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

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

MEMORANDUM IN OPPOSITION TO
STATE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In enacting the Indian Child Welfare Act (ICWA) in 1978, Congress determined that federal action was necessary to address "the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989). Congress acted following a multi-year investigation that revealed widespread evidence that state social services agencies were engaged in the wholesale, unjustified removal of Indian children from their parents, extended families, and tribal communities, harming Indian children and their tribes. *Id.*; 25 U.S.C. § 1901(4) and (5). Remnants of those practices remain even today.[1]

ICWA protects "the best interests of Indian children" in part by establishing "minimum Federal standards" in state child-welfare proceedings that seek to remove Indian children from their families and place them in foster care and perhaps, eventually, with adoptive parents. 25 U.S.C. § 1902. ICWA has been described by child-welfare experts as the "gold standard for child welfare policies and practices that should be afforded to all children," because it establishes a "best-practices framework" for a transparent, stable, and consistent process for custodial decisionmaking. *E.g.*, Brief for Amicus Curiae Casey Family Programs and other National Child Welfare Organizations at 3, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1279468, at *1-4. In particular, ICWA "embraces the bedrock principle of child welfare that, prior to a permanent, final placement, it is in the best interests of the child to support, develop, and maintain that child's ties to his or her acknowledged, interested, and fit birth parents," *id.*, as well as the goal of identifying placements with extended family, where possible. *Id.* at *24-25. In the forty years since ICWA's passage, many states have changed

[1] *See Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749 (D.S.D. 2015) (appeal pending) (finding state judges failed to protect Indian parents' fundamental rights at hundreds of removal proceedings, where temporary custody was granted to the Department of Social Services based on perfunctory hearings.)

their own child-welfare laws to apply these protections to all children. *Id.* at *20-21. For example, the State of Nevada indicates that a diligent search should be conducted in *every* child-welfare case for adult relatives within the fifth degree of consanguinity.[2]

Forty years after ICWA's enactment, three States (Texas, Louisiana and Indiana, collectively "State Plaintiffs") have launched a facial attack on the Act's constitutionality on multiple grounds, seeking broad declaratory and injunctive relief. A number of individuals who either have adopted or intend to adopt children in foster care in Texas, Nevada and Minnesota ("Individual Plaintiffs") have joined this venture, even though the most logical and effective place to address their concerns would be before the state courts hearing their cases.

State Plaintiffs urge this Court to reach the merits of their broad constitutional claims, even though the claims are not properly before the Court. Federal Defendants—the Department of the Interior, Secretary of the Interior Ryan Zinke, the Bureau of Indian Affairs, and John Tahsuda III, Acting Assistant Secretary for Indian Affairs (collectively, "Interior") —moved to dismiss in light of the numerous jurisdictional infirmities that encumber Plaintiffs' action. Plaintiffs' first response was to amend their complaint to add new Federal Defendants, namely, the United States, the Department of Health and Human Services and Alex Azar, Secretary of the Department of Health and Human Services. Plaintiffs now urge the Court to rush to the merits by moving for summary judgment. Neither of these responses cures the jurisdictional defects in Plaintiffs' case. This Court must resolve whether it has subject matter jurisdiction over each of Plaintiffs' constitutional and Administrative Procedure Act (APA) claims before it can entertain the substance of those challenges, and the Court should conclude that it lacks jurisdiction for the reasons stated in Defendants' Motion to Dismiss, ECF No. 56.

To the extent this Court reaches the merits on any claims, Plaintiffs' facial attack on ICWA fails. Plaintiffs claim that ICWA is based on racial classifications in violation of the Fifth

[2] *See* Nevada Division of Child and Family Services et al., State Child Welfare Policies and Procedures, Policy 1001 at 1001.5.1(A), *available at* http://dcfs.nv.gov/Policies/CW/1000/ ("due diligence" must be exercised to notify "all adult grandparents and all other adult relatives (within the fifth degree of consanguinity)" within thirty days of child removal).

and Fourteenth Amendments, even though the Act makes no reference to race or ethnic categories and is based solely on the political affiliation of parents and children as citizens of an Indian tribe. Moreover, the Supreme Court has long held that in the context of federally recognized tribes, classifications based on Indian tribal status constitute political, not racial, categories, in recognition of tribes' status as pre-Constitutional sovereigns. *See United States v. Antelope*, 430 U.S. 641 (1977); *Morton v. Mancari*, 417 U.S. 535 (1974); *Worcester v. Georgia*, 31 U.S. 515 (1832).

Plaintiffs also claim that Congress's Indian affairs power does not include the authority to protect Indian families, communities, and tribes from documented state practices that threaten the rights of tribal citizens, the continuing existence of tribes by the removal of their children, and the sovereignty and self-government of those tribes. This too is directly contradicted by centuries of Supreme Court precedent holding that Congress has "plenary and exclusive" authority to regulate in the field of Indian affairs. *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004); *Worcester*, 31 U.S. at 559. In light of this "plenary and exclusive" federal authority, and Congress's careful balancing of state courts' prerogatives in ICWA, Plaintiffs' assertion that the statute violates the Tenth Amendment and other constitutional provisions also fails. Indeed, Congress's Indian affairs authority has been repeatedly held to encompass the power to prevent states from unnecessary interference in tribal affairs. *United States v. John*, 437 U.S. 634, 652-53 (1978); *Worcester*, 31 U.S. at 560.

ICWA thus does not violate the Constitution, and the Final Rule does not violate the APA. State Plaintiffs' motion for summary judgment should be denied.

A. BACKGROUND

1. Indian Child Welfare Act

After years of hearings, deliberations, and debate, Congress enacted ICWA in 1978, finding "that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901(4); *see also Holyfield*, 490 U.S. at 32 (noting "that 25 to 35% of all Indian

children had been separated from their families and placed in adoptive families, foster care, or institutions"). Congress also determined that Indian children—unlike most children in the foster-care system—tended to be placed without consideration of whether a placement was available with relatives or within the tribal community, *see* 25 U.S.C. § 1901(5); *see also Holyfield*, 490 U.S. at 33 ("Approximately 90% of the Indian placements were in non-Indian homes" with "serious adjustment problems encountered by such children during adolescence").

Congress found that public and private agencies and state courts had played a significant role through unjustified removals of children and unnecessary termination of parental rights. 25 U.S.C. § 1901(4)-(5) (states "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."). The testimony before Congress demonstrated both a betrayal of the best interests of Indian children, as well as "the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34.

To address this crisis, Congress enacted ICWA, declaring that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). It further declared that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," *id.* § 1902. In ICWA, Congress confirmed that Indian tribes have exclusive jurisdiction over child-custody proceedings involving an Indian child domiciled within the reservation, and concurrent jurisdiction (with states) over other cases involving Indian children. *Id.* § 1911(a); *Holyfield*, 490 U.S. at 42; *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont.*, 424 U.S. 382 (1976). The statute also provided tribes with intervention and other rights in state court foster-care and termination-of parental rights proceedings. *E.g.*, 25 U.S.C. § 1911, 1912, 1914.

These rights protect tribes by preventing their demise through systematic loss of their children, *Holyfield*, 490 U.S. at 52-53, and also protect the best interests of the children,

including their interests in remaining with their family and their communities. Congress balanced these interests with the interest of the states in child welfare matters occurring within their jurisdictions, noting:

> While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

H.R. REP. NO. 95-1386, at 19 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7541, 1978 WL 8515. Thus, child-welfare proceedings involving Indian children in state courts continue to be primarily governed by state child-welfare law, with ICWA's protections applying only as necessary and relevant to a particular case. *See, e.g.*, *In re J.J.C.*, 302 S.W.3d 896, 899 (Tex. App. 2009) (ICWA preempts state law only where there is a conflict between the two).

ICWA applies solely to "child custody proceedings" (defined as foster-care placements, terminations of parental rights, and preadoptive and adoptive placements) involving an "Indian child."[3] 25 U.S.C. § 1903(1), (4). The "most important substantive requirement" of ICWA is the placement preferences. *Holyfield*, 490 U.S. at 36-37; *see* 25 U.S.C. § 1915(a)-(b). "In any adoptive placement of an Indian child under State law," ICWA requires that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *Id.* § 1915(a) ("adoptive preferences"). These preferences reflect "Federal policy that, where possible, an Indian child should remain in the Indian community." H.R. REP. NO. 95-1386, at 23. Importantly, ICWA specifies that courts may deviate from these preferences where there is good cause. 25 U.S.C. § 1915(a)-(b). ICWA also allows an Indian child's parent or tribe to bring a challenge to invalidate a foster-care placement or termination-of-parental-rights determination upon a showing that certain provisions of ICWA, §§ 1911-1913, have been

[3] The term "Indian child" is defined as "an unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

violated. *Id.* § 1914. Among other provisions, ICWA also requires notice of state child-welfare proceedings be provided to an Indian child's parents and tribe. *Id.* § 1912(a). ICWA also establishes standards that must be met before an Indian child can be placed in foster care or parental rights terminated. *Id.* § 1912.

2. Final Rule: Indian Child Welfare Act

On June 6, 2016, after notice and comment, Interior issued a Final Rule to "promote[] the uniform application of Federal law designed to protect Indian children, their parents, and Indian Tribes." *Indian Child Welfare Act Proceedings*, Final Rule, 81 Fed. Reg. 38,778-01 (June 14, 2016).[4] The Final Rule addresses the fact that "implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State." *Id.* at 38,779. The Final Rule promotes consistent application by clarifying issues like when the statute applies, 25 C.F.R. § 23.103, when a state court is required to provide notice of a child-custody proceeding to parents and the applicable Indian tribe(s), *id.* § 23.111, how an Indian child's membership in an Indian tribe is determined, *id.* § 23.108, and what should constitute good cause to deviate from the placement preferences, *id.* §§ 23.129-23.132.

