law that would otherwise govern the officials' actions. *Koog*, 79 F.3d at 458 (holding that imposing federal duties on state officials "effectively bypass[es] the state legislative process and substantively change[s] the enacted

policies of state governments"). As it explained, by "*add[ing] a new duty*" to those already required of state law enforcement officers—running background checks on gun purchasers—the Brady Act effectively amended the States' criminal codes. *Id.* at 459 n.7. Thus, the anti-commandeering doctrine prohibits Congress from issuing commands to state legislatures or officials.

It also precludes Congress from dragooning state courts. After all, requiring state judges "to perform discrete, ministerial tasks" dictated "by Congress" is no less of an intrusion on "the structural framework of dual sovereignty" than requiring state executive officers to do the same. *Printz*, 521 U.S. at 929, 932. Such "compulsion" imposes on state judiciaries "the same harms caused by congressional commandeering of the other branches of state government," Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 Brandeis L.J. 319, 363 (1998), and thus cannot be squared with the Tenth Amendment, *see Printz*, 521 U.S. at 929.

B. Multiple provisions of ICWA and the Final Rule commandeer the States.

ICWA violates the anti-commandeering doctrine because it is a federal regulatory program that must be carried out by the States. In ICWA, Congress has issued commands to state officials, agencies, and courts, effectively replacing state legislative choices with congressional policy decisions. But "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162. Congress overstepped its constitutional boundaries when requiring States to comply with ICWA.

1. Judge Owen correctly recognized that, at a minimum, three provisions of ICWA commandeer the States.

The Federal Defendants concede that some provisions of ICWA are "arguably phrased as directives to state agencies." Fed. Supp. Br. 47. Judge Owen identified several such sections as "a transparent attempt to foist onto the States the obligation to execute a federal program and to bear the attendant costs." Panel Op. 50 (Owen, J., dissenting in part).

First, she discussed section 1912(d) and (e), which govern parties seeking to place Indian children in foster care. *Id.* at 49-51. Section 1912(d) requires the party to make "active efforts" to provide remedial services and rehabilitative programs before placing an Indian child in foster care, and section 1912(e) requires the party to provide a qualified expert witness before it can place a child in foster care. To the extent that States are the parties that place children in foster care, these provisions apply to the States.[2] Panel Op. 49 (Owen, J., dissenting in part). Thus, ICWA's commands to make active efforts and find and hire certain expert witnesses commandeer state officials seeking to make foster care placements. *See Printz*, 521 U.S. at 903, 927-28 (finding unconstitutional a provision requiring state law-enforcement officers to "make a reasonable effort" to determine whether transferring the firearm to the proposed recipient would violate the law).

[2] The Tribes identify several state courts that have applied ICWA in private guardianship proceedings that meet the definition of "foster care" proceedings. Tribes Supp. Br. 43. But for the reasons described below, *see infra* pp.16-17, that does not exempt sections 1912(d) and (e) from the commandeering analysis.

Judge Owen also correctly recognized that subsections (d) and (e) of section 1912 present further commandeering concerns in contexts involving the termination of parental rights. Panel Op. 51 (Owen, J., dissenting in part). The fact that private parties may initiate certain proceedings to terminate parental rights in some narrow instances does not rehabilitate section 1912's unlawful commandeering. *Cf. id.* at 51 n.19. That is because (1) only States have the authority to terminate parental rights (through judicial or administrative processes); and (2) child welfare is the responsibility of States as sovereigns, 81 Fed. Reg. at 38,789 (recognizing "the States' sovereign interest in child-welfare matters"). *See also Printz*, 521 U.S. at 931 (suggesting that "the incidental application to the States of a federal law of general applicability [may] excessively interfere[] with the functioning of state governments").

As to the first, while private parties may seek to terminate parental rights, termination requires a ruling from a state court or administrative body. *See, e.g.*, Ind. Code § 31-35-2-8; La. Child. Code art. 1037; Tex. Fam. Code § 161.206. Thus, while phrased as directives to the parties seeking termination, subsections (d) and (e) bind the States and their courts to deny terminations unless those procedures have been followed. In short, those subsections tell the States how they must regulate their citizens (deny their termination requests unless they follow certain rules), which is the very act prohibited by the anti-commandeering doctrine. *See Murphy*, 138 S. Ct. at 1477.

As to the second, this is not the situation, as in *Reno v. Condon*, 528 U.S. 141 (2000), in which the State and private parties both participated in a market regulated by Congress. There, the States were not acting as sovereigns, but market participants

(selling data), so congressional regulation of the market was not considered commandeering. *Condon*, 528 U.S. at 151 (finding law did not "require the States in their sovereign capacity to regulate their own citizens," but regulated the States as "owners of data bases"). Here, however, child welfare is not a market regulated by Congress in which public and private actors participate. It is the sovereign obligation of the States.[3] They may choose to share that responsibility with private parties, but in so doing they still act as sovereigns, not market participants. The anti-commandeering doctrine applies to subsections (d) and (e) in their entirety, and the Court should hold they are unconstitutional.

Judge Owen also correctly identified as commands to the States section 1915(e) and 25 C.F.R. § 23.141, which require States to create certain records, maintain them, and allow the federal government to access them whenever it wants. Panel Op. 52 (Owen, J., dissenting in part). The Federal Defendants attempt to minimize these provisions as "information-sharing requirements," Fed. Supp. Br. 46, but *Printz* rejected any de minimis exception to the anti-commandeering doctrine. When the United States argued that the background-check required by the Brady Act was minimal and temporary, the Court held that the law violated "the very *principle* of

[3] The panel majority reasoned that ICWA regulated the States as "child advocates and custodians." Panel Op. 32 n.15. But the States are not glorified caretakers of children. They have a "duty of the highest order to protect the interests of minor children, particularly those of tender years." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

separate state sovereignty" and that no comparative assessment of interests could overcome that defect. *Printz*, 521 U.S. at 932.

