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

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

MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSITION TO INDIVIDUAL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

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 found 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 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 their own child-welfare laws to apply these protections to all children. *Id.* at *20-21. For

[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).

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 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. These individuals—Chad and Jennifer Brackeen, Frank and Heather Libretti, Altagracia Hernandez, and Jason and Danielle Clifford—in fact have either finalized adoptions or are litigating their claims simultaneously in state courts, making some of the same constitutional arguments they simultaneously bring here.

Individual 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 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.

[2] *See* Nevada Division of Child and Family Services et al., Diligent Search Resource Handbook (Oct. 23, 2009), *available at* http://dcfs.nv.gov/Policies/CW/0500 (a diligent search "should be continuously promoted to establish placement options and/or preserve the continuity of relationships and lifelong connections for children").

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 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 Indian tribes. 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 Final Rule 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, and the Final Rule simply interprets the statutory direction.

ICWA thus does not violate the Constitution, and the Final Rule does not violate the APA. Individual Plaintiffs' motion for summary judgment should be denied, if the Court reaches the merits of their claims.

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 families and communities. Congress balanced these interests with the interest of the states in child-welfare matters occurring within their jurisdictions, establishing procedural safeguards in state-court proceedings. 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

[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).

determination upon a showing that certain provisions of ICWA, §§ 1911-1913, have been 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), and 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 38779. 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

Individual Plaintiffs have moved for summary judgment. Summary judgment is appropriate only where "there is no genuine issue as to any material fact and [a] moving party is entitled to judgment as a matter of law." *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001) (citing Fed. R. Civ. P. 56(c)).

Plaintiffs bring facial constitutional challenges to ICWA—that is, an attack on the statute itself—which would "reach beyond the particular circumstances of these plaintiffs." *John Doe*

[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).

No. I v. Reed, 561 U.S. 186, 194 (2010). 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).

Summary judgment should be stayed to permit adequate time to ascertain whether the record supports standing. If the Court denies the United States' motion to dismiss, it may reach the merits of claims for which there is subject matter jurisdiction. However, at summary judgment Plaintiffs "can no longer rest on . . . 'mere allegations [in the complaint]' but must 'set forth' by affidavit and other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Lujan v. Def. of Wildlife*, 504 U.S. 555, 561 (1992). Federal Rule of Civil Procedure 56(d) provides that a nonmovant may show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." *See Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993) ("To obtain a continuance of a motion for summary judgment in order to obtain further discovery, a party must indicate to the court by some statement, preferably in writing (but not necessarily in the form of an affidavit), why he needs additional discovery and *how* the additional discovery will create a genuine issue of fact."). Individual Plaintiffs' standing is premised on facts related to state court child-welfare proceedings, the records of which are not before this Court and are not readily available to the other parties due to state-law confidentiality

provisions.[5] *E.g.*, Nev. Rev. Stat. § 432B.290.2; Nev. Rev. Stat. § 127.140; Tex. Fam. Code Ann. § 261.201(a); 40 Tex. Admin. Code §§ 700.201-700.207; Minn. R. Juv. Protect. Pro. 8.04.

Individual Plaintiffs' declarations and brief in support of summary judgment is also replete with unsupported allegations of facts and hearsay, which Defendants have not had the opportunity to evaluate or contest, and which should be struck on the basis that they are inadmissible. *See Donaghey v. Ocean Drilling & Expl. Co.*, 974 F.2d 646, 650 n.3 (5th Cir. 1992) (admissibility of evidence on a motion for summary judgment is subject to the same standards and rules that govern admissibility of evidence at trial). For example, the declarations contain extensive hearsay in violation of Fed. R. Evid. R. 801,[6] as well as assertions about state-court proceedings that are unsupported by any documentary evidence from those proceedings. These allegations should be disregarded, or briefing on Individual Plaintiffs' motions for summary judgment should be stayed to permit further factual development. Accordingly, pursuant to Fed. R. Civ. P. 56(d), the Federal Defendants submit a declaration indicating the discovery needed to enable the United States to justify its opposition to summary judgment.

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

Count Four of the Second Amended Complaint (SAC) 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. Plaintiffs seek a declaration that Section 1915(a) and (b) are unconstitutional and unenforceable, and seek an "injunction barring Defendants from implementing or administering that provision by regulation, guideline, or otherwise." SAC ¶ 338. As with their other constitutional claims, this is stated as a

[5] As one example, Plaintiffs' declarations suggest that the adoption of Baby O. is essentially a private adoption in which Ms. Hernandez, Baby O's biological mother, surrendered the baby to the Librettis; we are also aware that the State of Nevada claims custody based on the fact that the State has previously removed Baby O. from the Libretti's care. *See* ECF No. 81 at 68 (page references to ECF documents refer to ECF pagination superimposed on the document). This confusion goes to the heart of Ms. Hernandez's rights and claims, as well as the Librettis' claims.

[6] *E.g.*, ECF No. 81 at 2, ¶¶ 3, 4, 5, 6, 7, 8, 11, 14, 15, 16; *id.* at 60, ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15; *id.* at 66, ¶¶ 4, 7, 9, 10, 13, 14, 15, 16; *id.* at 72, ¶¶ 8.

facial challenge to these provisions, and Plaintiffs "must establish that no set of circumstances exists under which the Act would be valid." [7] *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 classification of Indians … is based on race and ancestry" and thus violates the constitutional guarantee of equal protection." SAC ¶ 331; *see also* ECF No. 80 at 55. This 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. *Morton v. Mancari*, 417 U.S. 535 (1974). 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. *Holyfield*, 490 U.S. at 36.

A. The Court Should Strike and Disregard Those Portions of the MSJs 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, Individual Plaintiffs attempt to broaden the claim on summary judgment. *Compare* SAC ¶ 338 ("Plaintiffs thus seek a declaration that Section 1915(a) and Section 1915(b) of ICWA violate principles of equal protection and are unconstitutional and

[7] Individual Plaintiffs make no allegations as to how the application of the preferences is unconstitutional as applied to their specific circumstances. As a matter of law, 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.

unenforceable, and an injunction barring the Defendants from implementing or administering that provision by regulation, guideline, or otherwise.") *with* ECF No. 80 at 58-63. Individual Plaintiffs now argue that not only Section 1915, but also Sections 1913(d) and 1914, violate equal protection principles, and make vague allusions to other portions of the statute, including the definition of "Indian child," in their equal protection argument. ECF No. 80 at 61-63.[8]

The Court should strike these belated attempts to broaden the case. A complaint must "give the defendant fair notice of what the … claim is and the grounds on which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). As the Fifth Circuit has stated the requirement, "a complaint must do more than name laws that may have been violated by the defendant; it must also allege facts regarding what conduct violated those laws. In other words, a complaint must put the defendant on notice as to what conduct is being called for defense in a court of law." *Anderson v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 525, 528-29 (5th Cir. 2008) (holding that the "district court abused its discretion by certifying a class based on claims not pleaded in the complaint"). This is particularly true where the claim raises a constitutional challenge to a federal statute. *Cf. Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006) (in reviewing constitutional challenges, "we try to limit the solution to the problem, or to sever its problematic portions while leaving the remainder intact.").