ARGUMENT

State Plaintiffs have moved for summary judgment. Summary judgment is appropriate only where "there is no genuine issue as to any material fact and [the] moving party is entitled to judgment as a matter of law." *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001) (citing Fed. R. Civ. P. 56(c)). Here, State Plaintiffs bring facial constitutional challenges to ICWA—that is, an attack on the statute itself—which would "reach beyond the particular circumstances of these plaintiffs." *John Doe No. I v. Reed*, 561 U.S. 186, 194 (2010).

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

A facial challenge to a statute is "the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (where a statute presents constitutional difficulties, "the normal rule is that partial, rather than facial, invalidation is the required course"). Thus, broad facial challenges to the constitutionality of a statute, like the one Plaintiffs bring here, "impose 'a heavy burden' upon the parties maintaining the suit." *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (citing *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). And, as the Supreme Court has long recognized, striking down an Act of Congress "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

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

Plaintiffs move for summary judgment on Count Four of the Second Amended Complaint (SAC), which alleges that Section 1915(a) and (b) of ICWA (foster-care and adoptive placement preferences) and the regulations implementing those provisions violate the Equal Protection Guarantee of the Fifth Amendment. As with their other constitutional claims, this is stated as a facial challenge to these provisions, and Plaintiffs "must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745.

Plaintiffs have failed to meet this high burden. Their argument is based on the bare assertion that ICWA's placement preferences involve a race-based classification, which is incorrect as a matter of law. Federal laws addressing "Indians" have been part of the fabric of this Nation since its founding, and have been repeatedly upheld by the Supreme Court and the lower courts. This is because, as the Supreme Court has articulated in several cases, such classifications refer to a political, not a racial group. *Mancari*, 417 U.S. 535. This reasoning holds true for ICWA's placement preferences, which are predicated on non-race-based factors such as a familial relationship with the child, a political affiliation with the child's tribe or another Indian tribe, or holding a license from a tribal government. Thus, the placement

preferences must only "be tied rationally to the fulfillment of Congress's unique obligation[s] to the Indians." *Id.* at 555. The preferences, which were designed to promote the retention of children within their tribe and have been characterized by the Supreme Court as "the most important substantive requirement imposed on state courts" by ICWA easily meet this standard.

A. The Court Should Strike and Disregard Those Portions of the MSJ that Raise Equal Protection Challenges Not Presented in the Complaint

As an initial matter, although the Complaint challenges only 25 U.S.C. § 1915(a) and (b) on equal protection grounds, State Plaintiffs' brief is at times unclear as to whether they are now mounting a broader challenge (ECF No. 74 at 68[5] ("ICWA and the Final Rule Violate Equal Protection")) or are challenging only the third placement preference (ECF No. 74 at 73). Because the broader challenge is outside the scope of their Complaint, the Court should not consider those portions of the motion that arguably address other provisions of ICWA.

B. Classifications Based on Tribal Membership Are Not Based on Race

Plaintiffs assert that ICWA's adoptive placement preferences discriminate on the basis of race.[6] Their challenge relies on their argument that Indian classifications are race-based and therefore subject to strict scrutiny. ECF No. 74 at 69. This argument is inconsistent with the Constitution, 230 years of federal law (now comprising an entire Title of the U.S. Code), and Supreme Court precedent.

The Supreme Court has long held that federally recognized Indian tribes are "separate sovereigns pre-existing the Constitution" that exercise "'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty*, 134 S.Ct. 2024, 2030 (2014) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) and *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Tribes are expressly referenced as sovereigns in the Constitution. *See* U.S. CONST. art. I, § 8 (granting Congress the authority to regulate commerce

[5] Page references are to ECF superimposed pagination of documents.
[6] Plaintiffs also challenge the Final Rule on equal protection grounds, but do not analyze it separately.

"with the Indian tribes"); art. I, § 2 (excluding "Indians not taxed"); Amend. XIV, § 2 ("excluding Indians not taxed"). From prior to the founding of this Nation, and for nearly a century afterwards, the United States entered into treaties with Indian tribes, pursuant to the constitutional treaty power and under the collection of authorities referred to as the "War Powers." *See, e.g.*, *Worcester*, 31 U.S. at 517-18. In sum, since "the settlement of our country," the tribes "have been treated as a [quasi-sovereign] state." *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831). Tribes are, first and foremost, political entities—not racial groups.

The Fourteenth Amendment was adopted in 1868 as one of the "Reconstruction Amendments," designed principally to ensure the "freedom of the slave race." *The Slaughter-House Cases*, 83 U.S. 36, 71 (1872). The Fourteenth Amendment's equal protection clause prohibits "any State" from denying "to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Its protection has been extended to the actions of the federal government through the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954). The Fourteenth Amendment has been interpreted to prohibit racial classifications unless they are "narrowly tailored measures that further compelling government interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). But any argument that the Fourteenth Amendment was intended to limit Congress's authority to regulate with respect to tribes and their members is belied by the reference to "Indians" in the text of the Amendment.[7] U.S. CONST. amend. XIV, § 2 ("excluding Indians not taxed").

The Supreme Court has flatly rejected the argument that federal laws providing for "special treatment" of Indians, and enacted in furtherance of "Congress's unique obligation toward the Indians," are based on a racial classification. In *Mancari*, 417 U.S. 535, a unanimous Supreme Court rejected a constitutional challenge to an Indian government-employment

[7] There are serious questions as to whether the Fourteenth Amendment (and by analogy, the Fifth Amendment) was intended at the time of ratification to apply to Indians and Indian tribes, who were generally not viewed as being "within the jurisdiction" of the States. *See* U.S. CONST. amend. XIV, § 1; S. REP. NO. 41-268, at 11 (1870) (finding the Fourteenth Amendment has "no effect whatsoever upon the status of the Indian tribes…").

preference because it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id*. at 554; *id.* at 553 n.24 ("The preference is political rather than racial in nature."). The Court based its holding on tribes' unique legal status under federal law as domestic, dependent nations, and upon Congress's plenary power to "single[] Indians out as a proper subject for separate legislation" under, *inter alia*, the Indian Commerce Clause of the U.S. Constitution. *Id*. at 551-52; U.S. CONST. art. II, § 2, cl. 2; *see also Worcester*, 31 U.S. at 519 (Indian nations are "distinct, independent communities, retaining their original natural rights," and the United States may regulate relations with the tribes). Thus, so "long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed." *Mancari*, 417 U.S. at 555.

The Supreme Court elaborated on, and confirmed, these principles in *United States v. Antelope*, 430 U.S. 641, 646 (1977). In *Antelope*, the Court rejected an equal protection challenge by two tribal members to the application of federal criminal law, rather than state law, to crimes committed by Indians in Indian country. The Court explained:

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

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

Indeed, the principle that Congress may "single[] out Indians for particular and special treatment" in order to fulfill the United States' unique obligation toward the Indians underlies much of federal Indian law and policy. *See Mancari*, 417 U.S. at 552 (noting that, if laws targeting tribal Indians "were deemed invidious racial discrimination, an entire Title of the

United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized"). Since *Mancari*, both the Supreme Court and the Courts of Appeals have consistently rejected challenges to statutes that provide different treatment of Indians. *See, e.g.*, *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (Supreme Court has "repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians'"); *Fisher*, 424 U.S. at 390-91 (exclusive tribal court jurisdiction over adoption proceedings involving Indians is not racial discrimination); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-80 (1976) (tax immunity for reservation Indians is not racial discrimination); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (church that limited membership to "Native American members of federally recognized tribes who have at least 25% Native American ancestry" was a political classification).[8]

The distinction between tribal membership and a racial classification (a term which Plaintiffs have not attempted to define) is illustrated by the fact that many individuals who might have Native American heritage are not eligible to be citizens of a tribe. Tribes, as sovereigns, can generally establish their own membership criteria, which can include ancestry, residency, or other factors, just as other sovereign nations are free to establish citizenship criteria. *See Santa Clara Pueblo*, 436 U.S. at 55-56 (tribes have "power to make their own substantive law in internal matters" including membership (citing *Roff v. Burney*, 168 U.S. 218 (1897)). If these

[8] *See also United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (*Mancari* applies even if statute involves "disproportionate burdens imposed on Indians"); *E.E.O.C. v. Peabody W. Coal Co.*, 773 F.3d 977, 988 (9th Cir. 2014) (upholding hiring preference based on tribal affiliation as a political classification); *Means v. Navajo Nation*, 432 F.3d 924, 931 (9th Cir. 2005) (rejecting equal protection challenge to statute providing tribal criminal jurisdiction over nonmember Indians); *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1340 (D.C. Cir. 1998) (rejecting Tribe's equal protection claim, finding "ordinary rational basis scrutiny applies to Indian classifications.").

criteria are not met, an individual does not become a tribal member, whatever their "racial" makeup or self-identity.[9]

Tribal control over membership criteria (absent federal law to the contrary) also demonstrates that even if those requirements are viewed as involving ancestry or "racial" elements, it is the tribes—not the federal government—that are establishing those standards. Federal law defers to the determinations made by these sovereigns as to who may be tribal citizens, and does not distinguish based on race, ethnicity, ancestry, or any other prohibited basis, much as the federal government would not second guess whether the citizenship criteria of other nations improperly relies on ancestry. It is thus unlike the types of classifications assumed to be "racial" by the Supreme Court. *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003).