The Tribes argue that these provisions are permissible because the Supreme Court has approved other impositions of administrative obligations on the States. Tribes Supp. Br. 43-44. But the cases cited are easily distinguished. As explained above (and in *Murphy*), the law at issue in *Condon* applied to the States as market participants, not as sovereigns required to regulate their citizens according to Congress's commands. *Murphy*, 138 S. Ct. at 1479-80; *Condon*, 528 U.S. at 151. Similarly, the law in *South Carolina v. Baker*, 485 U.S. 505, 511 (1988), regulated States as participants in the bond market. It "pressur[ed]" them to change their bond rates but did not require them to enact or maintain any preexisting laws. *See Murphy*, 138 S. Ct. at 1478 (describing *Baker*). Here, ICWA's requirements to store and share information apply only to the States, not to any private parties. 25 U.S.C. § 1915(e); 25 C.F.R. § 23.141. So the argument that Congress can impose administrative obligations on States and private parties alike does not apply here.

2. Other provisions of ICWA and the Final Rule also commandeer the States.

In addition to those provisions Judge Owen identified, many other sections of ICWA commandeer state officials, agencies, courts, and the legislative process itself.

For example, the placement provisions impose additional obligations on States. As the preamble to the Final Rule noted, "[c]ourts have recognized that State efforts to identify and assist preferred placements are critical to the success of the statutory placement preferences." 81 Fed. Reg. at 38,839. Absent ICWA, the State Plaintiffs

would look for foster and adoptive homes for Indian children that are in accordance with the children's best interests. *See supra* pp.5-6. But ICWA requires the State Plaintiffs to conduct a different search, one that follows the race-based placement preferences of ICWA. 25 U.S.C. § 1915(a), (b); *see also Native Village of Tununak v. State, Dep't of Health & Social Servs., Office of Children's Servs.*, 334 P.3d 165, 178 (Alaska 2014) (highlighting "the importance of [a state child-welfare agency] identifying early in a [child custody] case all potential preferred adoptive placements" under ICWA). This alters the duties of state officials who carry out those searches and, under *Koog*, amounts to unlawful commandeering. 79 F.3d at 458.

The Final Rule lists seven different notices that must be provided by state agencies and courts, costing them thousands of hours, and hundreds of thousands of dollars, each year. 81 Fed. Reg. at 38,863-64 (listing notices required by 25 C.F.R. §§ 23.11, .110, .111, .116, .119, .136, .139, .141); *see also* 25 U.S.C. §§ 1912(a), (b), 1951(a). Other obligations include documenting active efforts and providing information to Indian tribes, Indian children, and the federal government. 81 Fed. Reg. at 38,863 (listing obligations required by 25 C.F.R. §§ 23.113, .120, .138, .140); *see also* 25 U.S.C. §§ 1915(e), 1951(b). Indeed, the Department estimates that merely figuring out whether children in child custody proceedings are Indian will take a total of 156,000 hours every year. 81 Fed. Reg. at 38,863 (estimating 13,000 children); *see also* 25 C.F.R. §§ 23.107-.109.

And all changes to the substantive state law—to be applied in state-law causes of action—commandeer the States. *See, e.g.*, 25 U.S.C. §§ 1912(e), (f), 1915(a), (b). Because ICWA is not a valid form of preemption, *see infra* pp.21-26, all changes to

the substantive decisional laws are simply congressional commands to the States—as if Congress were installed in the state legislatures to change the law.

All parties in *Murphy* agreed that, had Congress required state legislatures to take affirmative action under the Professional and Amateur Sports Protection Act, it would violate the anti-commandeering doctrine. 138 S. Ct. at 1478. While the Supreme Court rejected any distinction between affirmative commands and prohibitions, *id.*, ICWA's affirmative commands to States place it well over the constitutional line. ICWA was designed to be an all-inclusive federal regulatory program that governs the removal of Indian children from their homes and the placement of those children in foster and adoptive homes. But child custody issues are the responsibility of the States. *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law"). Congress's intrusion imposes obligations on state officials, agencies, and courts, replacing state legislative choices with federal ones. The anti-commandeering doctrine forbids this.

C. Defendants' contrary arguments lack merit.

Defendants do not deny that ICWA alters the way that state officials, agencies, and courts operate or that it imposes additional duties on the States. Instead, they argue that ICWA is preemption, not commandeering, because it only tells state courts how to decide certain issues. But ICWA does not validly preempt state law. It goes beyond merely providing a rule of decision for state courts by controlling state officials, agencies, and courts and by altering state-law causes of action.

1. ICWA is not a valid form of preemption.

Defendants argue that ICWA merely preempts inconsistent state law and, therefore, does not constitute commandeering. Fed. Supp. Br. 38-39, 43-47; Tribes Supp. Br. 40 n.18. *Murphy* rejected that argument. This Court should as well.

As explained by the Supreme Court in *Murphy*, the Supremacy Clause (on which preemption is based) is not a grant of legislative authority. 138 S. Ct. at 1479. So Congress cannot commandeer the States under the guise of preemption. Instead, Congress may preempt state laws only if it is exercising a power conferred on Congress by the Constitution and only if the federal law may be "best read as one that regulates private actors." *Id.* ICWA fails to meet either element.

First, as explained below, ICWA is not an exercise of a "power conferred on Congress by the Constitution." *See infra* pp.35-45.[4] Congress, therefore, lacked the authority to preempt any state law under ICWA.

Second, ICWA is not best read as regulating private actors. As the Supreme Court explained in *New York*, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." 505 U.S. at 166. As explained above, *see supra* pp.4-9, ICWA compels States, not private individuals, to undertake a variety of obligations when handling child custody proceedings involving

[4] Indeed, Defendants refer to "preconstitutional powers" as a source of Congress's authority to enact ICWA. Fed. Supp. Br. 41; Tribes Supp. Br. 51. But whatever "preconstitutional powers" are, they are *not* powers "conferred . . . by the Constitution."

Indian children. And it does so in the States' role as sovereigns, not as participants in a market regulated by Congress.