Neither Count Four, nor the remainder of Plaintiffs' lengthy SAC, provide "fair notice" of the scope of the equal protection challenge raised in Plaintiffs' motions. Plaintiffs' Count Four repeatedly refers to Sections 1915(a) and (b), which is consistent with the focus in the remainder of the Complaint on these particular sections. *See* SAC ¶¶ 331-38. Count Four makes a passing reference to Sections 1913(d) and 1914, but makes no specific allegations as to how those provisions violate equal protection principles. SAC ¶ 332. In sum, Plaintiffs ask this

[8] For the same reasons as discussed above, the portions of the motions for summary judgment seeking invalidation of provisions other than Sections 1915(a) and (b) on due process grounds should be struck and not considered by the Court. *Compare* SAC ¶ 367 (addressing Section 1915(a) and Section 1915(b)) *with* ECF No. 80 at 49-55.

Court for summary judgment on claims that are not before the Court. The portions of the motions for summary judgment seeking invalidation of provisions other than Sections 1915(a) and (b) on equal protection grounds should be struck and not considered by the Court.

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

Plaintiffs challenge ICWA's placement preferences, Section 1915(a) and (b), claiming that they discriminate on the basis of race. Their challenge relies on their argument that "a classification of federally-recognized Indian tribes (or their members) is generally a racial classification." ECF No. 80 at 58. 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 "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 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.[9] 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' unique obligation toward the Indians," are based on a racial classification. In *Mancari*, 417 U.S. 535, a unanimous Supreme Court rejected a constitutional challenge to an Indian government-employment preference because it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id*. at 554; *id.* at 553 n.24 ("The preference is political rather than racial in nature."). The Court based its holding on tribes' unique legal status under federal law as domestic, dependent nations, and upon Congress's plenary power to "single[] Indians out as a proper subject for separate legislation" 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' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Mancari*, 417 U.S. at 555.

[9] 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…").

The Supreme Court elaborated on, and confirmed, these principles in *Antelope*, 430 U.S. at 646. 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) ("[T]he 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).[10]

The distinction between tribal membership and a racial classification (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 criteria are not met, an individual does not become a tribal member, whatever their "racial" makeup or self-identity.

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 deemed "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 argue that tribal membership determinations are often based on ancestry, and that this transforms them into a racial classification. ECF No. 80 at 61. This argument is

[10] *See also United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (*Mancari* applies even if statute involves "disproportionate burdens imposed on Indians"); *Means v. Navajo Nation*, 432 F.3d 924, 931 (9th Cir. 2005) (rejecting equal protection challenge to statute providing tribal criminal jurisdiction over nonmember Indians); *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1340 (D.C. Cir. 1998) (rejecting Tribe's equal protection claim, finding "ordinary rational basis scrutiny applies to Indian classifications").

incorrect, both legally and factually. At the outset, nothing in ICWA references race, ancestry, or blood quantum. But the *Mancari* Court recognized that the political relationship of the United States with Indian tribes is inextricably bound up in the status of those tribes as sovereigns predating the formation of the United States, and tribal members are therefore typically descendants of the indigenous peoples of this country.[11] 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 (1899) (discussing statute establishing commission to compile "a complete roll of citizenship of each of said nations [in the Indian territory]). The Ysleta Del Sur Pueblo enrollment requirements are a clear example of this, as Congress by statute in 1987 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.[12] Pub. L. No. 100-89, § 108(a), 101 Stat. 666 (Aug. 18, 1987). For the Cherokee Nation, citizenship is limited to "original enrollees or descendants of original enrollees

[11] 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).

[12] 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, 126 Stat. 1213 (Aug. 10, 2012).

listed on the Dawes Commission Roll."[13] *See* Cherokee Nation Constitution, Art. IV, Section 1. And the White Earth Nation is similar, requiring a connection through descendancy to "the annuity roll of April 14, 1941, prepared pursuant to the Treaty with said Indians as enacted by Congress in the Act of January 14, 1889 (25 Stat. 642)." Revised Constitution and Bylaws of the Minnesota Chippewa Tribe, Minnesota, Art. II, Section 2.

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 (2011) (listing countries that use citizenship by descent). And ancestry is considered in other contexts as well, such as inheritance rules and preferences for the placement of a child with her extended family.

This illustrates that while "ancestry *can be* a proxy for race," it is not so in every circumstance, and is not so here. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (emphasis added). Here, the tribal-centered definition of "Indian child" establishes that 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

[13] 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).

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.

D. *Mancari* Remains Good Law

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. 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.*[14]

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 granted tax immunity to management of trust estates, to tribal court jurisdiction.[15] *Id.* at 555

[14] 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.

[15] The Court could have cited many more cases beyond these 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* and *Worcester*).

(citing *Bd. of Cty. Comm'rs v. Seber*, 318 U.S. 705 (1943); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Simmons v. Chief 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.")

Individual Plaintiffs lean heavily on *Rice* to support their cramped view of *Mancari*, but it cannot support this weight. ECF No. 80 at 57. *Rice* did not concern a federally recognized Indian tribe. *Rice* involved a Fifteenth Amendment challenge to a Hawaii state law that limited voters for a state-wide election of a state board of trustees to individuals who were descendants of the native and other peoples inhabiting the Hawaiian Islands prior to 1778. 528 U.S. at 509-10. Native Hawaiians are not, however, a federally recognized Indian tribe, and do not have the same political relationship with the United States. The Court recognized this distinction, noting that "[i]t is a matter of some dispute … whether Congress may treat the native Hawaiians as it does the Indian tribes." *Id.* at 518.

Indeed, the Court signaled that statutes that contained classifications based on Indian status raised no concerns, even where those classifications related to voting rights. The Court contrasted the Hawaii statute with the Menominee Restoration Act, Pub. L. 93-197, 87 Stat. 770 (Dec. 22, 1973), which limits voting on tribal matters to Indians, indicating that even though the Menominee Act classified individuals based on Indian status and concerned important voting rights: "[i]f a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affairs of a quasi sovereign." 528 U.S. at 520 (citing Menominee Restoration Act and the Indian Reorganization Act, 25 U.S.C. § 5123). The Court, in other words, rejected the argument that an election of a tribal entity comprised through ancestry and blood quantum raised any equal protection or Fifteenth Amendment concerns. Rather, the Court

acknowledged that federally recognized tribes and activity related to them falls within *Mancari*, rather than the strict scrutiny accorded categories based on race.