C. Ancestry Requirements for Tribal Membership Do Not Make That Classification "Racial"

Plaintiffs assert that "ICWA and the Final Rule's singular focus on ancestry" qualifies as racial discrimination. ECF No. 74 at 70-71. But they do not point to a single provision of either the statute or the Rule that evidences this supposed "singular focus." In fact, nothing in ICWA references race, ancestry, or blood quantum. To the contrary, the statutory definition of "Indian" is "any person who is a member of an Indian tribe…." 25 U.S.C. § 1903(3); *see also* 25 C.F.R. § 23.2. This is about citizenship in a sovereign tribe, not race or ancestry.

Plaintiffs then suggest that because tribal membership determinations are often based on ancestry, this transforms it into a racial classification. ECF No. 74 at 70. This argument is incorrect, both legally and factually. First, the *Mancari* Court explicitly rejected the argument, recognizing that the political relationship of the United States with Indian tribes is inextricably bound up in the status of those tribes as sovereigns predating the formation of the United States, and tribal members are therefore typically descendants of the indigenous peoples of this

[9] Membership in a tribe is also voluntary, and can be revoked pursuant to applicable tribal law. *See Means*, 432 F.3d at 934 n.68 (9th Cir. 2005).

country.[10] 417 U.S. at 552-53; *see also* 25 C.F.R. § 83.11 (federal acknowledgment as an Indian tribe requires "membership consist[ing] of individuals who descend from a historical Indian tribe"). Per *Mancari*, this does not transform either portions of the Constitution or statutes that single out Indians for special treatment into racial or ethnic discrimination.

Moreover, as a general matter, tribal membership is not based on "racial" ancestry. Although specific requirements vary by tribe, *see Santa Clara Pueblo*, 436 U.S. at 55-56, tribal membership is often based on demonstrating a connection, through factors that may include ancestry, with the political entity that has entered into a government-to-government relationship with the United States, such as by demonstrating a connection with an individual on a roll or list that was promulgated or recognized by the federal government as representing the members of the tribal sovereign. *See, e.g.*, *Stephens v. Cherokee Nation*, 174 U.S. 445, 455, 462 (1889) (discussing statute establishing commission to compile "a complete roll of citizenship of each of said nations [in the Indian territory]). The Ysleta Del Sur Pueblo enrollment requirements are a clear example of this, as Congress by statute in 1987 restored recognition of the Tribe, but also required that the membership of the tribe consist of individuals on an approved tribal roll, and their descendants.[11] Pub. L. No. 100-89, § 108(a) (Aug. 18, 1987). For the Cherokee Nation, citizenship is limited to "original enrollees or descendants of original enrollees listed on the Dawes Commission Roll."[12] *See* Cherokee Nation Constitution, Art. IV, Section 1. And the White Earth Nation is similar, requiring a connection through descendancy to "the annuity roll of April 14, 1941, prepared pursuant to the Treaty with said Indians as enacted by Congress in the

[10] Indeed, the Supreme Court has suggested that Congress could not "bring a community or body of people within the range of [its Indian affairs] power by arbitrarily calling them an Indian tribe"; rather, there must be some connection with "distinctly Indian communities." *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913).

[11] The statute has been amended to permit the Tribe to establish any further membership requirements, such as blood quantum. *See* Pub. L. No. 112-157 (Aug. 10, 2012).

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

Act of January 14, 1889 (25 Stat. 642)." Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Minnesota, Art. II, Section 1.

Jus sanguinis—determining eligibility for citizenship based on having an ancestor, such as a parent or grandparent, who was a citizen of a nation—is common among nations, and is not generally considered suspect. The United States itself does this in certain circumstances: a child born outside the United States is nonetheless eligible for citizenship if one or both parents are U.S. citizens (provided certain conditions are met), or if he or she were adopted by a U.S. citizen. 8 U.S.C. §§ 1431, 1433. And many other countries also grant citizenship rights based on descent, for example: Ireland (parent or grandparent); Israel (child or grandchild of a Jew); Hungary (parents, grand-parents, great-grandparents). *See, e.g.*, Nick Petree, *Born in the USA: An All-American View of Birthright Citizenship and International Human Rights*, 34 Hous. J. Int'l L. 147, 154 n.49 (2012) (listing countries that use citizenship by descent). And ancestry is considered in other contexts as well, such as inheritance rules and state-law preferences for the placement of a child with his or her extended family.

This illustrates that while "ancestry *can be* a proxy for race," it is not so in every circumstance. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (emphasis added). Here, the tribal-centered definition of "Indian child" makes clear that any consideration of ancestry is a proxy for tribal affiliation, not mere Indian blood. Indeed, the concurrence in *Rice* specifically contrasted the classification at issue there ("anyone with one ancestor who lived in Hawaii prior to 1778") with tribal membership requirements, noting that they generally defined membership "in terms of having had an ancestor whose name appeared on a tribal roll—but in the far less distant past." 528 U.S. at 526. The status of an ancestor—a parent, grandparent, or beyond—can be relevant to citizenship and other inquiries, without raising equal protection concerns. That is the case with tribal membership, which is properly viewed as a political classification.

Plaintiffs attempt to use federal and Texas law that expressly states that Indian classifications are *not* encompassed by prohibitions on racial and national origin discrimination to support the opposite conclusion. ECF No. 74 at 72. It is true that federal law prohibits

discrimination in foster or adoptive placements based on "race, color, or national origin, 42 U.S.C. § 1996b(1), but that statute also provides that this prohibition "shall not be construed to affect the application of the [ICWA]." *Id.* § 1996b(3); ECF No. 74 at 72. Congress phrased this qualification as a rule of construction, not an exception, reinforcing the conclusion that Congress views ICWA as drawing political, not racial distinctions.

D. *Mancari* Is Not a Narrow Holding

Faced with clear and consistent Supreme Court precedent that legislation directed at Indian tribes is not based on race, Plaintiffs attempt to portray *Mancari* and its progeny as narrow and limited holdings. ECF No. 74 at 70, 71. This is inaccurate. First, the Supreme Court's *unanimous* opinion in *Mancari* speaks in broad terms, and is not limited to the particular law under review. The foundation of the Court's analysis is the recognition of the "unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." 417 U.S. at 551. This applies to a range of federal laws, including ICWA, not just the preference at issue in *Mancari.*[13]

Similarly, the Court indicated the broad scope of its holding by recognizing that "[l]iterally every piece of legislation dealing with Indian tribes and reservations" singles out tribal Indians for special treatment, and that deeming such laws to be racially discriminatory would effectively erase an entire Title of the United States Code and jeopardize "the solemn commitment of the Government toward the Indians." *Id.* at 552. The Court was concerned with all of Title 25, not just the single law before it. The Court also relied on the fact that it had "on numerous occasions . . . upheld legislation that singles out Indians for particular and special treatment." *Id.* at 554-55. The Court cited four cases addressing subjects ranging from federally

[13] Although Plaintiffs fail to note it, the Fifth Circuit has applied *Mancari* to find that a federal law exempting the Native American Church from provisions prohibiting peyote possession were constitutional. *Peyote Way*, 922 F.2d at 1217.

granted tax immunity to management of trust estates, to tribal court jurisdiction.[14] *Id.* at 555 (citing *Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Simmons v. Eagle Seelatsee*, 384 U.S. 209 (1966); *Williams v. Lee*, 358 U.S. 217 (1959)). The Court understood its holding to be part of a line of precedent addressing federal Indian laws with diverse subjects. This is confirmed by the Court's subsequent decision in *Antelope* and the other cases discussed *supra* at Section I.B. *E.g.*, 430 U.S. at 645 ("The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications.")

Plaintiffs attempt to stretch *dictum* in the final paragraph of *Adoptive Couple*, 570 U.S. 637, to circumstances far beyond the scope of that case or the Court's holding. ECF No. 74 at 70. That case involved unique circumstances of unwed parents, and a non-custodial father who was found under state law to have abandoned his child in utero. *Adoptive Couple* was decided on statutory grounds, not involving equal protection, and specifically focused on the father's lack of custodial rights in that case, under state law. 570 U.S. at 647-54. The Court does not explain how its statement in *dictum* would square with *Mancari*, and the statement cannot reasonably be interpreted to undermine hundreds of years of Supreme Court precedent and congressional enactments. At most, the *Adoptive Couple* decision illustrates that state courts may consider equal protection arguments in the context of the specific facts before them, and determine situations at the margins where the connection between the child and a biological parent who is a member of a tribe has been legally severed. Notably, Plaintiffs do not (and cannot) cite any federal case finding that a federal statute directed at federally recognized tribes or their members violates equal protection principles. Put simply, the law remains that legislation that singles out

[14] The Court could have cited many more cases beyond these four since the unique constitutional and legal status of Indians has been recognized since the earliest laws and decisions of the Nation. *See* 417 U.S. at 555 (citing *Cherokee Nation v. Georgia*, 30 U.S. 1; *Worcester*, 31 U.S. 515).

tribal Indians "for particular and special treatment" is "political rather than racial in nature." 417 U.S. at 553 n.24.

E. Federal Laws Directed at Indians Must Only be Tied "to the Fulfillment of Congress's Unique Obligation Toward the Indians"

Plaintiffs assert that ICWA and the Final Rule "lack any relevant (sic) to tribal self-government." ECF No. 74 at 71. This statement is false as a factual matter, but also misstates the operative standard established by the Supreme Court. Contrary to Plaintiffs' mischaracterization of *Mancari* as requiring that Indian legislation "pertain[] to the Indians' ability to self-govern" (*id.*), in fact, the Supreme Court stated that legislation singling out Indians for "particular and special treatment" must simply "be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." 417 U.S. at 554-55. If the legislation meets this standard, Congress's "legislative judgments will not be disturbed." *Id.* at 555.

