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

CHAD EVERET BRACKEEN, et al.,	§	
	§	
and	§	
	§	
STATE OF TEXAS,	§	
STATE OF LOUISIANA, and	§	
STATE OF INDIANA,	§	
	§	
Plaintiffs,	§	Civil Action No. 4:17-cv-868-O
	§	
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.,	§	
Intervenor-Defendants.	§	

INTERVENOR-DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this case, the Plaintiffs seek to invalidate the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–63. Congress adopted ICWA after years of study and extensive hearings, which uncovered the shocking fact that state child-welfare agencies, with the approval of state courts, were removing a huge percentage of American Indian children from their Indian families and communities. Seeking to "protect the best interests of Indian children," *id.* § 1902, and recognizing that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," *id.* § 1901(3), Congress in ICWA imposed "minimum Federal standards for the removal of Indian children from their families," *id.* § 1902. ICWA has achieved great success in both advancing the best interests of Indian children and preserving their relationships with their parents, families, and tribes. Indeed, child-welfare organizations now describe ICWA as the "gold standard," and numerous states—including State Plaintiffs Texas, Indiana, and Louisiana—have either adopted their own Indian child-welfare laws or have mandated compliance with ICWA as a matter of state law.

The Plaintiffs seek to overturn 40 years of progress and Congress' considered judgment that caused it. They seek to substitute their judgment about the wisdom of the child-welfare policies furthered by ICWA for that of the members of Congress, who studied—and meticulously documented—the severe problems in state child-welfare courts that led to the law's enactment. Their kitchen-sink complaint attacks ICWA on a host of constitutional bases. All of their claims are meritless. In their complaint the Plaintiffs seek to invalidate ICWA by asking this Court to ignore settled law—settled law that Congress, via the Indian Commerce Clause and other sources, has "plenary power" to enact legislation related to Indians and tribes; settled law that when Congress legislates as to Indians, it makes a permissible political—not unconstitutional racial—classification; settled law that Tenth Amendment commandeering

principles do not apply to federal mandates requiring state courts to apply federal substantive law and accompanying procedural rules; settled law that permits congressional delegations of authority to other sovereigns, including Indian tribal nations; settled law regarding deference to agencies in reviewing regulations under the Administrative Procedure Act; and settled law regarding the limited protections offered by so-called "substantive due process" principles.

For the reasons explained below, the Plaintiffs' claims are meritless, and the Court should enter summary judgment for Defendants.

BACKGROUND[1]

I. THE INDIAN CHILD WELFARE ACT

In 1978, Congress passed ICWA,[2] one of the most forward-thinking laws regarding children in the state child-welfare system. Its protections were 30 years ahead of their time, and are widely supported by child-welfare professionals[3] and state-court judges alike.[4] ICWA is regarded as the "gold standard" of modern child-welfare practices because it protects the well-being of the child and her family by focusing on keeping the child safe within her own family when possible, preferring placement with family and extended family when necessary, and ensuring due process protections for children and their parents.[5]

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[1] No discovery is yet permitted in this case. *See* Fed. R. Civ. P. 26(d)(1). Besides the fact that the Brackeens are the adoptive parents of A.L.M.; Hernandez is the birth mother of Baby O.; the Cliffords are foster parents and prospective adoptive parents of Child P.; and the Librettis are foster parents and prospective adoptive parents of Baby O., none of Plaintiffs' other allegations or submitted declarations is relevant to the issues currently before the Court.

[2] Unless otherwise indicated, all statutory citations in this brief are to ICWA, 25 U.S.C.

[3] S*ee, e.g.*, Casey Family Programs, Comment Letter on Bureau of Indian Affairs Proposed Rule: Regulations for State Courts and Agencies in Indian Child Custody Proceedings (May 19, 2015), *available at* https://www.regulations.gov/document?D=BIA-2015-0001-1404; Children's Defense Fund, Comment Letter on Bureau of Indian Affairs Proposed Rule: Regulations for State Courts and Agencies in Indian Child Custody Proceedings (May 19, 2015), *available at* https://www.regulations.gov/document?D=BIA-2015-0001-0639.

[4] *See, e.g.*, Nat'l Council of Juv. & Fam. Court Judges, *Resolution in Support of Full Implementation of the Indian Child Welfare Act* (July 13, 2013), *available at* https://www.ncjfcj.org/sites/default/files/FNL_ICWA_Resolution_07132013.pdf.

[5] S*ee, e.g.*, Casey Family Programs, Comment Letter, *supra* note 3.

A. Congress Enacted ICWA Because of a Substantial Need to Protect Indian Children and Families.

That ICWA exists today to protect American Indian children and families is a testament to the foresight and thoughtfulness that went into the congressional hearings and the extensive legislative history that demonstrated the profound need for the law. ICWA is a result of years of congressionally commissioned reports and wide-ranging testimony taken from "the broad spectrum of concerned parties, public and private, Indian and non-Indian." H.R. Rep. No. 95-1386, at 28 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530. This evidence demonstrated with great clarity hundreds of years of federal and state policies that had decimated Indian families, a decimation that was ongoing. Congress intended ICWA to be nothing short of the wholesale repudiation of these policies.

Congress enacted ICWA in response to the removal of American Indian children from their families by state and private child-welfare agencies at alarming rates—far disproportionate to those of non-Indian families. In Minnesota, for example, Indian children were placed in foster care 5.2 times more often than non-Indian children, and 97 percent of those children were adopted by non-Indian parents.[6] By the early 1970s, tribes began to realize this was not an individual tribal issue, but a nationwide crisis involving all tribal communities. *See* Margaret D. Jacobs, *A Generation Removed: The Fostering and Adoption of Indigenous Children in the Postwar World* 102–15 (2014). By the time Congress passed ICWA in 1978, 25 to 35 percent of all Indian children had been taken from their families and placed in adoptive, foster, or institutional care. § 1901(4); H.R. Rep. No. 95-1386, at 9. Studies showed that 99 percent of these removals were based on vague assertions of "neglect" or "social deprivation" and the

[6] *Indian Child Welfare Act of 1977: Hearing Before the U.S. S. Select Comm. on Indian Affairs*, 95th Cong. 570 (1977), *available at* https://www.narf.org/nill/documents/icwa/federal/lh/hear080477/hear080477.pdf ("1977 Senate Hearing"); *see also id.* at 568 (describing similar rates in Michigan); *id.* at 578 (describing similar rates in New York); *id.* at 571, 582 (describing similar rates in North Dakota); *id.* at 584 (describing similar rates in Oklahoma).

emotional damage the children might be subject to by continuing to live with their Indian families. H.R. Rep. No. 95-1386, at 10.

Studies and congressional testimony revealed the devastating impact of this displacement on Indian tribes and families and identified significant and pervasive abuses in state-court child-welfare practices contributing to these harms. Testimonies revealed that, in conducting removals of Indian children, state officials, agencies, and procedures "fail[ed] . . . to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future." *Id*. at 19. For example, Goldie Denny, the Director of Quinault Nation Social Services, testified that while she and her sister were living with their father and grandmother, they "were removed by the welfare department because [they] were caught out in the street barefoot, wading in mud puddles." 1977 Senate Hearing at 77. The Oneida Tribe of Indians of Wisconsin (now known as the Oneida Nation) wrote that the "decision to remove these children from their homes and place them under non-Indian care has been made by non-Indians. It is unlikely that Indian systems would make decisions which would result in 1/5 of its youth being removed . . . ." *Id.* at 286.

In addition, state courts removed Indian children despite the failure of state agencies to prove that Indian parents were unfit. The initial removal of children and subsequent emergency court hearings involved wholesale denial of fundamental due process. State courts would accept evidence from state agencies obtained through entrapment, and Indian parents were rarely represented by legal counsel during these proceedings. H.R. Rep. No. 95-1386, at 11. For example, Cheryl DeCoteau of South Dakota testified before Congress that she did not receive notice of two hearings regarding the removal and placement of her son. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Comm. on Interior & Insular*

Affairs, 93rd Cong. 67 (1974).[7] Indeed, "it was never proven in court that [DeCoteau] was unfit. We had a hearing in the district county court. . . . The burden of proof was very clearly shifted on Mrs. DeCoteau to prove that she was fit, rather than the State proving she was unfit." *Id*.

As a result, Congress carefully crafted ICWA to protect the rights of Indian children, families, and tribes by establishing minimum standards to govern state-court child-welfare proceedings involving Indian children. In enacting ICWA, Congress intended to combat the deliberate abuses in the child-welfare system, to recognize tribes' inherent authority to determine the best interest of their children, and to restore the integrity of Indian families.

B. ICWA's Application.

At its core, ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society . . . by establishing 'a Federal policy that where possible, an Indian child should remain in the Indian community.'" *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (quoting H.R. Rep. No. 95-1386, at 23). Because Indian children are citizens in both their states and tribes, Congress addressed the nationwide issue of Indian child welfare by passing a law that governs state court child-welfare proceedings. ICWA is implemented by state courts with the intention "to promote the stability and security of Indian tribes and families." § 1902.

ICWA specifies precisely to whom it applies and under what circumstances. It applies only to child custody proceedings involving an "Indian child." § 1903(4). ICWA's application is directly tied to the child's membership or eligibility for membership in a federally recognized tribe. *Id*. ICWA's provisions apply to four defined types of state child custody proceedings: (1) foster care placement; (2) termination of parental rights; (3) preadoptive placement; and (4) adoptive placement. § 1903(1). ICWA requires notice to parents and tribes, court-appointed

[7] *Available at* https://www.narf.org/nill/documents/icwa/federal/lh/hear040874/hear040874.pdf.

counsel to indigent parents, and the testimony of a qualified expert witness to place a child in foster care. § 1912(a), (b), (e); *see also* H.R. Rep. No. 95-1386, at 22.

The Act also delineates the division of jurisdiction between tribal and state courts, *see* § 1911(a)–(b), and provides explicit protections for families in state-court proceedings that involve the involuntary removal of an Indian child from her parent or Indian custodian, *see, e.g.*, § 1912(d) and (e) (requiring that the party seeking to place a child in foster care prove to a court that "active efforts have been made to prevent the breakup of the Indian family" and that the continued custody of the child by the parent or Indian custodian is "likely to result in serious emotional or physical damage" through the testimony of a qualified expert witness.). Finally, in situations where children are removed due to an immediate emergency, ICWA mandates their return to their homes once the emergency has passed. § 1922.

The standards Congress adopted in ICWA for removing Indian children not only address abuses sanctioned by state courts, but also the harm caused to the children by their removal. The congressional findings "make[] clear that the underlying principle of the bill is in the best interest of the Indian child." H.R. Rep. No. 95-1386, at 19; *see also* § 1902 ("Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children . . ."). These standards are consistent with social-science research finding long-term harm of stranger foster care.[8] Unnecessary removals harm Indian children. While Congress was concerned in 1978 about "the placement of Indian children in non-Indian homes . . . based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture," *Holyfield*, 490 U.S. at 49–50, more recent studies show that the removal and placement of

[8] *See* Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 J. of Child & Adolescent Psychiatric Nursing 70 (2008).

children in foster care is not a net neutral, but may cause more harm than good.[9] Thus, the type of kinship care required by ICWA is more likely to lead to safer and more stable placements and continued connection to the child's family and tribal community.[10] Establishing placement preferences for children who are in foster care to stay with kin and community is fundamental to ICWA, but it is also fundamental to all state child-welfare laws.[11] Indeed, under Title IV-E of the Social Security Act, federal reimbursement to states for programs for all children is conditioned on attempts at kinship placement. *See* 42 U.S.C. § 671(a)(19).