Second, the challenged classification in *Rice* was not based on any modern-day affiliation with a sovereign entity, or even a defined historic sovereign entity, but rather on having an ancestor who resided on the islands over two hundred years prior. 528 U.S. at 514 (the state law "is specific in granting the vote to persons of defined ancestry and to no others"). In contrast, classifications based on tribal membership, such as those found in ICWA's placement preferences, are based on an individual's *current* political affiliation with a sovereign nation. Furthermore, *Rice* involved constraints on voting rights in a state election, and referenced the strict constraints of the Fifteenth Amendment, which are not present here. The Court limited its Indian law discussion to rejection of the State's argument that Indian law provides an exception from the Fifteenth Amendment the context of a state-wide election. But it did not modify the equal protection analysis applicable to Indian legislation more generally. *Id*. at 522. To the contrary, the Court confirmed the continued vitality of the *Mancari* analysis by acknowledging "[o]f course, as we have established in a series of cases, Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Id.* at 519 (citing cases). The Court also reiterated its observation from *Mancari* that "every piece of legislation dealing with Indian tribes and reservations … single[s] out for special treatment a constituency of tribal Indians." *Id.* (citing *Mancari*, 417 U.S. at 552). And the Court repeated *Mancari*'s holding, that although the employment preference required both one-fourth or more Indian blood and affiliation with a federally recognized tribe, the preference was not directed toward Indians as a racial group but was rather "political . . . in nature." *Id.* at 520 (quoting *Mancari*, 417 U.S. at 553 n.24).

Plaintiffs cherry-pick words from the *Rice* opinion to support their argument, but they do not bear scrutiny. ECF No. 80 at 58. For example, the Court's reference to the "limited exception" of *Mancari* did not intend to cabin the *Mancari* holding to its facts, but rather sought to avoid extending *Mancari* to the "new and larger dimension" of a *State-sponsored voting*

scheme. 528 U.S. at 520. And, contrary to Plaintiffs' assertion, ICWA does not "fence out whole classes of its citizens from decisionmaking in critical state affairs." ECF No. 80 at 58 (citing 528 U.S. at 522). To the contrary, ICWA *includes* additional voices and options—in the form of tribal participation and suggested placements—in state-court decisionmaking regarding the welfare of tribal children.

Plaintiffs further attempt to stretch *dicta* in the final paragraph of *Adoptive Couple* to circumstances far beyond the scope of that case or the Court's holding. ECF No. 80 at 59-60. 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 *dicta* 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.[16] Put simply, the law remains that legislation that singles out tribal Indians "for particular and special treatment" is "political rather than racial in nature." *Mancari*, 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"

[16] Plaintiffs also attempt to portray federal and Texas law that expressly states that Indian classifications are *not* encompassed by prohibitions on racial or national origin discrimination as supporting their argument. ECF No. 80 at 60. Federal law prohibits discrimination in adoptive or foster placements based on "race, color, or national origin, 42 U.S.C. § 1996b(1), but also provides that this prohibition "shall not be construed to affect the application of the [ICWA]." *Id.* § 1996b(3). That Congress phrased this qualification as a *rule of construction*, not an exception, reinforces the conclusion that Congress views ICWA as drawing political distinctions.

Mancari requires that legislation singling out Indians for "particular and special treatment" "be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 554-55. If the legislation meets this standard, Congress's "legislative judgments will not be disturbed." *Id.* at 555. As the Supreme Court has repeatedly recognized, from treaties and the federal government's course of dealing with the tribes, "there arises the duty of protection, and with it the power." *United States v. Kagama*, 118 U.S. 375, 384 (1886); *see also Bd. of Cty. Comm'rs*, 318 U.S. at 715; 25 U.S.C. § 5302(b) (declaring commitment to the "Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole.").

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

Plaintiffs ask this Court to find that minimum federal standards to protect tribal authority and prevent the widespread and often unwarranted removal of Indian children from their homes and tribes does not fall within Congress's constitutional authority. They acknowledge (ECF No. 80 at 56) that Congress's "unique obligation to the Indians" extends to "Indian land, tribal sovereignty, and self-government,"[17] as well as to such diverse subjects as preferential fishing rights, *see Washington*, 443 U.S. at 673, or treating Indians differently for purposes of criminal jurisdiction, *see Antelope*, 430 U.S. at 645, but do not explain how the protection of tribal children and their best interests can be considered less central to tribal existence than resources such as fish, or even tribal land.[18] 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.[19]

Plaintiffs also argue that child-custody proceedings involving tribal member children and parents "are plainly 'state affair[s]' and not 'the internal affairs of a quasi-sovereign.'" ECF No. 80 at 59 (citing *Rice*, 528 U.S. at 522). Although this is not the operative standard under *Mancari*, it is also false. The interests of tribes in child-custody proceedings involving tribal

[17] ICWA includes many provisions that confirm tribal sovereign authority to conduct Indian child-welfare proceedings or participate in state-court child welfare proceedings. *See, e.g.*, 25 U.S.C. §§ 1911; 1912(a); 1918; 1919. 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).

[18] 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.

[19] 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").

citizens go to core sovereign interests, whether they 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).

Rather than aiding Plaintiffs' argument, *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), illustrates the flaw in their argument. That case reversed the Interior Board of Indian Appeals' (IBIA) decision that the Reindeer Industry Act prohibited non-Alaska Native entry into the Alaska reindeer industry on statutory, not equal protection, grounds.[20] The Ninth Circuit's discussion in *dicta* of potential equal protection concerns with a broad interpretation of the Act has not been adopted by any subsequent court, but under any circumstances, would not apply to ICWA. In particular, the Ninth Circuit noted that the challenged interpretation of the Act makes it "very different from a lot of other legislation pertaining to Native Americans";[21] in contrast to that statutory interpretation, "[l]egislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because 'such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions.'" *Id.* at 664 (citation omitted). In any event, ICWA falls squarely within this framework because it is expressly designed to support tribal status, self-government, and culture. 25 U.S.C. § 1902. ICWA is tied to Congress's "unique obligation to the Indians."[22] *Mancari*, 417 U.S. at 554-55.

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

[20] The concurring judge in *Williams* refused to find that Congress intended to create a monopoly unless it expressly so provided and found it unnecessary to address the constitutional question. *Id*. at 666. The panel majority in contrast embarked on a lengthy frolic and detour before reaching the same conclusion.

[21] Moreover, the Act defines "Eskimos and other natives of Alaska" solely in terms of heritage, without reference to tribal membership. 25 U.S.C. § 500n.

[22] 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).