Congress's "unique obligation to the Indians" extends to matters far beyond tribal self-government. As the Supreme Court has repeatedly recognized, from treaties and the federal government's course of dealing with the tribes, "there arises the duty of protection, and with it the power." *United States v. Kagama*, 118 U.S. 375, 384 (1886); *see also Seber*, 318 U.S. at 715; 25 U.S.C. § 5302(b) (declaring commitment of Congress "to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole…."). Congressional authority has thus been held to include a wide variety of subjects, including Indian land, tribal sovereignty, and self-government, but also such diverse subjects as preferential fishing rights, *see Washington*, 443 U.S. at 673, and criminal jurisdiction, *see Antelope*, 430 U.S. at 645.[15]

[15] The Fifth Circuit held that a federal exemption "allowing tribal Native Americans to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture" which is "fundamental to the federal government's trust relationship with tribal Native Americans." *Peyote Way*, 922 F.2d at 1216. ICWA also is rationally related to preserving tribal cultures, by protecting the ability of tribal children to be raised, whenever possible, within the tribe and its customs.

But under any circumstances, ICWA is directly and expressly based on Congress's recognition that it may protect core tribal sovereignty and self-government. Citing "the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people," Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3); *see also* H.R. REP. NO. 95-1386, at 13-15 (discussing Congress's plenary power over Indian affairs, finding that "a tribe's children are vital to its integrity and future"). It was concerned about "the wholesale separation of Indian children from their families"—what Congress termed a "crisis [] of massive proportions," and sought to address the problem by confirming tribal jurisdiction over child-welfare cases, and providing federal standards for those that remain in state court. H.R. REP. NO. 95-1386, at 9.

Congress found, based on evidence that it gathered, that tribes were being decimated by the removal of their children by state and private agencies, and the placement of those children in non-Indian homes. *See Holyfield*, 490 U.S. at 32-35; S. REP. NO. 95-597, at 11-13 (1977). Congress observed that most of these removals were not based on physical abuse, but on, among other things, determinations of "neglect or abandonment where none exists." H.R. REP. NO. 95-1386, at 9-10. Congress also concluded that federal policies towards Indian tribes—in particular, the "Federal boarding school and dormitory programs"—"also contribute[d] to the destruction of Indian family and community life." *Id.* at 9; *see also id.* at 12. The protection of a tribe's *children*—its current and future citizenry—is a core element of protecting the tribe itself, which is clearly within Congress's authority.

ICWA also includes many provisions that confirm tribal sovereign authority to conduct Indian child-welfare proceedings or participate in state-court child welfare proceedings. Contrary to Plaintiffs' assertion, ICWA's provisions regarding tribal rights and authorities go to the core of tribal self-government. *See, e.g.*, 25 U.S.C. §§ 1911; 1912(a); 1918; 1919; *see also*

Holyfield, 490 U.S. at 35 ("At the heart of ICWA are its provisions concerning jurisdiction over Indian child custody proceedings.") Further, domestic relations of tribal members has long been considered a core element of tribal sovereignty and self-government, *Montana v. United States*, 450 U.S. 544, 564 (1981), whether those proceedings take place in tribal or state courts, much as the United States has an interest in the adoption of its citizens in other countries. *See, e.g.*, 42 U.S.C. § 14932 (addressing adoptions of children emigrating from the United States). This argument falls particularly flat when made by the States, which emphasize their own sovereign interest in child-welfare proceedings involving their citizens. ECF No. 74 at 54. It is no less true for tribes.[16]

F. Sections 1915(a)'s Adoptive Preferences Are Political Classifications That Are Directly Tied to Congress's Unique Obligation toward the Indians

Section 1915(a) provides: In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. These preferences do not raise equal protection concerns because they do not classify based on race, and are rationally tied to Congress's unique obligation toward the Indians.[17]

At the outset, it is important to note that these are preferences, not mandates. State courts retain discretion to find that there is "good cause" to place a child outside the preferences. 25 U.S.C. § 1915(a). And in many cases, no "preferred placement" has come forward, and thus the preferences do not apply. *See, e.g.*, *Adoptive Couple*, 570 U.S. at 654 ("there simply is no

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

[17] State Plaintiffs do not separately address the foster-care preferences or other specific provisions in their brief.

'preference' to apply if no alternative party who is eligible to be preferred under § 1915(a) has come forward"). As Congress described its intent: "This subsection and subsection (b) establish a federal policy that, where possible, an Indian child should remain in the Indian community, but is not to be read as precluding the placement of an Indian child with a non-Indian family." H.R. REP. NO. 95-1386, at 23.

The first preference, for placement with members of the child's extended family exhibits no conceivable racial or tribal element at all, although it is, by definition, related to the child's "ancestry." This preference applies to all extended family members who can meet state standards as a safe and appropriate placement.

The second adoptive preference is for placements with other members of the child's tribe. This, too, is entirely unrelated to the race of the placement; rather, it turns on their political affiliation with the child's tribe. Thus, individuals of Native American heritage who lack membership in a federally recognized tribe do not qualify for the preference. It is thus, like the preference considered in *Mancari*, "not even a 'racial' preference." 417 U.S. at 553. Plaintiffs argue that non-Indian families are discriminated against as opposed to Indian families, but because "Indian" is not a race-based classification, it follows that a provision targeting Indians necessarily does not racially discriminate against those that do not have Indian political status.

And, the preference is rationally tied to fulfillment of Congress's "obligation toward the Indians." *Id.* at 554-55. The preference helps ensure that Indian children are not unnecessarily removed from their extended families and tribal community and polity, and "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and the tribe in retaining its children in its society." H.R. REP. NO. 95-1386, at 23. The preference facilitates the ability of that child to be a tribal citizen and an active participant in tribal government and community life, and thus helps ensure the preservation of the tribe itself.

The third adoptive placement preference is for "other Indian families."[18] Again, this term describes a political, not a racial group. ICWA defines "Indian" as "any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43." 25 U.S.C. § 1903(3). Thus, an individual or family would not qualify as an "Indian family" and thus be eligible for the preference unless at least one adult in the household is a tribal member. The race of the potential placement is not relevant to the state court's inquiry, only their political status as a member of an Indian tribe. For the reasons discussed above, this is a political, not a racial, classification.

This preference also passes rational basis review. *Mancari*, 417 U.S. at 555. Congress reasonably concluded that placements in the homes of members of other tribes will, in most cases, better promote the ongoing political and cultural connection of Indian children with their tribes, as well as the ongoing viability of the tribes themselves. Many tribes have close historic political and cultural connections, and may only be considered separate federally recognized tribes through historic events or the decisions of the federal government. For example, the White Earth Band of Ojibwe is one of six component bands of the Minnesota Chippewa Tribe; a placement of a White Earth child with a member of one of the other bands would facilitate the child's political and cultural connection with the White Earth Band as well. In addition, Congress recognized that a child may be eligible for membership in more than one tribe. *See* 25 U.S.C. § 1903(5). The third preference would encourage placement in another tribe where the child is eligible for membership, even if that tribe was not chosen by the court to be the "Indian child's tribe" under 25 U.S.C. § 1903(5). Plaintiffs suggest that Congress is limited to the goal of simply "allowing tribes to govern themselves," (ECF No. 74 at 73), but as discussed above, Congress's authority is significantly broader, and this preference furthers its legitimate goal of protecting the political and cultural connection of children with tribes.

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

Congress has the authority to enact legislation addressing tribal members as a group, even though there are 573 separate federally recognized tribes which each possess their own sovereign authority. Indeed, most of Title 25 speaks in terms of "Indians" and "Indian tribes" broadly. For example, tribes have the authority to prosecute criminal misdemeanors committed by members of other tribes within Indian country under their jurisdiction. 25 U.S.C. § 1301; *Lara*, 541 U.S. at 209 (2004); *Means*, 432 F.3d at 934 (25 U.S.C. § 1301 does not violate equal protection principles, explaining that a federal "statute subjects [plaintiff] to Navajo criminal jurisdiction not because of his race but because of his political status as an enrolled member of a different Indian tribe"). Since the adoptive placement preferences "can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians," Congress's "legislative judgment" should "not be disturbed." *See Mancari*, 417 U.S. at 555.

To the extent that Plaintiffs' motion is read to challenge the definition of "Indian child" on equal protection grounds, *see* ECF No. 74 at 70, that claim is not found in their complaint.[19] Under any circumstances, that definition is also a political classification: ICWA applies to children who are enrolled members, as well as to children who are not yet enrolled due to their age, but who have two direct political ties to a sovereign tribe. First, at least one of the child's parents (who is necessarily a party to the child-welfare proceeding) must be a member of a federally recognized tribe.[20] Because young children are not able to make their own decisions, it is not unusual for a parent's status or attributes to be imputed to a child. *See, e.g.*, *Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012) (discussing "imputed parental attributes to children" in application of immigration law); *Holyfield*, 490 U.S. at 48; *Rosario v. INS*, 962 F.2d 220 (2d Cir. 1992) (a minor's domicile was "the same as that of its parents, since most children are presumed not legally capable of forming the requisite intent to establish their own domicile"). Second, the

[19] Plaintiffs lack standing to assert the claims of parties not before the court. Moreover, Plaintiffs' interests, both as states and as prospective adoptive parents, are not necessarily aligned with those of Indian children.