C. The Need for the Protections Established in ICWA Continue Today.

While the history of Indian child-welfare policies indicated to Congress that Indian children and families needed federally enforced, heightened standards before a child could be removed, ICWA is just as important now as when it was passed. Even today, Indian children are four times more likely to be placed in foster care at their first encounter with the court system.[12] There are no statistically significant differences regarding mental health or chemical dependency (the primary reasons why children are removed from their families) between Indian and non-Indian families receiving child-welfare services, yet Indian children are placed in foster care at a

[9] Joseph J. Doyle Jr, *Child Protection & Child Outcomes: Measuring the Effects of Foster Care*, 97 Amer. Econ. Rev. 1583 (2007).

[10] Marc Winokur *et al.*, *Kinship Care for the Safety, Permanency, and Well-Being of Children Removed from the Home for Maltreatment: A Systematic Review*, Campbell Systematic Revs. 31 (2014), *available at* https://campbellcollaboration.org/library/download/334_f3e5902c235e06ca93a26be6bb888999.html; D. M. Rubin *et al.*, *Impact of Kinship Care on Behavioral Well-Being for Children in Out-of-Home Care*, 162(6) Pediatrics & Adolescent Med. 550, 552 (2008).

[11] Forty-eight states' statutes give preference to suitable kinship placements for foster care. *See* Child Welfare Information Gateway, *Placement of Children with Relatives*, U.S. Dep't of Health & Human Servs. Children's Bureau (2018), *available at* https://www.childwelfare.gov/pubPDFs/placement.pdf#page=2&view=Giving%20preference%20to%20relatives%20for%20out-of-home%20placements.

[12] Robert B. Hill, *An Analysis of Racial/Ethnic Disproportionality & Disparity at the National, State, and County Levels*, Casey-CSSP Alliance for Racial Equity in Child Welfare 10–11 (2007), *available at* https://www.cssp.org/publications/child-welfare/alliance/an-analysis-of-racial-ethnic-disproportionality-and-disparity-at-the-national-state-and-county-levels.pdf.

higher rate than white children.[13] In fact, one study found that, although "[t]he caregivers of White children . . . were slightly more likely to have problems with drug and alcohol abuse than were the caregivers of AI/AN [American Indian/Alaska Native] children . . . AI/AN were almost two times more likely to be removed from their families because of caregiver alcohol abuse and almost seven times more likely to be removed because of caregiver drug abuse."[14]

In 2015, Indian children in the United States remained overrepresented in the foster-care system by a factor of 2.7 as compared to non-Indian children.[15] This is why, in 2016, the Department of the Interior promulgated the ICWA regulations ("Final Rule"), attempting to ensure the uniform application of the law, and address the disproportionate impact of foster care on American Indian children. *See* Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,779 (June 14, 2016) (codified at 25 C.F.R. pt. 23).

ICWA's procedural protections for parents and their children continue to be as critical as they were in 1978. While countless state courts endeavor to implement ICWA's procedural protections, some courts routinely order the removal of Indian children without implementing the protections of ICWA, without advising parents of their right to challenge the petition against them, to call witnesses, or to testify on their own behalf, and never requiring the state to present evidence from a live witness. *See, e.g.*, *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 760–61 (D.S.D. 2015).

Interior intended the Final Rule to bring consistency to the implementation of ICWA. 81 Fed. Reg. at 38,782. Because ICWA applies *alongside* state child-welfare laws, *id.* at 38,780;

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[13] Vernon Brooks Carter, *Factors Predicting Placement of Urban American Indian/Alaska Natives in Out-of-Home Care*, 32 Children & Youth Servs. Rev. 657, 661 (2010).

[14] *Id.*

[15] Nat'l Council of Juv. & Family Court Judges, *Disproportionality Rates for Children of Color in Foster Care (Fiscal Year 2015)* 1, 6 (2017), *available at* http://www.ncjfcj.org/Disproportionality-TAB-2015.

Valerie M. v. Ariz. Dep't of Econ. Sec., 219 Ariz. 331, 335, ¶ 18, 198 P.3d 1203, 1207 (2009) (collecting cases on dual burden), there has been some inconsistent application of the law. Interior noted that similarly situated Indian children and their parents were receiving inconsistent treatment and often differing levels of protection, contrary to the goal of ICWA—federal minimum standards below which no state court can go. *See, e.g.*, 81 Fed. Reg. at 38,790 (discussing the need for an active efforts definition).

Indeed, the Final Rule was based on 40 years of state courts' application of ICWA. "In many instances, the standards in this final rule reflect State interpretations and best practices, as reflected in State court decisions, State laws implementing ICWA, or State guidance documents." *Id.* at 38,779. For example, the federal "active efforts" definition mimics protections the Michigan Legislature enacted in 2013. Mich. Comp. Laws § 712B.3(a).

Today, child-welfare professionals consider ICWA to be the "gold standard" for protecting children and families.[16] As a result, ICWA's placement preferences are infrequently challenged. For example, in 2017, there were three reported placement preference cases appealed. *See* Kathryn E. Fort & Adrian T. Smith, *Indian Child Welfare Act Annual Case Law Update and Commentary*, 6 Am. Indian L. J. 32, 57–58 (2018). And there were only 34 total reported ICWA cases in the same year. *Id.* at 37.

II. THE INSTANT LITIGATION.

The Individual Plaintiffs and State Plaintiffs filed a joint second amended complaint alleging seven claims. (ECF No. 35.) The Individual Plaintiffs include (1) Chad and Jennifer Brackeen, the adoptive parents of A.L.M., who live in Texas, (2) Nick and Heather Libretti,

[16] *See* Brief of Casey Family Programs & Child Welfare League of Am. *et al.* as Amici Curiae in Support of Respondent Birth Father at 2, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399), 2013 WL 1279468, at *2 ("Amici are united in their view that, in the Indian Child Welfare Act, Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children . . .").

foster parents of Baby O., who live in Nevada, (3) Altagracia Soccorro Hernandez, birth mother of Baby O., who lives in Nevada, and (4) Jason and Danielle Clifford, foster parents of Child P., who live in Minnesota. A.L.M., Baby O., and Child P. each qualifies as an "Indian child" under ICWA. The State Plaintiffs are Texas, Louisiana, and Indiana.

Plaintiffs allege constitutional claims and claims under the Administrative Procedure Act (APA). All Plaintiffs allege that §§ 1901–23 and 1951–52 of ICWA violate the Commerce Clause of Article I of the Constitution (Count Two) (*id.* ¶¶ 266–81); that ICWA, the Final Rule, and 42 U.S.C. §§ 622(b)(9) and 677(b)(3)(G) violate the Tenth Amendment (Count Three) (*id.* 35 ¶¶ 282–323); and that ICWA's adoptive preferences and provisions governing vacature for fraud and duress violate the equal protection component of the Due Process Clause of the Fifth Amendment (Count Four) (*id.* ¶¶ 324–38). The Individual Plaintiffs allege that ICWA's placement preferences violate their substantive due process rights under the Fifth Amendment (Count Six) (*id.* ¶¶ 350–67). And the State Plaintiffs allege that ICWA and the Final Rule violate the non-delegation doctrine implicit in Article I of the Constitution (Count Seven) (*id.* ¶¶ 368–76). Plaintiffs also allege violations of the APA. (*Id.* ¶¶ 247–65 (Count One); ¶¶ 339–49 (Count Five).)

The Federal Defendants filed a motion to dismiss. (ECF No. 56.) The Individual Plaintiffs and State Plaintiffs each filed a motion for summary judgment. (ECF Nos. 72, 79.)

ARGUMENT

I. SUMMARY JUDGMENT STANDARD.

In reviewing a motion for summary judgment, the court asks whether 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hibernia Nat. Bank v. Carner*, 997 F.2d 94, 97 (5th

Cir. 1993) (quoting Fed. R. Civ. P. 56(c)). "[I]f a rational trier of fact, based upon the record as a whole, could not find for the non-moving party, there is no genuine issue for trial." *Id.* "Such a finding may be supported by the absence of evidence to establish an essential element of the nonmoving party's case." *Id.* This Court must "view all of the evidence and inferences drawn from that evidence in the light most favorable to the party opposing the motion for summary judgment." *Id.*

II. ICWA AND THE FINAL RULE DO NOT VIOLATE EQUAL PROTECTION.

Count IV alleges that ICWA's placement preferences, § 1915(a), the collateral attack provisions, §§ 1913(d) and 1914, and the Final Rule's parallel provisions violate Plaintiffs' equal protection rights under the Fifth Amendment. (ECF No. 35 ¶¶ 324–38.) The Individual and State Plaintiffs seek summary judgment on Count IV on the basis that ICWA (and the implementing Final Rule) is a race-based classification subject to strict scrutiny. (Individuals Br. 41–49; State Br. 52–58.) Plaintiffs are wrong and this Court should enter summary judgment for Defendants.

ICWA applies to proceedings involving an "Indian child"—which the statute defines as "either (a) a member of an Indian tribe or (b) [a person who] is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." § 1903(4). The challenged provisions of ICWA and the Final Rule, as applied to cases involving an Indian child, do not violate the equal-protection component of the Fifth Amendment for two reasons. First, the Supreme Court has consistently held that a classification of Indians is a political classification, not a race-based classification, and is subject to rational-basis review, not strict scrutiny as Plaintiffs contend. Second, ICWA's definition itself establishes a political—not a racial—distinction.

A. The Supreme Court Has Definitively Held that "Indian" Is a Political, Not a Racial, Classification.

According to Plaintiffs, special treatment of Indians is only a political classification in limited circumstances, and otherwise is an impermissible racial classification. (Individuals Br. 42–49; State Br. 52–58.) Plaintiffs' argument is contrary to binding Supreme Court precedent. The Supreme Court has consistently held that legislation passed by Congress that gives special treatment to "Indians" is a permissible political classification subject to rational-basis review. Accordingly, cases reviewing racial classifications under strict scrutiny, such as *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), are inapplicable.

The seminal case is *Morton v. Mancari*, 417 U.S. 535 (1974). In that case, the Supreme Court upheld a policy of the Bureau of Indian Affairs (BIA) that gave hiring preferences to Indians over non-Indians. The plaintiffs alleged that the preference constituted invidious racial discrimination in violation of the Fifth Amendment. The Supreme Court rejected this argument. *Id.* at 553–55.

The Court began its analysis by noting that this issue "turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes." *Id.* at 551. This plenary power of Congress was drawn directly from the Constitution. *Id.* Article I, § 8, cl. 3 "provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation." *Id.* at 552. And Article II, § 2, cl. 2 gives the President the power to make treaties with Indian tribes. *Id.* The Court noted that if legislation that singled Indians out for special treatment "were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased." *Id.*

The Court then rejected the argument that the preference represented racial discrimination. Indeed, it found that the preference "is not even a 'racial' preference." *Id.* at 553.