Against this framework, the specific challenged ICWA provisions are addressed in turn.[23]

a. Section 1915(a)—Adoptive Placement Preferences

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

At the outset, it is important to note that these are preferences, not mandates. And similar preferences for consanguinity are often applied generally by states independent of ICWA. *See* HHS, Placement of Children with Relatives, *available at* https://www.childwelfare.gov/pubPDFs/placement.pdf (last visited May 22, 2018). 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 'preference' to apply if no alternative party who is eligible to be preferred under § 1915(a) has come forward"). As Congress explained: "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—placement with members of the child's extended family—exhibits no conceivable racial or tribal element at all. This preference applies to all extended family members who can meet state standards as a safe and appropriate placement, and would apply equally to a child's grandmother who lacks any tribal affiliation as it would to relatives who are tribal members.[24] Preferences for placements with a child's relative—even though these are

[23] Plaintiffs' argument on this issue includes unsupported factual allegations, which should be disregarded. *E.g.*, ECF No. 80 at 58-59, 61-63.

[24] Of course, ICWA preferred placements must still meet applicable state standards for safety and appropriateness. *E.g.*, *In re A.A.*, 167 Cal. App. 4th 1292 (Cal. Ct. App. 2008) (ICWA preferred placement must still meet state standards for appropriateness of home).

arguably "ancestry-based"—are not unique to ICWA, and are part of many states' laws.[25] Relative placements are also encouraged by federal law. 42 U.S.C. § 671(a)(19) ("the state shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child…."). ICWA's preferences for family placements are thus not based on race or tribal status, and Plaintiffs have presented no argument or evidence as to why federal and state efforts (including through ICWA) to encourage kinship placements for a child are "invidious discrimination."[26] Plaintiffs' challenge to ICWA's preference for placements with a child's extended family fails as a matter of law.

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.

The second 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

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[25] *See In re JW*, 226 P.3d 873, 881 (Wyo. 2010) ("[W]e concluded that, as a matter of ageless tradition, as a matter of federal law, and as a matter of Wyoming law, there exists a compelling preference that what is 'best' for a child in circumstances such as those presented here, is placement with nuclear or extended family members.").

[26] Plaintiffs' challenge to the ICWA's family placement preference fails for another reason: Individual Plaintiffs, who have no familial relationship with the children they wish to adopt, are not "similarly situated" to a child's family members. "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities different from the others," but rather that "all persons similarly circumstanced shall be treated alike." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). Consequently, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). Here, the government may reasonably treat a child's relatives differently from unrelated foster parents when identifying preferred foster or adoptive placements.

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."[27] 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).

Congress has the authority to enact legislation addressing tribal members as a group, even

[27] 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(a)(1)(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).

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; *Means v. Navajo Nation*, 432 F.3d 924, 934 (9th Cir. 2005) (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' unique obligation toward the Indians" Congress's "legislative judgment" should "not be disturbed." *See Mancari*, 417 U.S. at 555. Plaintiffs' facial challenge to Section 1915(a) should be rejected.

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

Section 1915(b) first instructs that children should be placed in a foster care or preadoptive placement "which most approximates a family and in which his special needs, if any, may be met," as well as "within reasonable proximity to his or her home, taking into account any special needs of the child." Within these confines, Section 1915(b) provides a preference, in the absence of good cause to the contrary, to a placement with (1) a member of the Indian child's extended family; (2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs. As discussed above, these preferences do not preclude the placement of a child with a non-Indian family. None of the Individual Plaintiffs allege that these preferences have caused a child to be removed from their foster care or have otherwise altered their status quo within a child-custody proceeding.

As discussed above, a preference for placement with a child's family is not based on race or even tribal membership, and it violates no equal protection principles. The second preference,

for a foster home licensed or approved by the child's tribe, does not classify on the basis of race or even, necessarily, on tribal affiliation. Tribes may license foster homes that do not include tribal members. *See, e.g.*, https://www.nvbarrow.com/doc/Foster_Care_Standards_-_Final_A.pdf (Native Village of Barrow foster care provider eligibility requirements, which do not include tribal membership). Thus, this preference is simply for placements identified and licensed by a specific government. Congress rationally determined that the child's tribe would be best-positioned to identify suitable foster-care placements that facilitate a tribal connection.[28]

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

As discussed above, Plaintiffs failed to properly state a claim that Sections 1913(d) (permitting petition to vacate adoption decree where consent was obtained through fraud or duress) or 1914 (permitting petition to court of competent jurisdiction where foster-care placement or termination of parental rights alleged to violate certain standards) violate equal protection principles. Defendants nonetheless briefly address these provisions, which also fall squarely within congressional authority and raise no equal protection concerns.

Both provisions are designed to permit a court to review certain child-welfare decisions

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

and consider whether they were made based on fraud, duress, or in violation of federal law. Neither provision classifies based on race. The provisions may be invoked by either parent of an Indian child regardless of whether the parent is an Indian. Individual Plaintiffs suggest that because they "are not an 'Indian family,'" they are somehow uniquely disadvantaged by this provision, but this is false. It applies to all adoptions, whether by an Indian or not. And, as discussed above, the provision (along with the rest of ICWA) applies solely because of the political connection of a child with a federally recognized Indian tribe. They are not based on the race of the child.

Congress included Section 1913(d) to address its finding that Indian children were being removed from their parents without sufficient explanation or process. H.R. REP. NO. 95-1386, at 8, 11 ("the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children," and these efforts are sometimes coercive). Section 1913(d) provides a limited opportunity for parents to address waivers of their rights made under fraud or duress, and is narrowly tailored to address what Congress found to be a significant factor in the unwarranted removal of Indian children by state and private agencies. It falls squarely within Congress's authority.

Section 1914 is also a tailored way for Congress to ensure that the rights and standards set forth in ICWA, which are implemented exclusively in state courts, could be enforced by individuals. Thus, rather than relying on state-law appeal rights, which might not adequately account for whether federal standards were followed, Congress provided a federal right to petition to invalidate a state-court foster-care placement or termination of parental rights. These rights are limited: the petition must be filed in "any court of competent jurisdiction" and can only be based on violation of three statutory provisions. They are rationally tied to Congress's obligation to the Indians.

In their motion, Plaintiffs attempt to challenge the definition of "Indian child" on equal

protection grounds, a claim not found in their complaint. *See* ECF No. 80 at 61.[29] 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, 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. 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 child must have an additional political tie to the tribe through his or her 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 quasi-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 his

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

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 summary judgment on Claim Four should be denied.

II. Plaintiffs' Due Process Challenges Fail as a Matter of Law, as Plaintiffs Have Not Asserted Fundamental Rights Protected by the Fifth Amendment

Individual Plaintiffs allege that that Section 1915(a) and (b) of ICWA (foster-care and adoptive placement preferences) and the regulations implementing those provisions violate the Due Process Clause of the Fifth Amendment.[30] In particular, they allege that they have a substantial liberty interest in maintaining a "familial" relationship with children in foster care and suggest that the challenged provisions "vitiate[]" that interest without due process.