[20] Moreover, this requirement means that at least one tribal member will be party to state court child-welfare proceedings applying ICWA—the parent(s), the child, or both.

child must have an additional political tie to the tribe through their own eligibility for membership; in most cases, the tribe informs the state court or agency whether the child is eligible under that tribe's specific enrollment requirements. As a result, ICWA applies only to children who have the potential to become members of the political entity, and it excludes children who may have member parents but are not themselves eligible. This second requirement further ties the definition to the protection of the tribe, as a sovereign entity, and its members. Neither element delves into race or ancestry; rather, they are based on the determinations of the quasi-sovereign, political entity.

There are compelling practical reasons that Congress defined "Indian child" in this way. Most, if not all, tribes do not confer membership at birth, but rather require that an individual or his or her parents submit a formal application for enrollment, which then must be reviewed and adjudicated by the tribe. As Congress recognized, children do "not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in [their] tribe." H.R. REP. NO. 95-1386 at 17. But this cannot thwart the ability of Congress to protect tribal children: "the constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity." *Id.; cf. Nielson v. Ketchum*, 640 F.3d 1117 (10th Cir. 2011) (finding that Cherokee Nation statute that conferred tribal citizenship for 240 days to all newborns who are direct descendants of original enrollees of the Nation did not make infant a "member" for the purposes of ICWA). Furthermore, Congress determined that its Indian affairs authority is not limited to individuals who are formally enrolled as members of a tribe, noting the significant number of federal statutes and Supreme Court decisions that have recognized this fact. *See* H.R. REP. NO. 96-1386, at 16.

The challenged provisions of ICWA do not violate equal protection principles, and Plaintiffs' motion for summary judgment on Claim Four should be denied.[21]

II. Congress Has Constitutional Authority to Enact ICWA

Plaintiffs assert that "ICWA Violates the Commerce Clause" (ECF No. 74 at 65), but utterly fail to address the significant body of case law addressing congressional authority regarding Indian affairs under the Constitution. Their facial attack on the entirety of ICWA is directly contradicted by uniform Supreme Court precedent and Congress's legislative enactments since the Nation's founding. It should be rejected.

It is well settled that Congress has "plenary and exclusive" authority to regulate in the field of Indian affairs. *See, e.g.*, *Lara*, 541 U.S. at 200. The Supreme Court has recognized this broad authority of Congress since the early 19th century, when Chief Justice Marshall held that the constitutional powers granted to Congress "comprehend all that is required for the regulation of our intercourse with the Indians" and "are not limited by any restrictions on their free actions."[22] *Worcester*, 31 U.S. at 559; *see also Seber*, 318 U.S. at 716 (the "plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions" (citing cases)); *United States v. Sandoval*, 231 U.S. 8, 45-46 (1913) ("long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to

[21] State Plaintiffs baldly assert that ICWA's placement preferences would not survive strict scrutiny. ECF No. 74 at 73. This is incorrect as a matter of law, because the preferences are not racial. But if the Court disagrees, it should not reach the question of whether the preferences would withstand a higher level of scrutiny without providing Defendants an opportunity to conduct discovery and present additional argument on this point, or to seek interlocutory review.

[22] As the *Worcester* Court recognized, the Articles of Confederation were read by some states to limit Congress' Indian affairs authority since they provided that "the legislative power of any state within its own limits be not infringed or violated." 31 U.S. at 559. In contrast, the Court found that in the Constitution, the "shackles imposed on [Congress' Indian affairs] power, in the confederation, are discarded." *Id. See also Cherokee Nation v. Georgia*, 30 U.S. at 14 (noting that the Constitution "remov[ed] those doubts in which the management of Indian affairs was involved" "intending to give the whole power of managing those affairs to the government about to be instituted").

the United States … the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders").

As the Court recognized just a few years prior to the passage of ICWA, the "plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Mancari*, 417 U.S. at 551-52. In particular, the Constitution states that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. The "central function of the Indian Commerce Clause … is to provide Congress with plenary power to legislate in the field of Indian affairs." *Lara*, 541 U.S. at 200 (citing cases).

Congress's authority in the Indian affairs arena, however, is not drawn solely from the Indian Commerce Clause. The plenary authority also derives from the President's treaty power, U.S. CONST. art. II, § 2, cl. 2, which "has often been the source of the Government's power to deal with the Indian tribes." *Mancari*, 417 U.S. at 551. In 1871, Congress ended the practice of entering into treaties with Indian tribes, 25 U.S.C. § 71, and "voiced the intention of Congress thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States." *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902). But the Supreme Court "has explicitly stated that the statute 'in no way affected Congress's plenary powers to legislate on problems of Indians.'" *Lara*, 541 U.S. at 201 (citing *Antoine*, 420 U.S. at 203). The Supreme Court has also recognized that Congress's power in this area stems from "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government," *Lara*, 541 U.S. at 201, as well as the federal government's assumption of a trust obligation toward Indian tribes. *Mancari*, 417 U.S. at 552. Congress expressly relied on the Indian Commerce Clause, "other constitutional authority," and its "plenary power over Indian affairs" to support the enactment of ICWA. 25 U.S.C. § 1901(1). *See also* H.R. REP. NO. 95-1386, at 13-14. (the "Supreme Court has, time and again, upheld the sweeping power of Congress over Indian matters").

Plaintiffs attempt to confine the scope of congressional plenary authority under the Indian Commerce Clause to "economic activity," (ECF No. 74 at 65), but this cramped reading is directly contradicted by both Supreme Court precedent and longstanding practice. Congress has been found to have authority to legislate regarding many Indian affairs matters that are not economic activities, including matters concerning the attributes of tribal sovereignty and self-government, *Lara*, 541 U.S. at 202; *Santa Clara Pueblo*, 436 U.S. at 56-57; the removal of Indians from their lands, *Fellows v. Blacksmith*, 60 U.S. 366 (1856); the imposition of federal criminal laws on Indians, including on reservations, *Kagama*, 118 U.S. 375; and the abrogation of treaty terms, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). Plaintiffs' primary support for this argument is a concurring opinion authored by Justice Thomas, and not joined by any other Justices. *Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring). That opinion is not governing law and cannot be squared with precedent or two hundred years of congressional action.[23]

Since there is no Indian Commerce Clause precedent to support their argument, Plaintiffs rely exclusively on case law interpreting the Interstate Commerce Clause, ECF No. 74 at 65-68, but this law is inapposite. Contrary to Plaintiffs' assertion, the three grants of authority in Article I, Section 8, clause 3 of the Constitution have long been treated distinctly. *See Cherokee Nation v. Georgia*, 30 U.S. at 13 ("The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct" and the

[23] Justice Thomas first criticized the Court's Indian Commerce Clause jurisprudence in *Lara* in 2004, but no other Justice in the last fourteen years has joined his criticism. Justice Thomas relies heavily on the law review article cited in Plaintiffs' Brief (ECF No. 74 at 66). But his conclusions, and those of that author, have been challenged as misstating and misunderstanding the original understanding of the Indian Commerce Clause and the Constitution more broadly. *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L. J. 1012 (2015). For example, the States' Brief quotes Justice Thomas' concurrence as asserting that regulation of Indian commerce historically referred to "legal structures governing the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters." But legal historians have pointed out that the Founders viewed trade with the Indians with a diplomatic and political lens, not commercial. Ablavsky, 124 Yale L. J. at 1030.

same understanding is true for the Constitutional provision). And the Supreme Court has expressly rejected analogizing the two clauses. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Cherokee Nation*, 30 U.S. at 18. In *Cotton Petroleum*, the Court observed that it is "well established that the Interstate Commerce and Indian Commerce Clauses have very different applications." 490 U.S. at 192. Whereas the Interstate Commerce Clause "is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, [] the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* (citations omitted).

Thus, case law interpreting the Interstate Commerce Clause has little applicability to Indian affairs, as it "is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Id*; *see also United States v. Lomayaoma*, 86 F.3d 142, 145 (9th Cir. 1996) (noting the distinction between principles of federal Indian law and "those governing federal regulation of interstate commerce."). As a result, limitations on Congress's authority to legislate through powers derived from the Interstate Commerce Clause do not translate to the Indian Commerce Clause.

Plaintiffs restate their "economic activity" argument by asserting that "children are not 'commerce.'" ECF No. 74 at 66. But as discussed above, Congress's Indian affairs authority has been interpreted to extend far beyond the regulation of articles of commerce, to include, among other matters, federal criminal jurisdiction in Indian country.[24] See 18 U.S.C. §§ 1151-1153. Of particular relevance here, congressional authority to protect, modify, or reduce tribal

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

sovereignty and self-government has been repeatedly upheld as a core Indian affairs power. *E.g.*, *Lara*, 541 U.S. at 202; *Santa Clara Pueblo*, 436 U.S. at 56-57. Several ICWA provisions challenged by Plaintiffs directly address tribal authority to adjudicate or participate in child welfare proceedings involving tribal children, and fall squarely within this precedent. *See, e.g.*, 25 U.S.C. §§ 1911; 1912(a); 1914, 1915(c), 1919. And the entirety of ICWA is designed to protect the "continued existence and integrity of Indian tribes" by protecting their most vital resource—their children.[25] *Id.* § 1901(3); *see also id.* §§ 1915 (preference for tribal placements); 1917 (requiring courts to inform adopted individuals of their parents' tribal affiliations); 1951 (regarding disclosure of information to the Secretary of the Interior and for purposes of enrollment). As the Supreme Court recounted, there was "considerable emphasis" in the congressional hearings leading to ICWA "on the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34.