"The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. The Court further noted that:

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

Id. at 553 n.24. The Court concluded that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligations towards the Indians, such legislative judgments will not be disturbed." *Id.* at 555. And since the preference was reasonable and designed to further Indian self-government, it did not violate equal protection. *Id.*

The Court further confirmed that federal legislation relating to members of Indian tribes is not an impermissible racial classification—even when it *burdens* rather than *benefits* Indians—in *United States v. Antelope*, 430 U.S. 641, 645 (1977). *Antelope* concerned three enrolled members of the Coeur d'Alene tribe who were criminally charged in federal court rather than state court under the Major Crimes Act, 18 U.S.C. § 1153. 430 U.S. at 642. The three defendants contended that subjecting them to federal charges, simply because they were Indians, constituted unconstitutional racial discrimination. *Id.* at 643–44. Rejecting this claim, the Court conclusively stated that "[t]he decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subject 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. Reaffirming *Mancari*, the Court further noted that:

> federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of

> Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "racial" group consisting of "Indians."

Id. at 646.[17]

In short, under *Mancari* and *Antelope*, ICWA's definition of "Indian child"—based on membership (or eligibility for membership) in a federally recognized Indian tribe—is a political, not a racial, classification.[18]

Plaintiffs seek to circumvent *Mancari* and its progeny. They contend that these cases allow differential treatment of Indians only when the legislation involves Congress' treaty obligations and responsibilities to the Indian tribes, and that this principle does not apply broadly and cannot apply in the context of adoption. (Individuals Br. 42–43; State Br. 55–56.) But this argument ignores the actual language of these opinions. As the Court in *Antelope* made clear, "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." 430 U.S. at 645. Indeed, based on *Mancari* and *Antelope*, courts have repeatedly and routinely upheld a variety of Indian-specific legislation and regulations based on the fact that they involve political, not racial, classifications.[19] And *Mancari* approved of a hiring preference targeted at *individual* Indians, not tribes, finding it within the "plenary power … to deal with the special problems of Indians." 417 U.S. at 551–52.

Ignoring the language of these opinions, Plaintiffs claim that *Rice v. Cayetano*, 528 U.S. 495 (2000), signals that differential treatment of Indians is permitted only in cases tightly linked to Indian land, tribal sovereignty, and self-government. (Individuals Br. 42–43; State Br. 55–56.)

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[17] In addition to *Mancari* and *Antelope*, *see Wash. v. Confederated Tribes & Bands of Yakima Nation*, 439 U.S. 463 (1979); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977); *Fisher v. Dist. Court*, 424 U.S. 382 (1976).

[18] The Supreme Court's holdings in *Mancari* and *Antelope* are consistent with the original public understanding of the Constitution. *See Amicus* Brief of Indian Law Scholars.

[19] *See, e.g.*, *United States v. Garrett*, 122 F. App'x 628, 632 (4th Cir. 2005); *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002); *United States v. Juvenile Male*, 864 F.2d 641, 646 (9th Cir. 1988); *Peyote Way Church of God, Inc. v. Smith*, 556 F. Supp. 632, 640 (N.D. Tex. 1983).

But *Rice* says no such thing. There, the Court examined whether the right to vote for a state agency limited solely to persons of Hawaiian ancestry violated the Fourteenth Amendment. The Court held that even if Hawaiians were given the special status afforded Indian tribes—which the Court held they were not entitled to—it did not follow from *Mancari* "that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens." *Id.* at 520.

Plaintiffs place heavy emphasis on the phrase "the limited exception of *Mancari*," *id.*, but Plaintiffs mischaracterize *Rice*. Right before this phrase, the Court described *Mancari* as holding that a classification based on membership in a federally recognized Indian tribe was a permissible political classification. *Id.* at 519–20. That principle, "limited" or not, applies here. Nor does *Rice* limit *Mancari* to practices involving tribal self-government.

Plaintiffs also point to dicta in *Adoptive Couple v. Baby Girl*, where the Court stated that certain applications of ICWA "would raise equal protection concerns." 570 U.S. 637, 656 (2013). To be sure, this language suggests some unease *if* ICWA were applied in certain ways on facts quite different from those alleged by Plaintiffs. But whether ICWA violated equal protection was not at issue in *Adoptive Couple*. And to the extent that certain interpretations of certain ICWA provisions could raise equal protection concerns, it would merely require that a court avoid such interpretations in line with the constitutional avoidance principle (*see* note 27, *infra*), not strike down the statute as Plaintiffs seek.

Moreover, the Supreme Court in *Adoptive Couple* in no way suggested it was overturning its prior holdings such as *Mancari* and *Antelope*. And until it does, this Court must follow that precedent. "[I]t is [the Supreme] Court's prerogative alone to overrule one of its precedents." *Bosse v. Okla.*, 137 S. Ct. 1, 2 (2016) (per curiam); *see also Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct

application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *U.S. Air Tour Ass'n*, 298 F.3d at 1012 n.8 (rejecting the argument that subsequent cases effectively overruled *Mancari* because "the Supreme Court has made clear that the lower courts do not have the power to make that determination").

Therefore, because Supreme Court precedent dictates that ICWA's classification based on membership in a federally recognized Indian tribe is political, there need be only a rational basis to uphold this classification. *Mancari*, 417 U.S. at 555. And ICWA clearly has a rational basis: to protect the vital interest of Indian tribes in their children (an interest the United States shares), to stop the wholesale removal of Indian children from their homes, and to ensure the protection of the tribal relations and culture and social standards of Indian communities. § 1901(1)–(5). Courts have thus repeatedly rejected equal protection challenges to ICWA. *See, e.g.*, *In re Appeal in Pima Cty. Juvenile Action*, 130 Ariz. 202, 208, 635 P.2d 187, 193 (App. 1981); *In re Armell*, 550 N.E.2d 1060, 1067–68 (Ill. App. Ct. 1990); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Adoption of Child of Indian Heritage*, 219 N.J. Super 28, 30, 529 A.2d 1009, 1010 (App. Div. 1987), *aff'd*, 111 N.J. 155, 543 A.2d 925 (1988); *In re Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980). The Court should enter judgment for Defendants on Count IV.

B. ICWA's Definition of "Indian Child" Makes a Political Distinction, Not a Racial One.

The Court should also enter judgment on Count IV for an additional, independent reason. Count IV is premised on an argument that ICWA's definition of "Indian child" is a race-based classification. This argument is meritless.

Under § 1903(4), "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." And "Indian tribe" is defined as "any Indian tribe, band, nation, or other organized group or community of Indians *recognized as eligible for the services provided to Indians by the Secretary*." § 1904(8) (emphasis added). ICWA thus only applies in instances where a child is (1) already a *citizen* of a federally recognized Indian tribe or (2) has a parent who is a *citizen* of a federally recognized Indian tribe and is herself eligible to become a *citizen*.

The statute imposes no "blood" requirement or other purportedly race-based criterion. Rather, ICWA is triggered by a *political affiliation*: enrolled membership (and eligibility for it) in a sovereign nation—not ancestry—is the basis for application of ICWA. Plaintiffs' arguments to the contrary are simply wrong.

1. Plaintiffs contend that tribal citizenship is simply another way of invoking race. As discussed above, this argument is inconsistent with Supreme Court precedent. But this argument also is wrong as a factual matter. ICWA's definition of Indian children both includes children who are not racially Indian and excludes children who are racially Indian.

a. The definition of "Indian child" in ICWA includes children *without* Indian blood. Take Intervenor-Defendant Cherokee Nation as an example. Membership in the Cherokee Nation includes descendants of "freedmen," former slaves of certain tribal citizens who became members after the abolition of slavery. (Declaration of Linda O'Leary ¶¶ 3–4 (Tribes' App. 4–5).) The freedmen were African-Americans and had no Indian blood. Cherokee citizens also include descendants of various categories of "adopted whites," including descendants of white missionary Evan Jones and white trader Joseph Hardin Bennett. (*Id.* ¶ 3.)

The Cherokee Nation is not unique in permitting enrolled membership without a showing of Indian blood. Many tribes, for example, grant membership to descendants of freedman of the tribe. *See generally Choctaw Nation of Indians v. United States*, 318 U.S. 423, 424–26 (1943). Moreover, approximately 98 federally recognized tribes have no blood quantum requirement for membership. *See* Russell Thornton, *Tribal Membership Requirements and the Demography of "Old" and "New" Native Americans*, *in* Changing Numbers, Changing Needs: American Indian Demography & Public Health 103, 107 (Gary D. Sandefur et al. eds., 1996). These tribes utilize membership criteria known as "lineal descendency." *See* Matthew L.M. Fletcher, *Tribal Membership & Indian Nationhood*, 37 Am. Indian L. Rev. 1, 6 (2013). Lineal descendency has no minimum blood quantum. These facts are not surprising, since "many treaties signed between Tribal Nations and the United States affirm that an 'Indian' could include individuals with no American 'Indian blood' or ancestry." Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-Adoptive Couple Challenges to the Constitutionality of ICWA*, 43 Mitchell Hamline L. Rev. 801, 811 (2017); *see also id.* at 811 n.46 (citing treaties).

b. Conversely, many children who are racially Indian do *not* qualify as Indian children under ICWA. For example, even if a child were 100 percent Oneida, if neither parent was an enrolled member of the Oneida Nation, she would not meet the definition of "Indian child" and ICWA would not apply. (Declaration of Cheryl J. Skolaski ¶ 6 (Tribes' App. 22).) Because only 60 percent of Indians are enrolled members of a tribe, *see* Thornton at 108–09, the definition of "Indian child" excludes hundreds of thousands of racially Indian children from ICWA's protections.

Further, ICWA would not apply if the child is eligible for membership but her parents had relinquished their citizenship in a federally recognized tribe. Tribes generally have their own

rules regarding relinquishment of citizenship. (*See, e.g.*, O'Leary Decl. ¶ 7 (Tribes' App. 6) (describing the process to relinquish citizenship in the Cherokee Nation).) And if the parents relinquished their citizenship, their children—even if they are 100 percent Indian—will not meet the definition of an "Indian child" under ICWA.

Finally, a significant segment of the Indian population—well over 100,000 Indians—claim affiliation with tribes that are not federally recognized.[20] *See* 1 Am. Indian Pol'y Rev. Comm'n, Final Report to Congress 461 (1977);[21] *see generally* Mark D. Meyers, *Federal Recognition of Indian Tribes in the United States*, 12 Stan. L. & Pol'y Rev. 271, 274–75 (2000) (discussing unrecognized tribes). Children of such Indians, even if they have 100 percent Indian blood, are categorically excluded from ICWA because the tribe does not maintain a nation-to-nation relationship with the United States. *Cf. LaPier v. MacCormick*, 986 F.2d 303, 305–06 (9th Cir. 1993) (excluding a member of non-recognized tribe from the Major Crimes Act).