Even though ICWA certainly impacts private parties (such as Indian children, parents, and prospective parents), it does so by controlling state officials, agencies, and courts. This is unconstitutional, as determined in *Printz*. There, the Brady Act regulated the sale of firearms by private parties, but it did so by placing obligations on state officials to run background checks. 521 U.S. at 902-03. The Court found those obligations to be unconstitutional commandeering. *Id.* at 933. The same holds for *Murphy*—Congress did not prohibit individuals from gambling; it prohibited States from allowing individuals to gamble. 138 S. Ct. at 1470.

ICWA regulates where Indian children are placed, but it does so by regulating state actors and procedures. Thus, ICWA unconstitutionally regulates the States' regulation of private parties. *See New York*, 505 U.S. at 166 ("[T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."). ICWA, therefore, cannot be best read as regulating private actors and cannot be considered permissible preemption.

The Federal Defendants compare ICWA to the law at issue in *Deer Park Independent School District v. Harris County Appraisal District*, 132 F.3d 1095 (5th Cir. 1998), which exempted certain property in Foreign Tax Zones from state and local ad valorem taxes. Fed. Supp. Br. 44. But the Court properly recognized the difference between a federal tax exemption and a law that "essentially hijack[s] the administrative apparatus of state and local government to help achieve Congress' ends."

Deer Park, 132 F.3d at 1099. ICWA does not exempt Indian children from otherwise applicable laws. It hijacks state officials and agencies to achieve Congress's ends. State actors are "reduc[ed] to puppets of a ventriloquist Congress." *Printz*, 521 U.S. at 928. There is "simply no way to understand [ICWA] as anything other than a direct command to the States. And that is exactly what the anti-commandeering rule does not allow." *Murphy*, 138 S. Ct. at 1481.

2. ICWA does not merely provide a rule of decision for state courts.

Defendants also repackage their preemption argument by claiming that ICWA simply provides a federal rule of decision for state courts and that the anti-commandeering doctrine is, therefore, inapplicable. Fed. Supp. Br. 38-39; Tribes Supp. Br. 38-41. But ICWA is not limited to state-court decisions.

To begin, as described above, the burdens ICWA places on state courts go beyond simply applying federal law. They must send notices, retain records, and open those records for inspection whenever the federal government demands it. 25 U.S.C. §§ 1915(e), 1917, 1951(a). The mere fact that these non-judicial obligations have been placed on courts, rather than executive officials, does not render the anti-commandeering doctrine inapplicable. The Brady Act would still have been unconstitutional if state judges, rather than state law-enforcement officers, had been commanded to run the background checks. Requiring state judges "to perform discrete, ministerial tasks" dictated "by Congress" is no less of an intrusion on "the structural framework of dual sovereignty" than requiring state executive officers to do the same. *See Printz*, 521 U.S. at 929, 932.

Further, that a state court must ultimately approve the termination or adoption does not change the fact that everything the state employees and agencies have done up to that point has been demanded by Congress. Defendants' argument would place States in an impossible position—comply with Congress's commands in ICWA or follow their own law, knowing that the court would reject their efforts and the child would remain in limbo for even longer (or possibly removed from a stable home in which he was placed in violation of ICWA). Judge Owen's partial dissent recognized the dilemma in which ICWA placed the States. Panel Op. 49-50 (Owen, J., dissenting in part) (stating that States would be required to make "active efforts," as it was not realistic for States to simply allow Indian children to remain in unsafe situations). Congress cannot justify its commandeering of state officers by running it through the courts.

Testa v. Katt, 330 U.S. 386 (1947), is not to the contrary. *Testa* held only that state courts must hear federal causes of action. *Id.* at 394. But ICWA interferes in state-law causes of action (in addition to its affirmative commands to state actors). The Federal Defendants argue that this interference is permissible preemption, Fed. Supp. Br. 39, but, as explained above, ICWA is not permissible preemption. *See also* Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 Yale L.J. 947, 952 (2001) ("Congress has no authority to prescribe procedural rules for state courts to follow in state law cases.").

If ICWA were a valid application of the Supremacy Clause, it would be a surprising loophole in the anti-commandeering principle, and a dangerous one. It would allow Congress, for example, to prescribe sentences for state-law drug offenses, or

to require imposition of strict liability in auto-accident cases. And Congress could simply circumvent anti-commandeering restraints by directing state courts to rule that the State must assume waste generators' liabilities, or by directing state courts to enjoin state legislation authorizing gambling. *But see Murphy*, 138 S. Ct. at 1481; *New York*, 505 U.S.at 175 (1992). Neither the Supreme Court nor this Court has ever suggested that Congress has authority to manipulate the operation of state law in this way. The anti-commandeering doctrine disables the federal government from issuing orders to any branch of state government. *Cf. Mother & Father v. Cassidy*, 338 F.3d 704, 711 (7th Cir. 2003); Seamon, *States*, 37 Brandeis L.J. at 366 ("[I]t makes little sense to conclude that Congress can commandeer the state courts but not the other branches of state government.").

Prior to ICWA's enactment, the Department of Justice warned that "impos[ing] [ICWA's] detailed procedures" and "substantive standards" on a state court adjudicating "nonreservation Indian children and parents" is "so attenuated" to any Congressional power over Indians that "the 10th Amendment and general principles of federalism preclude th[is] wholesale invasion of State power." H.R. Rep. No. 95-1386 at 39-40 (1978). And the original 1979 Guidelines recognized that giving a federal agency a supervisory role over state courts is at odds with federalism and separation of powers. 44 Fed. Reg. at 67,584. Thus, the Federal Defendants are incorrect to claim that it is actually more respectful of federalism to tell state courts what they must do (rather than remove their jurisdiction over Indian children entirely). Fed.

Supp. Br. 40.[5] Federal regulation of state-court decisions, upon threat of removing children from stable foster or adoptive homes and upon pain of losing millions of dollars in funding if state courts fail to decide cases consistent with the federal government's viewpoint, is not permissible.