Plaintiffs ask this Court to create novel substantive due process rights in foster parents and prospective adoptive parents, a request this Court should reject. Substantive due process analysis "must begin with a careful description of the asserted right," the Supreme Court has counseled, "for '[t]he doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [courts] are asked to break new ground in this field.'" *Reno v. Flores*, 507 U.S.

[30] As discussed above, the portions of the motions for summary judgment seeking invalidation of provisions other than Sections 1915(a) and (b) on due process grounds should be struck and not considered by the Court.

292, 302 (1993) (internal citations omitted). "Courts must resist the temptation to augment the substantive reach of the Fourteenth Amendment, 'particularly if it requires redefining the category of rights deemed to be fundamental.'" *Griffith v. Johnston*, 899 F.2d 1427, 1435 (5th Cir. 1990) (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

Plaintiffs claim that the Brackeens' due process rights are being violated because ICWA, specifically Sections 1913(d) and 1914, and the regulations, "subject the Brackeen family to a period of uncertainty and mental anguish substantially longer than otherwise would be permitted under Texas law." SAC ¶¶ 344, 356; ECF No. 80 at 65. There is no basis in due process jurisprudence to recognize the right to immediate finality of adoption claimed by Plaintiffs as one of the "'fundamental rights implicit in the concept of ordered liberty' and 'deeply rooted in this Nation's history and tradition' under the Due Process Clause." *Griffith*, 899 F.2d at 1435 (citation omitted). Nor is there a fundamental right to be free from the possibility of a subsequent challenge to the validity of an adoption decree, particularly as the possibility of challenge under Section 1913(d) is limited. A challenge under Section 1913(d) must be brought within two years of the adoption; it can be brought only by a parent; and the parent must prove that his or her consent to the adoption was obtained through fraud or duress. A challenge under 1914 can only be brought by the child's parent, custodian, or tribe and can only be brought for violation of three sections of ICWA. Moreover, Section 1913(d) and 1914 also protects the recognized rights of the biological parent in maintaining the familial relationship with their child, where that relationship was improperly disrupted.

Plaintiffs also seek to assert the "familial" rights of foster parents, such as the Librettis and Cliffords, to be free of ICWA's placement preferences. SAC ¶¶ 345, 347, 357, 362; ECF No. 80 at 67-68. In claiming that these preferences violate the rights of foster parents, Plaintiffs again seek to protect a right not previously recognized as a liberty interest by the courts. The Supreme Court has refused to conclude that foster parents have an established, constitutionally

protected liberty interest in the continuation of their relationship with foster children.[31] *See, e.g.*, *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816 (1977) (declining to recognize foster parents' constitutionally protected liberty interest). While acknowledging that a foster family may develop bonds with a child, the Supreme Court concluded that the "limited recognition accorded to the foster family by the [state] statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family." *Id.* at 845-46. The Fifth Circuit, following this lead, has rejected the proposition that foster parents have a protected liberty or property right in their relationship with their foster children. *Drummond v. Fulton Cty. Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977) (en banc) (concluding that "[t]he very fact that the [foster] relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court, demonstrates that it is not a protected liberty interest").[32] There is no basis for this Court to recognize a fundamental right where the Supreme Court and Fifth Circuit have refused to do so.

Finally, Plaintiffs seek an unabridged right for biological parents to be able to direct the adoption of their children. SAC ¶¶ 346, 358; ECF No. 80 at 66. While an available parent's right to make decisions concerning the care, custody, and control of his or her child is "fundamental" and also protected by the Due Process Clause, *Troxel v. Granville*, 530 U.S. 57,

[31] Plaintiffs' challenge reaches even more broadly than just protecting the *continuation* of a foster-care relationship; since the preferences apply to the initial foster-care placement of a child, Plaintiffs' facial attack claims that due process rights are violated even where the child has not yet been placed with the foster parent and there is no such relationship.

[32] Plaintiffs latch on to the *Drummond* court's suggestion that the fundamental rights implicated by a limited category of foster care situations may be judged on a "case by case basis" in future cases. ECF No. 80 at 68. The *Drummond* court, however, makes clear that it addresses all foster care cases "in which a child placement agency charged with the custody of a child, places that child for temporary care," *Drummond*, 563 F.2d at 1207, which appears to be the case for the Librettis and Cliffords. Regardless, specific information about their foster care situation is not relevant to a facial challenge to the preferences. *Salerno*, 481 U.S. at 745. If these Plaintiffs are arguing that the application of the preferences violates due process as applied to their specific cases, that is a matter best left to the state courts hearing those proceedings, but if it is to be considered by this Court, further factual development is required.

66 (2000), that right has never been extended to give parents complete control over the adoptive placement and upbringing of a child when they seek to relinquish parental rights.[33] Indeed, even in adoption proceedings involving parental consent, state laws must be followed and the state court must still ensure that the interests of the child and the government are protected. *See, e.g.*, Nev. Rev. Stat. §§ 127.110; 127.150. And, ICWA's placement preferences *do* account for a parent's preference. *See* 25 U.S.C. § 1915(c); *see also* 25 C.F.R. § 23.132 (good cause to deviate from the placement preference may be based on the request of one or both parents).

Moreover, to the extent that any of the Individual Plaintiffs could be found to have any protected interest, there is an "important governmental interest" served by ICWA's requirement that state courts consider permanent placements, if available, that will allow the Indian child to remain with their family, tribe, or other tribal members. Congress found that state practices, pre-ICWA, resulted in widespread removals of Indian children from their homes and their tribes, and thus harmed individual children and threatened the very existence of Indian tribes. The placement preferences are designed to mitigate these harmful effects, while still permitting state courts to accommodate the needs of an individual child. Accordingly, the placement preferences do not impermissibly violate the Individual Plaintiffs' due process rights, and Plaintiffs' motion for summary judgment on this ground should be denied.

III. Congress Has Constitutional Authority to Enact ICWA

Plaintiffs seek summary judgment on Count Two, which asserts that ICWA Sections 1901-1923 and 1951-1952 (all provisions except those addressing Indian Child and Family grant programs) exceed Congress's constitutional authority (SAC ¶ 274), and it seeks declaratory and injunctive relief (SAC ¶ 281). ECF No. 80 at 80. Plaintiffs' argument is directly contradicted by uniform Supreme Court precedent and Congress's legislative enactments since the Nation's founding. It should be rejected.