Therefore, because the definition of "Indian child" under ICWA both (1) includes people without Indian blood and (2) excludes people who have Indian blood, it is facially neutral. To be sure, the definition is arguably correlated with race because many individuals who are tribal citizens also have Indian blood. But correlation alone does not establish a violation of equal protection in the absence of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that invidious discriminatory purpose is necessary to find a violation of equal protection). As there is no such allegation, their claim fails as a matter of law.

2. The Individual Plaintiffs make two other arguments that are meritless. First, they point to § 1915(a)'s tertiary placement preference, which gives preference to Indian families of other

[20] For a non-recognized tribe to obtain recognition, it must establish seven mandatory criteria. *See* 25 C.F.R. § 83.11. This is an extraordinarily difficult process. *See* Federal Recognition, National Congress of American Indians, *available at* http://www.ncai.org/policy-issues/tribal-governance/federal-recognition.

[21] *Available at* https://archive.org/download/finalreport01unit/finalreport01unit.pdf.

tribes. They contend that this back-up placement preference "eviscerates" the argument that the preferences are based on "political affiliation" with the parents' or child's tribe. (Individuals Br. 48.) This argument is meritless. Under *Mancari*, this preference is subject to rational-basis review, and the Individual Plaintiffs offer no reason why it is irrational for Congress to seek to ensure that an Indian child is raised in a family familiar with "the cultural and social standards prevailing in Indian communities and families." § 1901(5). This is particularly true in light of the fact that many Indians are descendants of members of two or more tribes.[22]

In any event, the Ninth Circuit rejected an analogous argument in *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005). *Means* involved 1990 amendments to the Indian Civil Rights Act, which extended to tribes criminal jurisdiction over all Indians (but not non-Indians)—including Indians who are members of *different* tribes. *Id.* at 929–30. Means was criminally prosecuted by the Navajo Nation even though he was an enrolled member of a different tribe, and he argued that subjecting him (but not non-Indians) to the criminal laws of the Navajo Nation constituted racial discrimination. *Id.* at 932. The Ninth Circuit rejected the argument, concluding that the statute "passes the 'rational tie' standard of *Mancari*." *Id.* at 933. The court explained that the differential treatment is "political rather than racial" because "the only Indians subjected to tribal court jurisdiction are enrolled or *de facto* members of tribes, not all ethnic Indians." *Id.* Accordingly, the court explained, "[t]he statute subjects Means to Navajo criminal jurisdiction not because of his race but because of his political status as an enrolled member of a different Indian tribe." *Id.* at 934; *see also United States v. Lara*, 541 U.S. 193, 210 (2004). That same principle applies here.

[22] *See* U.S. Census Bureau, American Indian and Alaska Native Tribes in the United States and Puerto Rico: 2010, *available at* https://www.census.gov/population/www/cen2010/cph-t/t-6tables/TABLE%20(1).pdf.

Second, Plaintiffs also point to *other* federal and state statutes that they claim "implicitly recognize[] that ICWA makes racial classifications." (State Br. 56–57; Individuals Br. 46.) But these other statutes are irrelevant, as Congress simply sought to avoid any potential challenge to ICWA—no matter how implausible—based on these later statutes.

This Court should therefore enter judgment for Defendants on Plaintiffs' claims that ICWA violates equal protection rights under the Fifth Amendment.

III. CONGRESS' PLENARY POWER OVER INDIAN AFFAIRS PROVIDES SUFFICIENT AUTHORITY FOR ICWA.

The Court should also enter summary judgment in favor of Defendants on Count II.

The Supreme Court has long recognized and repeatedly affirmed that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as plenary and exclusive." *Lara*, 541 U.S. at 200 (internal quotations omitted); *see also Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998) (observing that the Constitution vests Congress with "plenary power over Indian affairs."); *Antoine v. Washington*, 420 U. S. 194, 203 (1975) (recognizing Congress' "plenary powers to legislate on problems of Indians."); *Maryland Cas. Co. v. Citizens Nat. Bank of W. Hollywood*, 361 F.2d 517, 520 (5th Cir. 1966) ("The paramount authority of the federal government over Indian tribes and Indians is derived from the Constitution, and Congress has the power and the duty to enact legislation for their protection."). Moreover, the Court has acknowledged that 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. Expressly, as previously mentioned, Article I, § 8 of the Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce with . . . the Indian Tribes." U.S. Const. art. 1, § 8, cl. 3. As the Supreme Court has recognized, "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton*

Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). But the Court has also held that Congress' plenary authority is inherent in the constitutional structure and "rest[s] in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as 'necessary concomitants of nationality.'" *Lara*, 541 U.S. at 201 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 (1936)); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) ("The treaties and laws of the United States contemplate . . . that all intercourse with [Indians] shall be carried on exclusively by the government of the union.").

What is more, it is well settled that Congress' plenary authority extends beyond the borders of Indian reservations and territories. Indeed, "Congress possesses the broad power of legislating for the protection of the Indians *wherever* they may be within the territory of the United States." *United States v. McGowan*, 302 U.S. 535, 539 (1938) (emphasis added); *see also Morton v. Ruiz*, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions."); *Perrin v. United States*, 232 U.S. 478, 482 (1914) (explaining that congressional power extends "whether upon or off a reservation and whether within or without the limits of a state").

Despite the clarity with which the Supreme Court has repeatedly and consistently pronounced the "plenary and exclusive" nature of Congress' authority to enact legislation affecting Indians and tribes, Plaintiffs contend that Congress lacks authority to enact legislation protecting the most precious resource of tribal communities, their children. In making this argument, Plaintiffs cite no Supreme Court majority opinion nor any circuit rulings but instead rely on a smattering of concurring opinions by Justice Thomas and a number of articles that

contend the Supreme Court erred in consistently holding that in fact Congress' power is necessarily vast.

Specifically, Plaintiffs make three arguments as to why Congress does not have the authority to enact ICWA. First, Plaintiffs contend that Congress' power to legislate regarding Indian affairs is limited to commerce. (State Br. 49–52; Individuals Br. 66–67.) Second, Plaintiffs argue that States have exclusive control over domestic affairs including child custody proceedings involving Indian children. (State Br. 50–51; Individuals Br. 67.) And third, Plaintiffs assert that the power Congress enjoys is over Indian tribes, not individual Indians. (State Br. 52; Individuals Br. 67.) For the reasons set forth below, each of these arguments is wholly inconsistent with binding Supreme Court precedent and, accordingly, must be rejected.

A. Congress' Authority in Indian Affairs Is not Limited to Commercial Activity.

The central argument both the State Plaintiffs and Individual Plaintiffs advance is that the power of Congress is of such a limited nature that it cannot possibly enact a law enunciating federal standards with respect to children who are (or are eligible to be) citizens of an Indian tribe. (State Brief 37, 49–52; Individuals Brief 66–68.) Their argument rest on two false premises: First, that the sole source of federal power over Indian affairs is the Indian Commerce Clause; and second, that Congress can only enact legislation in Indian affairs that addresses a narrow definition of "commerce."

As to the first, the Supreme Court has made abundantly clear that the Indian Commerce Clause is not the sole basis of congressional power over Indian affairs. Indeed, *Lara* could not be more clear on this point: congressional plenary authority "rest[s] in part, not upon affirmative grants of the Constitution, but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as necessary concomitants of nationality." 541 U.S. at 201 (internal quotations and citations

omitted); *see also United States v. Kagama*, 118 U.S. 375, 384–85 (1886) (explaining that "[t]he power of the general government" over Indian affairs was "[n]ecessary to their protection, as well as to the safety of those among whom they dwell," and such power "must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States").

Moreover, Congress' power to address matters involving tribes and Indians is not limited to economic activity. It is instead "plenary" in nature, *see supra* pp. 21–22; the Oxford English Dictionary defines "plenary" as "[f]ull, complete, or perfect; not deficient in any element or respect; absolute." *Plenary*, Compact Oxford English Dictionary 1365 (2d ed. 2004). Not surprisingly, then, Plaintiffs cite not a single binding authority that remotely suggests that congressional authority is limited to legislating regarding commercial activity in Indian affairs. Instead, Plaintiffs rely on cases involving the Interstate Commerce Clause where the Supreme Court has held Congress' power is far narrower. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 608–09 (2000). But there is no support for the novel proposition that such *interstate* commerce cases are relevant to interpreting the *Indian* Commerce Clause. *See Cotton Petroleum*, 490 U.S. at 192 ("the Interstate Commerce and Indian Commerce Clauses have very different applications"). In addition, Plaintiffs cite Justice Thomas' concurring opinion in *Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring), which does suggest congressional authority is cabined to economic activity. But that is a *concurring* opinion for a reason. Not a single other Justice has expressed similar sentiment. And whatever the merits of Justice Thomas' individual opinion, lower courts are bound by the long string of *majority* opinions broadly applying the Indian Commerce Clause. *See supra* p. 16.

And since the adoption of the Constitution itself, Congress has exercised its power in ways that have nothing to do with economic activity. The first Congress enacted the Trade and

Intercourse Act of 1790, Pub. L. No. 1-33, 1 Stat. 137, which, among other things, extended federal criminal law and jurisdiction into Indian Country as applied to non-Indians. If the original understanding of the Constitution were that Congress' authority over Indians was limited to commercial activity, the first Congress would not have enacted a law so far outside the realm of commerce. The fact is Congress has always exercised broad authority over matters involving tribes and Indians well beyond the ambit of commerce. These are but a few examples: Act of November 6, 1919, ch. 95, 41 Stat. 350 (extending citizenship to certain Indians who served in World War I); Indian Citizenship Act of 1924, 8 U.S.C. § 1401(b) (extending United States citizenship to all Indians born in the United States); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461–79 (managing the allotment of tribal communal lands); Major Crimes Act, 25 U.S.C. § 1153 (providing federal jurisdiction over certain enumerated crimes); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–04 (applying nearly all provisions of the Bill of Rights to Indian tribes); Violence Against Women Act, 25 U.S.C. § 1304 (extending tribal jurisdiction over non-Indians for crimes of domestic violence); Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. §§ 3201–10 (mandating Indian child abuse reporting); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (providing protections for Indian religious practice); Snyder Act, 25 U.S.C. § 13 (proving educational assistance to tribes and individual Indians); and the Johnson-O'Malley Act, 25 U.S.C. §§ 5342–47 (providing educational and health assistance to off-reservation Indians).

In short, there is no basis to conclude that congressional authority is limited to economic activity and is therefore insufficiently robust to enact ICWA.

B. The States' General Authority over Domestic Relations Does Not Undermine Congressional Authority over Indian Affairs.

The State Plaintiffs' argument (State Br. 37) that the general recognition of state authority over domestic-relation matters somehow means that Congress cannot enact ICWA is equally

unavailing. Cases such as *In re Burrus*, 136 U.S. 586, 593–94 (1890), and *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992), stand for the unremarkable proposition that there is a strong preference for state *courts* rather than federal *courts* to decide domestic relations matters such as divorce and child custody. But this is not in dispute. And indeed ICWA is completely faithful to it, retaining state-court jurisdiction over child-custody proceedings, except for Indian children domiciled on the reservation. *See Holyfield*, 490 U.S. at 43–49 (holding that the tribal court had exclusive jurisdiction over child custody proceeding even though children were born off reservation and even though the children "had never been there"); *Fisher*, 424 U.S. at 389 (holding that the tribal court had exclusive jurisdiction over on-reservation adoption proceeding). ICWA establishes "federal standards that govern state court child custody proceedings involving Indian children." *Adoptive Couple*, 570 U.S. at 642. There is nothing in any of the cases upon which Plaintiffs rely that remotely suggest that Congress lacks authority to provide national standards for Indian child-custody proceedings. Indeed, ICWA is hardly the only federal law that imposes federal standards in the domestic-relations field. *See* Jill Elaine Hasday, *Federalism and the Family Reconsidered*, 45 UCLA L. Rev. 1297, 1380–84 (1998) (giving examples of federal laws involving social security, military benefits, tax exemptions, and child-welfare standards that create federal definitions and standards in the family-law context).