Finally, the Federal Defendants have begun framing ICWA as a grant of rights to Indian children, parents, and tribes that state courts must then respect. Fed. Supp. Br. 44-45 (suggesting a right not to have children removed (absent certain protections) and a right to limited emergency placements). That is not what ICWA is. Read plainly, ICWA is a limitation on States, not a grant of rights to others. The preamble to the Final Rule made clear that "Congress enacted ICWA to curtail State authority in certain respects." 81 Fed. Reg. at 38,789. And Congress's findings supporting ICWA condemned abusive conduct of state agencies and courts. 25 U.S.C. § 1901. Congress's conclusion was not that Indians had too few rights, it was that their rights were not being respected. Indeed, because ICWA does not apply in tribal courts, any "rights" created by ICWA apply only when the States are involved. ICWA is a limitation on state conduct.[6]

---

[5] The Federal Defendants assert that Congress could simply shift jurisdiction of child custody proceedings over Indian children to federal courts, Fed. Supp. Br. 40, despite the Supreme Court's "domestic relations exception" that "divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

[6] Even so, the "right" versus "commandeering" line is too susceptible to manipulation. The law in *Murphy* could have been described as a "right" to prevent gambling, but that did not save it.

3. The Court should not sever the offending provisions of ICWA but invalidate it entirely.

Defendants generally argue that the Court should sever any unconstitutional provisions from ICWA and allow the rest to stand. Fed. Supp. Br. 37, 45, 48; Tribes Supp. Br. 46 n.22. Given the number of permutations that could arise depending on how the Court rules on the various constitutional claims, it would not be useful to catalogue each possibility here. Instead, once the Court determines which sections of ICWA are unconstitutional (under any theory in this case), it should apply the well-established two-step process for determining severability. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

First, if the Court holds any portion of ICWA unconstitutional, it must determine whether the truncated statute will operate in the manner Congress intended. *Id.* at 685. If not, then the Court must invalidate the remaining provisions. *Id.* Next, even if the remaining provisions can operate as Congress intended, the Court must determine if Congress would have enacted them standing alone and without the unconstitutional portion. *Id.* If enough sections of ICWA are unconstitutional that it cannot operate as intended or if Congress would not have enacted the remaining provisions standing alone, the Court should invalidate it entirely.[7]

For the reasons described above, large portions of ICWA commandeer the States, such that the remainder would not operate as intended and likely would not

[7] To be clear, although referring to "ICWA" generally, Plaintiffs did not challenge 25 U.S.C. §§ 1931-34, which concern grants made by the federal government to Indian tribes.

have been enacted. *See, e.g.*, *Murphy*, 138 S. Ct. at 1482-84. The Commerce Clause argument, if accepted, would also require invalidating ICWA. But again, until the Court determines which provisions rise and fall, further analysis would be difficult.

* * *

ICWA may be a well-intentioned statute. But that does not excuse the unconstitutional manner in which it commandeers States. As *Printz* summed up: "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." 521 U.S. at 933. The district court's judgment should be affirmed.

II. Permitting Indian Tribes to Alter the Order of Placement Preferences Violates the Non-Delegation Doctrine.

In one of ICWA's key provisions, Congress set placement preferences for Indian children who are being adopted or placed into foster care. 25 U.S.C. § 1915(a), (b). But in the very next subsection, Congress granted Indian tribes the authority to change those preferences—and thereby change the very laws enacted by Congress. *Id.* § 1915(c); *see also* 25 C.F.R. § 23.130(b). The delegation to Indian tribes to set the law that binds non-Indians and States violates Article I of the Constitution, which vests "[a]ll legislative Powers" in Congress. U.S. Const. art. I, § 1, cl. 1. Defendants argue that there has been no delegation because Indian tribes have inherent sovereign authority over any state child custody proceedings involving an Indian child. But their position wrongly expands tribal sovereignty beyond the limits set by the Supreme Court. Indians may not regulate the conduct of non-Indians who are not on

Indian land under the guise of tribal sovereignty. Section 1915(c) and the related regulation (25 C.F.R. § 23.130(b)) are unconstitutional.

A. Granting Indian tribes the authority to change federal law violates the non-delegation doctrine.

The "fundamental precept of the delegation doctrine is 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). Congress may not transfer to another branch "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825).

Current doctrine permits Congress to delegate legislative authority *to federal agencies* "as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). But that doctrine has never been understood to authorize delegations of power to private entities—the "most obnoxious form" of delegation. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *see also A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (stating that legislative delegation to a private trade or industry group "is utterly inconsistent with the constitutional prerogatives and duties of Congress"). And it certainly does not allow Congress to give a private party the power to override Congress's own policy decisions and write rules of decision binding on state courts.

Yet that is exactly what section 1915(c) does. ICWA delegates to hundreds of non-federal entities (any one of the 573 federally recognized Indian tribes in

America) the authority to change federal law that binds States and their courts. 25 U.S.C. § 1915(c). Nothing in the Constitution gives Indian tribes the authority to bind state courts in child custody cases. *See, e.g.*, U.S. Const. art. VI, cl. 2 (States are bound by the Constitution, federal laws, and treaties).

In addition to binding state courts, section 1915(c) impacts Indians outside of the tribe that is rewriting the law, as well as non-Indians. But Indian tribes have no political accountability to those non-members whose lives they may ultimately control. *See Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) (explaining the accountability problems presented by delegation); *see also Boerschig v. Trans-Pecos Pipeline, LLC*, 872 F.3d 701, 708 (5th Cir. 2017) (explaining that private parties "are not bound by any official duty," but may act "for selfish reasons or arbitrarily" (quoting *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-22 (1928)). Indeed, even the children whose placement the tribes may reorder may not be members of the tribe that will determine their future home. Moreover, tribal authorities are representing the interests of their tribes, not the people of the United States. *Cf. Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 57 (2015) (Alito, J., concurring) (noting that "all officers of the United States must take an oath or affirmation to support the Constitution").

If the citizens of a state dislike the impact of a tribe's placement preferences in a particular case, whom do they hold accountable? The child custody proceeding was in state court, but its outcome was controlled by Congress, which gave its authority to an Indian tribe. *See Dep't of Transp.*, 575 U.S. at 57 (Alito, J., concurring) ("When citizens cannot readily identify the source of legislation or regulation that affects

their lives, Government officials can wield power without owning up to the consequences."). Granting authority to control the outcome of state child custody proceedings to unaccountable Indian tribes violates the non-delegation doctrine.