Plaintiffs also erroneously assert that Congress can only "regulate Indian tribes," and lacks authority to legislate regarding individual Indians, including children.[26] ECF No. 74 at 66. The Supreme Court has held to the contrary, finding that "commerce with Indian tribes means commerce with the individuals composing those tribes." *United States v. Holliday*, 70 U.S. 407, 417 (1865); *Dick v. United States*, 208 U.S. 340, 357 (1908). Congress has routinely passed laws under its Indian affairs power that address individual Indians, such as by dictating which

[25] Such a finding only highlights the difference between enactments pursuant to the Indian Commerce Clause and enactments pursuant to the Interstate Commerce Clause. With the latter, the Court is careful to ensure Congress does not overstep its bounds by legislating matters properly left to the States. But the sovereign rights and interests of Indian tribes do not typically align with those of the States; instead, tribes rely upon federal legislation to protect and advance their interests.

[26] In making this argument, Plaintiffs' Brief repeatedly misrepresents the plain text of the statute. ECF No. 74 at 68. As discussed *supra* at Section I.F, ICWA only applies if the child is a member or the child's parent(s) is a member and the child is eligible. ICWA does not apply to individuals who simply have "Indian heritage" or "consider themselves Native American." The States' Brief also misstates the holding of *Adoptive Couple*, which did not find that "ICWA does not apply to child who was 1.2% Cherokee." To the contrary, the Supreme Court applied ICWA to the case, but found that the specific provisions at issue were not applied correctly. 570 U.S. 637.

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

In enacting ICWA, Congress correctly relied on its plenary authority over Indian affairs under the Constitution and the United States' trust relationship with Indian tribes. *See* 25 U.S.C. § 1901. Plaintiffs' motion for summary judgment on Count Two should be denied.

III. Plaintiffs' Tenth Amendment Challenge Must Fail as a Matter of Law

Plaintiffs assert that ICWA (in its entirety) violates the Tenth Amendment, asserting the Congress lacked authority to enact the statute, that domestic relations are the "virtually exclusive province of the States," and that it impermissibly commandeers State government. SAC ⁋⁋ 284-293; ECF No. 74 at 53-61. For the reasons below, these arguments fail.

A. The Tenth Amendment Does Not Reserve Any Authority Over Indian Affairs to the States.

"If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156 (1992). Here, as discussed *supra* at Section II, the Constitution explicitly and implicitly grants Congress plenary and exclusive authority over Indian affairs. Congress passed ICWA pursuant to this enumerated power; thus, the Tenth Amendment is necessarily not implicated. *Id.*; *Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1153-54 (9th Cir. 2013); *Raich v. Gonzales*, 500 F.3d 850, 867 (9th Cir. 2007); *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000) ("We have held that if Congress acts under one of its enumerated powers, there can be no violation of the Tenth Amendment."). Thus, while it is true that the Supreme Court has recognized that domestic relations are generally the province of the states, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), the

Supreme Court has also long recognized that states "have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996); *Worcester*, 31 U.S. at 560-61. Congressional authority includes, if Congress so chooses, divesting the state of authority over domestic relations matters involving Indian parents and children and concomitantly enhancing tribal authority over Indian children. On this basis, ICWA is fully within Congress's Indian affairs authority, and does not violate the Tenth Amendment.

B. States' Residual Sovereignty Over Domestic Relations Does Not Include Exclusive Jurisdiction Over the Domestic Relations of Indians

Plaintiffs argue that an "inviolable doctrine … places all matters of family, marriage, parental rights, and child custody in the sole hands of the States." ECF No. 74 at 53. But this overstates the authorities on which they rely, and fails to account for circumstances where domestic relations matters overlap with areas of primary or exclusive federal power. State authority over domestic relations is not expressly conferred in the Constitution, but rather is a residual authority defined by what remains after constitutional grants of authority to the federal government. *Printz v. United States*, 521 U.S. 898, 919 (1997). It thus must account for those areas where Congress has constitutional authority. Here, Congress's plenary power over Indian affairs is such an area, and it includes power over Indian child welfare and the protection of Indian families and tribes from inappropriate and unjust treatment in state child-welfare systems.

At the outset, Plaintiffs overstate the extent to which state authority over domestic relations is "exclusive." (ECF No. 74 at 70). Plaintiffs cite *Ankenbrandt v. Richards*, 504 U.S. 689, 697-701 (1992), but that case does not advance their argument, as it held that there is *no constitutional prohibition* on federal court jurisdiction over domestic relations. It determined, rather, that Congress had not *by statute* granted such authority to the federal courts. *Id.* at 697-98. But it did not suggest that such a grant would have violated the Tenth Amendment.

Furthermore, Congress has legislated on numerous occasions to address child-welfare issues related to other federal powers (like the Indian affairs power), such as interstate disputes,

immigration, and foreign relations.[27] State authority over domestic relations in these areas has been correspondingly diminished. *See New York*, 505 U.S. at 159. For example, in 1980, Congress established uniform national standards for the assertion of child-custody jurisdiction in the Parental Kidnapping Prevention Act (PKPA), to address the nationwide problem caused by parents who lost custody in one state illegally removing the child to a different state where the non-custodial parent might receive more favorable treatment. 28 U.S.C. § 1738A; *see Thompson v. Thompson*, 484 U.S. 174, 180 (1988). The PKPA established conditions for the exercise of jurisdiction, which were later adopted into the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as was its requirement that states give full faith and credit to the custody determinations of other states.[28] Like ICWA, the PKPA "is addressed entirely to States and state courts." *Id*. at 183. Congress has also legislated with regard to child welfare in the areas of immigration and foreign affairs. *See, e.g.*, 8 U.S.C. § 1101(a)(27)(J) (requiring consent of the Secretary of Health and Human Services to juvenile court jurisdiction over an alien in the Secretary's custody); 22 U.S.C. § 9003(a) (granting federal courts jurisdiction concurrent with state courts over Hague convention actions). The situation today, therefore, is considerably more

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

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

complex than it was in 1890, when the Supreme Court declared "the whole subject" of domestic relations as belonging to the laws of the states.[29] *See In re Burrus*, 136 U.S. 586, 593-94 (1890).

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

Congress's Indian affairs authority extends not only to matters relating to the domestic relations and sovereignty of tribes, but also these subjects as they pertain to state-tribal relations. Congress's powers over Indian affairs "comprehend all that is required for the regulation of our intercourse with the Indians," *Worcester*, 31 U.S. at 559, and from the earliest days of our Nation, Congress has exercised this power to protect Indian tribes from the actions of non-Indians, including states.[30] Early treaties between the United States and tribes concerned

[29] In 1890, tribal Indians had not yet been granted U.S. citizenship, and would have been clearly understood to not be encompassed in this recognition of state authority. 43 Stat. Ch. 233, p. 253.
[30] Nor does Congress lose this authority simply because a state also has jurisdiction over a group of Indians. *See, e.g.*, *John*, 437 U.S. at 653-54 (although Choctaw Indians who remained in Mississippi became state citizens, Congress retained power "to deal with them" including by the exercise of federal criminal jurisdiction).

primarily tribal intercourse with non-Indians (including states), as did the series of Non-Intercourse Acts that Congress regularly passed through 1802. *See* Act of 1790 (July 22, 1790); Act of 1793; Act of 1796; Act of 1799; Act of 1802; Act of 1834, 25 U.S.C. § 177. The aim of these measures was to build peaceful relations and "prevent unfair, improvident, or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress," *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996), and to maintain a system of federal and tribal criminal jurisdiction over Indians. Congress has continued in its role of overseeing state and tribal relations to the present day, including in the area of child welfare. *See, e.g.*, 42 U.S.C § 655(f) (amending Title IV-D of the Social Security Act to authorize direct payments to tribes that demonstrate the "capacity to operate a child support enforcement program meeting [program] objectives"); 45 C.F.R. § 302.36(a)(2) (requiring State IV-D programs to "extend the full range of services available under its IV-D plan to . . . [a]ny Tribal IV-D program").

In ICWA, Congress expressly balanced the interests of federal, state, and tribal governments, noting that it does not "oust the States of their traditional jurisdiction over Indian children falling within their geographical limits," H.R. REP. NO. 95-1386, at 19, but rather only provides limited standards for state courts to follow where state law is not equally or more protective. Congress concluded, however, that it could impose standards and procedures on state courts to protect the substantive rights of all Indian children, relying in part on the Supreme Court's holdings that local forms of practice may not be applied to defeat a federal right. *Id.* at 18 (citing, *inter alia*, *Brown v. Western Ry. Co.*, 338 U.S. 294 (1949)). Thus, ICWA balances the federal interest in protecting the integrity of Indian families and the authority of Indian tribes with the states' interest in child-welfare matters.

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

Congress viewed ICWA as a compromise between the full power of its authority over Indian affairs and the traditional role of the states in adjudicating child-welfare proceedings—a

view supported by the absence of any successful constitutional challenge in its 40-year history—but Plaintiffs now aver that ICWA went too far.[31] According to Plaintiffs, Congress has illegally commandeered States because it requires "requires states to enforce ICWA." ECF No. 74 at 57-58. This is inaccurate: ICWA establishes federal standards to protect the rights of Indian children, their parents, and Indian tribes. The basic rights afforded by ICWA are the law of the land and are applied by state courts by means of the Supremacy Clause, such that ICWA does not impermissibly 'commandeer' state courts. The Supreme Court has repeatedly reaffirmed the "power of Congress to pass laws enforceable in state courts." *New York*, 505 U.S. at 178; *Testa v. Katt*, 330 U.S. 386, 394 (1947); *F.E.R.C. v. Mississippi*, 456 U.S. 742, 760-61 (1982). This is no anomaly: statutes enacted by the very first Congress established "that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907. Here, state courts are responsible for ensuring the legal rights—including rights under federal law—of the children and parents whose cases the court is adjudicating. *See, e.g.*, *Wicks*, 208 S.W.2d at 878. Plaintiffs attempt to reframe these rights as obligations on state courts or agencies, but this is not accurate.