Further, the State Plaintiffs contend that the "domestic relations exception" to federal diversity jurisdiction supports their claim that the Constitution mandates that domestic relations is solely the province of the states. (State Br. 38.) They are mistaken, as the Supreme Court has held precisely the opposite—that "the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts." *Ankenbrandt*, 504 U.S. at 695. Instead, as the Court explained, the domestic relations exception is a matter of *statutory construction*, not constitutional command. *Id.* at 693–701. The exception thus hardly supports

Plaintiffs' contention that it acts as a constitutional bar to Congress exercising its plenary authority as it did in ICWA.

Finally, Plaintiffs err in portraying ICWA as a unique congressional interference in a domain—child-welfare legislation—otherwise solely governed by state law. In fact, since 1974 Congress has enacted more than *30 laws* addressing state child-welfare agencies and courts.[23] These include the far-reaching Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115, which imposed extensive requirements on state child-placement and adoptions laws and procedures. Among other things, in ASFA Congress required states to file for termination of parental rights once children have been in foster care for fifteen of the most recent twenty-two months (42 U.S.C. § 75(5)(E)); mandated states to document efforts to find adoptive or other permanent placements for children, including placements with fit and willing relatives (*id*. § 675(1)(E)); and gave preference when making placement decisions to adult relatives over nonrelative caregivers when relative caregivers meet all relevant state child protection standards (*id.* § 671(a)(19)). If the states do not adopt these standards, they cannot access Title IV-E or -B funding. Therefore, if ICWA falls outside of Congress' authority, a host of other federal laws—including ASFA—do so as well. Plaintiffs fail to acknowledge, let alone justify, the legal revolution that their arguments portend.

C. Congress' Plenary Authority over Indian Affairs Is Broad and Encompasses Authority over Both Tribes and Individual Indians.

The State Plaintiffs' final contention—without citing any cases in support of it—is that Congress' power is limited to legislating regarding Indian tribes, not individual Indians. (State Brief at 52.) This contention is fanciful. First, numerous Supreme Court cases have held that

[23] *See* Child Welfare Information Gateway, *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption* (Mar. 2015) (citing statutes), *available at* https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf.

Congress' plenary power extends beyond Indian tribes. *See, e.g.*, *Venetie*, 522 U.S. at 531 n.6 (noting that the Constitution vests Congress with "plenary power over *Indian affairs*" (emphasis added)); *Antoine*, 420 U. S. at 203 (recognizing Congress' "plenary powers to legislate on *problems of Indians*" (emphasis added)). As the Fifth Circuit said in *Maryland Cas. Co.*, the "paramount authority of the federal government over Indian tribes *and Indians* is derived from the Constitution, and Congress has the power and the duty to enact legislation for their protection." 361 F.2d at 520 (emphasis added). *Mancari* is a particularly instructive example. There, the Court addressed the constitutionality of the "longstanding Indian preference" for employment of Indians at the BIA. 417 U.S. at 537. A hiring preference, of course, is by definition individual in nature. Yet the Court had no problem holding that Congress possessed the "plenary power . . . to deal with the special problems of Indians." *Id.* at 551–52. As the Court explained, so "long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the *Indians*, such legislative judgments will not be disturbed." *Id.* at 555 (emphasis added).

Finally, Plaintiffs' suggestion that this case is not about tribal interests but merely children (State Br. 52) is not only erroneous, but entirely misses the point of ICWA. As Congress found and is self-evident, Indian children are necessary for the very survival of Indian tribes as distinct polities. § 1901(3). This was not lost on the Supreme Court in *Holyfield* when it observed that "[r]emoval of Indian children from their cultural setting *seriously impacts a long-term tribal survival* and has damaging social and psychological impact on many individual Indian children." 490 U.S. at 50 (internal quotations omitted) (emphasis added). This is precisely why the Court ultimately concluded that "[t]he protection of this *tribal interest* is at the core of the ICWA." *Id.* at 52 (emphasis added).

In short, Congress' plenary authority extends to Indian affairs generally, not merely Indian tribes, and in any case in enacting ICWA Congress sought to advance the interests and equities of Indian tribes. Defendants are thus entitled to summary judgment.

IV. ICWA DOES NOT UNCONSTITUTIONALLY COMMANDEER THE STATES.

In Count III, the State Plaintiffs and the Individual Plaintiffs allege that ICWA unconstitutionally commandeers state agencies and officials to administer a federal program. Relying on *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), Plaintiffs contend that ICWA unconstitutionally "commandeer[s] State Plaintiffs[] to act in ways that they might not otherwise act" (State Br. 41) and "commandeer[s] state resources to achieve federal policy objectives" (Individuals Br. 68). Plaintiffs misunderstand the Tenth Amendment commandeering principle. The commandeering principle does not restrict federal commands to state *courts*, which the Supremacy Clause requires to apply and implement federal law. ICWA's provisions that Plaintiffs challenge are impositions on state courts, and they all involve textbook examples of preemption of state law that are perfectly consistent with the Tenth Amendment. Defendants are entitled to summary judgment.

a. To begin with, Plaintiffs err in portraying ICWA as an unwanted mandate that "displaces" state law (Individuals Br. 6). As state courts have recognized, ICWA does not completely replace state law with respect to Indian children, but supplements existing state substantive law and procedural rules (when not in conflict with ICWA). *See Valerie M.*, 219 Ariz. at 334–35, 198 P.3d at 1206–07 ("[Congress] recognized that federal requirements would be in addition to state law requirements, which will themselves prevail over federal law if they are more protective of parental rights," citing cases). Moreover, eight states have adopted their

own ICWA statutes, which are at least as stringent as the federal law.[24] Many other states—rejecting the State Plaintiffs' allegation that they are forced to comply with ICWA against their will—have enacted laws mandating compliance with federal ICWA as a matter of *state* law[25] or supplementing ICWA with state-law requirements.[26] Notably, among these states are all three State Plaintiffs. *See* Ind. Code Ann. § 31-21-1-2 ("A child custody proceeding pertaining to an Indian child as defined in the Indian Child Welfare Act (25 USC § 1901 et seq.) is not subject to this article to the extent that it is governed by the Indian Child Welfare Act."); La. Stat. Ann. § 13:1804 (same); Tex. Fam. Code Ann. § 152.104 (same). Indeed, Louisiana even recently enacted its own ICWA that essentially adopts the federal ICWA in most material respects. *See* 2018 La. Sess. Law Serv. Act 296.

b. On the merits, ICWA does not violate the commandeering principle applied in *New York* or *Printz* or in the recent decision in *Murphy v. National Collegiate Athletic Association*, 2018 WL 2186168 (U.S. May 14, 2017). In *New York* and *Murphy*, Congress commandeered the state *legislative* process; *Printz* involved commands to a state *executive-branch* officials. *Compare Murphy*, 2018 WL 2186168, at *13; *New York*, 505 U.S. at 170, *with Printz*, 521 U.S. at 909. Those cases simply do not apply to federal mandates on state *courts*. As the Supreme

[24] *See* Cal. Fam. Code § 170 *et seq.*; Iowa Code Ann. § 232B.1 *et seq.*; Mich. Comp. Laws Ann. § 712B.1 *et seq.*; Minn. Stat. Ann. § 260.751 *et seq.*; Neb. Rev. Stat. Ann. §§ 43-1501 *et seq.*; Okla. Stat. Ann. tit. 10, § 40 *et seq.*; Wash. Rev. Code Ann. § 13.38.010 *et seq.*; Wis. Stat. Ann. § 48.028.

[25] *See, e.g.*, Ariz. Rev. Stat. Ann. § 25-1004(A) ("A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act (25 United States Code § 1903) is not subject to this chapter to the extent that it is governed by the Indian [C]hild [W]elfare [A]ct."); Fla. Stat. Ann. § 39.0137(1) ("This chapter does not supersede the requirements of the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq., . . . or the implementing regulations."); Kan. Stat. Ann. § 38-2203(a) (state law applies "except in those instances when the court knows or has reason to know that an Indian child is involved in the proceeding, in which case, the Indian child welfare act of 1978, 25 U.S.C. § 1901 et seq., applies."); Mont. Code Ann. § 42-2-604(2)(g) ("The petitioner shall file with the petition for termination of parental rights . . . proof of compliance with the Indian Child Welfare Act of 1978 . . . if applicable"); N.C. Gen. Stat. Ann. § 48-1-108 ("If the individual is an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., then the provisions of that act shall control the individual's adoption."); N.D. Cent. Code Ann. § 27-20-32.3 ("When an agency is seeking to effect a foster care placement of, or termination of parental rights to an Indian child, the court shall require active efforts as set forth in 25 U.S.C. 1912(d).").

[26] *See, e.g.*, Colo. Rev. Stat. Ann. § 19-1-126; Fla. Stat. Ann. § 39.0137(2).

Court explained in *Printz*, "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." 521 U.S. at 907 (emphasis added). Indeed, "unlike legislatures and executives, [state courts] applied the law of other sovereigns all the time." *Id.* "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them," the Court acknowledged in *New York*, "but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." 505 U.S. at 178–79. And this month the Court reaffirmed that preemption doctrine, established by the Supremacy Clause, represents one way in which "[t]he Constitution limits state sovereignty." *Murphy*, 2018 WL 2186168, at *10. Put simply, "Congress has the power to require that state adjudicative bodies adjudicate federal issues and to require that States . . . follow federally mandated procedures." *South Carolina v. Baker*, 485 U.S. 505, 514 (1988).

Indeed, though the State Plaintiffs mask this fact by contending that ICWA requires that "States" take these actions (State Br. 42), the provisions of ICWA that Plaintiffs challenge impose obligations on state *courts*. Indeed the Individual Plaintiffs admit as much in their brief. (*See* Individuals Br. 67 ("ICWA regulates state-court child custody proceedings.").) The complaint alleges that ICWA §§ 1911, 1912, 1913, 1915, 1917, and 1951 impermissibly "command" the states (ECF No. 35 ¶¶ 294–308), but each of these provisions is directed at the actions taken, procedural rules followed, and substantive law applied by state *courts*. Section 1911(b) and (c) address when a court must transfer a case and allow intervention by specified parties. Section 1911(d) requires that full faith and credit be accorded to child-custody proceedings of an Indian tribe, and involves no more constitutional doubt than the full faith and credit statute, 28 U.S.C. § 1738. Section 1912 provides procedures to be followed in specified court proceedings, including requisite notice, appointment of counsel, the types of evidence that

parties must submit, and the standard to be applied in considering foster-care and parental-rights termination orders. Section 1913 governs the validity of consents for foster care or voluntary termination of parental rights and collateral attack in court of adoption decrees. Section 1915 provides the placement standards to be used in foster and adoption proceedings. Section 1917 directs courts to provide certain information to the person subject to an adoption proceeding. And section 1951(a) requires the state court to provide the Secretary of the Interior with the adoption decree and other information.