Finally, even if Congress could give Indian tribes the power to override Congress's policy judgment and write rules of decision for state courts, section 1915(c) still fails because it lacks an intelligible principle. It places no restrictions on what placement preferences a tribe might impose on courts and parties—only that they may "establish a different order of preference by resolution." 25 U.S.C. § 1915(c). This uncabined grant of authority reflects no discernable underlying principle established by Congress.[8]

ICWA also does not represent the practical problem of an overly technical and everchanging subject matter that has been used to justify delegation in general. Congress actually set the placement preferences in ICWA, 25 U.S.C. § 1915(a), (b), so no further expertise was necessary. Yet Congress chose to give Indian tribes the unilateral authority, not to fill in gaps in a technical law, but to change the very law that Congress enacted—something Congress itself could not do without following the proper constitutional procedures. *See INS v. Chadha*, 462 U.S. 919, 944-51 (1983) (describing constitutional process of enacting a law). Congress cannot give Indian tribes unfettered discretion to set the law that binds the States.

[8] ICWA creates a narrow ground for a court to set aside tribal preferences if the placement is not "the least restrictive setting appropriate to the particular needs of the child." 25 U.S.C. § 1915(c). But that exception places no limitation on what tribes may demand in the first place.

B. Tribal sovereignty does not permit Indian tribes to regulate non-members who are not on Indian land.

The Federal Defendants and Tribes rely primarily on notions of tribal sovereignty to justify the delegation, Fed. Supp. Br. 49; Tribes Supp. Br. 54, but they fail to recognize the limits of that sovereignty. As the Supreme Court has stated, Indian tribes "exercise inherent sovereign authority over their *members* and *territories*." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (emphases added). ICWA involves non-members who are not on Indian territory. Section 1915(c) cannot, therefore, be justified as an exercise of tribal sovereignty.

The concept of tribal sovereignty does not extend to controlling non-members who are not on Indian land. Indeed, such efforts by tribes are "presumptively invalid." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008). The Supreme Court has long recognized that tribal sovereignty has a "significant geographical component." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980). Thus, while tribes may exercise jurisdiction over Indian children domiciled on the reservation, *see, e.g.*, *Fisher v. Dist. Court*, 424 U.S. 382, 390 (1976) (per curiam), they are generally subject to state laws outside of the reservation, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

In addition to the geographical component, tribal sovereignty is typically limited to its members. As the Supreme Court has stated, Indian tribes have the authority to regulate their "internal and social relations," to make their own law in "internal

matters," and to enforce their laws "in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *see also Montana v. United States*, 450 U.S. 544, 564 (1981) (recognizing tribal authority to regulate domestic relations "among members").

But state child custody proceedings are not internal tribal affairs. They do not take place on tribal land, and they are not limited to tribal members. Instead, they occur in state courts, concern numerous individuals (children, parents, prospective parents, and state actors) who may not be tribal members, and are ultimately decided by state-court judges, not tribal authorities. Tribal sovereignty does not extend that far. To conclude otherwise would allow Congress to give Indian tribes the authority to change any laws whenever an Indian is involved.

Thus, Defendants' and the panel's reliance on *United States v. Mazurie* is misplaced. 419 U.S. 544 (1975). *Mazurie* recognized that Indians possess "attributes of sovereignty over both their members and their territory." *Id.* at 557. Although the regulation at issue impacted non-members, it concerned activity on Indian land—something that is absent in ICWA, as ICWA does not apply to tribal courts. Moreover, ICWA goes far beyond *Mazurie*'s description of Indian sovereignty, as the placement preferences also bind the States. The States may have ceded some of their sovereignty to the federal government under the Constitution, *Printz*, 521 U.S. at 918, but they did not cede any to Indian tribes.

Thus, Defendants are also wrong to rely on *Mazurie*'s statement that the nondelegation doctrine is "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *Id.*

at 556-57. Not only do Indian tribes not possess "independent authority" over child custody proceedings that are not on Indian lands, Indian tribes are not the only sovereign with an interest in the proceedings regulated by ICWA. The preamble to the Final Rule recognizes "the States' sovereign interest in child-welfare matters." 81 Fed. Reg. at 38,789. Indeed, it is through the States' efforts—passing child-welfare laws, creating agencies, employing child-welfare officials, bringing child custody cases to court—that child custody proceedings even exist in the first place.

Defendants also argue that section 1915(c) merely incorporates tribal law into federal law and compare it to other statutes in which Congress has incorporated state law. Fed. Supp. Br. 49; Tribes Supp. Br. 54. Quite simply, section 1915(c) does not incorporate tribal law—it *sets* the law (25 U.S.C. § 1915(a), (b)), and then gives Indian tribes carte blanche authority to *change* it. And in doing so, Congress purports to allow Indian tribes to bind the States.

Section 1915(c) cannot be compared to the laws cited by Defendants. It is not like the Federal Tort Claims Act in which the federal government chooses to subject itself to liability in accordance with state tort laws. 28 U.S.C. § 1346(b)(1). Nor is it like the Assimilative Crimes Act, 18 U.S.C. § 13(a), in which Congress chose to subject federal enclaves to state criminal laws after "123 years of experience" of repeatedly conforming federal law to local law. *United States v. Sharpnack*, 355 U.S. 286, 293-94 (1958). ICWA does not incorporate tribal law or reference tribal law to fill in

gaps in federal law. It is authorization to change federal law. Section 1915(c) is an unconstitutional delegation, not a permissible incorporation.[9]

III. Congress Lacked the Constitutional Authority to Enact ICWA.

The subject of domestic relations is "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) (stating that "[t]he whole subject of the domestic relations of . . . parent and child[] belongs to the laws of the States and not to the laws of the United States"); *see also Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern").

Nevertheless, through ICWA, Congress has invaded this exclusive state territory and replaced state law and policy with federal law. Congress purported to do this pursuant to the Commerce Clause and "other constitutional authority." 25 U.S.C. § 1901(1). But the Commerce Clause, which permits Congress to "regulate Commerce . . . with the Indian Tribes," U.S. const. art. I, § 8, cl. 3, does not permit a federal scheme to regulate state child custody proceedings—even if they involve Indian children.