That ICWA legislates for the protection of Indian children is plain from its declared policy to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."[32] 25 U.S.C. § 1902. Having found that "an alarmingly high

[31] Plaintiffs' challenges to the Final Rule in Count Three are not redressable and must be dismissed for that reason as well. Plaintiffs seek declaratory and injunctive relief only to prevent the implementation of the statute, SAC ¶ 323; thus, Count Three turns on whether the statute, not the Final Rule, violates the Tenth Amendment. Therefore, allegations in Count Three that purport to independently challenge provisions of the Final Rule should be struck. *See* SAC ¶¶ 300-302, 305, 307, 314. State Plaintiffs' arguments in their motion for summary judgment regarding these provisions similarly should be disregarded. *See* ECF No. 74 at 43-44 (addressing Final Rule provisions on invalidation of adoption for fraud and duress, 25 C.F.R. § 23.136, and the diligent search requirement, *id.* § 23.132(c)(5)).

[32] The Supreme Court recently affirmed its view that "[t]he Constitution . . . 'confers upon Congress the power to regulate individuals, not States." *Murphy v. National Collegiate Athletic Ass'n*, Nos. 17-476, 16-477, slip op. at 16, 2018 WL 2186168, at *11 (May 14, 2018).

percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies," *id*. § 1901(4), Congress vested in Indian children, their parents, and the children's tribes, certain statutory rights that Plaintiffs now seek to overturn.[33] These include the right to notice of state-court proceedings, *id.* § 1912(a); a tribal right to exercise exclusive jurisdiction or to intervene, *id.* § 1911(a), (c); the right to seek transfer of proceedings to tribal court, *id*. § 1911(b); the right of parents to not have children removed from them or parental rights terminated prior to active efforts to reunify the family, *id.* § 1912(d); the right to propose homes for a child, *id.* § 1915(a)-(b); and the right of adoptees to learn their tribal affiliation, *id.* §§ 1917, 1951.

That these rights are largely enforceable only in the context of state child-custody proceedings is unsurprising. Congress attributed the breakup of the Indian family, not principally to the actions of Indian children, parents, or tribes, but rather to the fact that "States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). It makes no sense in this context to speak of congressional power to legislate to protect individuals divorced from any connection to the states, who were the main perpetrators of the discriminatory conduct identified by Congress. In this regard, ICWA follows a long line of statutes in which the federal government establishes rights that are respected by the states. *See, e.g.*, Fair Housing Act, P.L. 90-284, 82 Stat. 73 (prohibiting

[33] The exact scope of Plaintiffs' anticommandeering challenge appears to still be in flux even after they have twice amended their complaint. In their motion, Plaintiffs have introduced challenges to two statutory sub-sections, Sections 1911(b) and 1913(d), for which there was no correspondingly specific allegation in the Complaint. *Compare* SAC ¶¶ 295, 296, 298-99 *with* ECF No. 74 at 42-44. State Plaintiffs also now attempt to challenge provisions of the Final Rule for which there is not a corresponding Tenth Amendment allegation in the Complaint. *See* ECF No. 74 at 42-44 (raising for the first time anti-commandeering challenges to 25 C.F.R. §§ 23.139, 23.138, 23.138, § 23.111-.121, 23.141). Because State Plaintiffs ask for summary judgment on claims not before the Court, these portions of their motion should be struck and not considered.

discrimination in the sale or rental of most housing); Voting Rights Act of 1965, P.L. 89-110, 79 Stat. 437 (temporarily suspending literacy tests and voter disqualification devices); Civil Rights Act of 1960, P.L. 86-449, 74 Stat. 86 (requiring, *inter alia*, that voting and registration records for federal elections be preserved); Civil Rights Act of 1875, 43 Cong. Ch. 114, March 1, 1875, 18 Stat. 335 (barring discrimination in public accommodations; prohibiting exclusion of African Americans from jury duty).

That rights conferred by federal statute on Indian children, their parents, and their tribes may supply minimum federal standards for state courts to apply as they adjudicate child-welfare cases involving Indian children is unremarkable and, in most cases, unobtrusive. Although it behooves Plaintiffs (and is easier) to describe ICWA as establishing burdensome standards that inexorably apply to a child-custody proceeding involving an Indian child, *see* ECF No. 74 at 43-44, the reality is considerably more complex. State law continues to apply to these proceedings, and takes precedence over any provision of ICWA when it is more protective of parental rights. 25 U.S.C. § 1921. But as to those state-law standards that do not protect the rights identified in ICWA and thus would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Congress may substitute federal standards. *Felder v. Casey*, 487 U.S. 131, 151 (1988); *see also Jinks v. Richland County*, 538 U.S. 456 (2003) (upholding federal statutory provisions tolling state statutes of limitation); *Brown v. Western Ry.*, 338 U.S. 294 (1949) (federal right provided to the plaintiff could not be defeated by the forms of local practice). In the absence of comparably protective state law, ICWA's provisions act as a backstop; the effect of ICWA on the states, therefore, lies in direct proportion to the degree to which state processes and actions obstruct the rights and protections Congress established for Indian children, their parents, and tribes.[34]

[34] The chart that State Plaintiffs submitted does no more than purport to identify where ICWA and state law differ, which does not further their Tenth Amendment argument. The chart is also inaccurate and, in places, deliberately misleading. For example, ICWA does not apply "racial preferences" or permit racial discrimination. ECF No. 74 at 59-60. State-court proceedings also continue to apply a "best interest of the child standard," as Congress has declared that it is "the

Like every federal law weighed in state courts, the availability of different causes of action, rights, and legal arguments may alter specific proceedings before the court, but this does not constitute impermissible commandeering. ICWA does not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. ICWA neither creates the underlying child-custody proceedings nor compels an outcome. It merely provides standards that may apply in those cases, and the State, when it is a party to a proceeding, must comply with those standards, just as any party must adhere the governing legal standards in a court proceeding. Thus, this case is unlike the statute at issue in *Printz*, since it does not command the state executive to take action but rather imposes "an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." 521 U.S. at 907. This does not offend the Tenth Amendment.

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

Notably, although some states have opted to enact their own laws adopting or exceeding the standards established by ICWA, ICWA does not compel conforming legislation, and most states have not. Finally, ICWA does not itself compel any costs,[35] though as in any case, there

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policy of this Nation to protect the best interests of Indian children" by the establishment of the minimum standards in ICWA. 25 U.S.C. § 1902.

[35] Plaintiffs also allege in Count Three that "Social Security Act Sections 662(b)(9) and 677(b)(3)(G) commandeer States by requiring them to comply with all aspects of ICWA to receive federal funding." SAC ¶ 309. They do not advance these claims in their motions. Regardless, the Supreme Court has only once found that Congress exceeded Tenth Amendment limits on its spending power, and that decision is inapplicable here. *See National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2603-07 (2012).

may be costs associated with advocating for a particular position in a particular child-welfare proceeding. ICWA does not commandeer states, and Plaintiffs' motion for summary judgment on Claim Three should be denied.

IV. Section 1915(c) does not Offend the Non-Delegation Doctrine

Section 1915(c) of ICWA requires a court placing an Indian child for foster care or in an adoptive placement to consider the preferences of the child, the parent and the child's tribe. 25 U.S.C. § 1915(c). State Plaintiffs argue the provision amounts to an unconstitutional delegation of Congress's legislative power to tribes. ECF No. 74 at 62-65.

At the outset, no Plaintiff alleges that tribal preferences are being imposed upon them so no standing supports this Court's review of the provision. State Plaintiffs note that they have on file the preferences of one tribe, but do not suggest that those preferences are at issue in any current child-welfare proceedings. *Id.* at 64. And if the Court lets the claim proceed, then State Plaintiffs' challenge, divorced from any actual application of Section 1915(c), must be construed as a facial challenge and they have the burden of demonstrating that no set of circumstances exists under which Section 1915(c) would be valid.

Section 1915(c) follows Sections 1915(a) and (b), which provide ICWA's preferences, absent good cause to the contrary, for adoptive, preadoptive, and foster care placements. Section 1915(c) then requires consideration of the preferences of the Indian child, the parents, and the child's tribe:

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

25 U.S.C. § 1915(c). State Plaintiffs argue that this provision in effect allows tribes to reorder the preferences identified in subsections (a) and (b), and that this in turn amounts to delegating legislative authority to tribes.

Some state courts have held that this provision allows a tribe to express its preference in a particular case through a resolution or other statement that notifies the court this is the tribe's formal preference, rather than just the opinion of a tribal social worker or other official. *See Cutright v. State*, 244 S.W.3d 702, 707 (Ark. Ct. App. 2006) (tribes request that six siblings be kept together in one placement "was sufficient to invoke the preference set out in sub-section 1915(c)"); *In re J.M.*, No. C068201, 2012 WL 541523, at *12 (Cal. Ct. App. Feb 16, 2012) (tribe's placement preference for child, set forth in a declaration rather than resolution, suffices for Section 1915(c), despite "technical noncompliance"); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 328-29 (N.Y. 2005) (tribe should have been permitted intervention because otherwise the "tribe's order of preference [in the case] is unlikely to be presented to the court"). *See also In re T.S.W.*, 276 P.3d 133, 147 (Kan. 2012) ("Thus the entire text 25 U.S.C. § 1915(c) indicates that the district court should modify the order of preferences in 25 U.S.C. § 1915(a) when (1) the tribe establishes a different order under certain circumstances or (2) a consenting parent seeks anonymity with respect to the placement of the child.").