Likewise, those parts of the Final Rule that the complaint alleges commandeers the states also address state courts. (*See* Individuals Br. 42–43 (citing 25 C.F.R. §§ 23.111, 23.120, 23.132(c)(5), 23.138, 23.139, 23.140, 23.141); State Br. 68–69 (citing 25 C.F.R. §§ 23.132(c)(5), 23.107(a) and (b)).) Section 23.107(a) and (b) provide that "the court must" follow certain procedures to determine whether a child is an Indian child; § 23.111 specifies the notice the state "court must ensure" is provided to specified parties; § 23.120 addresses "[h]ow does the State court ensure that active efforts have been made"; § 23.132(c)(5) specifies the criteria for "[a] court's determination to depart from the placement preferences"; § 23.138 requires the court to provide notice of tribal affiliation; § 23.139 specifies that the court must provide notice of adoption to specified parties; § 23.140 requires a state court to provide a copy of the adoption decree to the BIA; § 23.141 requires state courts—or, at the election of the state, state agencies—to maintain certain records.

To be sure, a few provisions as written could appear to impose obligations on parties—which sometimes is a state agency—rather than the courts. For example, § 1912(a) imposes a notice requirement on "the party seeking the foster care placement of, or termination of parental rights to, an Indian child," and § 1912(d) requires "[a]ny parties seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under state law" to "satisfy the

court" that they engaged in "active efforts . . . to prevent the breakup of the Indian family." But in *substance* these provisions are naturally read—and, as a matter of the constitutional avoidance principle,[27] *should* be read—as conditions that must occur before *the court* may order a foster-care placement or termination of parental rights.[28] ICWA does not subject state officials to a freestanding obligation to provide the specified notice or engage in active efforts—instead, unless those things occur, the *court* cannot approve the placement or termination. Indeed, each of these provisions is specifically tied to a state-court proceeding. In this way, ICWA operates quite differently from the Brady Act at issue in *Printz*, where the federal law "direct[ed] state law enforcement officers to participate . . . in the administration of a federally enacted regulatory scheme." 521 U.S. at 904. That simply is not the case here.

In support of their argument, the State Plaintiffs include a more than page-long chart showing the ways in which ICWA supposedly modifies state law. (State Br. 43–44.) They contend that "[t]hese requirements impermissibly commandeer State officials." (*Id.* at 45). Not so—these are simply exercises of "the well established power of Congress to pass laws enforceable in state courts" that preempt inconsistent state law. *New York*, 505 U.S. at 178. The states' compliance with federal law in such a circumstance "is mandated by the text of the Supremacy Clause." *Id.* at 178–79; *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (noting that state laws contrary to the laws of Congress are invalid because "[i]n every such case, the act of Congress . . . is supreme; and the law of the State though enacted in the exercise of

[27] *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) ("It is . . . incumbent upon us to read the statute to eliminate [constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress.").

[28] This reading of ICWA is consistent with the Final Rule. With respect to both the notice and active-efforts statutory requirements, the Final Rule expressly places the burden on the *court*. *See* 25 C.F.R. § 23.111(a)(1) ("the court must ensure that … [t]he party seeking placement promptly sends notice . . ."); *id.* § 23.120(a) ("Prior to ordering an involuntary foster-care placement or termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful.").

powers not controverted, must yield to it"). And, in addition to establishing the substantive law to be applied, it is settled that Congress may also require state courts to follow specified procedures when applying federal law. *See, e.g.*, *Felder v. Casey*, 487 U.S. 131, 151 (1988) (holding that state law requiring plaintiff to give notice of suit to federal officer sued in state court under 42 U.S.C. § 1983 was preempted); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (holding that state court was required to conduct a jury trial in action under Federal Employers Liability Act); *see also* Erwin Chemerinsky, Federal Jurisdiction 231 (7th ed. 2016) ("If the federal law expressly specifies the procedures to be used with regard to a particular cause of action, then, of course, states must follow it.").

Finally, seeking to escape the principle that the commandeering doctrine does not apply to federal direction to state courts, the Plaintiffs contend that ICWA "force[s] state judges into service as *executive* agents" (Individuals Br. 69) (emphasis in original) and that it requires state judges to take "actions [that] are ministerial in nature and are not related to a court's judicial power" (State Br. 45). In advancing this argument, however, Plaintiffs mischaracterize ICWA, which simply requires state judges to follow ICWA (rather than state law) in carrying out their *judicial* functions. That a few minor aspects of those functions seem bureaucratic in nature—*e.g.*, sending court orders to specified government officials—does not make them non-judicial. First, such minor tasks are not properly designated as "executive." In *Printz*, the Court rejected such a characterization of "ancillary functions" performed by courts. There, the Court pointed to a 1790 federal law that assigned state courts with "the quintessentially adjudicative task" of addressing citizenship applications, and it explained that "it is unreasonable to maintain that the ancillary functions of recording, registering, and certifying the citizenship applications were unalterably executive rather than judicial." *Printz*, 521 U.S. at 908 n.2. Second, in all events, such minor impositions by ICWA are of a kind with what *state* law already requires of state judges. For

example, the State Plaintiffs complain that the Final Rule requires state courts to send the adoption decree and related information to the BIA (State Br. 45, citing 25 C.F.R. § 23.140)—but the law of each of the Plaintiff States imposes *equivalent* requirements on their courts. *See* Ind. Code Ann. § 31-19-12-3 (requiring the court to send the adoption decree to the department of health records); La. Rev. Stat. Ann. § 40:79(A)(1) (requiring the court to complete a form supplied by the department of children and family services and send it to the state registrar); Tex. Fam. Code Ann. § 108.003 (requiring the court to complete a certificate of adoption and send it to the state's bureau of vital statistics); 25 Tex. Admin. Code. § 181.31(a) (same). If that is a proper judicial function for state courts applying state law, the same is true when they apply federal law. *Cf. Testa v. Katt*, 330 U.S. 386 (1947).

V. ICWA DOES NOT VIOLATE THE NON-DELEGATION DOCTRINE.

The State Plaintiffs contend that, in ICWA, Congress unlawfully delegated its lawmaking function by permitting tribes to change the order of placement preferences set forth in § 1915. (State Br. 46–49.) This argument is without merit. Congress has broad authority to foster tribal self-determination and self-governance, *see New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334–35 (1983), and Plaintiffs fail to cite a single case striking down legislation even tangentially related to Indians on the basis of the nondelegation doctrine. Defendants are entitled to summary judgment on Count VII.

A. Section 1915 Satisfies the "Intelligible Principle" Standard.

Plaintiffs' claim fails at the outset because ICWA does not delegate any legislative function when it permits tribes to reorder the placement preferences established by Congress. The Supreme Court has repeatedly stated that Congress adequately legislates when the statute sets forth an "intelligible principle"—a requirement that is not particularly demanding. *Whitman*

v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530–31 (1935). As Justice Scalia explained for the Court,

> In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition."

Whitman, 531 U.S. at 474.

Although the Court "even in sweeping regulatory schemes [has] never demanded . . . that statutes provide a 'determinate criterion'" to satisfy the intelligible principle standard, *id.* at 475, Congress did provide a detailed list of placement preferences. Congress allowed tribes to change the order, but only if they do so by resolution and only if they comply with Congress' direction that every placement must be "the least restrictive setting appropriate to the particular needs of the child." § 1915(c). These provisions provide "intelligible principles."

Plaintiffs' assertion that § 1915 creates "new law" (State Br. 48) stretches the imagination. Such a policy judgment by Congress is constitutional. Justice Scalia summarized that, "[i]n short, we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Whitman*, 531 U.S. at 474–75 (internal quotations omitted). This policy judgment is particularly appropriate here, given tribal sovereignty and the trust relationship between the federal government and tribes. *See Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287–92 (D.C. Cir. 2000) (affirming Congress' delegation of authority to tribes to establish air quality standards under Clean Air Act). Accordingly, § 1915 satisfies the intelligible principle standard and Plaintiffs' claim must be rejected.

B. Congress Has Authority to Delegate to Tribes.

In any event, Plaintiffs' assertion that Congress may not allow tribes to reorder Congress' placement preferences is wrong as a matter of law. Congress legislates against the backdrop that tribes, as sovereigns that pre-date the Constitution, retain all inherent powers of sovereignty that have not been limited by treaty or statute or by implication as result of their dependent status. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("[U]ntil Congress acts, the tribes retain their existing sovereign powers."). "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991).

First and foremost, tribes possess inherent lawmaking authority. And this law-making authority can be and is regularly exercised in defining their citizenship and with respect to domestic relations. *See Montana v. United States*, 450 U.S. 544, 564 (1981) ("[T]he Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). In recognition of this inherent sovereignty, Congress affirmed that foster care and adoptive placement of a child (who is a tribal citizen or has a parent who is a tribal citizen and the child is eligible for citizenship) is at the core of a tribe's inherent authority. §§ 1901(3), 1902.

Accordingly, to the extent this is a delegation at all, instead of merely recognizing the inherent power of tribes, it is well settled that Congress may delegate federal authority to tribes

and indeed Congress has done precisely that on innumerable occasions.[29] As Justice Rehnquist, writing for a unanimous court, explained,

> This court has recognized limits on the authority of Congress to delegate its legislative power. Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are a separate people possessing the power of regulating their internal and social relations. . . . [W]hen Congress[] delegated its authority to control the introduction of alcoholic beverages into Indian county, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. . . . It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority to regulate Commerce . . . with the Indian tribes.

Mazurie, 419 U.S. at 556–57 (internal quotations and citations omitted). Congress may legislate either by delegating federal power to tribes or by "relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes." *Lara*, 541 U.S. at 207.

As shown above, Plaintiffs' claim that tribes are akin to private entities was squarely rejected by the Court in *Mazurie*. Plaintiffs fail to cite a single case limiting Congress' authority to delegate to tribes. The cases that Plaintiffs cite support no such conclusion. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), deals with a tribe's inherent authority and contains no support for the limitation on congressional power Plaintiffs seek. Their reliance on *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996), is puzzling given that state sovereign immunity is not at issue here. *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), do not assist them because in both cases there was no specific statute expressly on point. Indeed, the

[29] *See* Helping Expedite and Advance Responsible Tribal Home Ownership Act, Pub. L. No. 112-151, § 2, 126 Stat. 1150–53 (2012) (codified at 25 U.S.C. § 415); *Lara*, 541 U.S. at 210; *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997); *Rice v. Rehner*, 463 U.S. 713, 728–29 (1983); *Montana*, 450 U.S. at 545–46; *United States v. Mazurie*, 419 U.S. 544, 557–58 (1975); *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1216 (9th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 927 (2002); *Ariz. Pub. Serv. Co.*, 211 F.3d at 1287–92.