[33] To the contrary, because of the competing interests of the child and the State, the Supreme Court has found that the interests of a biological parent—even one that has and wishes to continue an existing relationship with their child—may be erased completely by other considerations. *See Michael H.*, 491 U.S. 110; *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

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."[34] *Worcester*, 31 U.S. at 559; *see also Bd. of Comm'rs of Creek Cty*, 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. 28, 45-46 (1913) ("long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States … the power and duty of exercising a fostering care and protection" over Indian tribes).

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.[35] The plenary authority also derives from the President's treaty

[34] As the *Worcester* Court recognized, the Articles of Confederation were read by some states to limit Congress's Indian affairs authority since it 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's Indian affairs] power, in the confederation, are discarded." *Id.* *See also Cherokee Nation*, 30 U.S. at 14 (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").

[35] Individual Plaintiffs assert, without authority, that the Indian Commerce Clause "is the only plausible constitutional font of congressional authority to regulate Indian affairs." ECF No. 80 at 80. But the Supreme Court has expressly held to the contrary. *See Lara*, 541 U.S. at 201; *Mancari*, 417 U.S. at 552; *Antoine v. Washington*, 420 U.S. 194, 203 (1975).

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' 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 ("selling, buying, and bartering," ECF No. 80 at 81), 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 power to remove 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.[36]

To the contrary, 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. See 18 U.S.C. §§ 1151-1153. Of particular relevance here, congressional authority to protect, modify, or reduce tribal 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.[37] *Id.* § 1901(3); *see also* 25 U.S.C. §§ 1915 (preference for tribal placements); 1917 (requiring courts to inform adopted individuals of their parents' tribal affiliations); 1951 (regarding disclosure of information to the Secretary of the Interior and for purposes of enrollment). As the Supreme Court recounted, there was "considerable emphasis" in the congressional hearings leading to ICWA "on the impact on the tribes themselves of the massive removal of their children." *Holyfield*, 490 U.S. at 34.

The Indian Commerce Clause has been treated by the Supreme Court as distinct from the

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[36] 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 articles cited in Plaintiffs' Briefs (ECF No. 80 at 66). But his conclusions, and those of these authors, 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).

[37] 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. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192-93 (1989).

Interstate Commerce Clause. *See Cherokee Nation*, 30 U.S. at 13 ("The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct" and the same 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 also erroneously assert that Congress lacks authority to legislate regarding individual Indians, including children.[38] ECF No. 80 at 81. The Supreme Court has held to the

[38] In making this argument, Plaintiffs' Brief repeatedly misrepresents the plain text of the statute, asserting that the statute applies to proceedings involving any Indian child "defined solely by eligibility for tribal membership." ECF No. 80 at 81; *id.* at 80 (suggesting Congress is legislating regarding "all individuals who happen to be eligible for membership in an Indian tribe"). This is false; ICWA only applies if the child is a member or the child's parent(s) is a member and the child is his or herself eligible for membership. 25 U.S.C. § 1903(4).

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, among other matters, which individuals are recognized as part of a tribe; are eligible for a distribution of funds; are subject to tribal, state, or federal criminal jurisdiction; or may receive federal benefits. *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.

IV. The Challenged Final Rule Provisions Do Not Commandeer States

Individual Plaintiffs assert that two provisions of the Final Rule unconstitutionally commandeer states. ECF No. 80 at 82. As an initial matter, they lack standing to bring this claim because they have failed to show how the Final Rule has had any effect on their proceedings. Their brief suggests only that the Rule "affects their ability to effect A.L.M.'s adoption" (ECF No. 80 at 82), but that adoption has now been finalized for many months. By their own admission, their purported fear that this adoption might be overturned through some unlikely series of events is based on statutory provisions (e.g., 25 U.S.C. § 1913(d), 1914)), not the Final Rule. The other plaintiffs have not shown that the Final Rule applies to their proceedings at all, since they appear to have commenced before the Rule's effective date of December 12, 2016. 25 C.F.R. § 23.143. *Bond v. United States*, 564 U.S. 211, 222 (2011), cited by Plaintiffs, permitted a non-state plaintiff to object to a law on federalism grounds, but only if "the enforcement of those laws causes injury that is concrete, particular, and redressable." Plaintiffs do not meet this standard here.

In any event, the Final Rule does not commandeer state courts or agencies. Individual

Plaintiffs object to only two specific provisions. First, they argue the Rule "imposes an affirmative and onerous requirement" on state courts and state agencies to conduct a "diligent search" to identify preferred placements for an Indian child. *See* 25 C.F.R. § 23.132(c)(5). But this assertion is belied by the text of the provision itself, which makes clear that Section 23.132(c) is not a "requirement" at all—it is plainly stated as a set of factors on which the court "should" base its finding of good cause to deviate from the placement preferences. Interior's intent was made explicit in the Preamble to the Final Rule: "the final rule says that good cause 'should' be based on one of the five factors, but leaves open the possibility that a court may determine, given the particular facts of an individual case, that there is good cause to deviate from the placement preferences because of some other reason." 81 Fed. Reg. at 38,839. Moreover, the diligent search provision in § 23.132(c)(5) is only triggered if, and only if, "the agency relies on unavailability of placement preferences as [a] good cause" justification. *Id.* at 38,841. There can be no conceivable commandeering problem from a regulatory provision that is written in non-mandatory terms. *See Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) (determining that a federal regulation requesting local law enforcement issue immigration detainers was not mandatory and therefore did not violate Tenth Amendment anti-commandeering principles).

Second, Individual Plaintiffs challenge the Final Rule provision that indicates that state courts must ask each participant in a child welfare proceeding if they know or have reason to know that the child at issue is an Indian child. 25 C.F.R. § 23.107(a). Where there is reason to know the child is an Indian child, but it is not confirmed, the Final Rule indicates that the court must confirm on the record that the agency or other party used due diligence to verify whether or not the child is in fact an "Indian child" as defined by the statute. *Id*. § 23.107(b). This provision goes to the court's initial and fundamental determination whether ICWA will apply at all to a particular proceeding, and the Rule simply elaborates on the standard the court must use in making this determination.

The Supreme Court has repeatedly reaffirmed the "power of Congress to pass laws

enforceable in state courts." *New York v. United States*, 505 U.S. 144, 178 (1992); *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 v. United States*, 521 U.S. 898, 907 (1997). 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. The Final Rule's standard for determining whether ICWA applies to these proceeding fits squarely within the accepted federal authority to set standards applicable in state courts, and to preempt those state-law standards that 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 Cty.*, 538 U.S. 456 (2003) (upholding federal statutory provisions tolling state statutes of limitation); *Brown v. W. Ry. of Ala.*, 338 U.S. 294 (1949) (federal right provided to the plaintiff could not be defeated by the forms of local practice).