Under either an original or current understanding of "commerce," ICWA is unconstitutional, and Defendants make no attempt to argue otherwise. Instead, they rely on Congress's "plenary power" over Indian affairs. But ICWA goes far beyond regulating Indian affairs, unless every court proceeding that involves an Indian is an

[9] Because section 1915(c) is unconstitutional, the related portion of the Final Rule implementing section 1915(c) is also unconstitutional. *See* 25 C.F.R. § 23.130(b).

"Indian affair." ICWA cannot be justified under any understanding of the Commerce Clause, and no other constitutional authority permits it.

Before proceeding to the merits, the State Plaintiffs will address the Tribes' argument that the Court lacks jurisdiction to entertain the State Plaintiffs' Commerce Clause argument because the State Plaintiffs did not file a cross-appeal. Tribes Supp. Br. 48-50. As the Tribes originally agreed, the district court held that ICWA violated the Commerce Clause. Tribes Panel Br. 40 n.14. The district court explicitly considered Plaintiffs' Commerce Clause argument and granted relief. ROA.4053-54.

Even so, no cross-appeal is necessary because the Commerce Clause argument is an alternative ground for affirmance. *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015); *Montoya v. FedEx Ground Package Sys., Inc.*, 614 F.3d 145, 149 (5th Cir. 2010). Affirming the judgment below on the basis of the Commerce Clause would not "enlarge[]" Plaintiffs' rights or "lessen[]" Defendants' rights. *See Jennings*, 135 S. Ct. at 798. Plaintiffs sought and received a declaration that ICWA (25 U.S.C. §§ 1901-23, 1951-52) is unconstitutional. ROA.4055. Holding that the Commerce Clause does not support ICWA would result in the same judgment—sections 1901-23 and 1951-52 are declared unconstitutional. Thus, the Commerce Clause argument is an alternative ground for affirmance and requires no cross-appeal.

Regardless, the authority of Congress to enact ICWA is one of the elements of the preemption argument, raised as part of Plaintiffs' anti-commandeering claim. So, as the Federal Defendants recognize, the Court will have to confront it regardless. Fed. Supp. Br. 40-43, 48.

A. An original understanding of the Commerce Clause does not permit ICWA.

As described by Justice Thomas in his concurrence in *Adoptive Couple v. Baby Girl*, ICWA does not fall within the original understanding of the Commerce Clause. 570 U.S. 637, 656-66 (2013) (Thomas, J., concurring). At the time of the founding, "commerce" consisted of "selling, buying, and bartering, as well as transporting for these purposes." *Id.* at 659 (citing 1 S. Johnson, A Dictionary of the English Language 361 (4th rev. ed. 1773) (reprint 1978)). As it related to Indian tribes, "commerce" meant "trade with Indians." *Id.* (citing Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201, 215-16 & n.97 (2007), and Report of Comm. on Indian Affairs (Feb. 20, 1787), in 32 Journals of the Cont'l Cong. 1774-1789, at 66, 68 (R. Hill ed. 1936)). "And regulation of Indian commerce generally referred to legal structures governing 'the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters.'" *Id.* at 660 (quoting Natelson, *supra* at 216 & n.99).

Earlier decisions of the Court regarding the Commerce Clause also confirm this understanding: "As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade,' and includes transportation, purchase, sale, and exchange of commodities between the citizens of the different states." *Carter*, 298 U.S. at 298 (quoting *Welton v. State of Missouri*, 91 U.S. 275, 280 (1875)). ICWA, however, does not concern merchants, goods, prices, selling, bartering, or anything that might be deemed commerce or trade. Children are not

commodities to be bartered or sold, and child custody proceedings are not instruments of commerce.

Moreover, the Commerce Clause refers to commerce with "Indian Tribes." U.S. Const. art. I, § 8, cl. 3. ICWA does not regulate Indian tribes as "Tribes," but applies to individual child custody proceedings, regardless of whether an Indian tribe is involved. *Adoptive Couple*, 570 U.S. at 665-66 (Thomas, J., concurring). For these reasons, as originally understood, the Commerce Clause would not have permitted ICWA.

B. ICWA does not regulate "commerce" as used in the Interstate Commerce Clause.

The Commerce Clause allows Congress to "regulate Commerce . . . among the several states, and with the Indian tribes." U.S. const. art. I, § 8, cl. 3. When invoked with respect to interstate commerce, the Commerce Clause permits Congress to regulate three categories of activity: the channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things in interstate commerce; and activities that substantially affect interstate commerce. *United States v. Morrison*, 529 U.S. 598, 608-09 (2000).

Applied to commerce "with the Indian Tribes" instead of "among the several States," this would permit Congress to regulate only (1) channels of commerce with Indian tribes; (2) instrumentalities of commerce with Indian tribes, or persons and things in commerce with Indian tribes; and (3) activities that substantially affect commerce with Indian tribes. ICWA does none of the above. Again, children are not

persons in commerce, and child custody cases do not substantially affect commerce—even if they involve Indian children.

If there was any doubt about the impact of child custody cases on commerce generally, that was answered in *United States v. Lopez*, 514 U.S. 549 (1995). There, the Supreme Court held that the Gun-Free School Zones Act did not fall within Congress's Commerce Clause authority. *Id.* at 551. The Court rejected as too attenuated the United States' argument that possession of a firearm in a school zone "may result in violent crime" which "can be expected to affect the functioning of the national economy" because violent crime causes financial costs on society, reduces the willingness of people to travel, and threatens the learning environment, resulting in a less productive society. *Id.* at 563-64. The same arguments apply to state child custody proceedings involving Indian children—any potential connection to commerce is far too attenuated to permit regulation.

Further, the Court in *Lopez* listed "family law (including marriage, divorce, and *child custody*)" as examples of what the United States' erroneous argument would permit Congress to regulate. *Id.* at 564 (emphasis added). The Supreme Court has thus made clear that the Commerce Clause does not permit Congress to regulate family law, including child custody proceedings. Therefore, under the definition of "commerce" as used in the Interstate Commerce Clause, ICWA is unconstitutional.