Court in *White Mountain Apache* explained that "Congress has manifested no intent whatsoever to delegate to tribes" the power at issue. 649 F.2d at 1281. Here, by contrast, ICWA clearly provides tribes with the ability to reorder the placement preferences.

Lara reaffirms Congress' plenary power to legislate with regard to a tribe's inherent authority as well as to delegate federal authority to tribes. In *Lara*, the Court reviewed legislation enacted in response to an earlier decision holding that tribes lacked inherent authority to prosecute an Indian who was not a citizen of that tribe. 541 U.S. at 196. In evaluating the legislation, the Court confirmed Congress' authority to delegate federal power to tribes but ruled that Congress could also affirm a tribe's inherent authority. *Id.* at 199 The Court explained that Congress' plenary authority included broad ranging powers to recognize and terminate tribes as well as restore a tribe's federal relationship that it had previously terminated. *Id.* at 200. The Court upheld Congress' authority to affirm a tribe's inherent authority to exercise criminal jurisdiction over an Indian who was not a citizen of the prosecuting tribe. *Id.* at 210.

Congress' approach here is fully consistent with the legislation at issue in *Lara*. In § 1915, Congress both restricted tribes' inherent sovereignty by legislating default placement preferences and relaxed that restriction. This reaffirmation of tribal authority is certainly more limited than the reaffirmation of criminal jurisdiction over non-member Indians at issue in *Lara*.

In sum, ICWA's provision allowing tribes to reorder the placement preferences is well within Congress' authority. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' nondelegation claim.

VI. THE FINAL RULE IS NOT INVALID UNDER THE APA AS ARBITRARY, CAPRICIOUS, OR CONTRARY TO ICWA.

Plaintiffs contend that the Final Rule is invalid under the Administrative Procedure Act (APA). (Individuals Br. 55–66; State Br. 58–59.) Specifically, they argue that the Department of the Interior lacked authority to promulgate the Final Rule, that the Final Rule's "clear and

convincing evidence" standard conflicts with ICWA's "good cause" requirement, and that *Chevron* deference does not apply. Plaintiffs' arguments are wrong and Defendants are entitled to summary judgment.

A. ICWA Provided Interior With Authority to Promulgate the Final Rule.

Plaintiffs contends that ICWA did not provide Interior with authority to issue the Final Rule, relying in part on its decision not to issue regulation in 1979 and the 37-year period since ICWA's enactment. (Individuals Br. 56–60.) This argument is baseless.

First and foremost, in contending that ICWA fails to provide a basis to promulgate the Final Rule, Plaintiffs ignore that ICWA in clear terms unambiguously grants rulemaking authority. Section 1952 of ICWA states that "the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter." This language is materially identical to provisions in other statutes that courts have routinely determined is a complete delegation of rule making authority.[30] Plaintiffs identify no statutory language or legislative history indicating that Congress didn't mean what it so plainly said when it authorized rulemaking "to carry out the provisions of this chapter."

Second, contrary to Plaintiffs' contention, Interior's 1979 decision not to issue regulations is not permanently dispositive. As the Supreme Court has recognized, "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy *on a continuing basis*." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984) (emphasis added). To "consider" on a "continuing basis" is plainly a Supreme Court directive that earlier judgments by agencies are properly reconsidered with more evidence, with a different record or different understandings. What is more, an agency is permitted to

[30] *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81 (2005); *Am. Hospital Ass'n v. Nat'l Labor Rel. Bd.*, 499 U.S. 606, 610 (1999); *Quest Commc'ns Int'l Inc. v. F.C.C.*, 229 F.3d 1172, 1179 (D.C. Cir. 2000); *Snap-Drape, Inc. v. Comm'r of Internal Revenue*, 98 F.3d 194, 198–99 (5th Cir. 1996).

change its policy interpretations, and doing so does not subject its action to "more searching review." *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). In a case upholding a federal agency's disapproval of a state plan that it had previously approved, the Fifth Circuit explained that "[a]n agency is not bound to follow a prior, incorrect interpretation of its own policy." *Luminant Generation Co. LLC v. U.S. EPA*, 714 F.3d 841, 857 (5th Cir. 2013). The same is true in this case—the mere fact that Interior previously questioned the need for rulemaking and its authority to do so does not preclude it from now deciding it has such authority and issuing the Final Rule.

It is noteworthy that Interior provided substantial and well-reasoned explanation for its departure from its 1979 guidance in its 86-page preamble to the Final Rule and the Solicitor of Interior's 22-page Memorandum Opinion. As explained in the preamble, after years of consultation, public hearings, and comment, Interior determined that, contrary to its 1979 guidance, binding regulations *are* necessary to carry out the Act. 81 Fed. Reg. at 38,782–84. For example, Interior explained:

> 37 years of real-world ICWA application have . . . underscored the need for this regulation. The intervening years have shown both that State-court application of the statute has been inconsistent and contradictory across, and sometimes within jurisdictions. This, in turn, has impeded the statutory intent of providing minimum Federal standards that would protect Indian children, families, and Tribes, and has allowed problems identified in the 1970's to remain in the present day.

Id. at 38,786 (citation omitted); *see also* Memorandum 37037 from Solicitor of Interior to Secretary of Interior on Implementation of the Indian Child Welfare Act by Legislative Rule at 16-17 (June 8, 2016), *available at* www.doi.gov/sites/doi.gov/files/uploads/m-37037.pdf ("Although the Department initially hoped that binding regulations would not be necessary, a third of a century of experience has established the need for more uniformity in the interpretation and application of this important Federal law."). In other words, when Interior opined—barely a year after ICWA was enacted—that binding regulations were unnecessary, it could not foresee

the inconsistent applications of ICWA's core procedural protections nor did it have the benefit of best practices that developed over the ensuing decades. That Interior "changed its interpretation in light of its gained experience" does not render the Final Rule unreasonable under *Chevron* or arbitrary. *La. Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 555–56 (5th Cir. 2014).

Moreover, Interior's 1979 declination to promulgate did not have the guidance from the Supreme Court's seminal decision in *Holyfield*. In providing a reasoned explanation why its earlier concerns about its authority to issue regulations were misplaced, Interior explicitly noted the extraordinary insight and benefit of *Holyfield* that placed a premium on the congressional intent of national uniformity:

> In 1979, the Department had neither the benefit of the Holyfield Court's carefully reasoned decision nor the opportunity to observe how a lack of uniformity in the interpretation of ICWA by State courts could undermine the statute's underlying purposes. In practice, the meaning of various provisions of the Act has been subject to differing interpretation by each of the 50 States, and within the States, by various courts. What was intended to be a uniform Federal minimum standard now varies in its application based on the State or even the judicial district. The Department thus has come to recognize that, as the Supreme Court stated in Holyfield, "a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind."

81 Fed. Reg at 38,787 (citation omitted). Interior also explained that Supreme Court decisions after its guidance had upheld agency rules under similar grants of rulemaking authority. *Id.* at 38,785.

In support of their positions, Plaintiffs rely heavily on *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018). *Chamber* has no bearing on this present case. *Chamber* was a challenge to a rule purportedly promulgated under ERISA by the Department of Labor to dramatically expand the coverage of the "fiduciary rule" to include broker-dealers and others. *Id.* at 363. The new rule stood in stark contrast to earlier, decades-old regulations that did not include broker-dealers, and it was wholly inconsistent with the common law. *Id.* at 369.

Chamber bears little resemblance to this case and is wholly distinguishable. As an initial matter, *Chamber* determined that the promulgated rule was well outside the congressional mandate. *Id.* Here, as shown, ICWA expressly provides for the rulemaking Interior completed, and the scope of the regulations—defining best practices and establishing national standards—is perfectly consistent with ICWA as *Holyfield* makes clear. Furthermore, unlike the regulation in *Chamber*, the Final Rule does not conflict with the statutory text of ICWA. To the contrary, the Final Rule hues closely to the statute in all respects and Interior rejected opportunities to stray from ICWA's ambit. For example, Interior rejected a comment seeking to permit courts to override a parents' objection to transferring jurisdiction of a case to tribal court. Instead, the Final Rule closely "mirrors the statute" by permitting a court to deny a request to transfer jurisdiction over a case to tribal court based on a parent's objection. 81 Fed. Reg. at 38,824; 25 C.F.R. § 23.117; § 1911(b). Moreover, the Final Rule omitted a requirement for qualified expert witness testimony at emergency proceedings because "[§] 1922 of ICWA does not impose such requirements on emergency proceedings." 81 Fed. Reg. at 38,818. And Interior promulgated the Final Rule to clarify ambiguous provisions of ICWA, such as the "qualified expert witness," and did so in a manner consistent with ICWA and its legislative history, so as to increase uniformity among state courts. 81 Fed. Reg. at 38,830. In short, *Chamber* in no manner provides the basis for vitiating the rule Interior promulgated under the clear power ICWA provided.

B. The Final Rule's Clear and Convincing Evidence Standard Is Fully Consistent with the Statutory "Good Cause" Requirement.

Plaintiffs further contend that the regulation is invalid because a clear and convincing evidence standard conflicts with ICWA's "good cause" requirement in § 1915. (Individuals Br. 60–63.) Their argument is based on the assertion that "good cause" had a clear, "existing common-law meaning" at the time of ICWA's enactment and that it represented "an invitation to state family courts to exercise their discretion." (*Id.* at 60.) Plaintiffs tell this Court that "the

Final Rule purports to impose on state courts a fixed definition of 'good cause'" and "requires that '[t]he party seeking departure from the placement preferences should bear the burden of proving [good cause] by clear and convincing evidence.'" (*Id.* at 61.)

Plaintiffs' arguments ignore the preamble and the Final Rule. The Final Rule clearly states that state courts "should" base good cause on the five listed considerations, 25 C.F.R. § 23.132(c), and that good cause "should" be proven by clear and convincing evidence, 25 C.F.R. § 23.132(b) (emphasis added). But, the Department also explained:

> The final rule also recognizes that there may be extraordinary circumstances where there is good cause to deviate from the placement preferences based on some reason outside of the five specifically-listed factors. Thus, 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. While the rule provides this flexibility, courts should only avail themselves of it in extraordinary circumstances, as Congress intended the good cause exception to be narrow and limited in scope.

81 Fed. Reg. at 38,839. Thus, while the Final Rule does provide "some parameters on what may be considered 'good cause' in order to give effect to ICWA's placement preferences," and makes clear that ordinary bonding or attachment that flows from time spent in a non-preferred placement that was made in violation of ICWA does not constitute good cause, courts maintain discretion to "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." *Id.* Contrary to Plaintiffs' assertion that "good cause" had a well-settled meaning, Interior appropriately followed Congress' direction that courts should not apply "good cause" as a vague exception that nullifies ICWA's carefully crafted protections.[31] Indeed, Plaintiffs' approach is contrary to

[31] *See* 81 Fed. Reg. at 38839, 38844, 38847; H.R. Rep. No. 95-1386 at 19, 23 (explaining that section "establish[es] 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.").