The Final Rule's interpretation of what a court must determine in order to conclude that the protections of federal law do, or do not, apply to a particular case falls squarely within this precedent. Thus, the Final Rule 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. Theese provisions neither create the underlying child-custody proceedings nor compel an outcome, but rather merely provide protective standards that may apply in those cases, and the State, when it is a party to a proceeding, must comply with those standards. Plaintiffs' motion for summary judgment on Claim Three 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

Individual Plaintiffs assert that the Final Rule violates APA, arguing that the action is arbitrary and capricious under several theories. ECF No. 80 at 69. Plaintiffs also allege that the

Final Rule is contrary to law because certain provisions violate ICWA and certain other provisions of the Final Rule violate the Constitution. This grab-bag challenge to the Final Rule should be rejected.

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. at 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, thorough responses to comments received by the agency, and the language of the rule itself.

Plaintiffs argue that the Final Rule is arbitrary and capricious because Interior changed its policy as to the reach and effect of its ICWA regulations. But federal agencies "are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Plaintiffs next argue that the Final Rule is arbitrary and capricious and contrary to law because BIA lacks the authority to supervise state courts. ECF No. 80 at 72-73. But Plaintiffs ignore 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. Federal law, including agency regulations, may provide substantive standards and related procedural safeguards for state courts to follow, which is what the Final Rule does. Plaintiffs then take issue with Interior's interpretation of the ambiguities within ICWA's Section 1915(a) placement preferences, *see* 25 C.F.R § 23.132. Finally, Plaintiffs incorporate their constitutional challenges to ICWA. These many and far-reaching challenges are all meritless. The Final Rule is a procedurally sound, reasonable interpretation, authorized by both ICWA and the Constitution.

A. Interior Provided a Well-Reasoned Explanation for Promulgation of the Final Rule

Plaintiffs' claim that the Final Rule is arbitrary and capricious primarily rests on their dissatisfaction with Interior's decision to promulgate more thorough regulations in 2016, although the agency declined to do so in 1979, when it instead issued guidelines to state courts.

ECF No. 80 at 70. Plaintiffs contend that the passage of time between the enactment of a statute and an agency's decision to reassess its scope of authority and amend its policy, without more, empowers the Court to reject the Final Rule or otherwise not accord Interior deference. *Id*. But that is not the standard for assessing an agency's change in policy.

In *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the Supreme Court made clear that the APA's narrow standard of review—whether an agency's action was arbitrary, capricious, or otherwise contrary to law—is the appropriate standard of review when an agency revises an earlier action or changes its position, just as it is when the agency acts in the first instance. *Id.* at 514–16. The Supreme Court held that when an agency revises prior action or changes its position, the agency must recognize the change of position and explain it. *Id.* at 515. The agency "need not demonstrate to a court's satisfaction that the reasons for the new [position] are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *Id.* 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. at 38,782-90.

a. Interior Acknowledged the Change in Position as to the Agency's Authority to Issue Regulations, Gave Good Reasons for the Change, and a Reasoned Explanation for Why Its Position Changed

The Final Rule's Preamble includes a fulsome discussion of its change of position, expressly recognizing that in the 1979 Guidelines, the Department made statements "suggesting that it lacks authority to issue binding regulations," 81 Fed. Reg. at 38,786, but then explaining its decision to reassess its authority to issue such regulations. First, Interior looked at its statutory authority. ICWA expressly authorizes rulemaking: "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." 25 U.S.C. 1952. Interior interpreted this "expansive language" to "evince[] clear congressional intent that the Secretary will issue rules to implement ICWA." 81 Fed. Reg. at 38,785. Interior

also recognized that in 1979, the agency did issue regulations addressing some issues, including notice in involuntary child-custody proceedings, payment for appointed counsel, grants to Indian tribes and Indian organizations, and record-keeping and information availability. *Id.* Interior then looked at applicable federal law in determining that Section 1952's general grant of authority authorized the agency to issue rules and regulations addressing other provisions of ICWA. *Id; see also Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) ("Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated hereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation'"); *see also 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. at 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 of ICWA in the manner the *Holyfield* Court recognized Congress intended.

b. Through Promulgation of the Final Rule, Interior Neither Purports to Exercise Nor Actually Exercises Supervisory Control Over State Courts

Plaintiffs next point to Interior's statement in the 1979 Guidelines that, "[n]othing in the legislative history indicates that Congress intended this department to exercise supervisory control over state or tribal courts." 44 Fed. Reg. 67,584, 67,584 (Nov. 26, 1979). ECF No. 80 at

70. But Plaintiffs fail to explain how they believe Interior is exercising supervisory control over state courts through the promulgation of the Final Rule. 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. at 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)). Moreover, the Final Rule expresses no intention by Interior to "supervise" state courts' application of it; rather, it "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.

B. Interior's Interpretations of Ambiguities in Section 1915(a) of ICWA are Entitled to *Chevron* Deference

As demonstrated above, Interior provided a well-reasoned justification and analysis both as to its authority to promulgate regulations resolving ambiguities in ICWA and to the necessity of issuing regulations. *See* 25 U.S.C. § 1952. As such, the Final Rule is not "procedurally defective" as Plaintiffs contend, ECF No. 80 at 70, and Interior is entitled to *Chevron* deference as to its interpretation of ambiguities in ICWA.[39] One such ambiguity, and the only specific provision of the Final Rule that Plaintiffs challenge in their Summary Judgment Briefing as contrary to ICWA, is Interior's interpretation of Section 1915(a). As discussed above, Section 1915(a) provides a preference, 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. 25 U.S.C. § 1915(a). In assessing this provision during the rulemaking process, Interior recognized that "the question of what constitutes good cause is a frequently litigated area of ICWA," and as a result, determined it important to "provide some parameters on what may be considered 'good cause' in order to give effect to ICWA's placement preferences."

[39] Plaintiffs argue in a conclusory manner that *Chevron* deference should not apply because Interior lacks expertise in child welfare. To the contrary, Interior has expertise in Indian child and family services programs and child-welfare matters. 81 Fed. Reg. at 38,787.

81 Fed. Reg. at 38,839. Consequently, Interior promulgated 25 C.F.R. § 23.132, which elaborates the factors that might constitute good cause.

Plaintiffs challenge three discrete provisions of Section 23.132. They take issue with Section 23.132(b), which states that "the party seeking departure from the placement preferences *should* bear the burden of proving by clear and convincing evidence that there is 'good cause'" (emphasis added); with Section 23.132(c)(5), which states that the court's determination of good cause "*should*" be based on "unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located" (emphasis added); and tangentially with Section 23.132(e), which states that "[a] placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA." Setting aside the fact that Sections 23.132(b) and 23.132(c)(5) are not articulated in mandatory terms but rather advise a court how they *should* apply "good cause," Interior's interpretation of the good cause provision of Section 1915(a) in Sections 23.132(b), 23.132(c)(5), 23.132(e) is reasonable and should be upheld by this Court.