C. Congress's "plenary power" over Indians does not permit ICWA.

Defendants do not argue that ICWA satisfies either the original or current understanding of "commerce" described above, but instead rely on Supreme Court precedent holding that the Indian Commerce Clause gives Congress "plenary power

to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). Although Justice Thomas has traced the origin of this power and found it to rest on "shak[y] foundations," *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring), the Court need not rewrite the law on the Indian Commerce Clause in order to find that ICWA exceeds Congress's power. It needs to hold only that there are limits to Congress's "plenary power" over Indian affairs.

The Supreme Court has already held that Congress's plenary power "is not absolute." *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977). But judging by the briefing of Defendants, there is almost nothing that Congress cannot do if it concerns an Indian. That cannot be the law. As noted by Justice Thomas in his *Adoptive Couple* concurrence, "the notion that Congress can direct state courts to apply different rules of evidence and procedure merely because a person of Indian descent is involved raises absurd possibilities." 570 U.S. at 666 (Thomas, J., concurring). Were Congress's plenary power to extend that far, Congress could "dictate specific rules of criminal procedure for state-court prosecutions against Indian defendants" or "substitute federal law for state law when contract disputes involve Indians." *Id.* The Supreme Court has never held that Congress's plenary authority extends that far.

The question then remains where to draw that line. The laws that the Supreme Court has upheld as valid exercises of plenary authority over Indian affairs are either (1) regulations of commerce, *see, e.g.*, *Perrin v. United States*, 232 U.S. 478, 480 (1914) (concerning the sale of liquor on ceded lands); (2) direct federal regulations

of Indians or Indian lands, *see, e.g.*, *United States v. Antelope*, 430 U.S. 641, 648 (1977) (referring to Congress's authority to "prescribe a criminal code applicable in Indian country"); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903) (referring to Congress's power over "Indian tribal property"); or (3) expansions or contractions of Indian tribal sovereignty and self-government, *see, e.g.*, *United States v. Lara*, 541 U.S. 193, 202 (2004) (stating that Congress may "enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority"). ICWA falls within none of those categories—it is not a regulation of commerce (because children are not commerce), a direct federal regulation of Indians or Indian land (because it regulates non-members and state actors), or an expansion or contraction of tribal self-government (because it concerns only state proceedings). Thus, ICWA extends beyond any previous exercise of Congress's plenary power.[10]

The Federal Defendants offer the mild limitation of *Morton v. Mancari*: any law is permissible as long as it is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. 535, 555 (1974); Fed. Supp. Br. 41 n.9. But it is easy to imagine that *any* law pertaining to Indians is "tied rationally" to Congress's undefined obligation, so this presents no limit at all. The Federal Defendants also assert that Congress "plainly has authority to address the massive removal of

[10] The Tribes reference *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), and *American Federation of Government Employees v. United States*, 330 F.3d 513 (5th Cir. 2003), as examples of Congress using its plenary power to regulate Indians for purposes other than self-government. Tribes Supp. Br. 51-52. But neither case included a Commerce Clause claim.

children from tribal communities." Fed. Supp. Br. 40. But that is not the question. The question is whether Congress has authority *under the Commerce Clause* to enact federal statutes to govern state child custody proceedings. Simply because a problem exists does not mean that the Commerce Clause gives Congress the authority to address it any way it wants. *See, e.g.*, *Morrison*, 529 U.S. at 601-02 (concerning violence against women); *Lopez*, 514 U.S. at 551 (concerning gun violence near schools).

ICWA goes beyond merely regulating "Indian affairs." As demonstrated by the stories of the Individual Plaintiffs in this case, it has a deeply profound impact on non-Indians. ROA.2625-29, 2683-87, 2689-93. And as shown above, it directly impacts state officials, agencies, and courts. *See supra* pp. 14-20. The Court should hold that Congress's plenary power over Indian affairs may not be stretched so far as to cover state child custody proceedings that impact numerous non-Indians.

Regardless, even when the Court acknowledges Congress's "plenary" power over a certain domain, Congress still cannot violate other portions of the Constitution. *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); *Weeks*, 430 U.S. at 83-84 (plenary authority over Indian affairs subject to Fifth Amendment); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (Congress's plenary authority over elections subject to the Appointments Clause); *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935) (Congress's plenary authority over Indian affairs is subject to the Takings Clause). Thus, even if ICWA is a permissible use of Congress's plenary authority, it remains unconstitutional for all of the other reasons described in Plaintiffs' briefs.

D. No other constitutional provision permits Congress to enact ICWA.

Defendants rely on several other constitutional provisions and "preconstitutional" powers to support their argument that Congress had the authority to enact ICWA. None give Congress that authority.

1. The Tribes continue to claim that ICWA is Spending Clause legislation.[11] Tribes Supp. Br. 46-48. It is not. Congress purported to enact ICWA pursuant to the Commerce Clause and Congress's plenary authority over Indian affairs, not the Spending Clause. 25 U.S.C. § 1901(1). There is no language in ICWA that makes compliance optional—States must comply with ICWA regardless of whether they receive any funding from the federal government.

The statute that conditions some federal funding on compliance with ICWA, 42 U.S.C. § 622, was not enacted until sixteen years after ICWA became law. *See* Social Sec. Act Amendments of 1994, Pub. L. No. 103-432, § 204, 108 Stat. 4398. While that provision creates an injury giving the State Plaintiffs standing to sue, as non-compliance would result in the loss of federal funding, it does not transform ICWA into Spending Clause legislation. The State Plaintiffs would be required to comply with ICWA even if they gave up that funding.

The Tribes also insist that, because the State Plaintiffs have accepted federal funds, they are now bound to comply with ICWA. Tribes Supp. Br. 47-48. But the State Plaintiffs seek declaratory relief that would allow them to continue to receive

[11] As the State Plaintiffs previously pointed out, the Tribes waived this argument by not raising it in the district court. *See* States Panel Br. 33.

future federal funds without compliance with ICWA. ICWA is not Spending Clause legislation, and the State Plaintiffs' past acceptance of federal funds does not bind them to forever comply with ICWA.