Congress' express policy in enacting ICWA, § 1902, and ICWA's voluminous legislative history describing the purpose and need of the legislation. 81 Fed. Reg. at 38,788–789, 38,843–847.

Similarly, with regard to the "clear and convincing" standard, the Department expressly declined to require that standard, explaining:

> While the final rule advises that the application of the clear and convincing standard "should" be followed, it does not categorically require that outcome. However, the Department finds that the logic and understanding of ICWA reflected in those court decisions is convincing and should be followed. Widespread application of this standard will promote uniformity of the application of ICWA. It will also prevent delays in permanency that would otherwise result from protracted litigation over what the correct burden of proof should be. So, while the Department declines to establish a uniform standard of proof on this issue in the final rule, it will continue to evaluate this issue for consideration in any future rulemakings.

81 Fed. Reg. at 38,843. Further, Plaintiffs' argument that a clear and convincing standard is contrary to ICWA has been routinely rejected.[32] For example, a recent California decision rejected this very argument. *In re Alexandria P.*, 228 Cal. App. 4th 1322, 1348–52, 176 Cal Rptr. 3d 468, 488–92 (2014). Of course, the irony of Plaintiffs' challenge to a "clear and convincing" standard should not be lost on the Court. Repeated concerns of Plaintiffs are delay and states' authority over domestic relations. Yet, as explained above, Interior advanced the clear and convincing standard in reliance on state court decisions and to avoid the delay that could otherwise result from protracted litigation.

C. *Chevron* Deference Applies to the Final Rule.

Finally, Plaintiffs assert that the Final Rule is not entitled to *Chevron* deference because Interior provided "no reasoned explanation" of its authority to promulgate the rule, provide some

[32] Plaintiffs would have this Court believe that Interior pulled the clear and convincing standard out of thin air, asserting that the agency failed "to adequately explain why they adopted the 'clear and convincing' evidence standard." (Individuals Br. 64.) To the contrary, Interior looked to States. "[C]ourts that have grappled with the issue have almost universally concluded that application of the clear and convincing evidence standard is required as it is most consistent with Congress's intent in ICWA to maintain Indian families and Tribes intact." 81 Fed. Reg. at 38,843 (citing cases).

parameters on what may be considered "good cause," or adequately explain why it utilized a "clear and convincing" standard. (Individuals Br. 63–64.)

As discussed *supra*, the 86-page preamble to the Final Rule and supporting 22-page Memorandum Opinion are textbook examples of a "reasoned explanation" for promulgating the Final Rule. Far from "*ipse dixit* statements" (Individuals Br. 63), Interior provided detailed analysis of the authority on which it relied. 81 Fed. Reg. at 38,838–847. In particular, the Final Rule relies on five state appellate and supreme court cases emphasizing the importance of a state's diligent search and assistance to preferred placements in meeting the requirements of § 1915. 81 Fed. Reg. at 38,839–840. The Final Rule logically reasons that requirements that a court's finding that a diligent search has been conducted for preferred placements be put on the record will more effectively fulfill § 1915(e), which permits Interior and tribes to review placements for compliance. *Id.* at 38,849. Interior explains that bonding and attachment concepts can have "serious limitations in court determinations" and thus should not provide the sole basis for departing from placement preferences. Interior based this conclusion on a multitude of factors, including *Holyfield. Id.* at 38,846. These representative examples of "reasoned explanations" drawn from legislative history, Interior's experience, trusted experts in the field of child welfare, and case law demonstrate Interior's concrete bases for issuing regulations that interpret § 1915 to ensure more consistent application of ICWA's placement preferences.

In sum, the Final Rule is due *Chevron* deference. In the face of Congress' unequivocal delegation of rulemaking authority, Interior's authority to promulgate rules pursuant to ICWA is not in doubt. Nor is there reasonable doubt about Interior's authority to depart from an erroneous interpretation of its own rulemaking authority aided by its reasoned explanation, nearly 40 years of experience applying the statute, and ICWA's interpretation in *Holyfield*.

VII. ICWA DOES NOT VIOLATE DUE PROCESS.

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Because the universe of liberty interests protected by due process is limited, it is "required" for a plaintiff to provide a "careful description of the asserted fundamental liberty interest." *Id.* at 721. Some liberty interests—including those of natural and adoptive parents in their relationship with their children—arise not from state law but from "this Nation's history and tradition." *Id.* But foster parents are different. The Supreme Court has held that, because their relationship with their foster children "derives from a knowingly assumed contractual relationship with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845–46 (1977) ("*OFFER*"). And when ICWA applies, that statute—in addition to state law—defines the scope of the liberty interest. Once a liberty interest is established, the plaintiff still must prove that the challenged governmental action unconstitutionally restricted that interest.

Here, the Individual Plaintiffs include adoptive parents, a natural parent who seeks to terminate her parental rights, and foster parents. They advance the novel claim that ICWA violates their substantive due process rights. Specifically, (1) the Brackeens argue that their rights are violated by the fact that A.L.M.'s adoption is subject to collateral attack for 18 months longer than provided by Texas law, (2) Ms. Hernandez argues her rights are violated because, after she voluntarily put her child up for adoption, ICWA regulates who can adopt her child, and (3) the Librettis and Cliffords claim that their rights as foster parents and prospective adoptive parents are violated because ICWA inhibits their ability to adopt their foster children. (Individuals Br. 49–55.) Each of these contentions is meritless and the Court should enter summary judgment for Defendants.

A. The Brackeen's Due Process Rights Are Not Violated By ICWA's Two-Year Time Period to Challenge an Adoption.

According to the Brackeens (Individuals Br. 50–52), their substantive due process rights are violated because IWCA provides a two-year period in which a parent or tribe can contest an adoption that was premised upon fraud or duress. § 1913(d); § 1914. This two-year period infringes on the Brackeens' rights, they claim, because it is longer than the six-month period to challenge an adoption provided under Texas law. Tex. Fam. Code Ann. § 162.012(a).

This argument is meritless. The Individual Plaintiffs' brief provides no reasoned explanation for why a six-month challenge period comports with "this Nation's history and tradition," but with a two-year period "neither liberty nor justice would exist." *Glucksberg*, 521 U.S. at 721. To be sure, the Brackeens would *prefer* a shorter period, but substantive due process does not allow them to "place the matter outside the arena of public debate and legislative action." *Id.* at 720. Indeed, they cite no cases supporting such a far-fetched claim.

B. Hernandez's Due Process Rights Are Not Violated Because She Gave Up All Rights to Baby O.

Hernandez claims that her due process rights are violated because her "desires regarding the adoptive placement of Baby O." are subject to ICWA. (Individuals Br. 52–53.) But the Individual Plaintiffs ignore a critical fact: she is choosing to give up all rights to Baby O. (Individuals App. 72.) Relying on law that parents who have "lost temporary custody of their child to the State" do not lose their liberty interest in their child, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), Hernandez claims she still has a liberty interest in Baby O. But Hernandez has not lost *temporary* custody of Baby O., but has agreed to terminate *all* of her parental rights.

Hernandez points to no cases holding that a birth parent has a due process right to direct their child's adoptive placement. In *Michael H. v. Gerald D.*, 491 U.S. 110, 128 (1989), the Supreme Court held that it is not unconstitutional for the state to give adoptive preference to the

man living with the birth mother over the child's biological father, concluding that such a determination "is a question of legislative policy and not constitutional law." *Id.* at 128. At least one other court has relied upon *Michael H.* to reject the argument that a birth mother's preference for her child's adoption raises due process concerns. *See Nat'l Council for Adoption v. Jewell*, No. 1:15-CV-675-GBL-MSN, 2015 WL 12765872, at *6 (E.D. Va. Dec. 9, 2015); *see also Baby Girl A v. Native Village of Akhiok*, 230 Cal. App. 3d 1611, 1619, 282 Cal. Rptr. 105, 110 (1991) (holding that ICWA's placement preferences did not violate the birth mother's due process rights after she voluntarily put the child up for adoption).

Citing two Nevada statutes, the Individual Plaintiffs contend that "state law affords biological parents the ability to select or influence the adoptive placement of their children." (Individuals Br. 52–53.) But under Nevada law, there are two different adoption mechanisms: agency adoption, governed by Nev. Rev. Stat. Ann. § 127.050; and specific adoption, governed by Nev. Rev. Stat. Ann. § 127.040. While the biological parents have a say in specific adoptions, in an agency adoption the natural mother relinquishes the child to the agency "with the intent that the agency act in place of the parents in selecting the adopting parents." *In re Adoption of a Minor Child*, 60 P.3d 485, 490 (Nev. 2002). And the evidence the Individual Plaintiffs submitted indicates that Hernandez used an agency adoption, and the agency arranged for Baby O. to be adopted by the Librettis. (Individuals App. 67.) Under Nevada law, Hernandez thus gave up any say in who adopts Baby O. and therefore she has no liberty interest.

C. The Librettis and Cliffords Do Not Have Any Due Process Rights as Prospective Adoptive Parents and Foster Parents.

Finally, the Librettis and Cliffords contend that their due process rights are violated because they are foster parents who want to adopt the children. But whether the Librettis and Cliffords have a liberty interest as foster parents is not simply based on their personal relationship with the children. *Drummond v. Fulton Cty. Dep't of Family & Children's Servs.*,

563 F.2d 1200, 1207 (5th Cir. 1977). Rather, state law—and ICWA—define that relationship. *OFFER*, 431 U.S. at 845–46; *Drummond*, 563 F.2d at 1207 ("The very fact that the 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, but an interest limited by the very laws which create it."). And many court have held that, based on a particular state's law, foster and prospective adoptive parents do not have a fundamental liberty interest in the placement of their foster children.[33]

While the Librettis and Cliffords allege that they have close and long-standing relationships with Baby O. and Child P., any liberty interest in those relationships is defined by state law and ICWA, which govern those relationships. And the Librettis and Cliffords fail to provide any explanation for why a liberty interest arises from state and federal law. Further, the Librettis and Cliffords fail to point to any violation of a liberty interest. As noted above, any liberty interest they have is defined in part by ICWA, so that statute cannot violate any liberty interest that it creates. The Court should enter summary judgment for Defendants.

CONCLUSION

For these reasons, Intervenor-Defendants respectfully request that the Court enter summary judgment for Defendants on all claims.

[33] *See, e.g.*, *Huk v. Cty. of Santa Barbara*, 650 F. App'x 365, 367 (9th Cir. 2016); *Rodriguez v. McLoughlin*, 214 F.3d 328, 339–41 (2d Cir. 2000); *Mullins v. State of Or.*, 57 F.3d 789, 794 (9th Cir. 1995); *Ellis v. Hamilton*, 669 F.2d 510, 513–14 (7th Cir. 1982); *Kyees v. Cty. Dep't of Pub. Welfare of Tippecanoe Cty.*, 600 F.2d 693, 699 (7th Cir. 1979); *see generally* Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 Colum. J.L. & Soc. Probs. 301, 333 (2007) ("attempt[s] to establish a due process liberty interest between foster parents and children have continued to fail").

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing document using the Court's CM/ECF system on this 15th day of June, 2018. Service on all counsel of record for all parties was accomplished using the Court's CM/ECF system.

/s/ *Adam H. Charnes*
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