The text of ICWA does not provide any parameters on what constitutes "good cause" under Section 1915(a), and the legislative history makes reference to "good cause" only in observing that the standard is designed to provide state courts "a degree of flexibility" when making certain determinations. S. REP. NO. 95-597, at 17 (1977). Interior determined that its prior statements in the 1979 Guidelines which gave "excessive weight" to this statement were incorrect, to the extent that the Department believed at that time that providing "*any* regulatory guidance" on the meaning of "good cause" improperly intrudes on state court's flexibility to address the fact-specific circumstances in a case. 81 Fed. Reg. at 38,788. Interior concluded, therefore, that while Congress recognized state courts should have flexibility in determining what constitutes good cause, "Congress intended good cause to be a limited exception, rather than a broad category that could swallow the rule," *id.* at 38,839.

Having found ambiguity with the term "good cause" and sufficient authority to interpret

it, Interior articulated five factors "upon which courts may base a determination of good cause to deviate from the placement preferences." *Id*. In the Preamble to the Final Rule, Interior expressly recognized that its use of non-mandatory terms was intended to "leave[] open the possibility that a court may determine, given the facts of an individual case" that good cause may exist "for some other reason." *Id.*

Plaintiffs do not challenge Interior's interpretation as unreasonable, but instead argue that "good cause" has an existing common law meaning that controls. ECF No. 80 at 74. Plaintiffs rely on *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360, 369–70 (5th Cir. 2018), an ERISA case in which the court determined that when Congress used "fiduciary" without defining the term, it intended to "incorporate the well-settled [common law] meaning" of fiduciary. *Id*. at 371. But ERISA differs from ICWA in that the "starting point" for interpretation of ERISA is always the common law of trusts. *Harris Tr. & Sav. Bank v. Salomon Smith Barney*, 530 U.S. 238, 250 (2000). The "Court look[s] to trust law in interpreting ERISA in large part because the terms used throughout ERISA . . . are the language and terminology of trust law." *Hunter v. Caliber Sys., Inc*., 220 F.3d 702, 711 (6th Cir. 2000) (quoting *Moench v. Robertson*, 62 F.3d 553, 565 (3d Cir. 1995)). Pointing to no case law that expressly defines or recognizes a common-law definition of good cause, Plaintiffs simply assert that "good cause" has been "historically" "interpreted as an invitation to state family courts to exercise their discretion."[40] ECF No. 80 at 74. Even if there was a clear common law definition, Plaintiffs ignore the fact that an agency generally has the inherent authority, when a term is not defined by Congress, to define it in derogation of the common law. *United States v. Chestman*, 947 F.2d 551, 558 (2d Cir. 1991) (agency not precluded from defining a term in a manner inconsistent with the common law). In any event, Plaintiffs fail to explain how the Final Rule limits a state court's discretion in applying "good cause." This is little more than an attempt by Plaintiffs to substitute its judgment for that of the agency, and must be rejected as that is not the purpose of APA review. *Pub.*

[40] In fact, Interior made the determination to provide guidance on "good cause" because it recognized that state courts differed in how they defined the term. 81 Fed. Reg. at 38,782.

Citizen, Inc. v. EPA, 343 F.3d 449, 455 (5th Cir. 2003) (under APA review, "we cannot substitute our judgment for that of the agency").

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

Plaintiffs also challenge Section 23.132(c)(5), which states that good cause based on a determination that a suitable preferred placement is unavailable should only be made after the court is satisfied that a "diligent search" was made to find a preferred placement. So while Section 23.132(c)(5) itself is not required to be followed, if the court relies on this provision, the Final Rule states that a court must also find that a diligent search was conducted. Interior reasoned that a diligent search is "required because the Department understands ICWA to require proactive efforts to comply with the placement preferences and requires more than a simple back-end ranking of potential placements." 81 Fed. Reg. at 38,839. Citing 42 U.S.C. § 671(a)(19) and (29), Interior also found that the diligent search requirement is "consistent with the Federal policy for all children —not just Indian children—that States are to exercise 'due diligence' to identify, locate, and notify relatives when children enter the foster care system." 81 Fed. Reg. at 38,839. Plaintiffs' contention that Interior provided no justification for this provision falls flat.

Plaintiffs also argue that Section 23.132(b) "impos[es] a clear and convincing evidence "requirement." ECF No. 80 at 76. That section advises state courts that the "party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is 'good cause' to depart from the placement preferences." As an initial matter, the "clear and convincing evidence standard," like the above-discussed five-factors that can constitute "good cause," is not articulated as a mandate. The Rule merely states that a court "should" use that standard. Plaintiffs argue that Congress's silence as to an evidentiary standard for "good cause" reflects an intent to avoid a heightened evidentiary showing for good cause. ECF No. 80 at 76. But Plaintiffs' position is contrary to what several state courts have concluded in applying ICWA and "good cause."[41] Relying on state court interpretations, Interior provided Section 23.132(b)'s evidentiary standard as guidance, but ultimately "decline[d] to establish a uniform standard of proof on this issue." 81 Fed. Reg. at 38,843. Thus, if Plaintiffs seek to advocate for a different evidentiary standard for determining good cause to depart from the placement preferences, those arguments should be made in the state courts that are applying the placement preferences, not here.

C. The Final Rule is Not Unconstitutional

Plaintiffs finally argue that the Final Rule violates the APA because both the rule and ICWA are unconstitutional. Plaintiffs' arguments boil down to the premise that because Congress lacks the authority to enact ICWA, the Department therefore lacks the authority to promulgate the Final Rule pursuant to ICWA. This argument can succeed only if ICWA is in fact unconstitutional, and for the reasons stated herein, ICWA does not violate any aspect of the Constitution. For the same reasons, neither does the Final Rule. Plaintiffs have failed to show that the Final Rule is arbitrary, capricious, or contrary to law, and therefore, the Court should grant summary judgment in Defendants' favor as to Counts One and Five.

[41] *See In re MKT,* 368 P.3d 771 ¶ 47 (Okla. 2016); *Gila River Indian Cmty.* v. *Dep't. of Child Safety,* 363 P.3d 148, 152–53 (Ariz. Ct. App. 2015); *In re Alexandria P.*, 176 Cal. Rptr.3d 468, 490 (Cal. Ct. App. 2014); *Native Vill. of Tununak* v. *Alaska,* 303 P.3d 431, 448, 453 (Alaska 2013) *vacated in part on other grounds by* 334 P.3d 165 (Alaska 2014).

CONCLUSION

For the foregoing reasons, Individual Plaintiffs' motion for summary judgment should be denied.

Dated: May 25, 2018

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.

/s/ Steven Miskinis
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