Plaintiffs may object to affording deference to the wishes of a child's tribe in the order of preference, but such deference does not create a non-delegation problem. The distinction between permissible and non-permissible delegations turns on whether Congress is delegating discretion to make law or discretion with regard to how it is executed. *Loving v. U.S.*, 517 U.S. 748, 758 (1996). Section 1915(c), in practice, is a vehicle by which a tribe, like a parent or the child may seek a departure from ICWA's Section 1915(a) and (b) placement preferences, and is not a blank check from Congress for a tribe to create law.

Moreover, the tribe's order of preference is not absolute. As this Court has noted, legislative authority is not delegated to a private party where the "ultimate authority to reject that [private party] advice" is retained elsewhere. *Texas v. United States*, Civil Action No. 7:15-cv-

00151-O, 2018 WL 1478250, at *23 (N.D. Tex. Mar. 5, 2018).[36] In the case of foster care placements, the court defers to the tribe's choice only if the proposed placement is "the least restrictive setting appropriate to the particular needs of the child." 25 U.S.C. § 1915(c). And in the case of adoptive or foster care placements, "the court would still have the power to determine whether 'good cause' exists to disregard the tribe's order of preference." *Adoptive Couple,* 570 U.S. at 655 n. 11. The Court's determination of good cause accounts for the wishes of the parents and the child, where appropriate. *See* 25 C.F.R. § 23.132(c)(1)-(2). Accordingly, at the end of the day, a tribe cannot dictate the placement of its children—that authority remains in the hands of the state courts. To be sure, those courts will consider a tribe's preferred order of placement, and should defer when circumstances warrant. But the ultimate authority to determine if good cause exists to disregard those preferences remains in the state court. 570 U.S. at 655 n.11.

If the Court finds no constitutional infirmity with allowing tribes to express its preference in particular state cases concerning placement of tribal children, then that suffices to defeat the facial challenge to Section 1915(c). But if the Court wishes to consider those instances where a tribe offers, by resolution, a different order of preference for all tribal children in state child-custody proceedings, the conclusion is the same. *See Pascua Yaqui Tribe v. Superior Court*, No. F041800, 2003 WL 164977, at *9 (Cal. Ct. App. Jan. 24, 2003) (describing Section 1915(c) tribal resolution that applies generally to the tribe's children). Federal law may incorporate the laws of other sovereigns. The Supreme Court has found no non-delegation problem where federal statutes adopted state laws, even prospective state laws, as federal law. *See United States v. Sharpnack*, 355 U.S. 286, 294 (1958) (Assimilative Crimes Act's incorporation of later-

[36] In *Texas*, this Court nevertheless found a non-delegation violation because the private party established the "baseline legal standard and regulatory floor" regardless of "additional or higher legal barriers in [the agency review process]." *Id.* at *24. Here, by contrast, ICWA itself establishes the "baseline legal standard" through Sections 1915(a)-(b), and if a tribe does not weigh in, those standards govern. And if a tribe does re-order ICWA's preferences, that remains only one factor among others in the district court's consideration, as discussed above.

enacted state law "[r]ather than being a delegation by Congress of its legislative authority to the States . . . is a deliberate continuing adoption by Congress . . . of such unpreempted offenses and punishments as shall have been already put in effect by the respective States for their own government"); *see also United States v. Hawes*, 529 F.2d 472, 478 (5th Cir. 1976) ("The Constitution is not violated when a federal statute incorporates the laws of the states.").

Thus, even if the Court accepts State Plaintiffs' characterization of Section 1915(c) as elevating tribal law to federal law, ECF No. 74 at 64, *Sharpnack* makes clear that Congress can and does frequently incorporate the law of another government. *Sharpnack*, 355 U.S. at 294-97 (collecting examples of federal statutes incorporating state law). Moreover, nothing in *Sharpnack* or any other decision that Federal Defendants are aware of suggests that such incorporation of another government's law is constitutional only where that government is a state. As noted above, Section 1915(c) is structured so that a tribe's preferred order of preference is not the last word, will be counterbalanced with the preferences of the parents and, where appropriate, the child, and can be disregarded for good cause. Furthermore, a given tribe's chosen order of preference only applies to children who are members of that tribe or to children who are eligible for membership and who have a parent who is a current member.[37] Accordingly, Section 1915(c) does not offend the non-delegation doctrine and Plaintiffs' motion summary judgment on Count Seven should be denied.

V. The Final Rule is Not Arbitrary, Capricious, or Contrary to Law and *Chevron* Deference Applies to Interior's Interpretation of ICWA

Plaintiffs assert, in cursory fashion, that the Final Rule violates APA, primarily arguing that it violates the Constitution, and "incorporat[ing] by reference the Individual Plaintiffs'

[37] Again, because this is a facial challenge, State Plaintiffs succeed only if they demonstrate "there is no set of circumstances under which the statute would be constitutional," so State Plaintiffs may not hypothesize "imaginable" scenarios where the constitutionality of Section 1915(c) is more questionable than in other cases. *Barnes v. Mississippi*, 992 F.2d 1335, 1342 (5th Cir. 1983) (refusing to consider "imaginable" scenario until it actually manifests itself in an "as-applied challenge").

argument that the Final Rule is 'arbitrary and capricious and an abuse of discretion.'" ECF No. 74 at 75.

As described more fully in Federal Defendants' Opposition to Individual Plaintiffs' Motion for Summary Judgment, this claim must fail. After a notice and comment period, Interior promulgated the Final Rule to improve implementation of ICWA and promote a more uniform application of the law. 81 Fed. Reg. 38,778. In 100 pages of the Federal Register, Interior provided an analysis of the statutory authority to promulgate the rule, an explanation of why additional regulations were needed (including its change in position), thorough responses to comments received by the agency, and the language of the rule itself. In *FCC v. Fox*, 556 U.S. 502 (2009), the Supreme Court made clear that the APA's narrow standard of review—whether an agency's action was arbitrary, capricious, or otherwise contrary to law—is the appropriate standard of review when an agency revises an earlier action or changes its position, just as it is when the agency acts in the first instance. *Id.* at 514–16. The Supreme Court held that when an agency revises prior action or changes its position, the agency must recognize the change of position and explain it, but "need not demonstrate to a court's satisfaction that the reasons for the new [position] are better than the reasons for the old one." *Id.* at 515. A review of the Final Rule demonstrates that Interior displayed an awareness that it was changing positions, provided good reasons for the decision to issue regulations, and provided a reasoned explanation for why it no longer agrees with the agency's prior positions as to the scope of the authority to issue such regulations. *See* 81 Fed. Reg. 38,782-90. In particular, Interior considered the broad grant of rulemaking authority in 25 U.S.C. § 1952, and concluded it possessed the required authority to issue the Final Rule. *See City of Arlington v. FCC*, 569 U.S. 290, 306 (2013) (finding not "a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support Chevron deference for an exercise of that authority within the agency's substantive field").

Interior made the decision to reconsider its authority to issue regulations based on 37 years of experience that weighed in favor of a different result. 81 Fed. Reg. 38,785. Over that

time, ICWA's application in state courts has been inconsistent and at times contradictory, and that this has impeded Congress's statutory intent. *Id*. Interior also found support for regulations in the Supreme Court's decision in *Holyfield*, 490 U.S. 30, which emphasizes the importance of ensuring federal laws, and specifically ICWA, have "uniform nationwide application" and not be impaired by state law. *Id.* (quoting *Holyfield*, 490 U.S. at 43-44). Interior reasonably concluded that it possessed the authority to foster "nationwide uniformity" in the interpretation and elaboration of provisions of ICWA in the manner the *Holyfield* Court recognized Congress intended.

Plaintiffs also argue that the Final Rule is arbitrary and capricious and contrary to law because BIA lacks the authority to supervise state courts, ECF No. 74 at 75, but this ignores the fact that Interior expresses no intent in the Rule (and has expressly disclaimed such intent in this proceeding) to enforce or otherwise supervise the application of the Final Rule in state court proceedings. Interior analyzed this very issue and determined that it does not view the rule as "an 'extraordinary' exercise of authority involving an assertion of 'supervisory control' over State courts." 81 Fed. Reg. 38,789. That is because the Final Rule does not instruct state courts how to decide their case or make "judicial decisions subject to reversal by executives." *Id.* (quoting *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005)). Rather, the Final Rule "clarifies a limited set of substantive standards and related procedural safeguards that courts will apply to the particular cases before them." *Id.* This does not amount to agency supervision of state judiciaries.

As demonstrated above, Interior provided a well-reasoned justification and analysis both as to its authority to promulgate regulations resolving ambiguities in ICWA and to the necessity of issuing regulations. *See* 25 U.S.C. § 1952. As such, the Final Rule is not "procedurally defective" as Plaintiffs contend, ECF No. 80 at 70, and Interior is entitled to *Chevron* deference as to its interpretation of ambiguities in ICWA. It easily meets this standard.

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

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

CONCLUSION

For the foregoing reasons, the Court should deny State Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th of May, 2018 a true and correct copy of the foregoing was submitted to the Clerk of the Court for the U.S. District Court, Northern District of Texas, along with Plaintiffs' counsel, using the ECF system of the court.

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