2. The Federal Defendants and the Navajo Nation assert that the Treaty Clause also enables Congress to enact ICWA. Fed. Supp. Br. 41; Navajo Supp. Br. 9-13. But the treaties identified merely describe the federal government's obligation to educate, feed, and clothe children of specific Indian tribes. *See, e.g.*, Treaty with the E. Band of Shoshoni & Bannock Tribe of Indians, art. VII, July 3, 1868, 15 Stat. 673 (promising a schoolhouse and a teacher "competent to teach elementary branches of an English education"); Treaty with the Nez Perces, art. V, June 11, 1855, 12 Stat. 957 (providing two schools supplied with books, furniture, stationery and teachers for free to the children of the tribe); *see also* Indian Law Scholars Amicus Br. 3-8 (describing other treaties). None authorize the federal takeover of all state child custody proceedings that happen to involve Indian children of any one of the 573 federally recognized tribes. *See* Indian Entities Recognized by & Eligible to Receive Servs. from the U.S. Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019) (listing recognized tribes). Treaties do not permit otherwise unconstitutional commandeering of the States or equal-protection violations. And they cannot expand Congress' powers beyond what Article I grants. Nor does the Treaty Clause permit Congress to interfere in state child custody proceedings.[12]

[12] One treaty with the Navajo Nation requires the federal government to legislate for the "permanent prosperity and happiness" of the Navajo. Treaty with the

3. Finally, the parties rely on unspecified "preconstitutional powers" which, by definition, are powers that are found nowhere in the Constitution. Fed. Supp. Br. 41; Tribes Supp. Br. 51. "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C. J.); *see also McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (explaining that the federal government is "one of enumerated powers" and "can exercise only the powers granted to it").

The Supreme Court's reference to "preconstitutional powers" in *Lara* does not refer to an implicit grant of authority to Congress to interfere in any state proceeding that involves an Indian. 541 U.S. at 201. Rather, it refers to the "necessary concomitants of nationality" that characterized the United States' early relationship with Indian tribes, which was more "an aspect of military and foreign policy than a subject of domestic or municipal law." *Id.* (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936)). In other words, any "preconstitutional powers" concern the authority to deal with tribes on a sovereign-to-sovereign basis, not the authority to enact domestic-relations laws that bind the States whenever an Indian child is involved. Congress had no constitutional—or preconstitutional—authority to enact ICWA.

Navajo, art. XI, Sept. 9, 1849, 9 Stat. 974. Interpreted broadly, such language would create virtually no limit on what Congress could do.

IV. ICWA and the Final Rule Violate the Equal-Protection Guarantee of the Fifth Amendment, and the Final Rule Violates the Administrative Procedure Act.

Pursuant to Federal Rule of Appellate Procedure 28(i), and in addition to its briefing at the panel stage, the State Plaintiffs adopt the supplemental briefing of the Individual Plaintiffs regarding how (1) ICWA and the Final Rule violate the Fifth Amendment's equal-protection guarantee, and (2) the Final Rule violates the Administrative Procedure Act.

V. The State Plaintiffs Have Standing to Bring All of Their Claims.

Even though both the district court and the panel determined that Plaintiffs have standing to bring these claims, ROA.3749-53; Panel Op. 11-19, the Federal Defendants, Tribes, and Navajo continue to assert that the State Plaintiffs lack standing to bring some of them. Fed. Supp. Br. 16 n.3; Navajo Supp. Br. 1 n.1; Tribes Supp. Br. 20-23. Their arguments are meritless.

The simplest answer to the standing question is that, as objects of the Final Rule, the State Plaintiffs have standing to challenge the rule on any grounds—including the unconstitutionality of the statute on which the Rule is based. *Contender Farms, LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015); *see also* 5 U.S.C. § 706. Consequently, all of the State Plaintiffs' constitutional arguments are necessarily before this Court, as the Court would have to consider each as part of the challenge to the Final Rule.

Second, the Federal Defendants and Tribes continue to urge the Court to conclude that when the district court "**DENIED**" their motions to dismiss for lack of standing that it, in fact, granted the motions as to the State Plaintiffs' equal-

protection claim. Fed. Supp. Br. 16 n.3; Tribes Supp. Br. 20. At no point did the district court rule that the State Plaintiffs lacked standing for any of their claims. That the district court neglected to include equal protection in the list of claims for which the State Plaintiffs have standing (ROA.3753) does not change the fact that the district court denied the motions to dismiss in their entirety. ROA.3760. And if there was any question about what the district court intended, it was answered when the court specifically, and repeatedly, cited the State Plaintiffs' equal-protection arguments in its summary-judgment ruling. ROA.4028-29, 4030. The district court would not have discussed and ruled on the State Plaintiffs' equal-protection claim if it had previously dismissed the claim for lack of standing.

Finally, the Tribes argue that the State Plaintiffs lack an impending injury with respect to their non-delegation claim. Tribes Supp. Br. 21-23. The panel correctly concluded that the State Plaintiffs have standing, as it is undisputed that the Alabama-Coushatta Tribe has advised Texas that its "placement preferences differ[] from those in" ICWA and has filed those preferences with DFPS. ROA.1919; Panel Op. 18. As the Alabama-Coushatta Tribe is one of the three Indian tribes in Texas, ROA.4023 n.4, the possibility that Texas will have a child custody proceeding involving a child of that tribe is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis omitted). And the presence of one party 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).

Conclusion

The Court should affirm the judgment of the district court.

Respectfully submitted.

Jeff Landry
Attorney General of Louisiana

Curtis Hill
Attorney General of Indiana

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Solicitor General
Kyle.Hawkins@oag.texas.gov

Beth Klusmann
Assistant Solicitor General

David J. Hacker
Special Counsel to the
First Assistant Attorney General

Counsel for State Appellees

Certificate of Service

On January 7, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,641 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).

/s/ Kyle D. Hawkins
Kyle D. Hawkins